When are fundamental rights fundamental?

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Outline of the discussion

- importance and development of gender equality
  - concept of equality/different forms of discrimination
- the relevant legislative framework
  - the Goods and Services Directive (2004/113)
- case law
- the effect on insurance
  - when does discrimination matters?
  - some consideration in light of Case C-236/09 Test Achat
The development of the principle of equality in the EU

- Case 149/77 Defrenne
  “There can be no doubt that the elimination of discrimination based on sex [is] part of (...) fundamental rights”
- Case C-442/00 Caballero
  Fundamental rights “include the general principle of equality and non-discrimination”
- Case C-236/09 Test Achat
  “Equality between men and women is a fundamental principle of the European Union”

- Article 119 EEC (now 141 EC)
- first generation Directives
  - Equal Pay; Equal Treatment; Social Security
- second generation Directives
  - Race Directive (2000/43); Disability Directive
- third generation Directives

In a case involving equal pay and maternity rights, the European Court of Justice (“ECJ”) cites as a precedent a case called Schumaker [Case C-27/93]. As a trainee working on a maternity rights case, I was instructed by my supervisor to go and get a copy of this case. I looked at my supervisor and said, “but it’s about taxation of EC workers …”. She looked at me irritatedly, “so what’s it got to do with maternity?” “nothing”, I replied.”

The concept of equality

- direct discrimination: means treating one person less favourably than another on certain specified grounds (inter alia, sex, race, disability, age)

- indirect discrimination: occurs where the effect of certain requirements, conditions or practices has a disproportionately adverse impact on one group or other (e.g., when a rule or condition, which is applied equally to everyone, can be met by a considerably smaller proportion of people from a particular group, the rule is to their disadvantage, and it cannot be justified on other grounds).

- harassment, sexual harassment, incitement to discriminate
The relevant legal framework

- Race Directive (2000/43)
Source: CEJI Policy Reponse, 2010
Directive 2004/113

- legal base: Article 13 EC

- it prohibits discrimination based on gender, in the access areas of goods and services [Art. 3(1)] which are offered outside the area of private and family life [(Art. 3(2)]

- media, advertising and education are excluded by the material scope of the Directive [Art. 3(3)]

- the Directive was adopted in December 2004 and was due to be implemented by the Member States by 21 December 2007
The exception/positive action

- **Article 4(5)**
The Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to member of one sex is justified by a legitimate aim and the means of achieving that aim are justified.

- **Article 6**
With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.
When differences can be permitted?

- differential pricing for services
- sex segregation of services utilised by both men and women
- single sex provisions of services
The application of the principle of gender equality to insurance

- gender is often used as a rating factor for a number of insurance products.

- on the one hand, the insurance industry highlights the fact that a total ban on using gender when calculating insurance premiums would have a considerable detrimental effect on companies’ competitiveness and, ultimately, on consumers who would be forced to pay more.
Women live longer and therefore, on average, they are more expensive to insure ...

but they are better drivers, so they are cheaper!
• on the other hand, it has been argued that there are a number of factors, which are not linked to sex, that are equally important in establishing life expectancy (socio-economic, marital status, the region where a person lives ...)

• furthermore, EU equality law focuses on individual rather than group characteristics. Thus, to allow the use of sex as a criteria, would violate a fundamental right
Article 5(1): the principle

The principle enshrined in Article 5 is that:

“Member States shall ensure that in all new contracts (...) the use of sex as a factor in the calculation of premiums and benefits for the purpose of insurance and related financial services shall not result in individuals’ premium and benefits”
Article 5(2): the exception

In order to achieve the above, Member States are given two options:

- to ban all differential treatment based on gender in the provisions of insurance products
- to allow gender-based treatment, subject to conditions regarding the relevance and accuracy of the data on which the differences are based and the publication of gender-related data.
Relevant Case Law

- *Lindorfer v Council of the European Union C-277/04P* (opinion of AG Jacob)

  “In order to see such discrimination in perspective, it might be helpful to imagine a situation in which (as is perfectly plausible) statistics might show that a member of one ethnic group lived on average longer than those of another. To take those differences into account when determining the correlation between contributions and entitlements under the Community pension scheme would be wholly unacceptable, and I cannot see that the use of the criterion of sex rather than ethnic origin can be more acceptable.”

Such rules should not therefore treat members differently, unless the difference in treatment can be objectively justified.

**But**

In addition, the fact that the same equilibrium can be attained with “unisex” actuarial factors is also shown by the fact that, subsequently to the events giving rise to the case, the Council decided to use such factors. The ECJ consequently decided that the Court of First Instance was wrong in holding that Ms Lindorfer had not suffered discrimination on account of her sex.
Case C- 236/09 Test Achat

“a condition of lawfulness of all EU act is the respect for fundamental and human rights”

Importance of gender equality

can the position of men and women with regard to the determining risks factors in respect of insurance be different?

NO
The Judgment of the Court

Article 5(2) of Council Directive 2004/113 (...) is invalid with effect from 21 December 2012
the judgment is a *welcomed reiteration that gender equality IS a fundamental right.*

**HOWEVER**

rather than a ban a more stringent interpretation of article 5(2) might have offered a more workable solution

Article 5(1) *does not* prohibit discrimination but it simply states that

“Member States shall ensure that in all new contracts (...) the use of sex as a factor in the calculation of premiums and benefits for the purpose of insurance and related financial services shall not result in individuals’ premium and benefits”

Recital 19 of the preamble expressly acknowledge that “[c]ertain categories of risks may vary between the sexes”
Two points should have been addressed:

- Gender equality is a fundamental right and derogations are possible *only if* compelling reasons exist: are actuarial factors that take gender into consideration, for the purpose of insurance contracts, compelling reasons?

- The insurance industry would argue that insurance assesses *risk* in the most accurate possible way in order to offer a competent service; thus, are there any instances when gender should justifiably be part of such risk?
Different types of insurance: the impact of gender

- life insurance
- health insurance
- critical illness
- motor
- travel
- employer liability
- annuity
Core issues of the Directive

● general remarks:
  ● problems with implementation; *de facto* limited impact
  ● what are “goods” and “services”?  
  ● education/advertising/media
  ● private and family law
  ● hierarchy of equalities

● the Directive in the general context of the EU equality framework

● insurance
The Proposed Directive

- **scope of application**
  - (social protection, including social security and health care, social advantages, education, access to and supply of public goods and services *including* housing)

Yet, “within the limits of the powers conferred upon the European Community”

- **broad definitions of discrimination**
  - (harassment and denial of reasonable accommodation)

- **permitted differential treatment**
  - (age, financial services and religious schools)

**BUT**: implementation?
Relevant Literature

- European Network of Legal Experts in the Field of Gender Equality, Sex-Segregated Services, December 2008