The Test-Achats Ruling – follow-up at EU level

EU GENDER EQUALITY LAW - SEMINAR FOR LEGAL PRACTITIONERS

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Introduction

• Landmark case
• Implications in all Member States
  ▪ National legislation
  ▪ Insurance practices
• As from 21 December 2012
I. The legal framework

• Directive 2004/113/EC: gender equality in access to/provision of goods and services
• Financial services covered by Article 5
  ▪ Article 5(1): the unisex principle
  ▪ Article 5(2):
    • differentiation allowed under certain conditions
    • invalid as from 21/12/12
I. The legal framework

- Three main products: motor insurance; life assurance; private health insurance
- All MSs allow gender differentiation for at least one type of insurance
- Always for life assurance/annuities
- Unisex products do exist (e.g. motor insurance in certain MSs)
II. The ruling

ECJ ruling of 1 March 2011, C-236/09:

• “Article 5(2) of [Directive 2004/113/EC] is invalid with effect from 21 December 2012.”

Only paragraph 5(1) remains:

• “Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.”
II. The ruling

- Focus on the will of the legislator
- Interaction between 5(1) and 5(2)
- An overarching principle (the unisex rule) and a limited derogation
- Is the derogation consistent with main principle?
II. The ruling – specificity of 5(2)

- Differentiation not referred to as a non-discriminatory practice
- Only a possibility left to Member States
- To be used by 21/12/2007
- Obligation to review after 5 years
- No « regression » possible if unisex rule already implemented
II. The ruling – findings of the ECJ

- Purpose of the Directive: 5(1) – unisex rule: differentiation is not allowed
- Premise: men and women in comparable situation with regard to insurance premiums and benefits
- 5(2) is a transitional rule that should not be open-ended
- Main lesson: ensure consistency in legislation
II. The ruling

Impact on other exceptions/instruments

- Draft Equal treatment Directive (covers other grounds, such as age and disability in the access to goods and services)
- No direct impact - judgement on sex discrimination only
- Draft exception worded in a different way (“not discriminatory”)
- No overarching principle that age/disability should not lead to differentiation
III. Follow-up - General

- Objective: clarify implementation issues
- 20 June: meeting of the Forum on the use of gender in insurance (Member States' representatives, equality bodies, the insurance industry, actuaries and civil society organizations)
- September: Vice-President Reding meets business leaders from the insurance industry
- December 2011: interpretative guidelines
IV. The Guidelines

- **Scope - contracts**
  - New contracts concluded as from 21/12/12
  - Concept of ‘new contract’

- **Gender-related insurance practices still allowed**
  - Reserving and internal pricing
  - Reinsurance pricing
  - Marketing and advertising
  - Life and health underwriting
IV. The Guidelines

- Other risk-factors
  - Correlated with gender: might raise indirect discrimination issues but ID can be justified
  - Not correlated with gender (e.g. age and disability): no impact

- Insurance and occupational pensions

Available in all official languages:
Questions?