

The effect of the *Test-Achats* case on insurance and the goods and services directive



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Outline of the discussion

- some background information (development of gender equality, the relevant legislative framework ...)
- the Goods and Services Directive (2004/113) and its relationship with insurance
 - Case C-236/09 *Test-Achats* and its implications and Guidelines presented by the Commission (C(2011)9497 final)

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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 Achats*
“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
 - Recast Directive; amended Equal Treatment Directive; Goods and Services Directive (2004/113); proposed Directive on sexual orientation, religion, belief, disability and age

 - Treaty of Lisbon and Charter of Fundamental Rights
- See further S. Fredman, “Equality: a New Generation?” (2001) *ILJ* 145-168;
M. Bell, “The Principle of Equal treatment: Widening and Deepening” in P. Craig, G. de Burca, *The Evolution of EU Law*, (OUP, 2011), 611.

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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 (eg., 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

Legislation that takes the principle of Equality beyond the employment market

- Race Directive (2000/43)
- Goods and Services Directive (2004/113)
- proposed Directive on sexual orientation, religion, belief, disability and age (COM (2008) 426)

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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

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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



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The background to the discussion: gender equality and 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.

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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

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Commission proposal COM(2003) 657

“All insurance is based on the pooling of risk and the solidarity which is created between the insured... equal treatment for men and women is a fundamental right and the Commission believes that the freedom to set tariffs must be subject to that right... The Commission concludes ... that differences of treatment based on actuarial factor *directly related to sex* are not compatible with the principle of equal treatment...”



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”

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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.

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“All Member States currently allow gender differentiation for at least one type of insurance. In particular in all Member States, insurers are allowed to use sex as a risk-rating factor in life insurance”

(C(2011) 9497 final; Report from CIVIC Consulting, 2010)

Case C-236/09 *Test-Achats*

- Belgium had initially applied Art. 5(1) – HOWEVER
- Art. 10(1) Law 10 May 2007 (the Amending law) stated that
“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.”

In 2008 an action was brought before the Belgium Constitutional Court arguing that the domestic legislation breached EU law, in particular the fundamental principle of equality between men and women.

The Court was asked:

1. whether Article 5 (2) of Directive 2004/113 was compatible with [Art.6(3)TEU] and more specifically with the principle of equality and non-discrimination;
2. in case of a negative answer to the first question whether the derogation encapsulated into Article 5 (2) was also incompatible with [Art 6(3) TEU] if its application was restricted to life assurance contracts.

The opinion of the AG, Mrs Kokott

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

➡ emphasis on the 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

Judgment of the Court

Importance of fundamental rights

temporal limitation of the derogation

comparability of the situations involved



Potential and Limitations

the judgment is a *welcomed reiteration that gender equality IS a fundamental right*

HOWEVER

1. relationship between the different parts of Art 5.

- Art 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”
 - Art. 5(3): cases where the use of gender can never be justified
 - Art. 5(2) cases where the use of gender is a “determining factor”
- See also: Recital 19 of the preamble expressly acknowledges that “[c]ertain categories of risks may vary between the sexes”

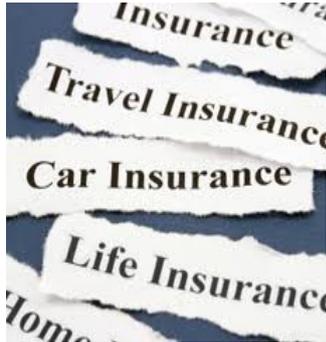
2. Art. 5(2) is an exception: role of exceptions in EU law



furthermore:

- 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

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The Commission Guidelines

The Guidelines are not binding upon Member States but issues for practical guidance.

Definition of Contracts – Art. 5(1) applies only to new contracts.

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Gender-related practices still allowed

Art. 5(1) prohibits any result whereby differences arise in individuals' premiums and benefits due to due to the use of gender as a factor in the calculation of premium and benefits. It does not prohibit the use of gender as a risk-rating factor in general. Such use is allowed in the calculation of premiums and benefits at the aggregate level, as long as it does not lead to differentiation at individual level. (...) it therefore remain possible to collect, store and use gender status or gender-related information within those limits ...

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... therefore it is still possible

reserving an internal pricing

reinsurance pricing

marketing and advertising (Art.3(3) Goods and Services Directive)

life and health underwriting

Art. 4(5) Goods and Services Directive BUT Art. 5(3)



Risk-factors

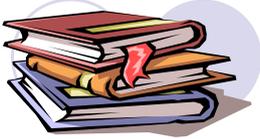
direct/indirect discrimination

The use of risk factors which might be correlated with gender remain possible, as long as they are true factor in their own rights (eg. size of car engine)

Insurance and occupational pensions

Directive 2006/54 EC

Monitoring of the Guidelines



Relevant Literature

- E. Caracciolo di Torella, "The Principle of Equality, the Goods and Services Directive and Insurance: a Conceptual Approach" 13 *The Maastricht Journal of European and Comparative Law*, 339-350, 13, (2006)
- European Network of Legal Experts in the Field of Gender Equality, *Sex Discrimination in the Access and Supply of Goods and Services and the Transposition of Directive 2004/113*, July 2009
- A. McColgan, *The Goods and Services Directive: a curate's egg or an imperfect blessing?* *European Gender Equality Law Review* 1/2009
- Y. Thiery, C. Van Schoubroeck, "Fairness and Equality in Insurance Classification", *The Geneva Papers*, (31) 2006, pp. 190-211)
- Y. Thiery, C. Van Schoubroeck: Proposal for a Directive on Sex Discrimination: Civil Rights "individualistic" tradition versus insurance "Group" tradition, *Euredia*, 585-612, (2003/4)

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- DG Employment, Social Affairs and Equal Opportunities, *Study on the Use of Age, Sex, Religion or Belief, Racial or ethnic and Sexual Orientation in Financial Services, in particular in the Insurance and Banking Sector*, Main Report, CIVIC Consulting, 2010
- C. Tobler, Case note on Case C-236/09, *Test-Achats* (2011) 48 *Common Market Law Review*, 2041-2060
- P. Watson, "Equality, Fundamental Rights and the Limits of Legislative Discretion: Comment on Test-Achats", (2011) 36 *European Law Review*, 896-908