



The *Test-Achats* decision: a post-mortem analysis of Article 5 Directive 2004/13



Dr Eugenia
Caracciolo di Torella
ecdt1@le.ac.uk

Outline of the discussion

- some background information (evolution of the concept of gender equality, the relevant legislative framework ...)
- the Goods and Services Directive (2004/113) and its relationship with insurance, in particular Art. 5.
- Case C-236/09 *Test-Achats*, the Guidelines presented by the Commission (C (2011) 9497 final) and their effect on Article 5 of the Goods and Services Directive

2

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 157 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
- M. Bell, “The Principle of Equal treatment: Widening and Deepening” in P. Craig, G. de Burca, *The Evolution of EU Law*, (OUP, 2011), 611. 3

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

Gender Equality as the EU fairy tale



but what about insurance?

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.

Women live longer and therefore, on average, they are more expensive to insure ...



but they are better drivers, so they are cheaper!

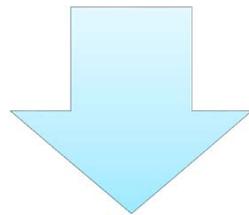
- on the other hand there are a number of factors, which are not linked to sex, that are equally important in establishing life expectancy (socio-economic, marital status, the region where a person lives ...)

- 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



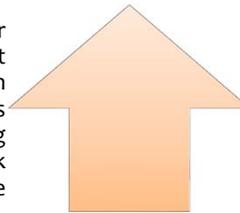
Commission proposal COM(2003) 657

“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) Article 5(2) Directive 2004/13: 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) Directive 2004/13: Member States might decide... to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of the risk based on relevant and accurate actuarial and statistical data ...”:



Report from CIVIC Consulting, 2010:

“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”

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

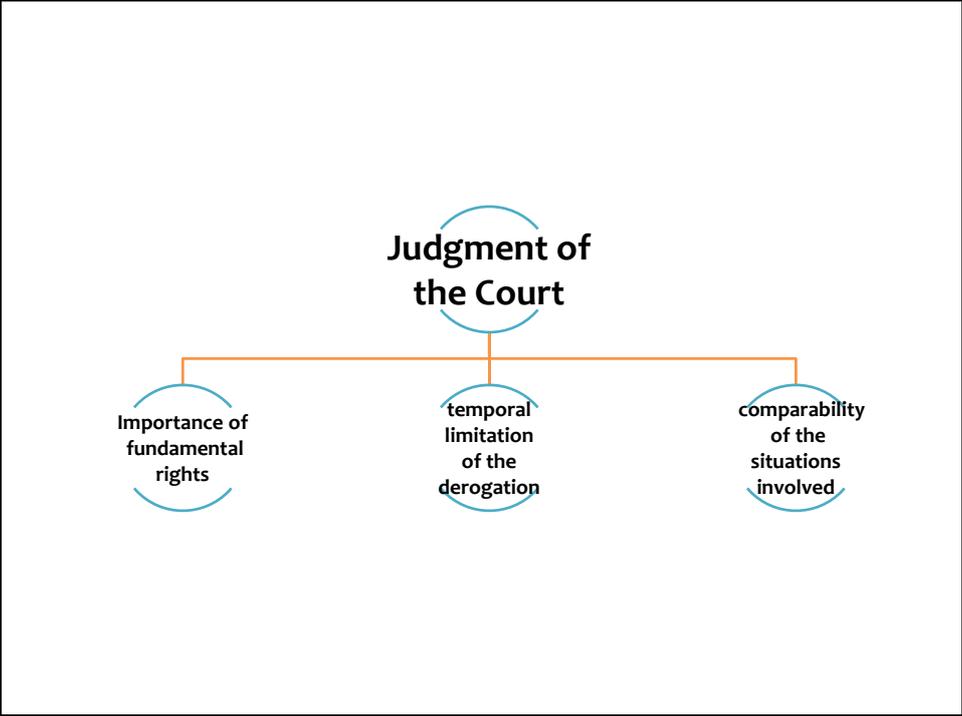
“a condition of lawfulness of all EU act is the respect for fundamental and human rights”

NB: 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





Article 5(2) of Council Directive 2004/113 (...) is invalid with effect from 21 December 2012

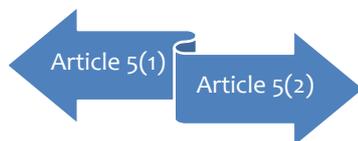
Potential and Limitations

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

HOWEVER

1. relationship between the different parts of Art 5.
2. The impact of gender on different type of insurance
3. Art. 5(2) is an exception: role of exceptions in EU law
4. The issue of comparability

The relationship between the two paragraphs of Article 5



- Are they intended to coexist?
 - if certain circumstances occur, situations caught under Article 5 (1) can potentially be excluded by Art 5(2)
- Are they mutually exclusive?
 - situations can be caught either under Article 5 (1) or under Art 5(2)
- Article 5(3)
 - In any event MS must ensure that costs related to pregnancy and maternity are attributed equally to men and women

Different types of insurance: the impact of gender



- life insurance
- health insurance
- critical illness
- motor
- travel
- employer liability
- annuity

19

AG Sharpston Case C-427/06, *Birgit Bartsch v Bosch und Siemens Hausegeräte*, 2008 ECR I-7245 at para 59

“[a]ny set of human beings will resemble each other in some respect and differ from each other in others. A maxim like that of Aristotle therefore remains an empty rule until it is established what differences are relevant for the purpose at hand. In short, the answers to the questions “who is covered by the principle of equal treatment” and “what aspects of economic and social, political, civic and personal life are encompassed by that principle?” are not immutable. They evolve with society. As they do so, the law reflects that change by starting to state explicitly that certain forms of discriminatory treatment, previously unnoticed or (if noticed) tolerated, will be tolerated no longer. Such legal changes are an extension- a new further expression – of the general principle of equality. [...] Once the possible (new) scope of the principle has emerged, the natural next step is to define it more precisely and to put in place the rules to combat the discrimination that has been identified”.

Communication on Guidelines on the Application of Council Directive 2004/113 EC to Insurance in Light of the Judgment of the Court of Justice of the European Union Case C-236/09 (Test Achats) C(2011) 9497 final

- not binding upon Member States BUT issued for practical guidance.
- **definition of Contracts**
 - contracts ending before 21.12.2012
 - contracts concluded after 21.12.2012 (new contacts)
 - contracts running as of 21.12.2012
- Art. 5(1) applies only to new contracts.

21

Gender-related practices still allowed

Art. 5(1) prohibits any result whereby differences arise in individuals' premiums and benefits 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 ...

22

... 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

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)

Where are we now?
Has Cinderella gone to the ball?



not as far insurance is concerned! it is tempting to conclude that the Commission has re-introduced the very same exceptions that the Court tried to eliminate but without the guarantees of sex as “determining factor” and the production of “relevant and statistical data” contained in Article 5(2).

Arguably, the timid effort of the Goods and Services Directive, the bold statement of principles of *Test Achats* and the clumsy attempt of the Commission's Guidelines merely confirm the complexities surrounding this area of law: gender equality and insurance is an issue for which "the time was not ready to legislate". (E. Schanze, "Injustice by Generalization: Notes on the Test-Achats Decision of the European Court of Justice" (2013) 14(2) German Law Journal, 423-433, 433)

Relevant Literature



- G. de Baere, E. Goessens, "Gender Differentiation in Insurance Contracts after the Judgment in Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres*" (2011-12) 18 *Columbia Journal of European Law* 339-367
- 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
- N. Reich, "Non Discrimination and the Many Faces of Private Law in the Union – Some Thoughts after the Test-Achats Judgment" (2011) *European Journal of Risk and Regulation*, 283-290
- 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)

26

- 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
- E. Caracciolo di Torella, “No Sex Please: we’re Insurers” 5 *European Law Review*, 238-654.
- 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)

Thank you!

any questions?

