

ERA Seminar: EU Gender Equality, 28 May 2013

The role of the national judge in applying the EU anti-discrimination directives:

- relationship with national legal orders and**
- the preliminary ruling procedure**

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Head of Cabinet to Judge Vajda, ECJ

3 typical types of litigation:

- National law transposes Union law but it is uncertain what Union law requires.
- National law is contrary to Union law, and the question is what to do about it.
- Union secondary legislation is contrary to primary Union law.

Current key cases

- C-403/01 Pfeiffer
- C-555/07 Küçükdeveci
- C-236/09 Test Achats
- C-243/09 Fuss
- C-167/12 CD
- C-363/12 Z





Case C-236/09 Test Achats

- Reference on validity of Article 5(2) from the Belgian Cour constitutionnelle
- Assigned to the Grand Chamber of the ECJ
- Validity of Art 5(2) of Directive 2004/113 assessed by reference to Articles 21 and 23 of the Charter: discrimination based on sex is prohibited; equality between men and women must be ensured in all areas

Insurance – Article 5

'Actuarial factors'

Recital 18: The use of actuarial factors related to sex is widespread in the provision of insurance; the use of sex as an actuarial factor should not result in differences in individuals' premiums and benefits.

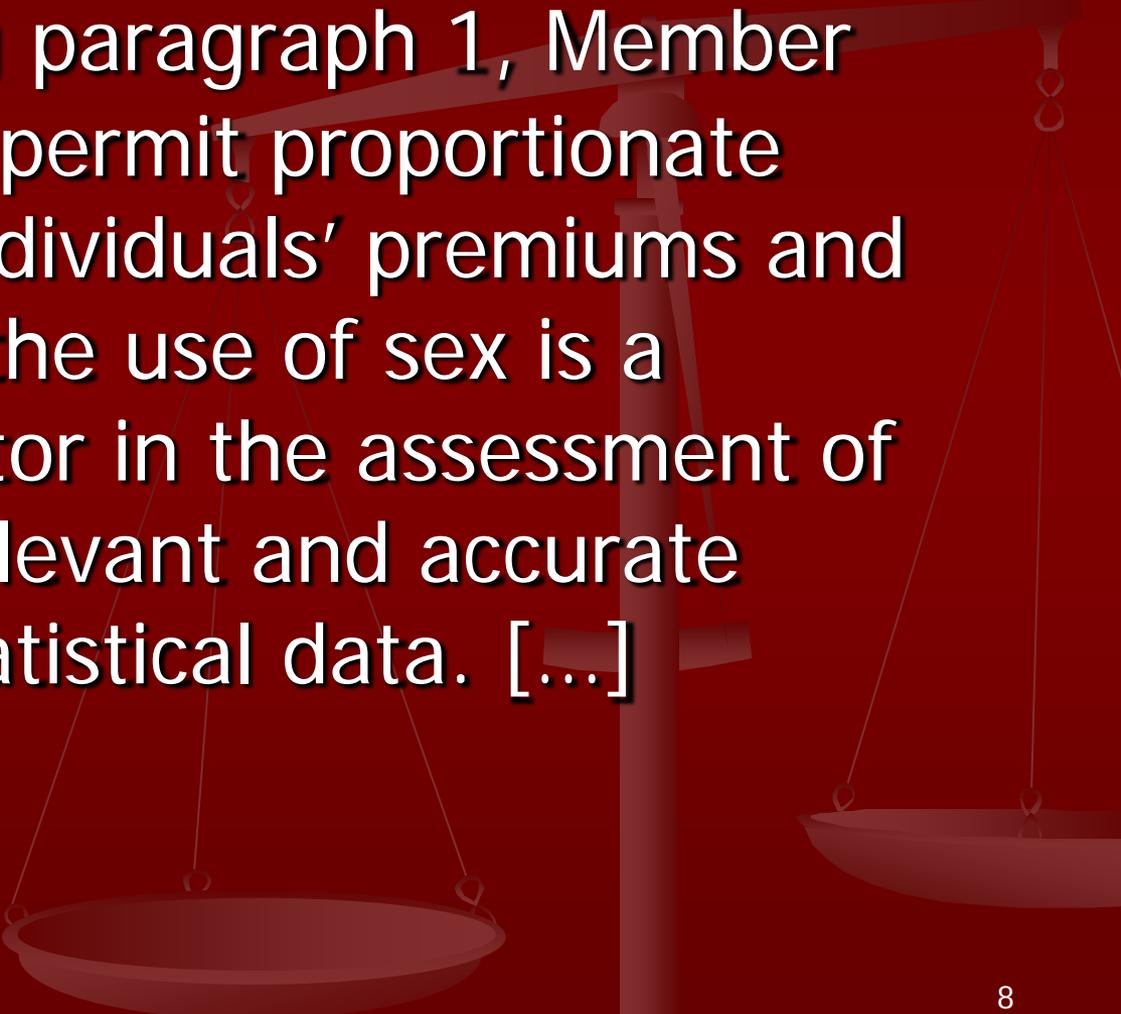
Recital 19: Certain categories of risks may vary between the sexes; for contracts insuring those types of risks, Member States may decide to permit exemptions from the rule of unisex premiums and benefits.

Article 5(1) – The Principle

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 [...] shall not result in differences in individuals' premiums and benefits.

Article 5(2) – The Derogation

Notwithstanding paragraph 1, Member States may [...] permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. [...]



The ECJ's Reasoning

1. It is up to the legislator to decide whether to take action; but if it takes action, it must contribute, in a coherent manner, to the achievement of the intended objective.
2. Transitional periods were permissible in principle in moving to unisex premiums.
3. Art 5(2) permits Member States to allow insurers to apply unequal treatment without any temporal limitation.
4. This exemption from the unisex premium rule works against the achievement of the equal treatment objective, which is the purpose of the Directive, and is incompatible with Articles 21 and 23 of the Charter.

ECJ Judgment of 1 March 2011

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

The “Comparability Objection”

“Comparable situations must not be treated differently, and different situations must not be treated in the same way”

Q: Is the situation of male and female policyholders really comparable in all branches of insurance?

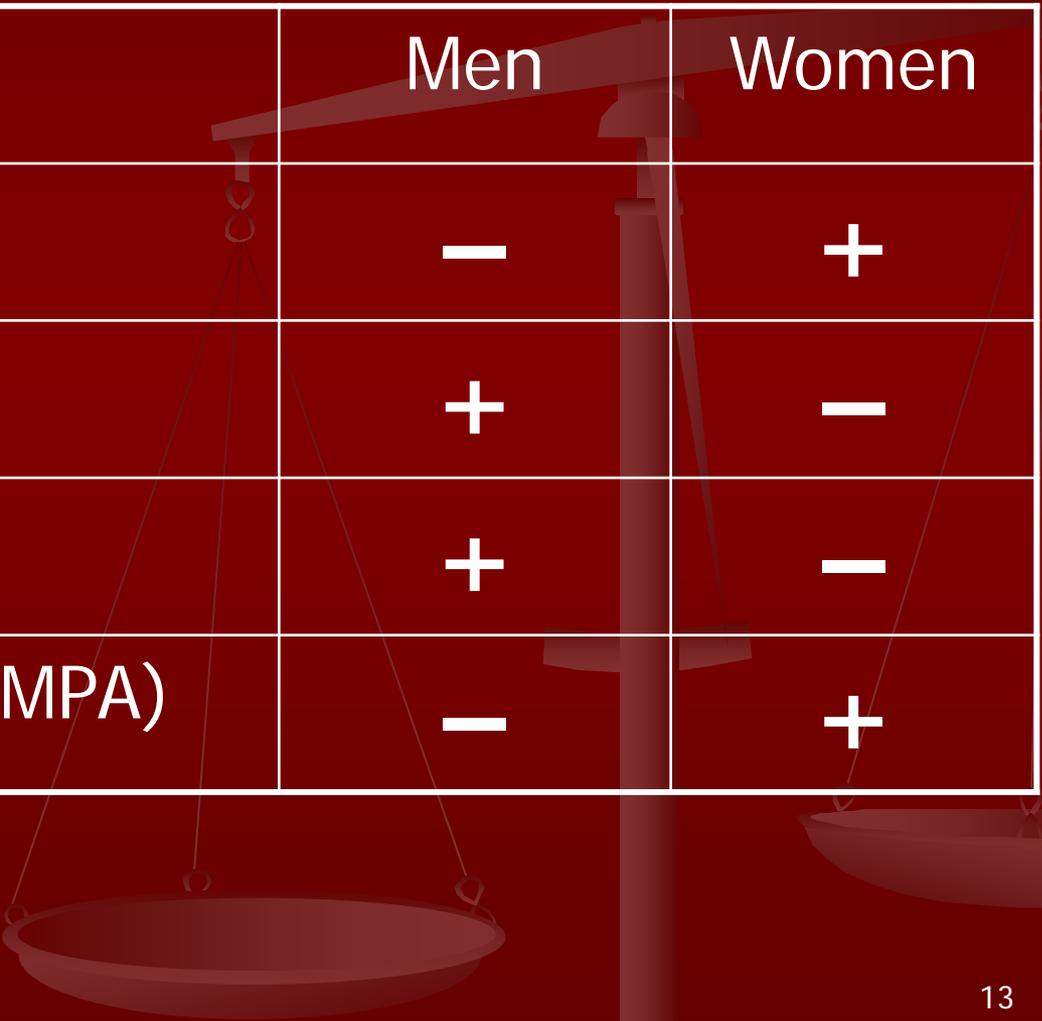
A: It depends on the context of the measure which makes the distinction.

Here: The express purpose of the Directive is the application of unisex premiums.

Overall Premium Increase

- Increased uncertainty
- Anti-selection risk
- Moral hazard

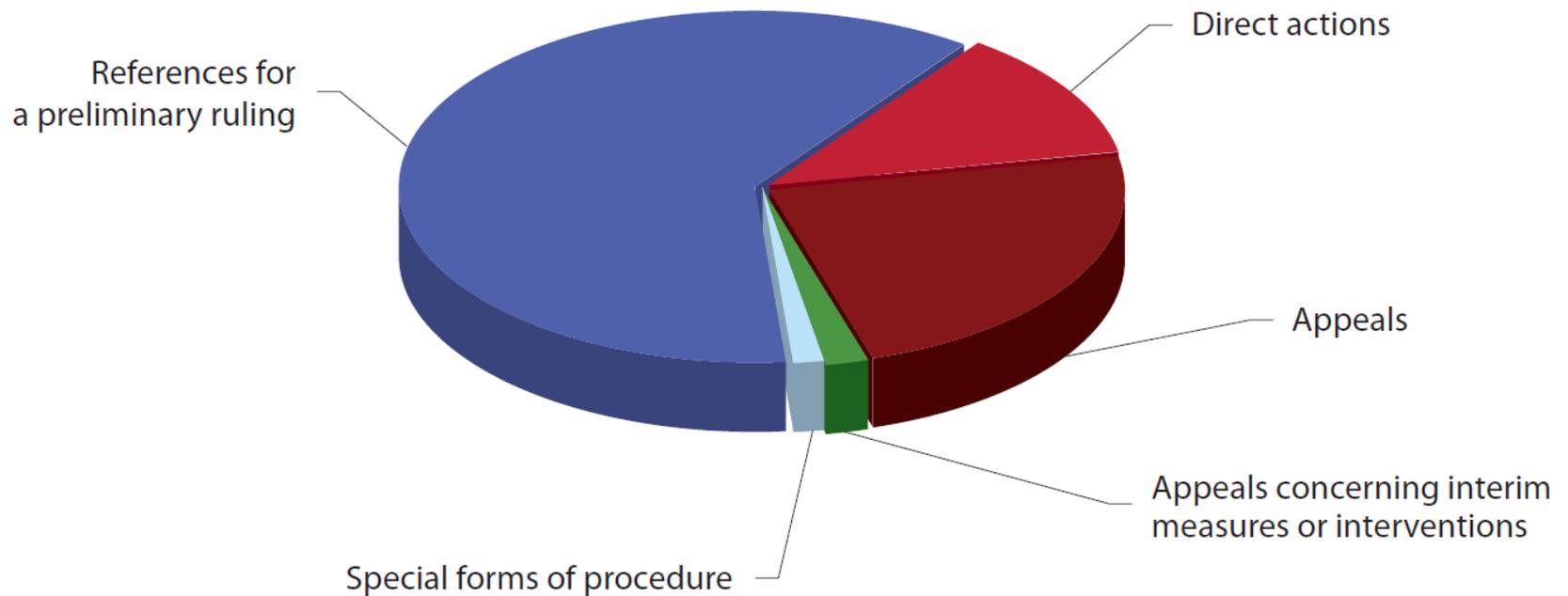
Likely pricing consequences for different lines of business



	Men	Women
Car Insurance	-	+
PHI, Critical Illness	+	-
Annuities	+	-
Term Assurance (eg MPA)	-	+



Range of Cases



A reference is (almost) always **possible**;
sometimes it is also **obligatory**.

Query in what cases it is **desirable**.

A reference to the ECJ is obligatory where:

1. the validity of Union law is in issue.
2. the national court is deciding a case in last instance
(i.e. no appeals will be possible against the judgment)

UNLESS

the answer to the issue of Union law is
obvious; or
resolved by a previous ECJ judgment.

Reference timeline

1. Reference lodged by National court; translations sent to all Member States and Union Institutions
2. Written Observations (within 2 months) from main parties and any Member States / Union Institutions intervening
3. Appointment of Judge-Rapporteur and AG; Preliminary Report
4. General Meeting of the Court decides:
 - Allocation to a Chamber (3, 5 or 15 Judges?)
 - Decision by way of Order?
 - Questions to Parties?
 - Hearing?
 - AG's Opinion?
5. Hearing
6. AG's Opinion
7. Judgment sent back to National court
8. Application by the National court to the case in front of it

Some features of decision making at the ECJ

- ECJ as generalist court; wide variety of cases, even wider variety of judicial backgrounds
- Strong anti-discrimination line: case allocation to "discrimination enthusiasts"; disconnect with practical application
- Teleological rather than literal reasoning: language regime
- Equality as a horizontal principle, stemming from business contexts: CAP, Competition, VAT, ...

Thank you!
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