

# IS SEX AN APPROPRIATE DETERMINING FACTOR IN THE CALCULATION OF INSURANCE PREMIUMS?

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# GENDER EQUALITY IN ACCESS TO GOODS AND SERVICES - OUTLINE

- Directive 2004/113
  - Scope
  - Definitions
  - Actuarial factors - Art. 5
  - Defence of rights
- Short evaluation of the Directive
- **Test-Achats case**
  - **A.G. Kokott opinion**
  - **Decision of the Court**
  - **Evaluation**
- Possible consequences for insurance sector
- Conclusions

# GENDER EQUALITY OUTSIDE EMPLOYMENT

- Principle of equality - cornerstone of EU law, indicator of the level of democracy
- For decades - focus on **gender** equality in **employment** and social protection
- After Amsterdam Treaty - possibility to extend the scope of equality
  - further grounds
  - gender equality outside employment

# EC PRIMARY LAW BASIS

- **Art. 13 EC Treaty**
  1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, **may take appropriate action to combat discrimination** based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
  2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.
- **Today Art. 19 Treaty on the Functioning of the EU**

# BASED ON ART. 13 ECT, RESP. 19 TFEU

Race directive

Framework employment directive

Goods and services directive

Further proposals

Framework equality directive - COM(2008)426

# GENDER EQUALITY OUTSIDE EMPLOYMENT

- First directive on gender equality outside employment and vocational training -  
**Council Directive 2004/113/EC**  
of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services
- To be transposed until 21.12.2007
- Rather modest piece of EC law

# WHY THIS DIRECTIVE?

- Unequalities between men and women also in other areas than employment
- Problematic areas:
  - Media and advertising
  - Education (gender stereotypes kept)
  - Insurance
  - Sex segregated services
  - Different pricing

# SCOPE OF DIR. 2004/113

- Applies to all persons who provide goods and services
- Goods and services
  - Available to the public
  - Offered outside private and family life
- Not applicable to:
  - Choosing contractual partner
  - Content of media, advertising, education
- Very narrow scope - some national laws apply also to education
- With exclusion of private and family life - excluded also gender based violence



# PRINCIPLE OF EQUAL TREATMENT

- Article 4
- Prohibited:
  - Direct and indirect discrimination
  - Harassment, sexual harassment
  - Instruction to direct or indirect discrimination
- Exception:
  - art. 4 par. 5
  - This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary

Question of legitimate aim - golf-clubs vs. Gay or lesbian clubs

# EVALUATION OF THE DIRECTIVE 2004/113

- Not a very much „succeeded“ piece of EC legislation
- In some respects gender behind other grounds
- No definition of goods and services
- Vague focus on problems related to pregnancy
- Exclusion of important aspects of life, where mostly women’s dignity is in question:
  - Advertisement
  - Media
  - Education
  - Gender based violence
  - Participation in decision-making

# SOME QUESTIONS - NOT ENTIRELY SOLVED YET

- **Sex-segregated services vs. decency**  
Swimming pools, saunas (women's days)
- **Activities closed to another sex**  
Men's clubs, women's cafes  
Flights, some adrenaline sports closed to pregnant women
- **Differential pricing**  
Women's and men's haircut, dating services, dancing schools

**Very problematic - using gender as one of actuarial factors - differentiated premiums and bonuses in private insurance**

# ART. 5 OF THE DIR. 2004/113

## Article 5

### ○ Actuarial factors

1. 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.

2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to 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 Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.

3. In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits.

Member States may defer implementation of the measures necessary to comply with this paragraph until two years after 21 December 2007 at the latest. In that case the Member States concerned shall immediately inform the Commission.

# INSURANCE - ACTUARIAL FACTORS

- Not everywhere unisex tariffs for insurance contributions
- Problematic areas:
  - Car insurance
  - Private pensions insurance
  - Private health insurance
- *Coloroll* case: a case on contributions of employers different contributions for men and women to an occupational pension scheme are discriminatory - obiter dictum - against art. 119 (141,157)
- Long transitional period (up to 8 years)

CASE C-236/09

Association Belge des  
Consommateurs

Test-Achats ASBL, Yann van  
Vugt, Charles Basselier vs.  
Conseil des Ministres

decided 1. March 2011

<http://www.youtube.com/watch?v=316PBwvBzlw>

## CASE C-236/09 - FACTS

According to a Belgian act, a direct proportionate distinction may be drawn on the basis of gender for the purposes of calculating insurance premiums and benefits where sex is a determining factor in the assessment of risk on the basis of relevant and accurate actuarial and statistical data.

Applicants in the main proceedings submitted that that law is incompatible with the principle of equal treatment of men and women.

It infringes Articles 10, 11 and 11a of the Belgian Constitution read in conjunction with Article 13 EC, Directive 2004/113, Articles 20, 21 and 23 of the Charter of Fundamental Rights, Article 14 ECHR, Article 26 of the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women.

## CASE C-236/09

The Belgian Constitutional Court finds that the Law in dispute makes use of the exemption under Article 5(2) of Directive 2004/113 and that the applicants' complaints therefore also apply to that provision of the directive. In those circumstances the Constitutional Court regards it as necessary, before ruling on the action pending before it, to decide on the validity of Article 5(2) of Directive 2004/113.

The Constitutional Court expressly accepts that the Court of Justice alone has jurisdiction to decide on that issue of validity and that under the third paragraph of Article 234 EC (now the third paragraph of Article 267 TFEU) it is required, as a national court against whose decisions there is no judicial remedy under national law, to bring the matter before the Court.



# CASE C-236/09 - PRELIMINARY QUESTIONS

- (1). Is Article 5(2) of Directive 2004/113/EC compatible with Article 6(2) EU, and more specifically with the principle of equality and non-discrimination guaranteed by that provision?
  
- (2). If the answer to the first question is negative, is Article 5(2) of the Directive also incompatible with Article 6(2) EU if its application is restricted to life assurance contracts?

## CASE C-236/09

- ◉ Written opinions in proceedings before the CJEU presented by:
  - Test-Achats,
  - Belgium, Ireland, France, Lithuania, Finland, U.K.,
  - EU Council, EU Commission
- ◉ All subjects, except Test-Achats, submitted that the art. 5(2) is not against the equality principle, some argued, there are already many contracts based on sex as an actuarial factor

# CASE 236/09 - GA OPINION

## CONFLICT WITH EQUAL TREATMENT PRINCIPLE

- considerable doubts whether Article 5(2) of Directive 2004/113 in the form chosen by the Council is at all suitable for expressing the principle of equal treatment, in particular the requirement not to treat different situations in the same way. A provision having that objective should be applicable in all Member States.
- the case-law in Neath and Coloroll Pension Trustees suggests the conclusion that the prohibition of discrimination on grounds of sex under European Union law precludes differences between men and women which are purely statistical from being taken into consideration with regard to insurance risks.

# GA OPINION - RISK FACTORS - GROUP OR INDIVIDUAL EXAMINATION

- Article 5(2) of Directive 2004/113 is intended to take into account the specific characteristics of insurance. Insurance companies offer services with regard to which it cannot be said with certainty at the time when the contract is concluded if, when and to what extent the insured person will have recourse to them. Recourse to prognoses is indispensable in actuarial calculations of premiums and services in order to make that risk calculable and develop the products in such a way as to do justice to the risk.
- In that regard, the making of an individual prognosis in respect of each insured person is not normally the first priority; instead recourse is had to experiential values. It is therefore in principle perfectly legitimate with regard to risk evaluation to carry out a group examination instead of - or in addition to - an individual examination.

# GA OPINION - POSSIBLE CONSEQUENCES

The use of a person's sex as a kind of substitute criterion for other distinguishing features is incompatible with the principle of equal treatment for men and women. It is not possible in that way to ensure that different insurance premiums and benefits for male and female insured persons are based exclusively on objective criteria which have nothing to do with discrimination on grounds of sex.

Purely financial considerations, such as the danger of an increase in premiums for a proportion of the insured persons or even for all of the insured persons, do not in any event constitute a material reason which would make discrimination on grounds of sex permissible. In addition it seems reasonable to assume that the premiums for some insured persons would be higher than at present if there were no exemption clause like Article 5(2) of Directive 2004/113; that would normally have to be balanced against lower premiums for insured persons of the other sex in each case. In any event none of the parties to the proceedings has submitted that the introduction of so-called unisex rates would give rise to a serious danger to the financial equilibrium of private insurance systems.

.... proposal that the Court should declare Article 5(2) of Directive 2004/113 to be invalid due to infringement of the prohibition of discrimination on grounds of sex, which is enshrined as a fundamental right.

# C-227/04 LINDORFER - COMPARABLE CASE?

Staff regulations - discriminatory?

Actuarial values higher for women - they receive fewer years of pensionable service than men in the case of transfer of their pension rights into the community scheme - discriminatory on ground of sex

G.A. Jacobs: U.S. Supreme court case law -  
Manhard: it can not be said that an actuarial distinction based entirely on sex is 'based on any other factor other than sex.' Sex is exactly what it is based on. Using actuarial factors based on sex seems therefore as a generalisation, which, from the point of view of the principle of equality, is not acceptable.

## C-236/09 - CJEU DECISION

- ◉ the use of actuarial factors related to sex was widespread in the provision of insurance services at the time when the directive was adopted. Consequently, it was permissible for the EU legislature to implement the principle of equality for men and women - more specifically, the application of the rule of unisex premiums and benefits - gradually, with appropriate transitional periods.
- ◉ Main argument: given that Directive 2004/113 is silent as to the length of time during which differences may continue to be applied, Member States which have made use of the option are permitted to allow insurers to apply the unequal treatment without any temporal limitation.

## C-236/09 - CJEU DECISION

- ◉ purpose of Directive 2004/113 in the insurance services sector is, as is reflected in Article 5(1) of that directive, the application of unisex rules on premiums and benefits. ... use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals. ... Directive 2004/113 is based on the premiss that, for the purposes of applying the principle of equal treatment for men and women, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.
- ◉ There is a risk that EU law may permit the derogation from the equal treatment of men and women, provided for in Article 5(2) of Directive 2004/113, to persist indefinitely.



# C-236/09 - CJEU DECISION - ANSWERS TO PRELIMINARY QUESTIONS

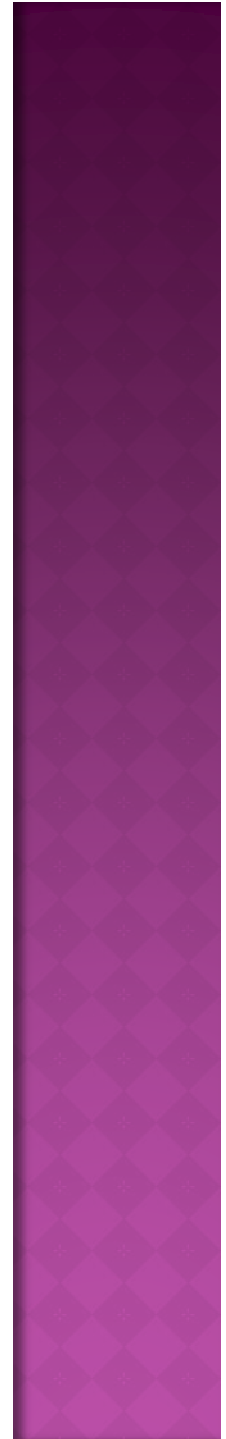
- ◉ In the light of the above, the answer to the first question is that Article 5(2) of Directive 2004/113 is invalid with effect from 21 December 2012.
- ◉ In view of that answer, there is no need to address the second question.

# EVALUATION AND POSSIBLE CONSEQUENCES OF THE DECISION

- ◉ Equality in insurance - a very hot issue - the decision did not take this into account very much
- ◉ Possible consequences:
  - Many insurance companies will probably use this opportunity to higher prices for their products in general
  - Some insurance products should cost the same for men and women
  - Car insurance - prices will higher for women
  - Life insurance - prices will higher for women
  - Private health insurance - prices will higher for men

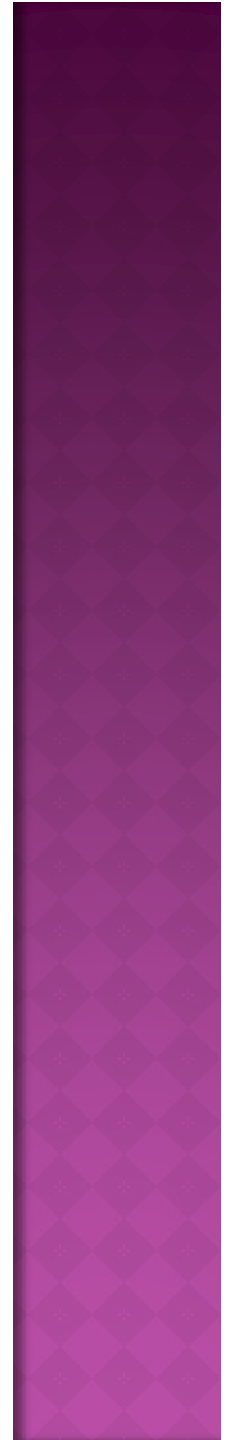
# POSSIBLE INFLUENCE OF THE JUDGEMENT TO OTHER AREAS OF DISCRIMINATION

- ◉ Proposal for new framework directive:
  - A special rule is added for insurance and banking services, in recognition of the fact that age and disability can be an essential element of the assessment of risk for certain products, and therefore of price. If insurers are not allowed to take age and disability into account at all, the additional costs will have to be entirely borne by the rest of the "pool" of those insured, which would result in higher overall costs and lower availability of cover for consumers. The use of age and disability in the assessment of risk must be based on accurate data and statistics.



# PROPOSED DIRECTIVE AND ACTUARIAL FACTORS

- ◉ Proposed recital 15 of preamble:
  - Actuarial and risk factors related to disability and to age are used in the provision of insurance, banking and other financial services. These should not be regarded as constituting discrimination where the factors are shown to be key factors for the assessment of risk.



# PROPOSED DIRECTIVE AND ACTUARIAL FACTORS

- ◉ Article 2 of the proposed directive:
  - 6. Notwithstanding paragraph 2, Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In particular, this Directive shall not preclude the fixing of a specific age for access to social benefits, education and certain goods or services.
  - 7. Notwithstanding paragraph 2, in the provision of financial services Member States may permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data.

# ANY LITERATURE?

- Aleen McColgan
- Eugenia Caracciolo di Torella
- Network of Legal Experts on Gender Equality  
<http://ec.europa.eu/social/main.jsp?catId=641&langId=en>
- European Gender Equality Law Review -  
<http://ec.europa.eu/social/keyDocuments.jsp?type=0&policyArea=418&subCategory=641&country=0&year=0&advSearchKey=noelr&mode=advancedSubmit&langId=en>

**THANK YOU FOR  
YOUR ATTENTION**

Any questions or  
comments?