

The Test Achats judgment of the ECJ.

by Professor Marco Frigessi

Who was the culprit?

Gender as a risk assessment criterion

In Italy the principle that individual risk related attributes, such as gender and age, are taken into account, is considered one of the fundamental principles of insurance. Insurance companies cannot underwrite and price risks that they cannot assess and analyse.

Examples

- Motor insurance, young women have lower claims rates than men of the same age, therefore they paid lower premiums.
- Women live circa around five years longer than men, they paid considerably lower term life insurance premiums for the same amount of cover in the event of death.
- For the same reason above (5-years longer life expectancy), women pay higher premiums for annuity insurance than men if they wish to get the same monthly pension, because, from a statistical perspective, this pension will have to be paid out for longer.

Impact of Test Achats

- After the judgment Test Achats of the ECJ of 1 March 2011, the gender factor is no longer used by Italian insurers for pricing the product
- There has been a general leveling up of premiums paid for the considered insurance products

WHO WAS THE CULPRIT ?

- Most of the criticism was against the Court.
- My opinion: the culprit was the EU legislator

Article 5 1

- Art. 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.

Article 5 2

- 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.

The judgment

- 30 It is not disputed that the 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. Recital 18 to Directive 2004/113 expressly states that, in order to guarantee equal treatment between men and women, the use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals. Recital 19 to that directive describes the option granted to Member States not to apply the rule of unisex premiums and benefits as an option to permit 'exemptions'. **Accordingly, Directive 2004/113 is based on the premiss that, for the purposes of applying the principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.**

The Judgment

- Accordingly, 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.
- 32 Such a provision, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter of Fundamental Rights of the European Union.

The meaning of Test Achats

- The ECJ did not confirm the thesis of the *advocate generale* who opposed the use of gender as a risk factor. The ECJ declares the regime ineffective on the inconsistency in directive 113/2004.
- UN VERO PASTICCIO!
- The European legislator would have had to specify in the directive the types of insurance contracts exempted from the application of the principle of unisex premiums. Such a legislative technique would reflect a clear legislative policy choice, as such, in principle, to be only accepted by the Court.

AGE

- Proposal for a directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation Brussels, 2.7.2008.
- Anxiety and worries of the insurers....
- Don't worry, be happy! The proposal does not have the same flaws of directive 113 of 2004.
- Thank you.