

Justification of gender discrimination, in response to the *Test-Achats* case

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Insurance

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Differentiation

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Impeding access

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Discrimination?

Violation of the principle of equal treatment?

“Things that are like should be treated alike, while things that are unlike should be treated unlike”

Conflict

- Right not to be discriminated against on the basis of
 - Gender, pregnancy, maternity, gender reassignment (**2004/113/EC**)
 - Age, Disability, Health status, Sexual orientation (2000/78/EC) (not in goods and services)
 - Nationality, Race... (2000/43)
- Need of adequate and affordable insurance



- Freedom of contract / freedom to market insurance products
- Freedom to set rates
- Highly competitive market
- Insurance technique
- Actuarial fairness



Bridging

- Actuarial fairness
- Legal principle of equal treatment



subordinate



- Freedom to market insurance products
- Freedom to set rates

Bridging the conflict?



- Instruments of weighing up interests
- Critical assessment of arguments of economic efficiency
- taking into account economic reality of insurance

The conflict illustrated: Opinion of AG Kokott in *Test-Achats*

- Article 5, 2 Gender Directive (2004/13/EC):

“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.”

- “Differences in treatment between the sexes may of course be justified in particular circumstances. A justification for direct discrimination on grounds of sex, [...] is however conceivable only in limited circumstances and has to be carefully reasoned. The Union legislature is by no means at liberty to allow arbitrary exceptions to the principle of equal treatment and thereby to undermine the prohibition against discrimination.”*
- Practical difficulties alone do not however justify the use, to an extent for reasons of convenience, of the insured person’s sex as a distinguishing criterion.*
- “I, like Advocate General Van Gerven before me, am of the opinion that the use of actuarial factors based on sex is incompatible with the principle of equal treatment for men and women.”*
- transitional period of three years*

The Court: Test-Achats judgment

- *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”*
- Already as of **21 December 2012**: prohibited to make use of gender as a risk-factor in insurance agreements
- Reason? **“without temporal limitation”**
Court tackles inadequacy of legislator
- Equal treatment → **Comparable situations should not be treated differently**
- *No justification by showing proportionate differences where the use sex is determining in the assessment of risk based on accurate actuarial and statistical data*

Incomplete (judicial) review model

- Entrance of review
 - Causality
 - Comparability

- Justification
 - Legitimacy
 - Appropriateness
 - necessity

Entrance of review

• Causality

- _ “On grounds of” → causal relation between discrimination ground and less favourable treatment –
- _ Refuting causality
 - Eg: pregnant when subscribing insurance: or Trans people willing to subscribe health insurance
 - _ Cause = lack of uncertain event
 - _ Pre-existing condition

• Comparability

- _ Incomparable situations → no discrimination
 - Comparability measure must be detached from protected grounds
 - _ Eg: different risk for women and men → hardly ever detached from gender
 - » Presumption of discrimination not refuted
 - _ Eg: difference in degree of how risk can be influenced
 - » Waiting periods for pregnant women
 - » Non-accessability for trans people

• Uncertainty / risk of poorly reasoned decisions

Justification

- Entrance of review alone → risk of incomplete weighing up of interests / stereotype thinking by judges
 - Justification = “ultimate touchstone”?
 - Europe: Possibility of justification dependant on
 - Applicability of Union Directives
 - Direct or indirect discrimination
 - Discrimination ground
 - Insurance workrelated or not
 - Applicable law (option rights for member states)
- = differentiated justification system
- Canada and South Africa: uniform justification system, no difference between direct and indirect discrimination

Justification

- Legitimacy
- Appropriateness
- Necessity

→ + elements of review from opting-out clauses

→ (eg. Proportional difference, actuarial and statistical data

As illustration of translation to insurance relations

→ + critical assessment of insurance technique based arguments

→ Still uncertainty! But less chance to introduce stereotype thinking in entrance of review

→ Necessity test = ultimate test for valuable weighing up of interests

Necessity

- Less burdensome measures
 - _ Individual risk assessment
 - _ Alternative risk-factors
 - Unlisted differentiation grounds
 - Mutable risk-factors
 - Eg. Mileage and PAYD
 - _ Bonus-malus systems
 - _ Segmentation method in proportion to risk?
- Guidelines from foreign jurisprudence
 - _ Essential character of insurance business
 - _ Substantial interference with rights of other policyholders
 - _ Additional benefit for alleged discriminated party
 - _ Initiatives of other market players
 - _ Market share of the undertaking
 - _ Service provider's capacity to shift and recover costs throughout its operation
- True proportionality
 - _ Taking into account fundamental interests (basic insurance needs, social and economic fundamental rights, social responsibility of insurance company)

Justification

- Still uncertainty but less chance of stereotype thinking
 - Compels to rationalisation and explained decisions
 - Questioning traditional ideas of efficient risk-classification
- Justification model still present in article 4,5: “exclusively or primarily to one sex”
 - Eg: Sheilah on weels, health insurance for women
 - Recital 17: not provided more favourably to members of one sex → hard to verify
- But: case by case, scarce jurisprudence, no uniformity in interpretation
- Guidelines by Commission of good practices could be recommended