The use of gender in insurance pricing

NOTE

2011
Abstract
In March 2011, on the basis of the Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, the Court of Justice applied the prohibition of direct discrimination which does not permit any specific justification, unlike indirect discrimination, in the sector of insurance which is particularly important from an economic perspective. From 21 December 2012, discrimination based on the gender will be prohibited. What is the impact of this decision on the insurance companies, on the consumers?
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1. INTRODUCTION

1.1. Preliminary explanations: risks and gender

Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services was the subject of an important judgement of the Court of Justice of 1 March 2011 (case C-236/09, Test Achats). The dispute brought before the Court is worth paying attention to.

By applying anti-discrimination law, in particular the prohibition of direct discrimination which does not permit any specific justification, unlike indirect discrimination, the Court intervenes in a sector, like the insurance one, which is particularly important from an economic perspective, stating that from 21 December 2012 no exemptions will be allowed in the field of actuarial tables.

The importance of the case can easily be measured by considering the high number of legal issues the interpreter has to deal with, given that for the first time the sex/gender factor is linked to the typical risk factor peculiar to contracts of insurance.

From an overall systematic perspective, the operation of balance to which the dispute refers is complex: market, individual autonomy (or freedom of contract) and equal treatment have to reach a more developed balance in insurance matters as well.

This report aims at verifying which consequences the judgement might lead to on the overall systematic level. In fact, besides its impact on the specific sector of banks and insurances, the judgment seems to be meant to affect not only other important sectors, like the welfare one, but also the implementation of prohibitions against discriminations on grounds of factors other than gender.

The report will not provide for an overall comparative analysis of the different transpositions of Dir. 2004/113, in particular as regards the derogation in article 5.2, which was declared invalid by the Court. Nor it will give precise econometric data on the financial-economic impact of the judgement. As it will be explained later, the plurality of different ways of transposition in the Member States, on one hand, the presence of different practices and insurance policies among the different market operators, on the other, make it hard to reach a synthesis assessment, which calls for further in-depth researches to be developed.

1.2. The ECJ Judgment 1 March 2011, C-236/09, the Opinion of Advocate General Kokott and the transitional period

1.2.1. The Tests Achats Judgement

With the Judgment of 1 March 2011, case C-236/09 – the reference was made in proceedings commenced by a Belgian consumers association – the ECJ declared the invalidity of article 5, par. 2, of Directive 2004/113/CE concerning the principle of equal treatment between men and women in the access to and supply of goods and services.

That provision allowed Member States to permit exemptions from the general rule – laid down by par. 1 of the same article – which requires to adopt for both men and women the same systems of actuarial calculation to determine premiums and benefits for the purposes of insurance in all the new contracts concluded after 21 December 2007. According to the
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Court, articles 6, par. 2 TEU and articles 21 and 23 of the Charter of Fundamental Rights prohibit any discrimination on grounds of sex and ensure equal treatment in every field.

Specifically, article 5 of Directive 2004/113, entitled «Actuarial factors», states that:

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.

4. 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».

This Article clearly considers the use of different actuarial calculations as a discrimination. The Court recognized the validity of the exemption in article 5 par. 2 given that the practice of their use is widespread and it is therefore necessary to recognize the discretion of the Eu legislator to determine when any action is to be taken in this field. To this purpose, the development of economic and social conditions within the Union itself must be taken in due account (par. 20).

Article 19 TFEU confers the legislator the discretion of determining when and how it will take action. Specifically, the Council, after obtaining the consent of the European Parliament, can take the measures necessary to combat against all the discriminations based on grounds of sex, race or ethnic origin, religion or personal beliefs, disability, age and sexual orientation. However, according to the Court, its action has to contribute, in any case, and “in a coherent manner, to the achievement of the intended objective” (par. 21, Judgment), which is the elimination of the use of gender-related actuarial calculations.

According to the Court, an exemption can thus be permitted only for transitional periods or with derogations of limited scope.

Therefore, the Council, notwithstanding its recognized discretion, has some limitations to respect, as it must exercise its competence “in accordance, inter alia, with the second subparagraph of Article 3(3) TEU, which provides that the European Union is to combat social exclusion and discrimination and to promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child, and with Article 8 TFEU, under which, in all its activities, the European Union is to
aim to eliminate inequalities, and to promote equality, between men and women” (par. 19).

According to the Court, a provision like Article 5.2, “which enables the Member States 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” (par. 32).

However, and unusually, the declaration of invalidity is not given a retroactive effect: it will take effect only from the end of an appropriate transitional period, which is intended by the Court to expire the 21 December 2012, which is the day the Directive is to be reviewed according to Article 16.

1.2.2. The impact of the Test Achats Judgement

The Test Achats Judgement is meant to have multiple and different consequences:

a – The declaration of invalidity of Article 5.2 of Directive 2004/113 has an important systematic value. For the first time, the Court of Justice declared the invalidity of a Directive provision in application of the principles enshrined in the Charter of fundamental rights. Accordingly, it gave access to the potential judicial assessment of all the acts adopted before the Charter was conferred the same legal value of the Treaty. The decision of the Court, in fact, makes the judgement more similar to a reference for legitimacy than to a reference for a preliminary ruling.

b – The judgement requires important economic sectors, like the financial and insurance ones, to carry out considerable innovations. As it is hereby impossible to assess its overall economic impact [n° 4], the report will focus on the legal consequences of the Judgement.

c – The Judgement and the so called “Test Achats doctrine” have an “expansive effectiveness” on other sectors similar to those directly concerned, in a complex context like the European welfare one. This Judgment is meant to affect with direct consequences, in particular, the sector of social security (so called “welfare effect”) as well as factors of discrimination other than gender (so called “horizontal effect”).

The report will focus, in particular, on point b) and, partially, on the “expansive effectiveness” of the Judgment, which will be analysed in points 2.2 and 3.1.1.1. (point c); the systematic effects on the current functioning of EU law will be left out (point a).

1.2.3. The Opinion of Advocate General Kokott

To properly understand the legal questions the Court dealt with in its very concise judgment – questions that have to be tackled in order to manage the end of the transitional period from a strictly legal perspective – special attention must be paid to the opinion of Advocate General Kokott, delivered on 30 September 2010.

As far as the analysis hereby conducted is concerned, the most interesting part is the one about the validity/invalidity of the derogation.
Advocate General Kokott clearly explains how the exemption validity has to be examined through the traditional justification test, which verifies whether the aim is legitimate and the means of achieving it are proportionate and appropriate.

A – With regard to the first profile – that is the one concerning the legitimate aim – Kokott points out that recourse to prognoses is indispensable in actuarial calculations of premiums and services as at the time when the contract is concluded it cannot be said with certainty if, when and to what extent the insured person will benefit from the service. It is equally legitimate – according to AG – to use, in alternative or in addition to the analysis of the specific situation of individual risk, statistical data concerning particular categories of people.

B – It is not legitimate, on the other hand, the way people are classified in different categories to that purpose. Every classification has to be consistent and in conformity with the legal regulatory framework in which it is adopted and, in that context, the principle of equal treatment has a specific importance.

Actuarial calculations do not take account of particular biological conditions of the person – unlike the provision in par. 3 of the same Article 5, which concerns pregnancy and maternity – but solely of statistical data. «There is then a sweeping assumption that the different life expectancies of male and female insured persons, the difference in their propensity to take risks when driving and the difference in their inclination to utilise medical services – which merely come to light statistically – are essentially due to their sex» (par. 61, AG Opinion).

It is not just sex: many other economic, environmental and social factors, linked to personal habits and life styles, have significant effects on life expectancy. In fact, as social change has made the traditional division of role models between men and women disappear, it is no longer possible to establish a clear connection between gender and the effects of behavioural factors on a person’s health and life expectancy.

Sex is certainly more visible and detectable than other factors affecting life expectancy. Nevertheless, convenience cannot be brought as an adequate justification for choosing sex as a factor in the calculation of premiums and services.

Any distinction of people to the purpose of the calculations in question has to be based on objective criteria and thus “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” (par. 67).

The question of which other economic, environmental and social factors can be used instead of the easier and mechanical use of the sex factor sends to the question of the way they can be used.

Actuarial factors can be used in two different ways: they can affect the price of an insurance, making premiums raise or diminishing benefits, or they can affect contractual conditions, excluding pre-existing conditions. The former is especially concerned with sex ground, the latter with the disability one.

Until Tests Achats there was a legal difference between the two practices because only for the former there were grounds of justification: the difference was admitted because of the “objectively determinable difference in average life expectancy between men and women
(Corte giust. 24 settembre 1994, C-200/91, Coloroll Pension Trustees; Corte giust. 22 dicembre 1993, causa C-152/91, Neath,) In tests achats the ECJ stated 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”. In her opinion advocate general Kokott explained that there’s “a sweeping assumption that the different life expectancies of male and female insured persons, the difference in their propensity to take risks when driving and the difference in their inclination to utilise medical services – which merely come to light statistically – are essentially due to their sex”.

At the moment it can be only highlighted that among habits and life styles – which are neither men’s or women’s – there are sports and their practical exercise, diet, smoke, medicines, drugs, while for other risks, like those linked to car driving, we can include not the sex of the car driver (in fact, in some European countries, the insured person is the owner of the car and not the car driver), but rather the job, the constant commuting, the amount of time spent driving every week or every month, the use of specific telephone devices to prevent the driver from being distracted. Ascribing to sex the likelihood of the insured person’s causing an accident whilst driving is just a rhetorical trick to quicken the assessment, moreover it does not correspond to the reality of vehicles’ circulation.

1.3. **The adverse selection theory**

The most relevant argument that can be put forward to support not only the legal validity but, above, the necessity of a systematic ordering of gender-related classifications (as well as for other factors of discrimination) is the so called “adverse selection“ theory.

According to this theory, in a voluntary insurance system (and only in that one), if the insurer ignores that some groups or a specific ensured person are more exposed to risk than the others, he will underprice the insurance for high risks and overprice it for lower risks. As a consequence, lower risk costumers will drop out of the system (because it is too expensive for them) and only people more exposed to risk would tend to buy an insurance. This will lead to premiums increase and eventually to the insurer failure. That’s why the fine-tuning of premiums using actuarial and statistic data is of key importance for insurers. If this is the most relevant obstacle to the extension of antidiscrimination law to financial products and services, it is also true that it seems to be over-perceived.

First of all, because the theory of adverse selection cannot apply to mandatory or essential in practice financial products.

Moreover, it should also be considered that the lack of market competitiveness has some further important negative effects because it encourages insurance companies not to align premiums to risks accurately; moreover there are some problems due to the lack of information of consumers to easily find the best provider. Last but not least very high risks of individuals are excluded, with negative effects on the risk spreading definition.

The “adverse selection” theory does not properly take account of the individual perspective: it assumes that the consumer, just because he has more information, can precisely estimate the risk. It does not consider the probabilities of error that an individual can make in this evaluation nor the different risk tendency of people.
Last but not least, it should be taken in due account that denial of contracts and other exclusion practices could lead to price high risk consumers out of the market. The consequences will be further impoverishment and social exclusion.

The negative impact on welfare is clear.

On the one hand, public institutions will be forced to cover risks not accepted from the private sector.

On the other hand, the impact of the different typologies of policies run by financial providers depends also on the availability of public services supporting risks. This is almost true for health and life insurances. The presence of high level public sanitary services reduces the need for private health insurance. As well, high public pensions will reduce the number of people looking for a private life assurance. How these items deal with the problems of “adverse selection” is something that should be accurately investigated. It is almost probable that the presence of a high quality public welfare will reduce the demand for private insurance of those who are more exposed to risks, rather than increase it. However, in a context of policies of public expenditure limitation, the demand for private insurances should grow and the way risks are selected become a key factor of social cohesion.

In the Civic report [n° 4], it is held that there’s no way to find an efficient market solution to the problem of the lack of cover of high risk individuals. But as human rights should prevail on market efficiency, once that the right to insurance of those people is stated, one should find the best way to achieve the aim preserving market efficiency as much as possible.

Nevertheless, the question could be addressed from another point of view: there are some specific financial products considered to be essential and these products should always be available for everybody (motor-vehicle liability insurance, private pensions, home loan insurance). In this perspective, the problem turns out to be not a merely formal question of equality, but rather the pursuit of the right way to ensure that everyone has fair access to financial products.

2. INSURANCES AND GENDER

With Article 5 of Directive 2004/113 “the Council made a conscious decision to adopt anti-discrimination legislation in the field of insurance”. This decision, as AG Kokott explains, requires verifying if the choice of permitting explicit exemptions from the application of the principle of equal treatment is in conformity with higher-ranking European Union Law.

The relationship between gender and insurance products, which is already complex from a theoretical-systematic point of view, becomes even more complicated if we take into account the plurality of products on the market that are to be dealt with.

As the Civic Report clearly shows [n. 4], the most common insurance products in Eu are: Private health insurance; Critical illness insurance; Disability/income protection insurance; Life insurance; Annuity products; Motor insurance; Travel insurance; Accident insurance; Long term care insurance; Loan insurance/Payment protection insurance; Home insurance; Private liability insurance. The most common banking products are: Mortgage loans; Consumer credit; Credit cards; Deposit account.
Data collection is a process as complex as data rearrangement. Generally speaking, for the purpose of Directive 2004/113 implementation, we need to distinguish between voluntary insurances (which are included in the scope of the Directive) and mandatory insurances. In Test Achats, the main proceedings concern life assurance. Nevertheless, the application of prohibitions of discriminations carried out by AG and by the Court concerns the supply of insurance services in general. This is the reason why there are two specific focuses to be considered: one on “motor” insurances, another one on life assurances (as in Test Achats; this is the sector that will be affected the most by this judgement).

Anyway, in the proceedings before the Court the following examples were primarily put forward: “Women have – from a statistical point of view – a higher life expectancy than men and serious traffic accidents are – from a statistical point of view – more often caused by men than by women. In addition, it is from time to time stated as regards private health insurance policies that women – from a statistical point of view – take advantage of more medical benefits than men” (par. 53).

2.1. **Mandatory insurances: the case of “motor” insurances**

Even if less important than age, sex or gender is, usually, a significant factor in insurance practice, relevant either to premiums definition or to the definition of contractual terms and conditions. As the Civic Report reminds [n. 4], "Sex is regarded by some insurers as a proxy for driving behaviour, because female drivers have fewer accidents than men. They are also likely to drive for a smaller total distance in the course of a year, although this factor (distance driven in the course of a year) is sometimes the subject of a separate question on motor insurance application forms and hence taken into account and priced in its own right, without regard to sex. The difference between premiums for men and women is likely to be most marked in the case of young men and women, since evidence suggests that the former pose a much higher risk”.

The interest for this specific situation stems from the fact that the result of applying Directive 2004/113 with no gender-related distinctions would likely be an increase of insurance premiums paid by the persons of the group that is treated less favourably than a person of the opposite gender “is, has been or would be treated in a comparable situation” (art. 2, dir. 2004/113). It is not sex itself to be protected, but rather the specific situation of disadvantage envisaged by the law. As it has been argued, the “correction of spontaneous market tendencies does not necessarily work in favour of minoritarian races and ethnic groups, or in favour of women at the expense of men: the aim is to bring treatments closer to each other (and eventually reach their full standardization), aside from the fact that a deregulated market might prefer the rise of segmented sub-markets for subjective categories or define its own exchange reasons in relation to a demand that makes more “convenient” (from a pure economic calculation perspective) to negotiate with the members of a certain “social group””. The example put forward is not random: “this could be the case of insurance premiums subscribed by women” [n. 8].

2.2. **Voluntary insurances: the case of life assurances**

It is not under discussion that life assurance is the field that the Test Achats Judgment will affect the most. According to the Civic report [n° ...], only a minority of insurers offer unisex premiums in this field and all member states permit exceptions from the unisex ruling in the life assurance area. Anyway, some countries permit to use sex as a determining factor in the calculation of the money to be reserved to pay pensions, but prohibit sex-specific differences in premiums and annuities. This is the case of Denmark as
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well as the solution stated in art. 5.1 Dir. 2004/113 for all the new contracts. Unfortunately we do not have any specific data on the use of gender as a rating factor. We know that many countries do not permit the use of this type of data at least for some financial and insurance products, but we do not exactly know in which ones. A serious obstacle to the full comprehension of the situation is represented by the differences among different forms of life assurance.

A first distinction should be made between term life insurances and private pensions schemes. In the former, women are treated more favourably than men, in the latter it is the opposite: the more the difference in life expectancy is high, the more women pay less for death insurance and get lower annuities in life pensions schemes.

As far as private pensions’ schemes are concerned, a further distinction should be made between defined-contribution and defined-benefits schemes. In the last ones, the use of gender as an actuarial factor is immediate as it affects the pricing of premiums; on the contrary, in the former ones premiums are usually defined on an equal basis and only at the expiring of the contract actuarial factors will be used in order to define annuity benefits. Moreover, many contracts allow the policyholder to choose, at the expiry of the contract, whether to have a lump sum or annuities. Until that moment there is no use of actuarial factors nor the possibility to exactly quantify capital savings, whose amount often depends on general financial trends. Only at that moment, the policyholder will decide whether it is worth a lump sum or annuities. The few anecdotal reported data we have refer both to term life insurance and annuities. This is an issue that should be carefully monitored.

Life assurances take part of a wider pensions’ system.

Traditionally, this system has been divided into three different pillars: the statutory, the occupational and the private schemes. For each pillar there is a different legal framework: statutory schemes are covered by directive 79/7/CE, occupational pensions go under art. 157 TFUE and directive 2006/54/CE, private pensions under dir. 2004/113. The use of gender segregated actuarial factors is not allowed in the first pillar while it is permitted in the 2nd and in the 3rd, even if in two different ways.

Dir. 2006/54, art. 9.1, lett. H), prohibits setting different levels of benefit, except in so far as it may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes; in the case of funded defined-benefit schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme’s funding is implemented.

As we know, on the contrary, art. 5 dir., 2004/113 states that in all contracts concluded after 21 dec. 2007 no differences in individual premiums and benefits between men and women should result from the use of sex as a factor. Art. 5.2 allowed the member states that still did not have an equality rule in this field to maintain the exemption.

The ECJ Judgement will now have important effects on both private and occupational schemes. As we will see, these two schemes are strictly connected in many ways. First of all, once the Court has stated that the use of sex as a factor is not permitted in private schemes, the same conclusion is likely to be reached for the occupational ones.

Second, the decision to buy a private life insurance depends on the availability of adequate public or occupational pension schemes.

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Third, there are many connections between the two pillars: many occupational pension funds have decided to pay annuities buying them from a private insurance. This is the case of many Italian and Hungarian pensions’ funds. In some countries (Sweden and Italy for example) the employee is free to choose whether to subscribe an occupational fund or to contract a private one.

The situation is quite different for the post-communist new Member States. Here recent reforms have introduced the so-called “World Bank Model”, which is based on three different pillars: state pensions, mandatory savings and voluntary schemes. Here the occupational pillar does not exist at all and pensions schemes fall under the scope of directive 79/7, while the others under directive 2004/113.

The Report on Directive 79/7/EEC and Directive 86/378/EEC as amended by Directive 96/97/EC, published by the Commission’s Network of legal experts in the fields of employment, social affairs and equality between men and women [n. 25], found the traditional three pillar distinction becoming meaningless and doubtful. In other words, the experts think that this distinction no longer fits pensions schemes as they have recently evolved. They also argue that a complete recasting of the legal framework would help to avoid complexity and ensure legal certainty. But they also believe that a complete recast would be a too difficult task, and that it would be better to concentrate to eradicate gender discrimination in the same way in all the three pillars.

In conclusion, recent Reports on the implementation of directives 2006/54 and 2004/113 show a mix of different solutions, which is very puzzling. In the occupational scheme, the use of unisex data is common in Denmark, France, Island, Holland, Sweden, Hungary e Greece, while the use of gender related data is more popular in Belgium, Germany, Italy, Lichtenstein, Malta, Norway, Ireland, Estonia, Spain and United Kingdom. There are no reliable data, as in many countries much depends on the choice of the single pension fund. Data from The United Kingdom and Estonia show differences in pricing and benefits for men and women, which can rise up to 25-30%.

The situation is quite different for private pensions schemes. As already explained, here the use of sex related data seems to be the rule in all countries.

In conclusion, the Test Achats Judgement will have a great impact not only on private pensions but also on all the pension systems and, in general, on welfare. The abolition of the use of sex as a factor in actuarial calculations will be a big challenge and an important step forward in the fight against discriminations. In this perspective, the consequences of the Judgement will be significant also for the adequacy of pensions as well as for the fight against social exclusion and poverty, which are much higher for older women.

3. THE END OF THE TRANSITIONAL PERIOD

The Test Achats Judgment has stated a “time-related” invalidity of Article 5.2 of Directive 2004/113. This solution requires distinguishing between the long-term effects of the Judgment (3.1.) and its immediate effects, which exist in any case and must be therefore accurately managed.
3.1. Judgment long-term effects

Judgment long-term effects can be distinguished between effects of systematic character on EU Law and expansive effects (so called “welfare effect” and “horizontal effect”) (see 1.4.2.).

As seen in § 1.4.2., the invalidity of Article 5.2 declared by the Court of Justice is not immediately effective: it will take effect only from 21 December 2012. This is an unusual solution, justified by the fact that the Judgement will firstly have an important general economic impact and current difficulties in implementing it must be taken in due account.

The press and insurance associations report an immediate increase of life assurance and motor-vehicle liability insurances, a very high increase, which varies from country to country not in relation to potential refusals to conclude contracts on grounds of sex – which is a situation, statistically not very important, prohibited in France even by the criminal code [n. 6] – but rather in relation to the definition of insurance premiums and related benefits.

As a consequence, there is a strong opposition by insurance companies [n. 3]. They argue that insurance necessarily implies risks distinction. The core of insurance is thus compromised every time the possibility of using a certain factor of classification is called into question.

As previously mentioned, further effects can be expected on the general theoretical level of fight against discriminations; this will likely give rise to criticism against the principle – which was laid down by the Mangold doctrine and confirmed in Test Achats – of the direct horizontal effect of the non discrimination principle. Specifically, the critics envisage the risk that the principle of legal certainty would be therefore called in question.

This seems to be the most relevant criticism of general character. However, the consequences of systematic nature of the Test Achats Judgement will not be hereby analysed (see 1.4.2.).

As already said, among the Judgment long-term effects there is the so called “expansive effect”.

The Test Achats doctrine has an expansive effect on other sectors similar to those directly concerned, in the complex context of the European welfare. The judgement is meant to have direct consequences in particular on the sector of social security (welfare effect) and on discrimination factors other than gender (horizontal effect). In regard to the first profile, it is worth mentioning that the evaluation on the validity of exemptions from the principle of equal treatment is meant to inevitably reopen the debate on the validity of other exemptions permitted in the other gender Directives. The reference goes to:

- Art. 9, Directive 2006/54/EC, which at letters h) and j) permits to set different levels of premiums and benefits in occupational social security schemes on grounds of sex so far as it may be necessary to take account of actuarial calculation factors;

- Article 7, Directive 79/7/EEC which still permits to exempt pensionable age and survivors’ and family benefits from the application of the equality principle.
3.1.1. The Judgement “horizontal effect” on the discrimination factors other than gender regulated by EU Directives (dir. 2000/43; dir. 2000/78)

The potential horizontal effect of the 2011 Judgement on factors other than gender requires a previous evaluation of the existing rules on supply of goods and services provided by dir. 2000/43 and 2000/78.

As far as the first one is concerned, it is worth reminding that the European legislator does not permit any exemption. As the scope of direct and indirect discriminations is extended to “access to and supply of goods and services which are available to the public, including housing” (art. 3, 1° co, lett. h) with no distinctions, the principle must be considered as already existing and operating in the EU 27.

As far as Directive 2000/78 is concerned, the situation is more complex, as the Directive is more limited in its scope (art. 3). This requires analysing the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM (2008)426 def, issued on 2 July 2008. In fact, the proposal to extend the scope of dir. 2000/78 still preserves the freedom to use actuarial and risk factors in the provision of insurance, banking and other financial services. Recital 15 to that Directive is worded as follows: “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”. Recital 16, then, adds: “All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. This Directive should not apply to economic transactions undertaken by individuals for whom these transactions do not constitute their professional or commercial activity”.

The reason of this exception is explained in the explanatory memorandum: “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”. According to Article 2.6, “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”. The following paragraph 7 adds that in the provision of financial services Member States might 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.

According to Art. 2, in conclusion, differences in treatment will be permitted in the provision of financial services under three conditions: first, they must be “a key factor in the assessment of risk”; second, they must be proportionate; third, the assessment of risk must be “based on relevant and accurate actuarial or statistical data.”

It has been held that these provisions must not be reviewed in the light of ECJ Judgment on case C-236/09. Major French legal scholars exclude such a possibility [n.]. In this regard, it is argued that the legislator is free to decide how to take action. In support of this interpretation, it can be observed that the provision of Article 2 of the proposal is...
phrased in terms of general exclusion, while Article 5.2 of Directive 2004/113 was phrased in terms of derogation allowed to Member states.

On the contrary, however, as far as their content is concerned, the two norms are absolutely similar: the conditions under which the use is permitted are the same. Hence, if those in Article 5.2 are invalid, so must be those in Article 2 of the new horizontal directive, as long as it is adopted in the same terms of the 2008 proposal.

In this regard, it is worth reminding that Halde has been dealing with differences of treatment based on disability and age for years, firmly declaring the sole invalidity of the prohibition against concluding contracts or the refusal of subscribing them, sanctioned by the criminal code. It is correct to remind that the code itself prohibits considering disability as a factor of derogation and authorises insurance companies to take account of the health status in the field of death and injury insurances, an health status that must not be confused with disability and has to be evaluated by means of precise questionnaires consistent with the purposes pursued.

It’s not accident that Halde itself, while dealing with the questions submitted to it, reminds that in any case the higher obligations set by European directives and the fundamental principles of European law (such as, for example, the Charter of Fundamental Rights of 2000) must be respected [n. 6]. Besides, the question involves the correct interpretation of Articles 21 and 23 of the Charter and seems to fall within ECJ competence.

In general, it must be observed that multiple or interjectional discriminations are always possible. Therefore special attention must be paid to the different types of discriminations women are exposed to in comparison to the other categories concerned by the 2000 Directives, such as disables and old people: it is the way discrimination is realized itself that radically changes. The problematic impact on insurances and financial services has not yet been fully investigated.

### 3.2. Immediate effects of the Test Achats Judgement: the affirmation of equality bottom-up.

Until 21 dec 2012, art. 5.2. will still be valid and the use of sex related data can continue. Nevertheless Tests Achats is going to have immediate effects that must be taken in due consideration. As it has clearly been stated in Mangold, Member States are required to progressively take concrete measures in order to approximate their legislation to the result prescribed by the directives. That obligation would be rendered redundant if Member States were to be permitted, during the period allowed for implementing the directive, to adopt measures incompatible with the objectives pursued by that act. Moreover the Court stated that “it is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired”. So, the first relevant effect of Test Achats is that Member States are not allowed to set any rule permitting the use of sex related data, even if they are proportionate and accurate. Moreover there is room to frame upon Member States a duty to cancel from their legislation any measure allowing the use of sex related data, in order to reach the equality issue at the expiring date. This is the reason why it is very important for EU institutions to give guidelines and information on the correct way to implement the new version of art. 5 (see § 4).
After 21 December 2012 things are really going to change. The ECJ case law firmly states that «so long as measures for bringing about equal treatment have not been adopted» - that is in case Member states did not implement the content of the Directive as it results from the cancellation of Article 5.2 – the only adequate way of complying with the principle is “to grant to the persons in the disadvantaged class the same advantages as those enjoyed by the persons in the favoured class” (ECJ 28 September 1994, C-408/92 Smith; ECJ 28 September 1994, C-200/91, Coloroll). The effect of the application of this ruling to insurance products would be very heavy: women could claim higher annuities in private pensions and men lower motor and life term insurance premiums. The only problem would be verifying whether such claims can refer only to new contracts or to those concluded prior to 21 December 2012 as well (see § 3.3).

Besides, according to the precedents of ECJ, in the assessment of validity of such claims no evaluation could be made on financial balance requirements and no validity test could be carried out.

From this point of view it is clear that any debate on the way data are collected, treated and published is going to be meaningless. Nevertheless, as we will see in § 4.3, the question of data treatment could still be really important: it could play an important role whether sex related data would be permitted on a collective basis, as art. 5.1 seems to suggest.

### 3.3. The Judgment impact on existing insurance contracts

Assumed that the 2011 Judgement will apply to future insurance contracts (those concluded after 21 December 2012), the impact of the Judgement on existing contracts is all but defined.

The economic impact of the Judgement can be estimated, in the immediate future, starting from the solution of this complex legal question, which is linked, from a factual perspective, to the duration of the contracts concluded (which is shorter for motor insurance, longer for the other types of insurances). The *Test Achats* Judgement, in fact, does not precisely explain which consequences the invalidity of Article 5.2 will have. The first important question to be solved is to determine if the prohibition to use actuarial calculations and differential statistical data after 21 December 2012 will apply only to new contracts or to the existing ones as well, for the sole calculation of premiums, for the sole calculation of benefits or for both of them.

In its Opinion, AG Kokott suggested the Court should give an adequate transitional period of time so that insurance companies could adjust to the new legal framework conditions. However, at the expiry of that period, the equality principle should have to apply to existing insurance contracts as well. It would not be justified - for the sole fact the contract was concluded before a certain date - to permanently deny insured persons who have been discriminated against the adjustment to which they are entitled.

#### 3.3.1. The precedents

The question had already been raised in similar terms after the *Barber* case, where the Court stated its judgement would take effect only from 17 May 1990, setting the dividing line for the application of the equality principle in those legal situations that have exhausted their effects in the past.
The ECJ precedents help to completely cover the question. To this extent, the joined opinions of advocate general van Gerven delivered on 28 April 1993 (cases Ten Oever c-109/91; Moroni, c-110/91; Neath, c-152/91 and Coloroll c-200/91) are particularly useful.

In regard to the declaration of applicability of Article 119 TEC to pensionable age with effect from 17.5.90, four different solutions were pointed out:

1. Apply the principle of equal treatment only to workers who became members of, and began to pay contributions to, an occupational pension scheme as from 17 May 1990.

2. Apply the principle of equal treatment only to benefits payable in respect of periods of service after 17 May 1990.

3. Apply the principle of equal treatment to all pensions which are payable or paid for the first time after 17 May 1990, irrespective of the fact that all or some of the pension accrued during, and on the basis of, periods of service completed or contributions paid prior to that date.

4. Apply the principle of equal treatment to all pension payments made after 17 May 1990, including benefits or pensions that had already fallen due and, here again, as in the previous interpretation, irrespective of the date of the periods of service during which the pension accrued.

As well, there are four possible solutions to Test Achats. The equal treatment ruling could apply:

a. only to contracts concluded after 21.12.12;
b. to all premiums and benefits paid or payable after 21.12.12;
c. to all benefits payable for the first time after 21.12.12, irrespective of the premiums paid before that date;
d. to all benefits payable after 21.12.12.

The third and fourth options were rejected by the AG in the joined opinions as they were in contradiction with the need itself to ensure legal certainty and most of all a balance between premiums and benefits.

The first one was rejected because, as it was a case of pension treatments, it would have deferred the judgement effects for about 40 years.

The second one was considered the option most compatible with the good faith of contractual parties: before the court judgement, the parties, in the belief that art 119 TCE was not applicable, could promise pensions and make payments based on a different pensionable age for men and women. Only in respect to periods of service after Barber, employers knew that in administering occupational pension schemes and calculating the contributions to be made to them, account had to be taken of a pensionable age which was the same for men and women. In the Joined Opinions of advocate general van Gerven delivered on 28 April 1993 these arguments were brought in favour of not allowing obligations entered into and payments made before 17 May 1990.
3.3.2. Possible interpretative perspectives

The application to all premiums and benefits paid or payable after 21.12.12 seems to be the most probable solution the court will give to the questions raised by the invalidity of art. 5.2, dir. 2004/113, in consistency with its precedents.

Nevertheless, there are some arguments that can support either the first or the second solution.

In favour of the first and at the expense of the second one, we must consider that the latter is very expensive as it requires renegotiating all the premiums and benefits of the existing contracts. This might result in a relevant increase of disputes as well as in the risk of renunciation by those who would be subjected to a rise in premiums.

Still, the content of Article 5 provides for the strongest argument in favour of the first solution: par. 1 prohibits differentiating premiums and benefits on grounds of sex after 21 December 2007 “for the new contracts” while par. 2 permits to derogate from par. 1. Thus it might be considered as implied that par. 2 refers only to new contracts as well. Beside these interpretative elements, there is the support of Recitals 18 and 19 to Directive 2004/113.

Recital 18, in particular, is worded as follows: “To avoid a sudden readjustment of the market, the implementation of this rule should apply only to new contracts concluded after the date of transposition of this Directive”. However, this interpretation was rejected by AG Kokott, who argued that “After that transitional period had expired all future insurance premiums, in the calculation of which sex-specific differences are currently still being made, and also the benefits financed out of the new premiums would however have to be neutral in terms of sex. That would also have to apply to existing insurance contracts. It would not be justified to permanently deny insured persons who have been discriminated against, who may, for example, in the past have concluded life assurance contracts, the adjustment to which they are entitled, particularly since such contracts may in many cases continue to run for a period of many years”.

Besides, we must consider that an application restricted to new contracts would have a paradoxical consequence, given the different durations of contracts themselves: for short-term insurances – such as the motor insurance – the increase or rearrangement of premiums would be immediate, while for pension schemes it would take effect only in many decades. This means that in the latter sector, we’d need to wait an entire generation to see an application of gender equality.

In the meanwhile women would be the most damaged from Test Achats: they will have to pay more while they are young to reach equality when they are old.

The Judgement effects would be, in the medium term, nullified. And just for the life assurances that started the entire Belgian dispute.

According to the foregoing considerations, evaluated as a whole, no interpretative option can be taken for certain nor totally excluded. In this regard, it must be highlighted that the activity report of French Halde deals with the specific topic of existing contracts, applying the distinction between long-term contracts and annual renewable contracts. Only for the latter, French case-law requires a renegotiation.
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The consequences of the judgement on the existing contracts

a) The issue specifically falls within the competence of the European Court of Justice.

b) The general rule of the “declaration of invalidity” holds that the decision has a retroactive effect unless the Court itself permits some effects of the invalid regulations for specifically identified purposes.

c) These legitimate purposes do not certainly concern the financial background of the judgement. They rather concern the need for legal certainty while dealing with and solving a question of such a deep economic-financial importance.

d) On the one hand, legal certainly implies that contractual terms and conditions that were previously arranged cannot to be modified.

e) On the other hand, the prohibition of discrimination must be considered as applying not only to the phase of conclusion of the contract but also to the phase of its execution.

f) The prohibition of discrimination and the equality principle stem directly from the Charter of Nice.

THE EQUALITY RULE ENSHRINED IN THE CHARTER OF NICE, WHICH IS LEGALLY BINDING ACCORDING TO ARTICLE 6 TEU, APPLIES TO:

- all the new contracts (concluded after 21 December 2012)

- all the contracts with annual renewable term (motor insurance);

- all the existing contracts in which the amount of premiums or benefits is renewable and periodically adjusted (defined-benefit pension plans) or is not going to be defined before 21 December 2012 (such as in the case of defined-contribution pension plans, in which the amount of paid up capital savings, as resulting from insurance yields, is defined and converted to annuity only at the expiry of the contract).

4. TRANSPARENCY AND EU AND/OR NATIONAL INSTITUTIONAL PROTECTION IN THE IMPLEMENTATION OF EQUALITY IN EXCHANGE OF GOODS AND SERVICES

4.1. The role of Eu institutions

Test achats is surely a point of no return in the fight against discriminations: after 21 December 2012, no differences in individual premiums and benefits on grounds of sex will be permitted. Nevertheless there is still much to do to deal with this issue. It is really a puzzling question to define what Eu institutions can do about it.

An important precedent was the Barber case, where the Court declared that the determination of different pensionable age for men and women was not in conformity with Article 119 TEC (now Article 157 TEUF), even if that difference was permitted by Dir. 86/378.
A compromise solution to the complex questions raised by the Judgement implementation was reached with a specific Protocol attached to ECC Treaty. However, it must be also reminded that many perplexities arose in this regard as the topic fell within the ECJ exclusive competence.

The risk of conflict was solved as the Court itself in its following judgments confirmed the same solutions set in the Protocol. It was anyway clear that the question was delicate and any action in this field required respecting strict limitations and an intense dialogue with the Court.

Even if well-aware of the delicacy of the topic, nevertheless we are inclined to hypothesize a wide margin of action for the European legislator for the purposes of the Judgment implementation.

According to an important opinion, such an intervention should be also aimed at managing the foreseeable and disrupting consequences of the Test Achats Judgement. Notwithstanding it is only the Court who can decide temporal and subjective restrictions to her judgement it must be stressed that the Court itself has recognized that the Council has wide discretion to provide transitional periods or derogations of limited scope in order to gradually achieve equality.

It would be legally admissible an action aimed at precisely rearranging the way the equality principle is to be implemented in the field of insurance and financial services. Such an intervention cannot be discretional considered that Council discretion is subjected to the specific limitations that can be deduced from the Court case-law:

- Any intervention must be consistent with the equality principle laid down by the Test Achats Judgement;

- The aim of possible interventions is fixed and binding: they must ensure the temporariness of derogations and enable the adjustment to the new regulatory framework;

- The rights linked to disputes already started before the day of invalidity of the norm (as in the Barber precedent) must be safeguarded in any case.

- There must be a fixed and precise time limit for the transitional period and this guarantee must be safeguarded: it is questionable that this time limit can be deferred beyond 21 December 2012 without incurring a institutional conflict with the Court of Justice.

Within these limitations and aims, an intervention seems to be more than desirable, in order to ensure more certainty on the Judgement effects and define a roadmap for the implementation of the equality principle as well as to avoid the rise of a possible sizeable amount of disputes on this topic, finally to manage some of the Judgement Consequences that have been already mentioned.
4.2. The necessary support by Equality bodies (Equinet and national bodies)

The key words for a good governance of such a delicate phase are institutional transparency and protection, at both Eu and national level. The forum set up in Equinet on this specific topic is particularly revealing of the key importance of equality bodies in the management of equality in the supply of goods and services.

In this regard, it must be highlighted that the implementation of Dir. 2004/113 in the part of Bodies for the promotion of equal treatment suffers for the too many national differences (France v. Italy, for example).

In the case of France, Halde is competent to deal with the cases it faces in the concrete exercise of its functions. In the case of Italy, there is an institutional gap, considered that delegated decree 198/06 established a solitary office lacking in functional equipment, not operating in the equal opportunity Department which is still today without an updated website of reference.

The necessary support by national equality bodies should become a precise target of EU institutions also in the field of equality in goods and services. This is particularly important given the complex question of management of derogations or of the transitional period set by the Court of Justice: the correct application of the regulatory framework requires using recent actuarial and statistical data, which are elaborated by financial and insurance companies, yet have to be collected, analysed and provided also to the institutional EU dimension.

Specifically, it is necessary to pursue, both at EU and national level:

1) Re-arrangement of premiums and not just their increase: the application of unisex criteria implies that actuarial calculations needs to be redefined on the basis of a wider category of reference, with no gender-related distinctions. This leads to the need to make an average between men and women, which cannot automatically result in an equalization to the highest risk rate. The pursue of this target requires consolidating reliable and effective instruments of intervention and control or introducing them wherever they do not exist (for example, periodical reports to be sent to national independent bodies, to be shared at European level: Equinet would become the site for the elaboration of the corresponding data for the Commission, the Council and the European Parliament, which should carry out a deep political and technical control).

2) An acceleration of the process of standardization of criteria also in long-term products (such as private pensions). However, it is necessary to distinguish whether the insurance is a defined contribution or a defined benefit plan. In defined-contribution insurances, benefits are based on the amounts credited to the participant’s individual account, so that there can be two hypothesis:

   a) Contributions are paid in different measure: solutions must be found for their equalization; the topic of the possible renegotiation of contracts is linked to this specific operative step.

   b) Contributions are paid in the same measure but benefits’ amount varies according to life expectancy: for this part, the intervention seems easier,
resulting in the application of new actuarial calculations based on the average
life expectancy of the two genders: there are no significant obstacles to an
even immediate implementation (this is the most common scheme in Europe
for workers).

c) In defined-benefit insurances the process of standardization is more complex
because the re-arrangement implies either the recalculation of the final
benefit or the redefinition of the due contributions. Besides, the review of
benefits’ amount could be facilitated by the fact that their periodical
recalculation is already arranged by contract and constitutes a basic element
of the system.

As already highlighted, managing this process of review of existing contracts seems to be
difficult. That is why there ought to be:

i. Precise data about the amount of the different typologies of insurance.

ii. Widespread Information about the need to review existing contracts.

iii. Definition of guidelines and specific criteria for the renegotiation of
contracts (the proposal of Civic about grey and black lists of specific
practices that shouldn’t be allowed seems to be particularly interesting;
codes of practices sectorial agreements and consumers’ assistance could
really help) – This would contribute to reduce the amount of disputes on
risk assessment.

The analysis carried out by Civic [n. 4] recommends a survey to provide additional
evidence concerning the impact of the introduction of unisex rates; it would also be
important to define ways to ensure a faster way to implement unisex criteria.

The accuracy and relevance of actuarial data is under discussion even in those countries,
like France, where the institutional system is more developed: Halde itself complained lacks
in data assessment [n. 6]

4.3. The use of actuarial factors

The use of different criteria requires verifying whether they lead to discriminations on
grounds of sex and/or race and ethnic origin. In fact, as long as the scope of Directive
2000/78 is not extended (COM 426/2008), these are the only factors considered by
European law.

The choice between different kinds of regulation should be led by the proportionality and
necessity test: that is by choosing the scheme with the less discriminatory impact.

The problem is given by the risk that the gender criterion is substituted by other criteria
which might potentially be discriminatory for other risk factors. In addition, the
development of practices of individualisation of the risk assessment could have among their
possible consequences: a rise of costs due to the higher complexity of data collection; an
increase of individual underwriting schemes, aimed at excluding certain risks by
individualized contractual clauses (this is a widespread practice towards disabled and illness
insurance); a higher invasion of contractual parties privacy, in order to analyse their health
status, life style and so on. Such practices could have paradoxical consequences: a healthy
life style would lower the premium for life assurance and motor-vehicle liability insurance, but could not apply to pension benefits (would you pay a higher pension to a smoker just because he/she has a shorter life expectancy?). This should be taken in due account in order to define the correct way of regulation: prohibiting the use of actuarial factors while at the same time individual underwriting is allowed or adopting more specific criteria could result into an even worse outcome.

As already explained, the Directive does not prohibit in general the use of differential actuarial calculations: it just prohibits their application to the phase of definition of individual premiums and benefits. In this perspective, considered the risks connected to the substitution of gender by other classifications which could turn out to be equally insidious, the use of systems of determination of flat premiums based on the entire community of risk (the category of insured) should be carefully evaluated. The opposite solution of a deeper consideration of individual factors and features, beside being much more expensive, could bring further discriminations, which might no longer be on grounds of sex but on grounds of other factors such as disability or health. This could also involve privacy violations.

The use of sex/gender as a factor is not prohibited, it is only in cases where this use results in a differentiation in pensions and benefits that it would be considered as an invalid practice.

The answer can be affirmative. To this purpose, Article 5.1 of Dir. 2004/113 seems to be clear, as it states that: “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”. Otherwise, this provision would have simply prohibited the use of sex as a factor in the calculation (as we can infer a contrario by reading Recital 18 to Directive 2004/113, which is worded as follows: “The use of actuarial factors related to sex is widespread in the provision of insurance and other related financial services. In order to ensure equal treatment between men and women, the use of sex as an actuarial factor should not result in differences in individuals' premiums and benefits. To avoid a sudden readjustment of the market, the implementation of this rule should apply only to new contracts concluded after the date of trans- position of this Directive”.

It must be remembered that in the supply of insurance services and other related financial services there is the common practice of using different actuarial factors according to gender.

In order to ensure equal treatment between men and women, the consideration of sex as an actuarial factor should not result in differences in individual premiums and benefits.

From a legal point of view, differentiation and discrimination are two very different concepts. Discriminations are illegal differences, as they infringe – as in the case at hand – European Union law in its entirety. On the contrary, differentiations can be permitted as long as they are in accordance with the regulatory framework in force and they do not turn into illegal differences.
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