

The goods and services Directive, gender equality and insurance



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The development principle of equality in the EU

Case 149/77 *Defrenne*

“There can be no doubt that the elimination of discrimination based on sex [is] part of (...) fundamental rights”

- Article 119 EEC (now 141 EC)
- first generation Directives
 - Equal Pay; Equal Treatment; Social Security
- second generation Directives
 - Race Directive; Disability Directive
- third generation Directives
 - Goods and Services Directive; Recast Directive; new Equal Treatment Directive

Directive 2004/113

- legal base: Article 13 EC
- it prohibits discrimination based on gender, in the access areas of goods and services which includes insurance.
- the Directive was adopted in December 2004 and was due to be implemented by the Member States by 21 December 2007.

Why the relationship between Gender Equality and Insurance is so difficult?

- gender is often used as a rating factor for a number of insurance products.
- on the one hand, the insurance industry highlights the fact that a total ban on using gender when calculating insurance premiums would have a considerable detrimental effect on companies' competitiveness and ultimately on consumers who would be forced to pay more.

□ On the other hand, it has been argued that there are a number of factors, which are not linked to sex, that are equally important in establishing life expectancy (socio-economic, marital status, the region where a person lives ...).

Furthermore, EU equality law focuses on *individual* rather than *group* characteristics. Thus, to allow to use sex, would violate a fundamental right.

Article 5 (1): the principle

The principle enshrined in Article 5 is that:

“Member States shall ensure that in all new contracts (...) the use of sex as a factor in the calculation of premiums and benefits for the purpose of insurance and related financial services shall not result in individuals' premium and benefits”

Article 5 (2): the exception

In order to achieve the above, Member States are given two options:

- ❑ to ban all differential treatment based on gender in the provisions of insurance products
- ❑ to allow gender-based treatment, subject to conditions regarding the relevance and accuracy of the data on which the differences are based and the publication of gender-related data.

Relevant Case Law

- *Lindorfer v Council of the European Union C-277/04P* (opinion of AG Jacob)

“In order to see such discrimination in perspective, it might be helpful to imagine a situation in which (as is perfectly plausible) statistics might show that a member of one ethnic group lived on average longer than those of another. To take those differences into account when determining the correlation between contributions and entitlements under the Community pension scheme would be wholly unacceptable, and I cannot see that the use of the criterion of sex rather than ethnic origin can be more acceptable”

- Case 103/2009 referred on 18 June 2009 *Test Achat v Belgian State*

Compatibility of Article 5(3) of Directive 2004/113 with Article 6(2) EU Treaty

The case of the UK

- the UK industry uses gender as a rating factor for a number of insurance products (motor, critical illness cover, private medical insurance)
- the Directive has been implemented into UK law through the Sex Discrimination (Amendment of Legislation) Regulation 2008
- most impact on motor and life insurance
- *Guide on the Publication of data associated with the use of gender in the assessment of insurance risks* – HM Treasury, 2008

Issues

- general remarks:
 - vague implementation; *de facto* limited impact
 - what are “goods” and “services”?
 - education
 - advertising
 - hierarchy of equalities
- the Directive in the general context of the EU equality framework
- insurance: the impact of Article 5

Insurance and gender: the way forward?

We need to reconcile the “philosophical commitment” (House of Lords, 2003-04) to gender equality with specific difficulties and practicalities.

- to delete the exception
 - it justifies direct discrimination
- to rephrase article 5
 - it hinders the reality of life
 - to introduce an obligation to publish actuarial and statistical datas
 - reliable
 - frequent