

Insurance services and gender equality



Yves Thiery

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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

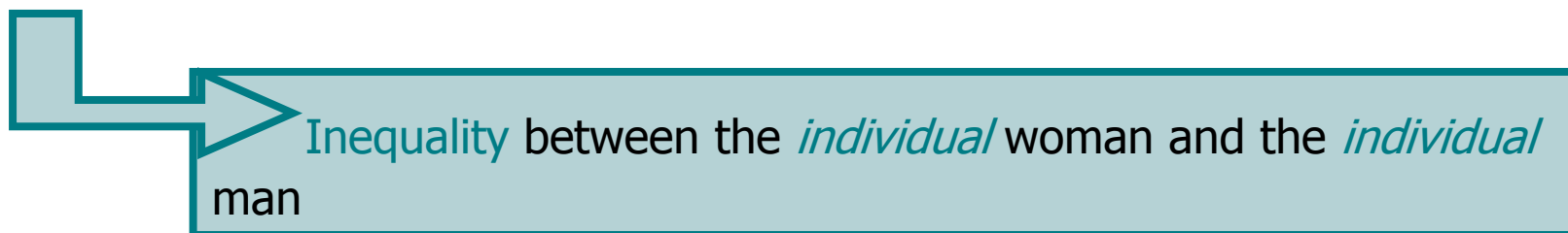


Explaining the conflict: an example

- **Young men**
 - Probability of car accident
 - Men on average higher chance
 - **Higher** premium
- **Women or older men**
 - Lower risk → **less** premium

Example: car insurance / health insurance

- single man and single woman
- same loss probability
- same damage amount
- man paid **more** premium / woman paid **more** premium



Inequality between the *individual* woman and the *individual* man

Conflict explained

- **Actuarial fairness**

- Incomparable risk =
Incomparable insurance
conditions

also when risk is assessed **on
the basis of** protected
discrimination grounds

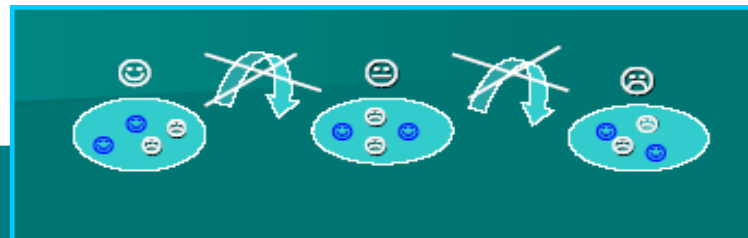
- No subsidies between risk
groups
- Fairness between **groups**

- **Legal principle of equal
treatment**

- Incomparable risk =
incomparable insurance
conditions

when risk is assessed **apart from**
protected grounds

- Solidarity between risk groups
- Equal treatment between
individuals



Problem areas

- Before 21 December 2012
 - Gender had direct influence on pricing/benefits in life insurance, and in most member states also motor vehicle insurance, health insurance, occupational disability insurance...

- After 21 December 2012 (“new contracts”)
 - No exemption from the rule of unisex premiums as incorporated in article 5,1 2004/113/EC Directive (*Test-Achats* judgment) (i.e. problem of article 5,2 and possibility of justification working *without temporal limitation*)
 - Commission guidelines:
 - contracts concluded for the first time from 21 December 2012 → no pricing differences
 - Contracts concluded before → pricing differences can be justified according to article 5,2

- Not only problems in pricing / also contractual conditions
 - Prohibition of discrimination applicable but
 - In practice
 - Eg: private health insurance
 - Benefits relating to pregnancy and maternity capped to certain level
 - Waiting periods of one/two years for pregnant women
 - Exclusion of costs of gender reassignment
 - Reference to impossibility to insure pre-existing condition

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**

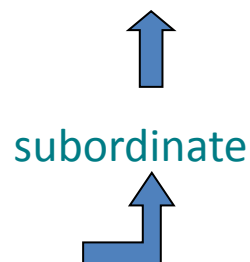
The morning after...

- What about Freedom to market insurance products / Freedom of tariffs?
- At least... on the same level playing field.
- What about running insurance agreements?
- What remains allowed in gender classification?
- What about premiums?
- What about pensions?
- What about Age and Disability?
- Alternative risk factors: closer to risk?

Bridging

- Actuarial fairness
- Legal principle of equal treatment

- 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

(judicial) review model

- Entrance of review
 - Causality
 - Comparability
- Justification
 - Possibility?
 - Legal conditions?
 - Open justification formula
 - Legitimacy
 - Appropriateness
 - necessity

Entrance of review

- Causality
 - “On grounds of” → causal relation between discrimination ground and less favourable treatment – facts in many cases undeniable
 - Proving causality in case of intransparent use of discrimination ground
 - But-for test= would the defendant have treated the claimant so, but for the protected ground
 - Condition: comparability of situations
 - Refuting causality
 - “Should not play any role”
 - Eg: pregnant when subscribing insurance: or Trans people willing to subscribe health insurance
 - Cause = lack of uncertain event
 - Pre-existing condition
 - Uncertainty/ risk of poorly reasoned decisions

Entrance of review

- Comparability
 - Incomparable situations → no discrimination
 - Different financial position of women and men → no discrimination
 - Cf. ECJ Birds Eye Walls case on early retirement
 - Different risk = different financial position?
 - 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-accessibility 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

Other problems / recommendations

- Damages (dissuasive, proportionate and effective)
 - Lump sum solutions (eg. Belgium 1300 euro)
 - Or proven damage (in case higher)

- Indirect discrimination
 - Difference with direct discrimination? Direct discrimination sometimes construed as indirect discrimination in order to use justification model
 - “particular disadvantage”?
 - Eg: clauses excluding payment of prostheses?
 - Particular disadvantage to women/ transgender?
 - Uncertainty

- Trans people
 - Scope: undergoing or having undergone gender reassignment surgery
 - Belgium: also genderidentity and gender expression
 - Eg. Insurance – breast augmentation
 - Incomplete recognition of state funded gender reassignment health care expenses
 - Not trivial!

Equality bodies

- Assisting victims
 - Advice
 - Notices of default
- Mediation – effective tool
 - Reputation damage / avoiding court rulings
 - Segmentation method in proportion to risk:
 - Refusal (most drastic)
 - Additional premium (in proportion to degree of the disease / disorder)
 - Limitation of insured interest
 - Exclusion clauses for very specific and certain events, not very direct or indirect exclusion of pre-existing condition
 - Waiting periods (eg. Pregnancy, 9 months and not 2 years)
 - Deductibles
 - Coverage limits
 - Preventive measures
- Representation in court (matters of principle)

Conclusions

- Test-Achats judgment criticized incoherence of EU legislator
- Uni-sex pricing only in “new contracts”
- Different treatment of direct and indirect discrimination
- Abolished justification scheme still leaves possibility of stereotype or poorly reasoned judicial decisions (non-causality / non comparability)
- Uncertainty – case by case – state by state
- Guidance recommended (eg Commission guidelines)
- Inspiration from foreign jurisprudence
- Effective and dissuasive sanctions (lump sum damages)
- Necessity of broad inclusion trans people (not only undergoing or having undergone gender reassignment surgery)
- Importance of equality bodies’ work (advice, notices of default, mediation, representation in court)