

SUMMARY

<p>ECJ 1 March 2011 (Grand Chamber), case C-236/09 (Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt and Charles Basselier – v – Council of Ministers), Gender discrimination</p>

***<p>Article 5(2) of Directive 2004/113/EC is invalid with effect
from 21 December 2012.</p>***

Facts

In 2008, the Belgian Consumers' Association Test-Achats and two individuals brought an action before the Belgian Constitutional Court seeking annulment of Article 5(2) of Directive 2004/113, which implements the principle of equal treatment between men and women in the access to and supply of goods and services ("the Directive"). Article 5(1) of the Directive enshrines the principle of "unisex" insurance premiums and benefits, literally providing: "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) derogates from this principle by providing that "Member States may decide before 21 December 2007 to permit proportional 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 Belgian law transposing the Directive made use of this derogation possibility.

National Proceedings

The Constitutional Court decided to stay the proceedings and to refer two questions to the ECJ. The first was whether Article 5(2) of the Directive is compatible with Article 6(2) EU and the principle of gender equality. The ECJ did not address the second question. Article 6(2) EU, as it read before the Lisbon Treaty, provided that the EU must respect fundamental rights, as guaranteed by the ECHR and the Member States' constitutional traditions, as general principles of Community Law. Article 6 EU was replaced on 1 December 2009 (Lisbon Treaty) by Article 6 TEU, which repeats these provisions and also refers to the Charter of Fundamental Rights of the EU ("the Charter"), which has "the same value as the Treaties" and which requires the Member States to ensure gender equality.

ECJ's findings

1. Following a summary of various provisions of EU law in the field of non-discrimination (§ 16-21), the ECJ notes that the use of actuarial factors relating to sex was widespread in the provision of insurance services at the time the Directive was adopted in 2004. Consequently, it was permissible for the EU legislature to implement the principle of gender equality gradually, with appropriate transitional periods (§ 22-23).
2. Article 5(2) of the Directive grants Member States the option to permit certain gender-based actuarial factors. However, given that the Directive is silent on the length of time during which such gender differences may continue to apply, it permits Member States that have made use of the option to allow insurers to apply unequal treatment without any temporal limitation (§ 24-26).
3. Is this gender-discriminatory? The Council argues that it is not, seeing that Article 5(2) merely intends to make it possible not to treat different situations in the same way. The ECJ has consistently held different treatment of different situations to be a requirement in the absence of objective justification (e.g. in case C-127/07, *Arcelor Atlantique*) (§ 27-28).
4. The comparability of situations must be assessed in the light of the subject matter and purpose of the EU measure that makes the distinction in question. In the present case, that distinction is made by Article 5(2) of the Directive (§ 29).
5. Recital 19 to the Directive describes the option granted to Member States not to apply the rule of unisex premiums and benefits as an option to permit "exemptions". The use of this expression signifies that the Directive is based on the premise that the respective situations of men and women with regard to insurance premiums and benefits are comparable (§ 30-31).
6. The combination of point 2 above (no temporal limitation) and point 5 above (the option not to apply unisex factors is genderdiscriminatory) creates the risk that EU law may permit

gender inequality to persist indefinitely. This works against the achievement of gender equality, which is the purpose of the Directive, and is incompatible with Articles 21 and 23 of the Charter (§ 32).

7. Article 5(2) of the Directive must therefore be considered to be invalid upon the expiry of an appropriate period, namely with effect from 21 December 2012 (§ 33-34).

Ruling

Article 5(2) of Directive 2004/113/EC is invalid with effect from 21 December 2012.

Creator: European Court of Justice (ECJ)

Verdict at: 2011-03-01

Case number: C-236/09