A Critical Analysis of Gender Discriminatory Practices in Insurance Law in the UK - Equality at all costs?

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Abstract – The use of gender as a factor for calculating insurance premiums has long been a cherished working tool for the insurance industry, allowing underwriters to classify risk cheaply and efficiently. Having enjoyed an exception to the equality legislation of the European Union, however, such practices have now been rendered unlawful through the European Court of Justice, leaving all EU Member States forced to alter national legislation to give effect to this change. This article will attempt to examine the legal framework relating to these practices and critically analyse the ECJ ruling. Highlighting the difficulty in balancing the principle of equality with commercial considerations, the implications of the ruling will be considered in light of its likely impact on both the industry and consumers. Notwithstanding the importance of equality, it will be argued that the decision did not fully appreciate the peculiar nature of the insurance industry and that the ban might introduce uncertainties in the market for which the consumer might ultimately pay the price.

Keywords: Insurance Premiums, Insurance Contracts, European Union, Test-Achats, Gender Discrimination, Risk Classification, Equality

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1. Introduction

It goes without saying that insurers owe their existence to the ability to charge premiums high enough to cover the insurance claims whilst continuing to maintain a competitive rate in the private market, revealing a great need for accurate calculations of the risks involved.\(^1\) In order for an underwriter to calculate such risks as accurately as possible, a great variety of factors which are thought to have an impact on this risk needs to be taken into account. This reasoning is perhaps best portrayed through section 18(1) of the Marine Insurance Act 1906, which states the duty of the insured to disclose every material circumstance known to him, a material circumstance being one which ‘would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk’.\(^2\) Within this simple premise lie inherent difficulties, springing out of the tension between financial considerations on one hand and the emerging importance of fundamental rights and the principle of equality on the other. Should an insurer, when deciding whether to take a risk or fixing a premium, be able to take into account personal characteristics of the individual seeking insurance?

It has traditionally been permissible to use certain factors such as sex\(^3\) and disability\(^4\) in the UK where this has been objectively justified, a position largely reflected in the Equality Act 2010.\(^5\) However, recent developments in European Union law have outlawed the further use of sex as a factor for calculating insurance risks where this results in a difference in premiums and benefits between women and men. Whilst Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (hereinafter called ‘the Gender Directive’) generally prohibited the use of sex as a factor for calculating premiums and benefits where this resulted in a difference in individuals’ premiums and benefits,\(^6\) the insurance industry benefitted from an exemption from the general rule as entrenched in Article 5(2) of the same Directive.\(^7\) This allowed for Member States to take action prior to 21

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\(^2\) Marine Insurance Act s 18(2).

\(^3\) Sex Discrimination Act 1975.


\(^5\) See e.g. Equality Act 2010, Sch 3, part 5.


\(^7\) ibid, Article 5(2).
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’. However, in Association belge des Consommateurs Test-Achats ASBL, v Conseil des ministres (hereinafter called ‘Test-Achats’), the European Court of Justice struck down this exception owing to its incompatibility with article 6(2) of the Treaty of the European Union which incorporated the Charter of Fundamental Rights into European Union law (hereinafter called ‘the Charter’). More specifically, the exception was held to be incompatible with the principles of non-discrimination and equality guaranteed respectively by Articles 21 and 23 of the Charter. This resulted in the prohibition of the use of sex as a risk factor prior to the end of 2012.

In February 2014, the European Insurance and Occupational Pensions Authority could report that the majority of the Member States, including the United Kingdom, had complied with this deadline by adapting national legislation on insurance, equal treatment or both, leaving a few to implement the changes at a later stage. Whilst three Member States had yet to finalise new legislation, two of the EEA Member States had indicated their intention to adapt their national legislation on a voluntary basis.

The law now stands in flux, with the new changes brought about by the ruling in Test-Achats being implemented throughout the European Union. Prima facie, removing discriminatory insurance practices might seem like a desirable policy which is worthy of the time and efforts of the European Court of Justice. Seen in the context of a world which has a historical record of oppressing specific groups thought to be the weaker links of society and which is increasingly trying to rectify these mistakes of the past, the trend of implementing anti-discrimination policies has been applauded. However, under the surface is a greater debate as to whether the elimination of the relevancy of gender in the specific context of insurance is proper and reasonable at all. Perhaps not surprisingly, the insurance industry has raised concerns about the newly

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11 ibid.
implemented changes. The main concern is that the prohibition on the use of gender classifications does not come without a cost which is likely to be shared between both consumers and insurance companies.

Further, the changes raise even more politically loaded questions relating to how far the state should go to intervene in the regulation of private insurance markets. Is sex discrimination within the insurance business a big enough problem to justify state intervention, or is the problem one of minor relevancy, making the insurance industry itself better equipped to determine which classifications were to be used or not?

With the aim of assessing whether the changes implemented by the Test-Achats decision represent a positive or negative development within the context of insurance, the second chapter of this article will first attempt to provide guidance into the legal framework in the European Union. Further, attention will be brought to the Test-Achats ruling itself and the guidelines issued by the European Commission relating to the ruling.

The third chapter will attempt to critically analyse the reception of the ruling. Particular focus will be placed on the implications the decision might have for the insurance industry and consumers. Further, the possibility of the decision triggering the rise of challenges known to the insurance industry such as adverse selection and moral hazard will be considered, along with any political implications. Finally, the chapter will question the basis for continuing down the same road of protecting against discrimination.

The forth chapter will conclude, and it will be argued that being only two years into the changes, the full implications of the Test-Achats judgment are yet to reveal themselves. However, ultimately, this search for equality within the insurance industry is likely to come with a cost which will have to be paid by consumers all over Europe. Whilst it is appreciated that discrimination is not a problem to be taken lightly, it will be suggested that the particular features of insurance make it perhaps an unsuitable arena for changes so rapidly and radically implemented as done through Test-Achats.
2. **Developments in the law relating to sex discrimination in the calculation of insurance risks**

2.1 *The Charter of Fundamental Rights*

Whilst initially being outside the scope of the European project with the early focus on ‘the establishment of common bases for economic development’\(^{12}\) in the Treaty Establishing the European Coal and Steel Community, the European Court of Justice slowly began to realise that issues of fundamental rights ought to be accommodated at a European level. This became particularly apparent in the *Solange* litigation\(^{13}\) where the German Constitutional Court initially refused to accept the supremacy of Community law\(^{14}\) but later altered its approach due to increased cognisance of such rights in the developing case law of the Court of Justice.\(^{15}\) With these decisions, a need to include fundamental human rights as a part of community law in order to preserve the integrity of the principles of both human rights and supremacy was revealed. The ultimate expression of the dedication of the European Union to individual fundamental rights was made in 2000 with the proclamation of the Charter of Fundamental Rights of the European Union. The Charter received binding legal status equivalent to that of the Treaties with the Lisbon reforms in 2009 with article 6(1) of the Treaty of the European Union now stating that ‘[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights […] which shall have the same legal value as the Treaties’,\(^{16}\) setting the scene for an even more powerful protection of individual rights within the Union.

The principle of non-discrimination is contained in article 21(1) of the Charter of Fundamental Rights, stating that ‘[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.’\(^{17}\) From this broad and ambitious ambit one can detect an idealistic provision attempting to set more of a principle rather than convey any direct protection. Further rights

\(^{12}\) Treaty Establishing the European Coal and Steel Community [1951] 261 UNTS 140, preamble.

\(^{13}\) *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1974] 2 CMLR 540 (Solange I) and *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225 (Solange II).


\(^{15}\) *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225, 265.

\(^{16}\) Consolidated Version of the Treaty of European Union [2010] OJ C83/01, Article 6(1).

\(^{17}\) Charter of Fundamental Rights of the European Union [2010] OJ C83/02, Article 21(1).
designed to combat sex discrimination more specifically can be found in article 23(1) which stipulates that ‘[e]quality between women and men must be ensured in all areas, including employment, work and pay,’\textsuperscript{18} also standing shy of providing any practical guidelines as to how this is to be achieved. Thus it is clear that directives might be able to perform such a stronger practical role when it comes to the implementation of the fundamental rights.

\textbf{2.2 Directive 2004/113/EC – the Gender Directive}

Having its basis in article 19(1) of the Treaty of the Functioning of the European Union, which states that the council ‘acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’,\textsuperscript{19} the so called Gender Directive\textsuperscript{20} was adopted in 2004. The aim was to address gender based discrimination in relation to the access to and supply of goods and services. The Directive radically widened the ambit of protection against discrimination, being the first directive to address sex discrimination which did not relate to employment.\textsuperscript{21} Article 1 provides that the purpose of the Directive is ‘to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the member states the principle of equal treatment between men and women’.\textsuperscript{22} The definition of ‘equal treatment’ is further contained in Article 4(1) as including the prohibition of both direct and indirect discrimination based on sex.\textsuperscript{23} However, an exception referred to as ‘actuarial factors’ which could be found in article 5 of the Gender Directive had left a potential loophole for insurance.

Article 5(1) provides that ‘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

\textsuperscript{18} \textit{ibid}, Article 23(1).
\textsuperscript{19} Consolidated version of the Treaty of the Functioning of the European Union [2012] OJ C 326, art 19(1).
\textsuperscript{23} \textit{ibid}, Article 4(1).
between individuals’ premiums and benefits’.\textsuperscript{24} This would appear to bring insurance within the ambit of the Directive along the same lines as the general supply of goods and services. However, after extensive lobbying by the insurance industry,\textsuperscript{25} a qualification to article 5(1) was included by article 5(2) which directs that ‘member states may decide before 21 December 2007 to permit proportionate differences in individuals’ premiums and benefits where sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data’.\textsuperscript{26} Whilst it will be seen that the rationale behind this provision has proved to be very controversial, the provision has also been criticised as being an example of bad drafting. This is particularly apparent through a comparison of recital 18 of the Directive, which suggests that ‘the use of sex as an actuarial factor should not result in differences in individuals’ premiums and benefits’,\textsuperscript{27} with article 5(1) which excludes the word ‘actuarial’ from the wording of the provision, causing unnecessary confusion as to the true intention of the Directive. Additionally, the very idea that the legislative body of the European Union attempts to place limits on the non-discrimination principle within a directive designed to combat discrimination has been questioned.\textsuperscript{28} Notwithstanding the criticisms, article 5(2) seemingly permitted insurance companies based in the member states to continue taking into account sex as a matter in making insurance calculations. Therefore there was scope in Union law for allowing the continuation of using sex as a factor in risk assessment for insurance purposes after the implementation of the Gender Directive.

2.3 The Test-Achats Ruling\textsuperscript{29}

Contesting the validity of a Belgian provision which made use of the derogation in article 5(2)\textsuperscript{30} the Belgian consumer association Test-Achats brought proceedings in the Constitutional Court of Belgium together with two private individuals, claiming that the Belgian law should be struck

\textsuperscript{24} \textit{ibid}, Article 5(1).
\textsuperscript{25} G James, ‘Test-Achats – what are the implications of the ruling?’ (2011) 122 BILAJ 5, 5
\textsuperscript{27} \textit{ibid}, recital 18.
\textsuperscript{29} Case C-236/09 Association belge des Consommateurs Test-Achats ASBL and others v Conseil des ministers [2012] 1 WLR 1933.
down based on it being incompatible with the principle of equality.\footnote{Case C-236/09 Association belge des Consommateurs Test-Achats ASBL and others v Conseil des ministers [2012] 1 WLR 1933.} The Court, finding the fundamental issue to be the validity of article 5(2) of the Directive, referred the question to the European Court of Justice for a preliminary ruling. Thus it was left to the Court of Justice to decide whether article 5(2) of the Directive was compatible with the principle of equality as laid down in article 6(3) of the Treaty of the European Union. In a rather brief judgment, the European Court of Justice chose to follow the Advocate General’s opinion, leaving out important arguments of great relevance. Therefore, the Advocate General’s opinion is a better starting point for understanding the arguments of the Court of Justice in favour of holding article 5(2) of the Directive to be invalid.

Advocate General Juliane Kokott delivered a rather powerful opinion in Test-Achats’ favour,\footnote{Case C-236/09 Association belge des Consommateurs Test-Achats ASBL and others v Conseil des ministers [2012] 1 WLR 1933, opinion of AG Kokott.} relying, \textit{inter alia}, on the pension scheme cases of \textit{Neath}\footnote{Case C-152/91 Neath v Hugh Steeper Ltd [1995] ICR 158, [1993] ECR I-6935, para 24.} and \textit{Coloroll},\footnote{Case C-200/91 Coloroll Pension Trustees Ltd v Russell [1995] ICR 179, [1994] ECR I-4389, para 73.} as authority for “the conclusion that the prohibition of discrimination on the grounds of sex under European Union law precludes differences between men and women which are purely statistical from being taken into consideration with regard to insurance risks”.\footnote{Case C-236/09 Association belge des Consommateurs Test-Achats ASBL and others v Conseil des ministers [2012] 1 WLR 1933, opinion of AG Kokott, p 1949.} Through the emphasis on the respect for fundamental rights as a condition for the lawfulness of the actions of the European Union, the scene was set for a formalistic interpretation of article 5(2), measuring it against the provisions of the EU Treaties and the Charter alone rather than taking any wider context into account. In fact, the Advocate General expressly stated that “[p]urely financial considerations, such as the danger of an increase in premiums for a proportion of the insured persons […], do not in any event constitute a material reason which would make discrimination on grounds of sex permissible.”\footnote{Case C-236/09 Association belge des Consommateurs Test-Achats ASBL and others v Conseil des ministers [2012] 1 WLR 1933, opinion of AG Kokott, p 1950.} This became particularly apparent at the point where she recognised that “[d]ifferences in treatment between the sexes may of course be justified in particular circumstances”\footnote{\textit{ibid}, p 1945.} but that this was only to be applied in limited circumstances which could be carefully justified and that there
was no room for arbitrary exceptions,\textsuperscript{38} making it clear that any financial considerations fell far below this high standard.

Stating the importance of the principle of equal treatment as being developed by the case law of the Court of Justice in cases such as the \textit{Defrenne} cases,\textsuperscript{39} any argument with the intention to play down this importance was defeated. Whilst it had been argued that the Council had discretion to adjust the anti-discriminatory measures they sought to introduce, the Advocate General made it clear that where the Council had in fact exercised its discretion to introduce such measures the measures taken had to be able to withstand the scrutiny of European Union law of higher ranking, such as the Treaties.\textsuperscript{40} Thus, the discretion of the Council was in no way ‘boundless’.\textsuperscript{41}

Through making it clear that the principle of equal treatment required comparable situations not to be treated differently and different situations not to be treated alike,\textsuperscript{42} Advocate General Kokott further considered ‘whether the situations men and women find themselves with regard to insurance services may differ in a way that is legally significant’.\textsuperscript{43} As the calculation of risk within the insurance business undoubtedly is a difficult and complex task, reliance on prognoses of risk which tend to be based on group examinations instead of individual examinations of the risk are common. Consequently, it was thought that it should not be possible to rely upon such group examinations in relation to the calculations of insurance risks.

Having already eliminated the main biological factor through the statement in article 5(3) of the Directive to the effect that costs relating to pregnancy or maternity could not be brought under the exception in article 5(2), it was made clear that the group examinations permissible under article 5(2) only followed statistical and not biological associations with a sex.\textsuperscript{44} With the social changes eliminating the traditional role models, it was in the Advocate General’s opinion that risks traditionally associated stronger with one sex no longer existed as to make such

\textsuperscript{38} \textit{ibid.}
\textsuperscript{40} Case C-236/09 \textit{Association belge des Consommateurs Test-Achats ASBL and others v Conseil des ministers} [2012] 1 WLR 1933, opinion of AG Kokott, p 1945.
\textsuperscript{41} \textit{ibid}, p 1947.
\textsuperscript{42} \textit{ibid}, p 1946.
\textsuperscript{43} \textit{ibid}.
\textsuperscript{44} Case C-236/09 \textit{Association belge des Consommateurs Test-Achats ASBL and others v Conseil des ministers} [2012] 1 WLR 1933, opinion of AG Kokott, p 1948.
differentiation viable in the context of insurance. Kokott recognised that it was easy to make recourse to sex as a substitute criterion for other more relevant factors, but that the complexity of making more accurate calculations could not justify the insurance exception in article 5(2). However, she acknowledged that insurance companies might need time to make adjustment to their way of calculating risks, recommending a transitional period. With the European Court of Justice following the recommendations given in her opinion, article 5(2) of the Directive was held invalid with effect as of 21 December 2012, reinforcing the power of the Court and the practical importance of the Charter as the principal instrument in the fight against discrimination within the European Union.

2.4 The Commission Guidelines

Subsequent to the ruling, the European Commission issued Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats). Although these are not legally binding, they provide a useful instruction for confused member states in the light of the radical ruling given by the ECJ. The Commission highlighted that as article 5(2) had been struck down, article 5(1) was to be applied, without derogation, when the transitional period had ended. Thus the law applicable for new contracts of insurance concluded after this date is that ‘[m]ember 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.’ Further, the Commission emphasised the need to distinguish between new and

45 ibid. p 1950.
46 ibid.
47 ibid. p 1953.
existing insurance contracts for this purpose, stating that only new contracts would be subject to the changes to the law as to avoid readjusting the market too sudden. However, any amendments to existing contracts requiring new consent of all the parties, and this consent being given after the expiry of the transitional period, would bring the contract within the ambit of the new rules, but leaving out any automatic renewals, premium adjustments, top-up policies on the existing terms or mere transfers from one insurance provider to another.

Additionally, any use of gender as a factor for calculating insurance risks is still permissible as long as it does not lead to differentiation at an individual level, permitting the continued use of such information for internal risk assessment, reinsurance pricing and for marketing and advertising purposes. Although gender differences no longer can result in differing insurance premiums and benefits, other physiological factors which are not prone to statistical existence only can still be considered, and thus still making it possible, inter alia, to take into account a family history of breast cancer even though this is typically more relevant for women. It also remains possible, in the view of the Commission, to buy gender specific insurance products such as cover for uterus or prostate cancer.

Despite the apparent harshness of the Test-Achats ruling, it is clear that the Commission guidelines show clear restrictions to its potential far-reaching range. Further limitations are also found in part 2.3 of the guidelines where it is stressed that the ruling only strikes down the derogation in the Gender Directive and prohibits the use of sex as a factor where the situations of men and women are comparable. Accordingly, the ruling does not impact the use of other factors such as age and disability in the calculation of insurance risks, as these are not regulated at EU level. Additionally, in the event of such regulation in the future, a similar derogation would be permissible as the situations would not be comparable. Further, indirect discrimination, with the Commission giving the example of ‘price differentiation based on the size of a car engine in

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54 ibid, para 11.
55 ibid, para 13.
56 ibid, para 14.
57 ibid.
58 ibid, para 15.
59 ibid, para 18.
the field of motor insurance’ would still remain possible despite the statistical tendency of men
to drive cars with a more powerful engine.\textsuperscript{61} Thus certain limits on the scope of the ruling are
suggested by the Commission.

\textbf{2.5 United Kingdom law}

The impact of the Test-Achats ruling and the invalidity of the insurance derogation in the Gender
Directive is better exhibited through a deeper insight into the practical implementation of the
decision in a Member State. Thus a short assessment of how the Test-Achats ruling has directly
affected United Kingdom law will be conducted. First, however, attention will be brought to the
legislative framework in place prior to the decision.

When the new Equality Act came into force on 1 October 2010 it served the purpose of
consolidating and amending previous laws existing in a series of anti-discrimination provisions
as contained in, \textit{inter alia}, parts of the Equality Act 2006, the Religion and Belief Regulations
2003, the Disability Discriminations Act 1995, the Race Relations Act 1976 and the Sex
Discrimination Act 1975.\textsuperscript{62} Protection against discrimination is based on specific protected
characteristics namely; age, disability, gender reassignment, marriage and civil partnership,
pregnancy and maternity, race, religion or belief, sex, and sexual orientation.\textsuperscript{63} Section 29(1),
setting out a general prohibition against discrimination in the provision of services, provides that
‘[a] person (a ‘service provider’) concerned with the provisions of a service to the public or a
section of the public (for payment or not) must not discriminate against a person requiring the
service by not providing the person with the service’\textsuperscript{64}, providing that contractual terms which
‘constitute, promote or provide for treatment’ prohibited by the Act are unenforceable.\textsuperscript{65} One
could undoubtedly see the insurance industry being placed within this prohibition, making risk
calculations based on protected individual characteristics a difficult task.

The national law might seem to provide protection to a wider set of characteristics than European
Union law, where article 19 of the Treaty of the Functioning of the European Union permits
legislative measures to combat discrimination based on similar grounds but excluding gender

\textsuperscript{61} \textit{ibid}, para 17.
\textsuperscript{62} Equality Act 2010, sch 27.
\textsuperscript{63} \textit{ibid}, s 4.
\textsuperscript{64} \textit{ibid}, s 29(1).
\textsuperscript{65} \textit{ibid}, s 142.
reassignment, marriage and civil partnership and pregnancy and maternity.\(^6\) It is, however, clear that United Kingdom law has taken measures to accommodate the practice of taking certain such characteristics into account for the purposes of insurance, making it less of a hostile legislative framework. This is particularly evident through schedule 3 part 5 of the Act, with particular regard to paragraph 21(1) which states that ‘[i]t is not a contravention of section 29, so far as relating to disability discrimination, to do anything in connection with insurance business if—(a) that thing is done by reference to information that is both relevant to the assessment of the risk to be insured and from a source on which it is reasonable to rely, and (b) it is reasonable to do that thing’.\(^6\)

A similar exception was inserted into the Act in relation to age at a later stage\(^6\) and can now be found in paragraph 20A.\(^6\) Moreover, another exception contained in paragraph 22 stipulated that discrimination relating to sex, gender reassignment, pregnancy and maternity could be permissible in relation to insurance. Following the ruling in *Test-Achats*, paragraph 22 was repealed by the Equality Act 2010 (Amendment) Regulations 2012/2992\(^7\) to give effect to the recent changes to the Gender Directive, albeit with notable reluctance from the United Kingdom government.\(^7\) No changes, however, have been implemented to remove the insurance exceptions in relation to age and disability, and it thus seems as though the UK government has taken the same restrictive interpretation to the potential expansion of the principle in *Test-Achats* as the European Commission.

\(^6\) Equality Act 2010, Sch 3, Pt 5, para 21.
\(^6\) Equality Act 2010, Sch 3 Pt 5, para 20A.
\(^7\) ibid, Sch 3 Pt 5, para 22.
3. Implications of the Test-Achats judgment

3.1 General reception

Although many have welcomed the change in the law relating to gender-based insurance classifications\(^{73}\), the *Test-Achats* judgment has also given rise to great controversy\(^{74}\) and received attention in the popular media far beyond what a judgment of the European Court of Justice could normally expect.\(^{75}\) The critique covers everything from the questioning of the scope of the judgment and the potential for the *Test-Achats* principle to be extended to other characteristics such as age\(^{76}\) to the court’s recourse to superficial technical arguments rather than one founded in principle.\(^{77}\) Some have even gone as far as criticising the Court of Justice for ‘its bluntness and poverty of argument’.\(^{78}\) The case has also caught the attention of EU lawyers, claiming that the legally binding nature of the Charter is finally becoming visible and that it ‘offers a solid foundation on which the court can sure-footedly raise its evaluative standards’ in relation to determining whether fundamental rights are adequately respected.\(^{79}\) Some have suggested that the decision provides clear evidence for the fact that the European Court of Justice is gradually extending beyond its original powers,\(^{80}\) even ‘paving way towards a dictatorship of the judiciary’.\(^{81}\)

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\(^{73}\) See e.g. F Temming, ‘Case Note - Judgment of the European Court of Justice (Grand Chamber) of 1 March 2010: ECJ finally paves the way for unisex premiums and benefits in insurance and related financial service contracts’ (2012) 13 German LJ 105, 112.

\(^{74}\) Much of which has been generated by German commentators, see C Tobler, ‘Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres*, Judgment of the Court of Justice (Grand Chamber) of 1 March 2011’ (2011) 48 CML 2041, for a useful guide for the reader who is less than fluent in German.


\(^{76}\) ‘Case Comment: Fears over Insurance Bias Remain’ (2011) 104 Euro Law 6, 6.


\(^{79}\) A Peripoli, ‘Case Comment: Is the ECJ finally putting the Charter to work?’ (2012) 128 LQR 212, 214.


The main point of attention, however, seems to be the purely practical concern that equality comes with a cost, fearing that the industry will suffer and that consumers could face a serious increase in their insurance premiums as a result of the ruling. However, it is clear that under the surface the decision is capable of raising an important academic debate, posing deeper questions as to the interplay between equality and fairness on the one hand and more commercially angled considerations on the other. Whilst it is clear that the existence of the insurance industry is owed to its potential as a profitable business venture, commentators have highlighted that ‘this does not mean that social considerations have no part to play in influencing their operation’. In sharp contrast to the critical views of the commercial world stand the perhaps more idealistic equality supporters, celebrating the decision as being one step in the right direction in the fight against discrimination.

3.2 Securing equality?

Adherents to the pursuit of anti-discrimination have celebrated the Test-Achats decision as putting an end to a manifestation of discrimination which has been proven particularly hard to eradicate. In 1992, Jane Keithley argued that the practice of using gender based mortality and morbidity tables should come to an end. She stated that ‘[t]he insurance industry in many countries, including Britain, has had to make insurance available on more equal terms than previously, especially by improving access for women. However, it has maintained its opposition in most countries to equalising premium and benefit rates. This appears to contravene the spirit, if not the letter, of recent laws’. Thus the removal of the insurance exception as found in the Gender Directive could be seen as a positive development, eliminating a contravention of the general trend towards more equality between the sexes within the legal framework both in the European Union and the United Kingdom.

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82 E Nanopoulos, ‘Case Comment: Insuring the Charter: who bears the cost?’ (2011) 70(3) CLJ 506, 508.
85 Ibid.
Moreover, some argue that differences in risk between men and women are so insignificant that they do not form a plausible ground for continuing the long-standing practice of discriminating between the sexes.\textsuperscript{87} Further, these differences, whilst manifesting themselves in the different sexes, have been contained to be rooted in other factors which are not as easily detectable. Felipe Temming explained the situation as follows: ‘[a]t best, sex is not more than a proxy for other secondary factors indicating life expectancy and is being used by insurance companies as a deciding parameter for risk evaluation because it is (economically) convenient to grasp and correlates with this risk. However, men and women are almost equal and homogenous with respect to this risk feature. There is no clear causal link between sex and longevity. Therefore, it is legitimate to balance the risk across the whole collective ‘men and women’.’\textsuperscript{88}

Whilst this explanation focuses on justifying treating men and women as one group, it is the attempt to avoid treating individuals as a group which has been one of the most important considerations in the fight against discrimination. This was specifically addressed by Advocate General Kokott in her opinion given in relation to the Test-Achats ruling. She conceded that recourse to such group examinations when attempting to consider a risk is in principle legitimate as exact statements of the risk based on an individual assessment are virtually impossible to make.\textsuperscript{89} However, she ultimately emphasised that the legal framework would decide which groups could be constituted for this purpose, inferring that economic, social and political considerations had to be taken into account.\textsuperscript{90} As has become apparent, she was of the clear opinion that social factors would stop sex from being used, as ‘it would without doubt be extremely inappropriate if for instance, in the context of medical insurance, varying risks of contracting skin cancers were to be linked to the skin colour of the insured person and either a higher or lower premium were thus to be demanded of him’\textsuperscript{91} and it would be ‘equally inappropriate to link insurance risks to a person’s sex’.\textsuperscript{92} With respect to Advocate General Kokott, this reasoning might not be as self-evident as she perceives it to be. This can be shown

\textsuperscript{87} F Temming, ‘Case Note - Judgment of the European Court of Justice (Grand Chamber) of 1 March 2010: ECJ finally paves the way for unisex premiums and benefits in insurance and related financial service contracts’ (2012) 13 German LJ 105, 120.
\textsuperscript{88} ibid.
\textsuperscript{90} ibid.
\textsuperscript{91} ibid., p 1948.
\textsuperscript{92} ibid.
clearly through comparing the way sex has been protected within the EU legal order to the way race has been protected. The so-called Race Directive\(^{93}\) implemented in 2000 has a far wider scope of protection to that of the Gender Directive, not only in terms of not including an insurance exemption but also through covering a larger amount of areas such as education and social advantages as well as access to and supply of goods and services.\(^{94}\) Thus it is clear that race is thought to be a ground for discrimination worthy of more protection than sex, as to think that this difference in protection was randomly made is to give the legislators of the European Union too little credit.

Leaving this aside, it is clear that the powerful voice of the Advocate General has indeed increased the amount of protection for sex as a ground of discrimination through the prohibition on the use of sex as an actuarial factor in insurance calculations. Although it has been recognised that this recent prohibition would lead to increased costs,\(^{95}\) this has been seen by many as a fair price to pay for securing the final goal of equality. However, as previously mentioned, not everyone has shared this enthusiasm. The insurance industry itself has been proved to be particularly negative to the ramifications of the Test-Achats decision, emphasising the advantages of allowing gender to be used in insurance pricing and risk calculations. In order to assess the potential impact of the decision on insurers, attention must first be brought to why and how these risks are classified in the first place.

### 3.3 The purpose of risk classifications

‘Insurance, therefore, takes from all a contribution; from those who will not need its aid, as well as from those who will; for it is as certain that some will not, as that some will. But as it is uncertain who will, and who will not, it demands this tribute from all to the uncertainty of fate’.\(^{96}\)

Whilst uncertainty in many ways is a fundamental feature to insurance, it has been argued that classifications of the risk the insurance companies take on is not equally fundamental to insurance as such, but rather can be seen as operating contrary to this uncertainty. However, for


\(^{96}\) D R Jaques, ‘Society on the Basis of Mutual Life Insurance’ (1847) 16 Hunt’s Merchant Mag & Com Rev 152, 158.
the successful running of an insurance business it means everything.\textsuperscript{97} Whilst being a vital factor to the accurate ascertainment of the profitability of such business, it is also important for the competitiveness of each insurance company that prices are set according to the expected loss, taking account of expenses and profits,\textsuperscript{98} to keep the balance between running a profitable business and ensuring its attractiveness to potential customers. Thus, finding appropriate classifications to use is highly important for the efficient running of an insurance business. However, evaluating which factors are desirable and which are not remains a difficult task. Is gender such a desirable factor?

In an Oxera research paper commissioned by the Association of British Insurers in 2010\textsuperscript{99} it was claimed that ‘[t]here are significant differences between females and males in their accident risk, morbidity risk and mortality risk..the costs of providing insurance products to cover these risks differ between men and women, including motor insurance, private medical insurance, life insurance and pension annuities.’\textsuperscript{100} Additionally, it is clear that gender is an easily detectable feature, which, in most cases, will require limited resources to ascertain, contributing to keeping administrative costs to a minimum.\textsuperscript{101} Thus, industry voices appear to claim that gender constitutes such a desirable classification factor any prohibition on its use in risk classifications could result in severe consequences.

\subsection{The myth of the actuary}

Stating that the differentiation in question only exists where gender is indeed a factor,\textsuperscript{102} the 2010 Oxera report clearly seems to be based on the premise that insurance classification is a science whereby the factors which are relevant and not relevant for such classifications are easily discovered. This premise can undoubtedly be questioned. The impression obtained from the insurance industry is that the use of gender has been founded in statistical data showing a real

\textsuperscript{98} S W Kemp, ‘Insurance and Competition’ (1981) 17 Id LR 547, 570.
\textsuperscript{100} ibid, 36.
difference in the risks men and women present in relation to different insurance products. However, it has been argued that alternatively, the origins of the importance placed on gender in the insurance context are thought to be forceful social and cultural norms.\(^{103}\) Brian Glenn has described the situation as follows: ‘[t]he process of risk selection (...) has two faces (...). The outward face is one of numbers, statistics, and objectivity. The inward face is that of narratives, character, and subjective judgement. The rhetoric of insurance exclusion – numbers, objectivity, and statistics – form what I call “the myth of the actuary,” a powerful rhetorical situation in which decisions appear to be based on objectively determined criteria when they are also largely based on subjective ones’.\(^{104}\) If this argument is accepted, the whole basis on which insurance is classified is standing on shaky grounds.

In order to evaluate whether the actuarial tendency of using gender as a factor when classifying risk presents an accurate representation of the risk or whether it is simply such a myth, it is necessary to look into the deeper context of how and why such classifications are made. What exactly are these mysterious gender differences that the insurance industry has been so eager to reflect in their calculations? In her opinion to the Court of Justice Advocate General Kokott points to the fact that it is not based on the most tangible differences, namely the biological factors separating men and women.\(^{105}\) This is made clear through article 5(3) of the Gender Directive which from the very beginning had abolished costs relating to pregnancy and maternity from resulting in differences in the premiums and benefits of individuals,\(^{106}\) a premise which can easily be justified, taking into account the inevitable involvement of both genders for maternity and pregnancy to occur in the first place.\(^{107}\) Thus attention must be brought to the statistics.

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3.3.2 The unavoidable statistically superior gender

Contrary to popular belief, gender classifications have not always formed an important part of risk calculations, only being implemented in the United States in the 1840s.\(^ {108} \) However, as previously mentioned, it is not hard to understand why recourse to gender classifications was eventually made, taking into account that such a factor can be detected without any mentionable cost to the insurer.\(^ {109} \) Nevertheless, academics have questioned whether the sex factor really is a reflection of a substantial difference between the genders or whether the truth behind one gender presenting to be a lower risk than the other stems from the fact that one gender must necessarily and unavoidably be statistically superior to the other. Felipe Temming, a proclaimed enthusiast of the Test-Achants decision, has summarised the argument against reliance on statistics as follows: ‘[i]t is certainly true that, from a statistical point of view, women live longer than men - an aspect that plays a prominent role in the formation life assurance, pension, and health insurance contracts. Indeed, the female sex might correlate with a longer life expectancy. However, the proposition that there is a genuine causal link between sex and longevity can be questioned, with good reason’.\(^ {110} \) This shows that whilst there will be a statistical superior gender in relation to any risk, this might not reflect a significant difference in the risk. Although being a tool which is heavily relied on, statistics are not necessarily completely watertight and statistical evidence should not uncritically be treated as a scientific truth without qualifications or errors. However, regardless of whether the insurance industry’s reliance on gender classifications can be objectively justified or not, it is clear that gender classifications have in fact been widely used and that the recent prohibition of them will have consequences.

3.4 Consequences for individual consumers

One of the biggest concerns in the light of the changes implemented by the Test-Achants judgment is that consumers will suffer the greatest consequences. Indeed, one commentator has picked up the irony that, taken into account its potential arbitrary effect on consumers, the case was

\(^ {110} \) F Temming, ‘Case Note - Judgment of the European Court of Justice (Grand Chamber) of 1 March 2010: ECJ finally paves the way for unisex premiums and benefits in insurance and related financial service contracts’ (2012) 13 German LJ 105, 120.
initiated by a consumer organisation.\textsuperscript{111} By the removal of gender as a factor, the lower-risk gender is likely to experience an increase in premiums to subsidise a decrease in the premiums of the gender with the higher risk.\textsuperscript{112} As suggested by the Oxera report, ‘[t]his may be considered to result in a fairer outcome, or a less fair outcome, depending on the view taken on fairness’.\textsuperscript{113} In the context of insurance, few would contest that the use of classifications is both efficient and fair, as they generally serve the useful purpose of making sure that the low-risk groups do not need to subsidise high-risk groups. From a more practical angle, it is generally considered fair that a person who does not smoke and therefore presents a lower risk of illnesses related to smoking should not have to pay higher premiums to subsidise a person who smokes and thereby willingly takes on the extra risk. Central to this is the idea that the fact that some people have a ‘taste for risk’\textsuperscript{114} should not mean that the consequences of this risk, which is voluntarily taken on, should be borne equally by everyone. Not only would this be viewed as unfair, it could also lead to people being less risk adverse.\textsuperscript{115}

With gender classifications, of course, the situation is different. It has been suggested that anti-discrimination law is traditionally seen as politically legitimate if it serves to protect people from mistreatment arising from reasons over which they have little or no control – in other words, are immutable.\textsuperscript{116} Without prejudice to the increasingly popular option of complete gender transformation surgeries, sex is generally not a controllable factor in the same way as smoking. It is precisely the factor of immutability which has been used as the standard of measurement in relation to discrimination law. In Test-Achats, Advocate General Kokott herself recognised that ‘[l]ike race and ethnic origin, gender is also a characteristic which is inseparably linked to the insured person as an individual and over which he has no influence.’\textsuperscript{117} Thus the Advocate General was clear in her opinion that this very fact was enough for prohibiting gender classifications.

\textsuperscript{111} E Schanze, ‘Injustice by Generalization: Notes on the Test-Achats Decision of the European Court of Justice’ (2013) 14 German LJ 423, 433.
\textsuperscript{113} ibid, 37.
\textsuperscript{115} See section 3.7 of this chapter.
3.5 Consequences for individual insurers

Further concerns have been acknowledged within the insurance industry in relation to the practical difficulties of removing gender as a risk factor. The suggestion is that with such an abolishment a highly relevant and fairly precise factor in risk assessment disappears and needs to be replaced by other factors. The discovery of these new factors may prove to be a costly process by its own right. Additionally, it has been suggested that the December 2012 transitional deadline was too short, leaving the insurance industry with very little time to find new factors. Whilst one idea is that such new factors might be even more intrusive to consumers than the gender factor, the main concern is linked to the possibility that the new factors are likely to be much less precise than their predecessor. Thus, insurance companies might choose to make up for this imprecision by including a risk margin by increasing premiums, impose product restrictions, target marketing towards the low risk gender or stop providing the service altogether. It is therefore clear that, in the eyes of the insurance industry, the prohibition of the use of gender as a risk factor following the Test-Achats ruling is capable of compromising the quality of the services offered by insurance companies.

3.6 Consequences for the market as a whole

As the concerns for insurance companies and individual consumers were not enough, fears that a change of the overall demand of the market will lead to greater impacts on the whole industry have grown. These seem to be concerned with three concepts well known in insurance, namely adverse selection, moral hazard and the ability to compete in the market, all of which will be considered separately.

3.6.1 Adverse selection

In addition to the risk of increased premiums and compromised services a real fear that the Test-Achats decision will lead to adverse selection has manifested itself. As previously mentioned,
the most direct consequence of the decision is the introduction of unisex rates, leading to increased premiums for the lower risk gender and lower premiums for the higher risk gender.\footnote{See section 3.4 of this chapter.} However, due to the way consumers are likely to react to these changes further implications which might affect the entire insurance market have been envisioned. It has been claimed that ‘[p]rivate insurance transfers risk most effectively in a world of symmetric uncertainty in which the insured and the insurer are equally ignorant of the probabilities of future events.’\footnote{S Chandler, ‘Visualizing adverse selection: an economic approach to the law of insurance underwriting’ (2002) 8 Conn Ins L J 435, 436.} Although the Test-Achats ruling construes an artificial situation where the insurers are forced to ignore sex as a factor in calculating insurance premiums, consumers might still be aware that this is a factual, although no longer a legal, reality. Thus the high-risk gender might be aware that they are in fact within the high-risk end of the scale and take advantage of this by over-insuring.\footnote{Oxera ‘The use of gender in insurance pricing: analysing the impact of a potential ban on the use of gender as a rating factor’ (2010) ABI Research Paper No. 24, 51 http://www.oxera.com/Oxera/media/Oxera/The-use-of-gender-in-insurance-pricing.pdf?ext=.pdf accessed 2 August 2013.} Likewise the low-risk gender might choose to or indeed be forced to re-evaluate their need for insurance in light of increased premiums, potentially causing them to under-insure.\footnote{ibid.} Such over- and under-insuring can occur by consumers making a more potentially detrimental choice as to whether to buy or not to buy insurance at all, or by consumers choosing more extensive or less extensive coverage depending on their assessment of their own risk.\footnote{Oxera ‘The use of gender in insurance pricing: analysing the impact of a potential ban on the use of gender as a rating factor’ (2010) ABI Research Paper No. 24, 52 http://www.oxera.com/Oxera/media/Oxera/The-use-of-gender-in-insurance-pricing.pdf?ext=.pdf accessed 2 August 2013.} Either way, the balance of the risk pool will shift, the consequences of which the insurer ultimately has to compensate for.\footnote{P Siegelman, ‘Adverse Selection in Insurance Markets: An Exaggerated Threat’ (2004) 113 Yale LJ 1223, 1224.}

If this is allowed to escalate, the so-called ‘death spiral’ might manifest itself as a threat, whereby the low risk gender withdraws from the market altogether, leaving to a collapse of the risk pool, although this is perhaps far more unlikely than a general increase in premiums and reduced levels of coverage.\footnote{Oxera ‘The use of gender in insurance pricing: analysing the impact of a potential ban on the use of gender as a rating factor’ (2010) ABI Research Paper No. 24, 52 http://www.oxera.com/Oxera/media/Oxera/The-use-of-gender-in-insurance-pricing.pdf?ext=.pdf accessed 2 August 2013.}
3.6.2 Moral hazard\textsuperscript{128}

The Oxera report conducted on behalf of the Association of British Insurers has claimed that the significance of adverse selection as resulting from the gender prohibition is limited\textsuperscript{129} and certainly susceptible for great variation between different insurance products such as motor insurance, health insurance and life insurance.\textsuperscript{130} However, the unisex rates might lead to escalated dangers of moral hazard within the high-risk gender. Being a well-known phenomenon within the insurance industry,\textsuperscript{131} moral hazard is ‘the tendency for insurance against loss to reduce incentives to prevent or minimize the cost of loss’.\textsuperscript{132} It is clear that this might occur as a result of the gender prohibition through for instance making young men more likely to buy more expensive cars with bigger engines and generally become less concerned of the risks involved, potentially leading to an increase in insurance claims as well as having implications for road safety.

3.6.3 Effects on competition

It has also been suggested that in addition to any threats of adverse selection, the Test-Achats ruling will bear with it consequences for the competitiveness of individual insurance actors within the market. This is thought to be a particular threat during the transitional period set by the Test-Achats ruling, ending 21 December 2012. With the need of insurance premiums to be set close to the average between all the customers of an insurance company, it is apparent that the new premium will reflect the gender mix already subsisting within the holders of one particular insurance product. Thus, if a product of an insurance company has attracted more customers from the high-risk gender than the low-risk gender, the average premium will now be set so high as to alienate the low-risk gender for that product, making them more willing to seek insurance somewhere else where the gender mix is more in their favour. The insurance company, losing its low-risk customers, might then have to increase their premiums further or withdraw

\begin{itemize}
\item For more information on adverse selection within the context of different insurance products see A Cohen and P Siegelman, ‘Testing for adverse selection in insurance markets’ (2010) 77(1) J R & I, 39.
\item See e.g. H Kolbus, ‘The Moral Hazard and the Increased Risk’ [1948] 9 Ins LJ 731 for an older account of moral hazard.
\end{itemize}
from the market entirely in order to build up a new and more gender-balanced customer base.\textsuperscript{133} Whilst larger insurance companies might be equipped to handle this by having more resources in the form of statistical data to rely on when recalculating premiums, smaller insurers with less resources are likely to suffer, making the decision potentially mortal to smaller insurance actors. However, it should be noted that the market is likely to gradually adjust to the changes made and stabilise now that the transitional period has passed.

\textbf{3.7 The relevancy of consumer awareness}

Whilst the concerns of the insurance industry are many, it is far from certain that all their concerns are likely to materialise. Finney, Everiss and Ixer have highlighted that it is perhaps not a coincidence that the \textit{Test-Achats} litigation was successful when initiated in Belgium, as the country has had gender-neutral motor insurance since 2007 without any evidence of these fears being realised, with premiums being held down by stronger competition.\textsuperscript{134} Likewise, any fears that adverse selection will lead to increased premiums due to consumers having an artificial advantage over the insurers in terms of knowledge might be exaggerated, as consumers might not be aware of what has been going on in Luxembourg and let alone that this might affect them. After all, it has been seen that there is substantial academic disagreement on the effects of the case, and taking this into account it would be strange if all consumers were more enlightened. However, it has also been seen that the case has received extensive attention both in the media and in consumer tailored journals and magazines,\textsuperscript{135} and thus consumers might be well informed of all the possible negative effects which might affect them through powerful and perhaps less than accurate headlines.\textsuperscript{136}

\begin{itemize}
  \item \textsuperscript{134} C Finney, M Everiss and S Ixer, ‘Guidance on sex in insurance: the UK and the European Commission issue their views on \textit{Test-Achats}’ (2012) 124 BILAJ 78, 83.
  \item \textsuperscript{135} The case has been reported in numerous such magazines, see e.g. C Sherwood, ‘Gender can no longer be used to price annuities’ (2001) 287 Occupational Pensions Journal 3, S Hawthorne, ‘Look to the future’ (2011) 40(4) Pensions World 1.
  \item \textsuperscript{136} See e.g. A Hoddinott, ‘Mars or Venus’ (2011) 40(4) Pensions World 45, C Jones and ‘Gender Bender’ (2011) 40(4) Pensions World 19.
\end{itemize}
3.8 Why not discriminate?

It is undoubtedly naïve to think that insurers are the only group which has a potential interest in being able to discriminate between genders. There is a fear that if the insurance industry had been allowed to continue to discriminate it would be difficult to draw a line if other industries wanted to do the same.\footnote{J Keithley, ‘Sex discrimination and private insurance: should sex differences make a difference?’ (1992) 20(2) Pol’y & Pol 99, 104.} It seems clear that such a fear stems from the perception of discrimination as an out-right evil which needs to be stopped at all costs. Whilst much of the development in combating unfair treatment of vulnerable groups in the past is undoubtedly owed to the fact that such discrimination has been taken seriously, this battle might now have come so far as to necessitate an evaluation of whether it is desirable to continue at the same pace, particularly in highly developed societies such as the British one. It is perhaps time to recognise to a larger extent that whilst unfair treatment must be avoided, not all unequal treatment will necessarily constitute unfair treatment.

Jakob Cornides has provided a highly interesting argument in this respect, and questioned ‘whether some of the proposed remedies are not worse than the evil they are meant to eradicate’.\footnote{J Cornides, ‘Three case studies on “anti-discrimination”’ (2012) 23(2) EJIL 517, 520.} He has criticised the treatment of discrimination as an extremely pressing problem deserving unlimited attention from the European Union, instead suggesting that the problem of discrimination is perhaps more rooted in self-perception than in reality. Further, he has supported the proposition that charging men and women different premiums if they present different risks cannot really be called discrimination at all, but, to the contrary, that treating different people the same in this way will constitute discrimination. ‘[W]hat we are witnessing here is the creation ex nihilo of a new “fundamental right”: the right to buy services of different value for the same price. Once again, “anti-discrimination” is transposed into an obligation to give equal treatment to unequal situations.’\footnote{ibid, 533.} Although perhaps being overly critical to the fight against discrimination, Cornides’ rather bold arguments provide valuable insight into the challenges of discrimination policy which are not normally raised.

One could argue that as with gender classifications some forms of insurance were more expensive for women whilst some were more expensive for men, these differences could create...
some sort of balance. Perhaps a more radical perception of this is that of Glenn James, who has claimed that ‘[t]he insurance market is sufficiently competitive for it to be absurd to say there is, at present, any systematic bias against one or other gender in a truly discriminatory sense’.\textsuperscript{140} Whilst more severe cases of discrimination within the insurance field can be detected, such as the refusal by some insurers in the 1980’s to sell life, health and disability insurance to women in the United States who were victims of domestic violence due to the increased risk they presented,\textsuperscript{141} there is a large difference between this kind of discrimination compared to one where no clear winner can be announced. If this is accepted, the use of sex as an actuarial factor when determining premiums and benefits might not be so unfair after all. Not all commentators have accepted this, claiming that it does not constitute a valid argument for weakening the protection against discrimination as the insurance products for which women have traditionally paid more, such as health insurance, are more important than those which have required higher premiums from men.\textsuperscript{142} However, an assessment of which insurance products are the most important is bound to be subjective, and some people might regard for instance motor insurance, where women have had the advantage of lower premiums, to be of higher importance. Thus the argument that the classifications provide for some sort of balance cannot be completely disregarded.

\textbf{4. Conclusion}

This article has highlighted the controversy caused by the decision in \textit{Test-Achats} and the wide ranging consequences that have followed. However, it is still perhaps too soon to tell what the exact ramifications of the changes in the law will be. Whilst some fears might be realised, other proposed effects may not come to fruition. Equally, the decision might turn out not to radically improve general equality as hoped.

Running an insurance business is perhaps not like running every other business, as in addition to being concerned with making a profit insurers also have a not insignificant impact on the welfare of the public. As such, one might suggest that in line with this, requiring insurance companies to

\textsuperscript{140} G James, ‘\textit{Test-Achats} – what are the implications of the ruling?’ (2011) 122 BILAJ 5, 12.
stop discriminatory practices is not unreasonable. However, the concept of discrimination is far more nuanced than this, and there can be little doubt that there is a clear difference in the equitability of refusing a woman who is a victim of domestic violence insurance cover because she poses an increased risk and making calculations by taking into account gender, where both genders may gain or lose, depending on the insurance product.

Further, one cannot underestimate the practical importance of actuarial factors and the consequences of imposing restrictions on which can be used and which cannot, even if not all of these actuarial factors can be said to be scientifically or even statistically watertight. The importance is perhaps not with this technicality, but with the fact that they have for a long time formed an indispensable element of the running of an insurance business through being used in practice. This is particularly true in relation to the use of sex, being the second most important actuarial factor after that of age for many insurance products.\(^{143}\) Whilst this is a fact which can undoubtedly be changed and has indeed been changed with the Test-Achats ruling, one can question the limited transitional period given by the European Court of Justice, giving insurance companies less than two years to come up with new ways of replacing one of the most important actuarial factors in use in modern insurance. This overall stresses one of the perhaps most fundamental flaws of the decision, namely its timing. In the words of Eric Schanze, ‘Test-Achats will likely not become a classic in civil rights jurisprudence, but rather an example of an issue, for which the time was not ready to legislate’.\(^{144}\)
