TEST-ACHATS: WHY THE EUROPEAN COURT OF JUSTICE SHOULD RETHINK ITS PRINCIPLE OF EQUAL TREATMENT JURISPRUDENCE IN THE CONTEXT OF SEX DISCRIMINATION

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Introduction

In Test-Achats the European Court of Justice (“ECJ”) found that Article 5(2) of Council Directive 2004/113/EC was contrary to the Charter of Fundamental Rights of the European Union (the “Charter”) Articles 21 and 23.1 Article 5(2) permits member states to allow the use of gender as an actuarial factor in setting insurance premiums and benefits where gender is a “determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.”2 Pursuant to that article most member states had allowed insurance companies to use gender as a factor in actuarial calculations to set rates for insurance benefits and premiums.3 As a result of these calculations, young women paid lower car insurance rates than young men because young women are statistically better risks than young men.4 Similarly, because women live longer than men on average,5 the pension payouts for men tended to be higher than those for women as women are projected to draw the benefits for a longer period.6

A Belgium consumer protection group challenged a Belgium law permitting these practices on

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4 Peter Wilkinson, Sex bias insurance ruling to hit women, CNN, Mar. 1, 2011 (on file with author).


the basis that they constituted unlawful discrimination.\(^7\) The Belgium constitutional court requested a preliminary ruling regarding the validity of Article 5(2) of Directive 2004/113/EC from the ECJ.\(^8\) The ECJ found that Article 5(2) worked to perpetuate the unequal treatment of men and women and, therefore, was incompatible with the Charter.\(^9\)

This paper will first set forth the background to the *Test-Achats* opinion beginning with the Treaty and Charter provisions that relate to equal treatment of the sexes. Then the principle of equal treatment as set forth by the ECJ in *Arcelor Atlantique* will be considered along with the relevant provisions of Directive 2004/113/EC. The *Test-Achats* opinion itself will then be analyzed and compared with the reasoning of the United States Supreme Court in *Los Angeles v. Manhart*.\(^10\) Finally, the policy implications of the *Test-Achats* opinion will be discussed.

**Treaty Provisions Relating to Equal Treatment**

Article 3(3) of the Treaty of the European Union (“TEU”) provides that the Union shall combat discrimination and promote equality between women and men.\(^11\) Article 6(2) TEU states that the European Union (“EU”) will accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “Convention”).\(^12\) This provision is mentioned in the recitals of Directive 2004/113/EC,\(^13\) but since the Convention does not protect

\(^7\) *Insurance and pension costs hit by ECJ gender ruling*, BBC, Mar. 1, 2011 (on file with author).
\(^8\) Case C-236/09, *Test-Achats*, para. 2.
\(^9\) Case C-236/09, *Test-Achats*, paras. 31-33.
\(^12\) *Id.* at 19.
against discrimination of any kind let alone sex discrimination,\textsuperscript{14} it seems to have limited 
applicability to Directive 2004/113/EC, which deals exclusively with sex discrimination. Similarly 
to Article 3(3) TEU, Article 8 of the Treaty on the Functioning of the European Union ("TFEU") 
states that “the Union shall aim to eliminate inequalities and promote equality, between men 
and women” in all its activities.\textsuperscript{15} Article 19(1) TFEU provides that the Council may act to 
prevent discrimination, including sex discrimination, after obtaining the consent of the 
European Parliament. Article 157(1) TFEU requires member states to ensure equality of pay 
between the sexes. All of these provisions are referred to by ECJ in its Test-Achats opinion.

The ECJ does not refer to Article 10 TFEU in Test-Achats. That article states: “In defining 
and implementing its policies and activities, the Union shall aim to combat discrimination based 
on sex…” Given the obvious applicability of this article to the question before the ECJ in Test-
Achats, it seems odd the ECJ did not make reference to it. This may have just been an oversight 
on the part of the ECJ and the plaintiffs in this case. But, it is more likely that the ECJ did not 
refer to Article 10 TFEU because, unlike Articles 8, 19 and 157, Article 10 was not a part of the 
Treaty of the European Community. Instead, Article 10 was a new addition to the treaties with 
the Lisbon Treaty and, therefore, only entered into force on December 1, 2009. Since the Test-
Achats case was referred to the ECJ only in June 2009, it is possible that the parties had not 
included Article 10 in their briefs. Given that the ECJ’s decision was only given on March 1, 
2011, it is nonetheless odd that the ECJ made no reference to this very pertinent treaty

\textsuperscript{14} European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, CETS No. 
005.
provision. However, it is unlikely that a consideration of Article 10 would have much altered the ECJ’s reasoning as it based its opinion on similar protections in the Charter.

**Charter of Fundamental Rights of the European Union**

Work on the Charter began in 1999 when the Cologne European Council authorized a convention to draft the Charter. The Biarritz European Council unanimously approved the draft in October 2000 and by December 2000 it was passed by the European Parliament and Commission and formally signed and adopted by the Parliament, Council and Commission. However, the Charter was not incorporated into the treaties forming the European Union until its inclusion in the Lisbon Treaty, which entered into force in December 2009. Until that time, the Charter was not legally binding on the EU or member states. Therefore, although the Test-Achats opinion was based on the Charter, at the time the case was referred to the ECJ, the Charter was not binding, but only an authoritative source. This may still be the case after the Lisbon Treaty although the Charter was recognized by the EU in Article 6(1) TEU and stated to “have the same legal value as the Treaties.”

Articles 21 and 23 of the Charter bear directly on the sexual discrimination claims at issue in Test-Achats. Article 21(1) prohibits any discrimination based on any number of personal attributes including sex. Article 23 provides that equality between the sexes “must be

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16 DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW 237 (2nd ed. 2010).
17 Id.
18 Id. at 238.
19 Id.
20 Id.
21 Id. at 239-40.
ensured in all areas including employment, work and pay.” However, Article 23 expressly does not prohibit affirmative action plans. At first reading these provisions sound duplicative, for it seems that the prohibition of discrimination makes it unnecessary to provide for equality. However, if the seeming exception to Article 23, that it does not prohibit affirmative action plans, is read as the purpose of Article 23 then the difference becomes clear. The mere prohibition of discrimination is not regarded as enough to ensure equality. Therefore, Article 21 alone is not enough; instead affirmative steps must be taken to ensure equality. This is where Article 23 comes into play.

There are some aspects of the Charter that are only tangentially relevant to Test-Achats but are nonetheless instructive as to the purposes and binding nature of the Charter. For instance, Article 22 states: “The Union shall respect cultural, religious and linguistic diversity.” Many of the other articles also are worded in a manner that appears intended to bind only the Union rather than member states. The lack of any reference to the Union in Articles 21 and 23 could indicate that the rights granted by it are directly binding on the member states. Article 51 addresses the issue of who is bound by the provisions of the Charter. It states, in section 1, that the Charter is addressed to “the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity and to the Member States only when they are implementing Union law.” Therefore, Articles 21 and 23 are binding both on the Union and on the EU member states when they act to implement Union legislation.

Although Articles 21 and 23 are not directly binding upon individuals they are effectively made so by the following method. The EU issues a directive instructing member states to

23 See e.g., Charter, supra note 22, arts. 22, 25, 26, 34(1), 36, and 38 (This does assume that “Union” is not supposed to include the EU member states).
regulate certain behavior, for instance, insurance in accordance with the EU’s authority under Article 3(3) TEU.24 This directive must be in compliance with Articles 21 and 23 and, therefore, must prohibit sexual discrimination and ensure the equality of the sexes.25 A member state then passes domestic implementing legislation to comply with the directive. Now this legislation, because Articles 21 and 23 are binding on the member state when it implements Union legislation, must similarly prohibit sexual discrimination by persons in that member state and ensure equality of the sexes within that member state.26 Thus, Articles 21 and 23 are effectively made binding on private persons within the member state by virtue of the state’s implementing legislation.

The Charter is quite different in its effects from the Constitution of the United States. This difference stems from the federal system of government in the United States and the fundamentally different nature of the United States’ Constitution from the Charter. The United States’ federal government cannot constitutionally compel states to pass legislation enacting federal policy through the states’ broad police powers.27 Instead, the federal government acts directly on the citizens.28 Because the rights guaranteed in the United States’ Constitution restrict only the power of the federal government, and the states through the 14th Amendment, they are not automatically made binding on private persons by federal or state legislation. The United States’ Constitution is generally prohibitive. It stops the government from infringing

24 See e.g., Implementing Directive, supra note 2.
25 Case C-236/09, Test-Achats, paras. 31-33.
26 Charter, supra note 22, art. 51.
28 See, Alexander Hamilton, Federalist Papers No. 15.
personal rights, whereas the Charter, especially in Articles 21 and 23, is affirmative, in that it requires the EU and member states to act to protect certain rights. For instance, Article 21 states: “Any discrimination based on any ground such as sex... shall be prohibited”; while Article 23 states: “Equality between women and men must be ensured in all areas.” By contrast, the 1st Amendment to the Constitution of the United States reads: “Congress shall make no law...” Thus, the United States’ Constitution prohibits certain governmental action while the Charter actually requires it. This requirement in the Charter for positive action by the EU and member states implementing EU legislation means that the police powers of the member states are harnessed to ensure private persons comply with many of the Charter’s provisions.

**Arcelor Atlantique and the Principle of Equal Treatment**

*Arcelor Atlantique* was a case initiated by certain large steel producers claiming, among other things, that the legislation adopted by the EU to conform to the Kyoto Protocol was unlawful because it failed to regulate all polluters in the same way. The directive in question, Directive 2003/87, set up a carbon trading market, but excluded certain industrial polluters from the requirement of having to obtain permits to pollute. The plaintiffs argued that this constituted different treatment of comparable situations because the regulations did not extend to regulate emissions from the plastics and aluminum industries. Those unregulated emissions were identical to the regulated emissions from the steel industry.

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29 See, U.S. CONST. art. 1 § 9 & amends. I-X (limiting Congress’ power). But see, U.S. CONST. amends. 13 § 2, 14 § 5 & 15 § 2 (granting Congress the power to take affirmative steps to prohibit discriminatory practices by states).
30 See e.g., Charter, supra note 22, arts. 9, 14(1), 18, 24(1), 27, 29, 30, 31(1), 34, 35, 38, and 46.
31 Or, at least, the ECJ’s opinion of how the Charter should be complied with.
34 Case C-127/07, *Arcelor Atlantique* at paras. 20-21.
The plaintiffs asserted the “constitutional principle of equal treatment” prohibited the different treatment of comparable situations.35 Interestingly the EU does not have a constitution, although the Charter had entered into binding effect under the Lisbon Treaty by the time the case was before the ECJ. However, the ECJ, citing its case law, accepted the plaintiffs’ view that the principle of equal treatment is a “general principle of Community law.”36 The ECJ stated the principle of equal treatment was the requirement that “comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.”37

The ECJ also accepted that greenhouse gas emissions from the steel, plastics and aluminum industries were comparable and that therefore the different regulation of those omissions constituted different treatment of comparable situations.38 But, the ECJ found that this different treatment was lawful because it was objectively justified.39 The ECJ determined that the objective of Directive 2003/87 was to regulate greenhouse gas emissions in an efficient manner.40 The system of regulating the steel industry, while excluding other industries that polluted in a similar manner, was found to be objectively justified by the concentration of large polluters in the steel industry.41 Other industries, although they resulted in a comparable amount of total pollution, were much more fragmented in terms of the sources of that

35 Id. at para. 21.
36 Id. at para. 23.
37 Id.
38 Id. at para. 38. This determination really is only a result of the level at which the ECJ undertakes its analysis. The pollution is the same but the sources of that pollution are not. So how comparable are the situations? See infra footnote 55.
39 Id. at para. 72.
40 Id. at para. 60.
41 Id. at para. 65. See supra footnote 38.
pollution than was the steel industry.\footnote{Id. at para.52-53.} Thus, the ECJ reasoned, regulation of the steel industry rather than other industries was objectively justified by the comparative ease with which compliance with regulation of the steel industry could be monitored.\footnote{Id. at para. 71 (basically this boils down to the principle that if you are easier to regulate than other persons or industries this justifies regulating you but failing to regulate them).}

The ECJ explained:

A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment... \[T\]he Community legislature is obliged to base its choice on objective criteria appropriate to the aim pursued by the legislation in question, taking into account all the facts and the technical and scientific data available at the time of the adoption of the act in question.\footnote{Id. at para. 47, 58 (internal citations omitted).}

Given the novel method of regulation being attempted, combined with the fact that it was merely the first step in a move to regulate a previously unregulated area, the ECJ found that the different treatment of polluters was objectively justified by the relative ease with which the emissions of certain industries could be monitored.\footnote{Id. at para. 72.} Therefore, the ECJ upheld Directive 2003/87 even though the ECJ found that it regulated comparable situations differently.\footnote{Id. at para. 73.}


Council Directive 2004/113/EC (the “Implementing Directive”) was intended to ensure that the principle of equal treatment was complied with in the provision of goods and services within the EU and, in its recitals, makes a number of observations relevant to the *Test-Achats* decision.\footnote{Implementing Directive, *supra* note 2.}
First, Recital 4 notes that Articles 21 and 23 of the Charter prohibit sex discrimination and guarantee the equality of men and women. Thus, the Implementing Directive’s express purpose is to ensure that the laws of member states comply with the principles of Articles 21 and 23. As explained above, it is by this method that Charter provisions are made binding on private persons within the EU.

Second, Recital 11 states that the Implementing Directive governs the goods covered by the provisions providing for the free movement of goods in the Treaty establishing the European Community and services within the meaning of Article 50 of that Treaty. In the United States this provision would probably be thought of as tautological. It merely acknowledges that through the Implementing Directive the EU cannot exercise power beyond that granted to it by the member states. However, this does mean that the Implementing Directive does not cover areas such as national defense, religion or family life.

Third, Recital 12 states that the Implementing Directive applies to both direct and indirect discrimination. Direct discrimination is where a quality is overtly discriminated against. Taking the example of Cassis de Dijon, the German government would have directly discriminated had it banned the sale of French liqueurs in Germany. By contrast, what the German government did do, which was to ban liqueurs that had less than a certain alcohol content without adequate justification, was indirect discrimination, because that ban affected

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48 The 10th Amendment of the United States Constitution has been regarded as tautological and reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

49 See TFEU, supra note 15 at art. 57. Implementing Directive, supra note 2 at para. 3.

50 For instance, direct discrimination was found in the case where a Spanish woman living in Germany was denied child benefits that would have been provided unquestioningly to a German woman. Case C-85/96, Martinez Sala v. Freistaat Bayern, 1998 E.C.R. I-2691.

only French liqueurs.\textsuperscript{52} Indirect discrimination involves unjustified regulation on the basis of factors that, while being seemingly neutral, have discriminatory effect.

Finally, while Recital 18 states that actuarial factors relating to sex should not result in differences in premiums between men and women, Recital 16 states that “differences in treatment may be accepted only if they are justified by a legitimate aim.” Recital 19 states that risks may vary between the sexes and, therefore, member states may allow exceptions from the requirement of unisex premiums on the basis of actuarial and statistical data. Recital 19 further directs that the underlying actuarial and statistical data must be verified as accurate, regularly updated, and made available to the public. While these recitals seem contradictory, they can be reconciled in light of the ECJ’s principle of equal treatment jurisprudence. Recital 18 sets forth one of the basic principles of equal treatment: that comparable situations are not to be treated differently.\textsuperscript{53} Recital 16 simply is a restatement of the justification by a legitimate aim exception.\textsuperscript{54} Recital 19 may be read either to govern those situations when men and women are not in comparable situations with respect to insurance or to set forth what constitutes justification for different treatment in the context of insurance.\textsuperscript{55}

Article 4 of the Implementing Directive sets forth the principle of equal treatment. It provides in its first section that there should be no direct or indirect discrimination on the basis of sex. But, in accord with the Recital 16, Article 4(5) allows for differences in provision of

\begin{itemize}
\item \textsuperscript{52} \textit{Id.} at paras. 8-15.
\item \textsuperscript{53} \textit{Case C-127/07, Arcelor Atlantique} at para. 21.
\item \textsuperscript{54} See \textit{id.} at para. 23.
\item \textsuperscript{55} It should be noted that the ECJ’s justification analysis in its principle of equal treatment jurisprudence is really based on the fact that those situations in which different treatment is justified are not really comparable. For example, the “justification” for different treatment of the steel industry in \textit{Arcelor Atlantique} was really based on the fact that that industry was different in that it had a greater concentration of large polluters. In reality there is only one issue in the equal treatment test and that is whether the situations are comparable.
\end{itemize}
goods and services to the sexes if these differences are “justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.” This language is modeled on the ECJ’s statement of the elements required for different treatment of comparable situations to be lawful.\(^56\) Perhaps that is why the only reference the ECJ makes to Article 4 in *Test-Achats* is to that article’s first section which prohibits discrimination.\(^57\)

Article 5 of the Implementing Directive is the provision relating to the use of sex as an actuarial factor. Article 5(1) provides that member states will not allow the use of sex as a factor to affect premiums and benefits for the purposes of insurance and related financial services. Article 5(2) provides an exception to 5(1) so that sex may be used as a factor to determine premiums or benefits “where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.” Article 5(2) further provides that the data upon which differences are based shall be published and reviewed regularly by the member states. Article 5(2) then requires that member states allowing the use of sex as an actuarial factor under that section review that decision after five years, taking into account a Commission report that was to be produced in accordance with Article 16.

Article 9 of the Implementing Directive provides that once a plaintiff in a sexual discrimination case has established facts sufficient to support a presumption of direct or indirect discrimination, then the burden shifts to the defendant to prove that there was in fact no breach of the principle of equal treatment. This provision greatly eases the burden on plaintiffs as discovery does not have to be used to show discriminatory motive, which might be

\(^{56}\) Case C-127/07, *Arcelor Atlantique* at para. 23.

\(^{57}\) Case C-236/09, *Test-Achats*, paras. 3, 5, and 17.
especially difficult in cases of indirect discrimination. It also shifts the burden of proof to the party better able to bear it as the allegedly discriminatory party will have better access to information regarding the reasoning behind its practices. 58

Article 13 requires that member states take action to ensure compliance with the principle of equal treatment. First, it requires that the member states abolish all laws, regulations and administrative provisions contrary to the principle of equal treatment. Second, it states that “any contractual provisions, internal rules of undertakings, and rules governing profit-making or non-profit-making associations contrary to the principle of equal treatment are, or may be, declared null and void or are amended.” Thus, the principle of equal treatment is not binding only on the member states, but also on individuals and fictional persons. So, through Article 13, the principle of equal treatment, which is “enshrined in Articles 21 and 23 of the Charter,” 59 reaches every contractual or quasi-contractual relationship within the EU.

Article 16 requires the European Commission to produce a report reviewing “the use of sex as a factor in the calculation of premiums and benefits” in relation to Article 5. Article 16 requires that this report be submitted to the European Parliament and to the Council no later than 21 December 2010. The author was unable to locate any record of this report. Perhaps anticipating the ECJ’s in ruling in Test-Achats, the Commission decided to save its time.

Overview of the Test-Achats Opinion

The only question the ECJ addressed in its Test-Achats opinion is whether Article 5(2) of the Implementing Directive is lawful under the principle of equal treatment. 60 The ECJ began

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59 Case C-236/09, Test-Achats, para. 30.
60 Id. at paras. 14, 35.
with a consideration of the background of the principle of equal treatment and its inclusion in the treaties forming the European Union and the European Convention for the Protection of Human and Fundamental Freedoms. The ECJ stated that the EU has authority to pass legislation to ensure equal treatment under Article 3(3) TEU and Article 8 TFEU, but that this legislation must contribute in a coherent manner to the achievement of the principle of equality.

The ECJ considered Article 5(1) of the Implementing Directive to incorporate the principle of equality of the sexes into the areas of insurance premiums and benefits by requiring unisex premiums and benefits. The ECJ interpreted Article 5(2) to create an option on the part of the member states to allow proportionate differences in premiums and benefits between the sexes “where the use of sex is a determining factor in the assessment of risks based on relevant and accurate actuarial and statistical data.” Therefore, the ECJ considered Article 5(2) to be a derogation of the general rule of equality between the sexes. The ECJ found that men and women are in comparable situations with respect to insurance premiums or benefits because the ECJ considered the Implementing Directive to be based upon that premise. As the option created by Article 5(2) may be renewed every five years without limitation, the ECJ found that it potentially allowed for the perpetual continuation of different treatment of comparable situations in the insurance industry.

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61 Id. at paras. 16-21.  
62 Id. at paras. 20-21.  
63 Id. at paras. 23-24, 30.  
64 Id. at para. 25.  
65 Id.  
66 Id. at para. 30.  
67 Id. at paras. 31-32.
In accordance with its reasoning in *Arcelor Atlantique*, the ECJ then moved on to consider whether this different treatment was objectively justified in light of the purpose of the Implementing Directive. The ECJ concluded that the purpose of the Implementing Directive was to ensure the equal treatment of the sexes through unisex premiums under Article 5(1) and that the premise of the Implementing Directive, expressed in Recital 18, was that “the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.”\(^68\) As Article 5(2) was an exception to the requirement of unisex premiums under 5(1), then it worked against the purpose of the achievement of equal treatment between men and women and therefore was not justified.\(^69\) Thus, the ECJ ruled that Article 5(2) was invalid as it allowed deviations from the principle of equal treatment.\(^70\)

**Legal Analysis of Test-Achats Opinion**

The ECJ’s reasoning in *Test-Achats* is very interesting for a couple of distinct, but related, reasons having to do with the premise and purpose of the Implementing Directive. First, there is the ECJ’s approach to determining that “the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.”\(^71\) The ECJ justified this conclusion entirely on the basis that the Implementing Directive had that as its premise.\(^72\) But, it could more plausibly be said that the Implementing Directive was premised on the fact that the respective situations of men and women with regard to insurance premiums and benefits are comparable *apart* from in the circumstances laid out in Recital 19 and the exception of Article 5(2). Those circumstances are when there is “relevant and

\^68 Id. at para. 30.  
\^69 Id. at paras. 31-32.  
\^70 Id. at paras. 32-33.  
\^71 Id. at para. 30.  
\^72 Id.
accurate actuarial and statistical data” that indicates that the situations of men and women are not comparable for the purposes of risk assessment. When relevant and accurate actuarial and statistical data shows that situations are not comparable it seems odd to hold that they are nonetheless comparable. If the situations are not comparable, then treating them as comparable would be the same treatment of different situations, which is contrary to the principle of equal treatment unless there is objective justification. The Implementing Directive acknowledged this fact in Recital 19 and accordingly allowed an exception from the requirement of unisex premiums in the specific circumstances set forth in Article 5(2). Article 5(2) embodies a legislative determination by the EU that in certain circumstances the situation of men and women with respect to insurance may not be comparable. Accordingly, the Implementing Directive allows the legislatures of the member states to take this into account when passing domestic implementing legislation providing there is sufficient evidence of differing situations. Thus, Article 5(2) did actually work to ensure the equal treatment of men and women in the provision of insurance.

The ECJ read this legislative determination of the EU out of the Implementing Directive without providing any analysis of why the situations of men and women are always comparable for the purposes of calculating insurance benefits or premiums regardless of credible evidence otherwise. By doing so, the ECJ eliminated the legislative power of the member states to determine when different treatment was justified, denying them the discretion embodied in

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73 Implementing Directive, supra note 2 at art. 5(2).
74 Case C-127/07, Arcelor Atlantique at para. 23.
75 Implementing Directive, supra note 2 at art. 5(2).
Article 5(2). In so doing, the ECJ violated the principle of equal treatment by requiring, without justification, that member states treat different situations in the same manner.

Second, the ECJ found that the purpose of the Implementing Directive was to achieve “the objective of equal treatment between men and woman.” In order to justify its conclusion that Article 5(2) was not objectively justified in accordance with the test set forth in Arcelor Atlantique, the ECJ must have found that Article 5(2) did not pursue “a legally permitted aim” of the Implementing Directive. This was not explicitly stated by the ECJ in Test-Achats, but is the only explanation for its selective reading of the Implementing Directive. To determine the aim of the Implementing Directive, the ECJ relied entirely on Recital 18 and Article 5(1) of the Implementing Directive while denigrating Recital 19 and Article 5(2) as exceptions and ignoring Article 4(5) altogether without justifying this selective reading. Relying on Recital 18 and Article 5(1) the ECJ found that the Implementing Directive’s aim was the rigid imposition of unisex premiums, without exception, even though this purpose is contradicted by Recital 19 and Articles 4(5) and 5(2). The only possible basis for the ECJ preferring Recital 18 over Recital 19 and Article 5(1) over Article 5(2) is that Recital 19 and Article 5(2) are incompatible with Articles 21 and 23 of the Charter and were therefore not indicative of the lawful aim of the Implementing Directive. Unlawful provisions of the Implementing Directive presumably should not be read to determine its lawful aim.

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76 Case C-236/09, Test-Achats, para. 32.
77 Case C-127/07, Arcelor Atlantique at para. 47.
78 Case C-236/09, Test-Achats, paras. 30-32.
79 Id. at para. 30
80 See Case C-127/07, Arcelor Atlantique at para. 47 (difference in treatment must relate to a “legally permitted aim pursued by the legislation in question”).
The ECJ did state that Article 5(2) is incompatible with Articles 21 and 23 of the Charter, but only justified this on the basis that Article 5(2) “works against the achievement of the objective of equal treatment between men and women.”\(^\text{81}\) The ECJ did not explain why allowing differences in premiums or benefits on the basis of “relevant and accurate actuarial and statistical data” constituted either discrimination under Article 21 or violated the principle of equality of Article 23.\(^\text{82}\)

The ECJ never referred to Article 5(2) in the *Test-Achats* opinion as allowing discrimination, but only stated that it was contrary to the objective of equal treatment. The principle of equal treatment works both ways. Unless there is objective justification, the principle prohibits both the different treatment of comparable situations and the same treatment of different situations.\(^\text{83}\) The ECJ failed to justify its finding that the situation of men and women with respect to insurance premiums and benefits is always comparable regardless of evidence to the contrary. Instead, the ECJ selectively read the Implementing Directive to find that it was based on this premise. Therefore, the ECJ failed to show that Article 5(2) is contrary to the principle of equal treatment without recourse to circular reasoning. Put as simply as possible, the ECJ justified ignoring Article 5(2) to find the lawful purpose of the Implementing Directive on the basis that Article 5(2) was unlawful, but then based that finding of illegality on a reading of the Implementing Directive to have as its premise that men and women are always in comparable situations with respect to insurance premiums and benefits. That reading could

\(^{81}\) Case C-236/09, *Test-Achats*, paras. 32.  
\(^{82}\) Implementing Directive, supra note 2 at art. 5(2).  
\(^{83}\) Case C-127/07, *Arcelor Atlantique* at para. 23.
only be achieved by the ECJ ignoring Article 5(2) on the basis that it is unlawful. Thus, the circle is completed.

So, in Test-Achats the ECJ largely sidestepped the justification analysis it delved into so deeply in Arcelor Atlantique. The ECJ determined in Test-Achats that men and women are always in comparable situations with respect to insurance premiums and benefits on the basis that the Implementing Directive was premised on that fact. Then, because it implicitly found that the only possible justification for Article 5(2) could stem from the fact that the situations of men and women are not comparable, the ECJ concluded that there was no justification for the different treatment permitted in Article 5(2). The logic is simple and inescapable once one jumps into the circle by accepting that the Implementing Directive presumes that men and women are always in comparable situations with respect to insurance premiums and benefits. This must be accepted despite the provisions of the Implementing Directive specifically aimed at those situations where men and women are shown not to be in comparable situations. Therefore, the ECJ’s Test-Achats opinion is poorly reasoned and contrary to the ECJ’s own principle of equal treatment jurisprudence.

Manhart

Constrained by its principle of equal treatment jurisprudence the ECJ in Test-Achats wrote a tortured and poorly reasoned opinion to reach the result it desired. The ECJ should have been a little more honest and openly adopted a new test to determine whether legislation violates Charter Articles 21 and 23. The reasoning the ECJ should have adopted if it wished to

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84 Case C-236/09, Test-Achats, paras. 30-32. Article 5(2) could alternatively be objectively justified on the basis that it encourages greater participation in the insurance pool if one sex is, for whatever reason, otherwise less likely to purchase insurance.

85 The author apologizes for being repetitious but believes this repetitiousness is necessary to enable his doggy-paddle-style logic to keep pace with the free-style sophistry of the ECJ.
mandate unisex insurance premiums was that used by the United States Supreme Court in *Manhart*. 86

In *Manhart*, the plaintiffs claimed that Los Angeles’ policy of requiring larger contributions to its pension fund from female employees than male employees violated Title VII of the 1964 Civil Rights Act. 87 Title VII prohibits discrimination by employers on the basis of race, color, religion, sex or national origin. 88 The Supreme Court interpreted Title VII simply to prohibit the use of sex as a factor in employer decisions, including those regarding insurance premiums. 89

The Supreme Court acknowledged that women live longer than men on average and, therefore, they were statistically expected to draw more in the way of pension. 90 But, the Court found that Title VII prohibited employers from making generalizations about individuals based on those listed characteristics, that is, race, color, sex or national origin. 91 The court found that determining pension contributions on the basis of sex amounted to making a generalization about individuals on the basis of their sex. 92 The simple test the Court used to determine whether sex discrimination was taking place was whether the treatment of that person would have been different but for their sex. 93 Simply, the Supreme Court found that Congress had prohibited the use of certain factors as a basis for different treatment of

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86 *Manhart*, 435 U.S. 702.
87 Id. at 705.
89 *Manhart*, 435 U.S. 709.
90 Id. at 704.
91 Id. at 708-09.
92 Id. at 708.
93 Id. at 711.
individuals by employers regardless of any other legitimate justification for that different treatment.

**Applying the reasoning of Manhart to Test-Achats**

Some differences between the situation in *Manhart* and that in *Test-Achats* should be noted before the reasoning of *Manhart* is applied to the situation at hand in *Test-Achats*. First, *Manhart* dealt with the issue of whether certain practices were statutorily prohibited, whereas *Test-Achats* dealt with the question of whether EU legislation allowed for the continued infringement of fundamental rights by member states. The two cases would have been more analogous had *Manhart* been decided on Constitutional, rather than statutory, grounds and if a state law allowing the use of sex as a factor by employers for determining pension contributions had been challenged rather than the policy of an employer. Had *Manhart* been decided on Constitutional grounds the Supreme Court would have applied an intermediate level of scrutiny and the outcome may have been different. Second, as Title VII only regulates the employer-employee relationship, the Supreme Court’s opinion expressly did not directly cover insurance industry practice, unlike *Test-Achats* which prohibits the use of sex as an actuarial factor.

The logic of *Manhart* is straightforward: Congress has prohibited the use of sex as a factor in the context of the employer-employee relationship; therefore the use of sex as a factor in that context is illegal. The same logic can be applied to Charter Articles 21 and 23. Together they could be read to prohibit the use of sex as a factor unless the use of sex as a

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94 *Id.* at 704.
95 Case C-236/09, *Test-Achats*, paras. 31.
98 Case C-236/09, *Test-Achats*, paras. 32, 34.
factor is intended to promote the interests of the under-represented sex. The Implementing Directive permitted the use of sex for a purpose other than that of promoting the interests of the under-represented sex. Therefore, it is unlawful because it is in conflict with the rights granted by the Charter.

Although the ECJ has painted itself into a corner with its principle of equal treatment jurisprudence, the ECJ could easily have just distinguished the Test-Achats case from the likes of Arcelor Atlantique in order to preserve that jurisprudence. The ECJ could have found that unequal treatment of the sexes is not subject to the same justification exception as are other instances of unequal treatment. This finding could be based on the fact that Charter Article 23 specifically guarantees the equality of the sexes without any justification exception, apart from that of affirmative action. In Arcelor Atlantique the ECJ found its case law created the principle of equal treatment as a fundamental part of EU law. There was no real reason why the ECJ had to rely on the principle of equal treatment in the Test-Achats case. Instead, the ECJ could have reached the same holding by finding that Article 21 and 23 of the Charter prohibited the use of sex as a factor in actuarial calculations because the use of sex in those calculations did not further the interests of the underrepresented sex. This basically involves the ECJ removing sex discrimination from the realm of the principle of equal treatment because the sexes must be treated the same regardless of whether they are in comparable situations.

Implications of the ECJ’s Prohibition on the Use of Sex as an Actuarial Factor

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99 Charter, supra note 22, arts. 21 & 23.
Adverse selection is a constant problem in the insurance industry.\textsuperscript{100} This problem stems from the fact that the worst risks have the most incentive to enter the insurance pool. The United States recently has passed legislation with the purported motive of forcing increased participation in the health insurance market in order to enable people to be covered regardless of any prior conditions they may have.\textsuperscript{101} This legislation was directly aimed at eliminating adverse selection in the health insurance market in the United States by requiring all individuals to purchase insurance.\textsuperscript{102} The ECJ’s \textit{Test-Achats} opinion increases the problem of adverse selection in the insurance industry by preventing insurance companies from using relevant and accurate actuarial and statistical data to calculate risk.

It is interesting to note at this point that the Belgium law was not overruled on the basis that it permitted the use of irrelevant or inaccurate actuarial or statistical data. The reasoning was not that the law permitted the use of factors that were not actually useful for calculating risk, but merely that it permitted the use of a prohibited factor, namely, sex.

Assuming that the Implementing Directive would have been correctly applied by the member states, it would have eliminated all unjustified discrimination in the provision of insurance in the EU. What the ECJ has done has reduced the ability of the European insurance industry to calculate risk accurately. This means that there will be less differential between the premiums charged or benefits received by different categories of risks. Like the young and healthy in the United States, those who judge that the insurance rates or benefits are not

\textsuperscript{100} See Amy Monahan & Daniel Schwarcz, \textit{Will Employers Undermine Health Care Reform by Dumping Sick Employees?}, 97 Va. L. Rev. 125, 135 (2011) (Discussing how risk classification is important to preventing adverse selection in insurance markets that would weaken those markets.).

\textsuperscript{101} Id. at 136.

\textsuperscript{102} Id. at 137-38.
appropriate for their individual situation will be disinclined to purchase adequate insurance.\textsuperscript{103} This will increase adverse selection in the European insurance markets. In order to combat the effects of adverse selection, the EU member states may have to require that all individuals purchase insurance. Traditionally this has been achieved in the area of retirement savings by implementing social welfare programs such as state pension systems.

Across the EU governments face enormous budgetary problems stemming in large part from the provision of state pensions. Governments have taken on the role of insurers without paying adequate attention to the liabilities they were assuming. Now the Test-Achats court compels private insurers to do the same thing. This hampers the ability of the private insurance industry to help people ensure that they are provided with an adequate protection. Men will have less incentive to purchase insurance for their retirement that will in fact include a subsidy to longer lived women. Men may simply save for their retirement in other ways, or fail to do so at all and rely on the state pension system. Similarly, women will have an incentive to purchase less automobile insurance as their insurance will include a subsidy to riskier male drivers. This will tend to reduce and skew the pool of insured, thereby increasing average insurance costs.\textsuperscript{104} It is beyond belief that executives in the insurance industry were really trying to discriminate against one sex or the other when setting insurance rates. It is far more likely that those executives were entirely concerned with increasing profitability by accurately calculating risk and thereby increasing their own bonuses.

Women and men are roughly equal proportions of the population of the EU. Each group should therefore be capable of protecting its interests through the political processes of both the individual member states and the EU. The Implementing Directive represented a legislative balancing of the dual aims of permitting accurate calculation of risk in the insurance industry and the prevention of sex discrimination. The ECJ in its Test-Achats opinion should have shown more deference to the reasonable determinations of the political branches of the EU. Thus the ECJ should have read the Implementing Directive as a whole, rather than ignoring those parts it found undesirable, and should have upheld the Implementing Directive’s allowance of the use of sex as an actuarial factor where that use had been adequately justified.

Conclusion

In Test-Achats the ECJ had to interpret creatively the Implementing Directive, which was drafted to comply with the ECJ’s principle of equal treatment jurisprudence, in order to find that some sections of the Implementing Directive were not in compliance with that principle. The ECJ should at least have been forthright and stated that it believed Charter Articles 21 and 23 prohibit the consideration of sex as a factor in insurance contracts because the only exception allowed by those Articles, affirmative action, is inapplicable in the context of insurance. Instead, the ECJ had to read into the Implementing Directive a legislative determination that is contradicted by the Directive’s text. Better yet, the ECJ should have shown greater deference to the more representative branches of the EU and trusted the
political process to protect the rights of men and women in the context of insurance regulation.

Thus, the ECJ should have found that the Implementing Directive complied with the principle of equal treatment and, therefore, did not violate Charter Articles 21 and 23.