April 2, 2012

Gender Factor in the Insurance Law: Recent Development of the ECJ in Context with the U.S. Approach

Vadim Mantrov

Available at: https://works.bepress.com/vadim_mantrov/2/
ABSTRACT

This essay discusses recent development of the Court of Justice of the European Union (ECJ) on lawfulness of the use of the gender factor in calculation of insurance premiums and benefits. After summarizing effective regulation of the United States and the European Union, the essay provides not only relevant facts and reasoning of the ECJ but also critical review of this reasoning and reveals differences of approaches between the U.S. Supreme court and the ECJ. Still, it concludes that the ECJ left door open for possible adaptations for lawfulness of the use of gender factor in future.

TABLE OF CONTENTS

1) Introduction
2) The effective U.S. and the EU regulation
3) Legal and factual background
4) ECJ’s reasoning
5) Conclusion
Gender Factor in the Insurance Law: Recent Development of the ECJ in Context with the U.S. Approach

It has been a longstanding practice in the insurance industry to use the gender of the insured persons in rating\(^1\) of a risk as justly admitted in the legal literature\(^2\), legislative documents\(^3\) and court practice\(^4\). This is one of the main reasons why in motor vehicles insurance\(^5\), personal insurance (with its types as life, health and accident insurance\(^6\)) and annuities\(^7\) calculation of insurance premiums and benefits\(^8\) to be paid\(^9\) is mainly influenced by a fact whether the insured person is a man or a


\(^{2}\) As admitted more than 30 years ago, “[s]ex discrimination in insurance is widespread” (Janet Sydlaske, *Gender Classifications in the Insurance Industry*, 75 Colum. L. Rev. 1403 (1975)). Prof. Robert H. Jerry, II pointed out that “[i]t is not surprising, then, that many insurers have contended for a number of years that they should be allowed to use gender when calculating the price to be charged or the benefits to be provided in certain kinds of insurance” (ROBERT H. JERRY, II, *UNDERSTANDING INSURANCE LAW* 102 (2nd ed. 1996); repeated in: ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* 110 (4th ed. 2007)). Similar opinion is expressed in the recent article by stating that “[t]he insurance industry has clung to sex based underwriting [internal reference omitted]” (J. Gabriel McGlamery, *Race Based Underwriting and the Death of Burial Insurance*, 15 Conn. Ins. L.J. 559 (2009)). It shall be added that unlike the U.S. authors there is reluctance between the European authors concerning the gender issue in the insurance law avoiding to consider in any way influence or lawfulness of the gender factor in the insurance law (see, for instance, JOHN BIRDS, *MODERN INSURANCE LAW* (7th ed. 2007); ROBERT MERKIN, *COLINVAUX’S LAW OF INSURANCE* (8th ed. 2006); MACGILLIVRAY ON INSURANCE LAW: RELATING TO ALL RISKS OTHER THAN MARINE (Nicholas Leigh-Jones general. ed., Andrew Longmore, John Birds & David Owen eds., 9th ed. 1997)). On the other hand, such issue is recognized in the legislative documents of the European Union (hereinafter the EU) (see infra note 3).

\(^{3}\) See, for instance, the Equal Treatment Directive (see note 41 infra) of the EU providing in its Point 18 of the Preamble that “[t]he use of actuarial factors related to sex is widespread in the provision of insurance and other related financial services”. As the Equal Treatment Directive applies to the whole EU, it would be fair to observe that this document relates to each of the 27 Member states of the EU.

\(^{4}\) As Justice Steven stated in *Los Angeles Dep’t of Water & Power v. Manhart* (see infra note 23), “[t]here can be no doubt that the prohibition against sex-differentiated employee contributions represents a marked departure from past practice” 435 U.S. 722 (1978) (emphasis added)

\(^{5}\) Covering both civil liability of motor vehicles drivers and insurance against losses related to motor vehicles

\(^{6}\) JERRY & RICHMOND, supra note 2, at 30, 45

\(^{7}\) Cf. influence of the gender factor to the different types of insurance as characterized by other authors as “personal lines of insurance” (Gaulding, supra note 1, at 1694 (footnote 1); Opinion of Advocate General Juliane Kokott, *infra* note 45, para. 45). On the other hand, there is more radical opinion stating that “gender classification threads across all types of individually purchased insurance, with the exception of homeowner's and renter's insurance” (Janet Sydlaske, *infra* note 2, at 1382)

\(^{8}\) Benefits in this essay is understood by payment obligations of the insurers to be made under insurance contracts in the motor vehicles insurance (which is based on the indemnity insurance) and personal insurance and annuities (which are based on the insurance of fixed sums or the so-called benefit insurance). For legislative definitions of indemnity insurance and insurance of fixed sums, see, Restatement of European Insurance Contract Law. Draft Common Frame of Reference, Chapter III, Section IX, Insurance Contract, Art. 1:201, available at www.restatement.info.

\(^{9}\) The calculation of those both payments – one as insurance premiums made by policyholders and another as benefits by insurers – depends on legal and economic criteria. Though the calculation of both payments initially are made by the insurer, inter alia, based on actuarial data, i.e. by economic
woman, i.e. determined by the gender factor, based on actuarial data. Due to the use of the gender factor in rating of risks, the insurance law comes into conflict with the principles of non-discrimination and equality. This, in turn, makes the gender factor to be one of the most interesting issues in insurance law as also brilliantly revealed in the literature by Professor Robert H. Jerry referring to his own experience.

The use of the gender factor is based on assumption that the gender factor “correlates with many risk factors, including life expectancy, number of automobile accidents, and use of medical services [internal references omitted]” which each has different implications for men and women. In the result and as concluded in the legal literature, “[g]ender is one of the basic characteristics on which the insurance industry groups individuals.” Due to this reason, the amount of insurance premiums and/or the benefits under the insurance contract are differentiated by the gender factor by insurers.

Because of combination of legal and economic arguments, the gender based approach in risk rating was welcomed by insurers and was generally based on the actuarial data, using “statistical differences as the basis for sex discrimination with respect to underwriting, rating, and coverage [internal reference omitted].” However, since such approach was recognized by the legislator as discriminatory, it was subject to the statutory limitations both in the United States of America (hereinafter the U.S.) and the European Union (hereinafter the EU) in the recent decades as interpreted by the courts in both jurisdictions.

criterion, their amount depends on agreement reached by parties of the insurance contract, i.e. by legal criterion.

10 The rationale or accurateness of the actuarial data which is at the outset of the gender factor goes beyond the scope of this essay. Still it shall be stated that the scope of the actuarial data may take into consideration vast range of reasons including psychological differences between men and women, for instance, on different risk aversion between genders (see Helen I. Doerpinghaus, Joan T. Schmit & Jason Jia-Hsing Yeh, Age and Gender Effects on Auto Liability Insurance Payouts, 75 J. of Risk and Insurance 527-550 (2008)) (concluding that “[t]he evidence suggests that female claimants receive lower payments than men, controlling for injury severity, wage loss, claimant fault, and a variety of other factors”).

11 JERRY, supra note 2, at 2
12 Gaulding, supra note 1, at 1661
13 Sydlaske, supra note 2, at 1382
14 Though this essay is limited only to insurance premiums and benefits for the sale of clarity, it shall be mentioned, however, that those both issues are not the single ones where differences between genders take place. These differences may take place also in case of coverage provided and terms of insurance contracts (see Sydlaske, supra note 2, at 1380, 1383-1385)
15 It shall be noted that the gender factor may be related not only with calculation of insurance premiums and benefits to be paid but also with other aspects involving gender factor, for instance, for concluding a life insurance contracts by both genders due to the income and value of household production (see Anna Sachko Gandolfi & Laurence Miners, Based Differences in Life Insurance Ownership, 63 J. of Risk and Insurance 683 (1996) (concluding that there exist meaningful gender differences by concluding life insurance contracts determined both by income of husbands and wives, and contributions to household production by them)
16 The calculation of insurance premium and benefits shall be carried out by insurers who use, inter alia, actuarial data influenced by many and different factors including gender factor.
17 Gaulding, supra note 1, at 1661
18 For discussion whether the use of the gender factor may or may not be discriminatory, see JERRY & RICHMOND, supra note 2, at 111-114
19 Though this essay is limited to the recent case of ECJ on the gender factor, it shall be noted for the sake of clarity that unlike the EU there is still unresolved questions (though minor from the point of view of their influence to the existing practice) in the U.S. whether the race may be of any influence to the evaluation of the probability of the risk to be insured and consequently - the amount of insurance
Recently, the Court of Justice of the European Union (hereinafter the ECJ) in the case C-236/09 to which this essay is devoted dealt with the issue of lawfulness of the use of the gender factor per se in insurance law as described above. Due to the scope of this essay, it will not discuss either the question whether the use of the gender factor is justified or uni-gender criterion should be used, or any economic aspects of this issue. In addition, the mutual relations between the insurance law and such principles of human rights as non-discrimination and equality is outside of this essay. It is sufficient, however, to state that “[u]nique treatment, for which no justifications exist, is in this approach an instance of prohibited discrimination.”

The effective U.S. and the EU regulation

At the beginning, it would be appropriate to consider the effective regulation of both the U.S. and the EU for better understanding of the recent ECJ case.

Before 30 years the U.S. Supreme Court recognized in two leading cases i.e. Los Angeles Dep’t of Water & Power v. Manhart (followed in subsequent cases such as Retired Public Employees’ Assn. of California v. State relying directly on that case) and five year later in Arizona v. Norris that the calculation of premiums and benefits based on the gender factor in case of annuities (pensions) being a part of employment (employer-sponsored) was prohibited.

However, considering that insurance contracts in the U.S. are regulated both at federal and state level, these judgments were only related to federal regulation, namely, Title VII of the Civil Rights Act of 1964 prohibiting gender based approach...
not only in case of annuities but in any kind of insurance being a part of employment. In this regard it shall be noted that the opinion that „the [U.S.] Supreme Court has held that gender-based insurance rates constitute illegal sex discrimination“, is true only in case of insurance being a part of employment. However, in none of these cases the U.S. Supreme Court dealt with the question whether such practices per se are contrary to the principle of non-discrimination. In such a way, both these leading cases do not influence states’ regulation for any kind of insurance which is carried out outside the employment, i.e., in private (or individual) insurance.

Exception exists only in case of health insurance where use of the gender factor outside the employment relationships shall be prohibited: the Patient Protection and Affordable Care Act prohibit different premiums due to gender factor ensuring fair health insurance premiums as to be effective since January 01, 2014.

On the other hand, a similar approach in case of annuities as a part of employment was adopted by the ECJ in the case C-262/88 and reaffirmed in the case C-200/91 by stating that the use of gender has violated the principle of equal

---

30 JERRY & RICHMOND, supra note 2, at 111
31 Title VII of the Civil Rights Act of 1964 provides that it shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin (42 U.S.C. § 2000e-2(a)(1)). Though there are recently proposed amendments into this Section, it extends application of this prohibition to persons being under unemployment status (H. R. 1113 To amend the Civil Rights Act of 1964 to prohibit discrimination on the basis of unemployment status (2011 CONG US HR 1113)).
33 As stated in Los Angeles Dep’t of Water & Power v. Manhart, “the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful” (435 U.S. 709 (1978))
34 According to the recent survey of regulation of the U.S. states concerning the use of the gender factor only 10 states prohibited the use of gender in insurance and in two states there exists this prohibition (The National Women’s Law Center, Nowhere to Turn: How the Individual Health Insurance Market Fails Women 32 (2008), available at http://action.nwlc.org/site/DocServer/NowhereToTurn.pdf) (the references to the applicable regulations made in subsequent pages)
35 As in this regard observed, both leading cases “override, rather than alter, the doctrine underlying the states’ approach to sex discrimination in insurance [internal reference omitted]” (Gaulding, supra note 1, at 1656. Also, right away after adoption of both leading judgments it was justly observed that “[n]othing in these decisions, however, prohibits insurance companies from marketing pension plans or other insurance products that use gender as a factor in calculating premiums or payments” (Robert H. Jerry, II, Kyle B. Mansfield, supra note 17, at 335)
36 PUBLIC LAW 111–148—MAR. 23, 2010
37 42 U.S.C. § 300gg (prohibiting discriminatory premium rates by providing that the premium rate shall vary with respect to the particular plan or coverage involved only by criterion used in that section)
38 42 U.S.C. § 300gg note
39 Case C-262/88 Douglas Harvey Barber v Guardian Royal Exchange Assurance Group [1990] ECR I-01889 - Barber (by deciding that it is for national court of the Member states of the EU “to safeguard the rights which that provision confers on individuals, in particular where a contracted-out pension scheme does not pay to a man on redundancy an immediate pension such as would be granted in a similar case to a woman”)
pay\textsuperscript{41} within the relationships of employment. However, like in the both leading judgments by the U.S. Supreme Court, the ECJ did not evaluate lawfulness of the gender factor per se.

Therefore, it is not surprising that when this issue got under evaluation of the ECJ, it triggered heated discussion due to the controversial judgment by the ECJ in the case C-236/09 adopted on March 1, 2011\textsuperscript{42}. Further facts and reasoning of the ECJ judgment will be reviewed separately.

**Legal and factual background**

The Council Directive 2004/113/EC\textsuperscript{43} (hereinafter the Equal Treatment Directive) was intended to combat any kind of discrimination and applied for insurance law as a sub-branch of private civil law\textsuperscript{44}. According to the Art. 1 of this Directive, 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”. The principle of equal treatment between men and women is enshrined in the Art. 4 of the Directive prohibiting any direct or indirect discrimination between both genders.

However, the scope of Art. 5 covers actuarial factors\textsuperscript{45} and provides in its first para. the obligation for Member states of the EU that in all contracts concluded after December 21, 2007 at latest, the gender factor in calculating insurance premiums and benefits shall be abandoned. This provision would cause headache to those insurers whose activity is based on actuarial data if there were no para. 2 to the Art. 5 providing for derogation from this obligation.

In this para. 2, the derogation allowed the Member states of the EU to decide whether 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”. Interestingly, the initial Proposal for the Equal Treatment Directive\textsuperscript{46} did not provide for such derogation as discussed in the Opinion\textsuperscript{47} of the Attorney General\textsuperscript{48} (see also discussion below by the Attorney General whether the European Commission could explain such change of attitude).

---

\textsuperscript{41} The principle of the equal pay is enshrined by the Art. 157 of the Consolidated version of the Treaty on the Functioning of the European Union (OJ, C 83, 30.3.2010., p. 47-199) (in time when Barber and Coloroll (see supra notes 37-38) judgments were adopted – by Art. 119 of the Treaty Establishing the European Community)


\textsuperscript{44} See Point 15 of the preamble for the Equal Treatment Directive (last sentence providing that it “should apply only to insurance and pensions which are private, voluntary and separate from the employment relationship”).

\textsuperscript{45} Due to this reason there are grounds to conclude that the Equal Treatment Directive is directly concerned with the insurance (more on division of the EU measures on insurance by impact, see FRANCESCO SEATZU, INSURANCE IN PRIVATE INTERNATIONAL LAW : A EUROPEAN PERSPECTIVE 5 (2003))


This derogation contained two additional rules imposed on the Member States of the EU if such derogation was permitted. First, it is to inform the European Commission and compile, publish and regularly update accurate data relevant to the use of gender as a determining actuarial factor. Second, it is to review their decision five years from the above date and send these review results to the European Commission. Therefore by granting powers to the EU Member states to decide whether to keep this derogation for another five year period, such derogation could be maintained for every successive five year period starting from the above date, i.e., December 21, 2007.

The Member states were under obligation to transpose norms of the Equal Treatment Directive into their national laws till December 21, 2007 as provided by the Directive. Also it was admitted in the literature that "all twenty-seven member states permitted gender-distinct rates for life insurance and annuities". For instance, Belgium provided such measure by Art. 3 of the Law of December 21, 2007, Latvia – by two related legislative acts as from September 12, 2009, the United Kingdom - by Art. 45 of the Sex Discrimination Act 1975 as discussed in the legal literature.

With this respect, a case arose in Belgium where the above mentioned law on transposing derogation provided in the Art. 5 (2) of the Equal Treatment Directive (2) stating that Member States may defer implementation of the measures necessary to comply with para. 1 until six years after date of transposition of the Directive at the latest.

Opinions of Attorney Generals are provided in the proceedings before the ECJ after arguments of the parties are heard to assist the ECJ to deliver the judgement. Though these opinions are not binding, they are “a source of law which can and should be taken into account of when clarifying the state of the law, much in the same way as writings of leading legal theorists” (MORTEN BROBERG & NIELS FENGER, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE 445 (2010)). The authority of these opinions are testified by the fact that Attorney Generals as judges of the ECJ “are both referred to as “members of the Court of Justice”” (Rose D’Sa & Peter Duffy, Judges and Advocates General, in EUROPEAN COURTS : PRACTICE AND PRECENDENTS 141 (Richard Plender general ed., 1997)).

There was a separate provision contained in Art. 16 (2) of the Equal Treatment Directive that the European Commission shall draw up a summary report including a review of the current practices of Member States in relation to the use of above derogation and submit it to the European Parliament and to the Council. Also, the Member states shall take into account this report by adopting decision for maintaining the derogation as envisaged by the Art. 5(2), however, such duty was only formal as the power to adopt decision to continue to maintain the derogation discussed was at the hand of Member states of the EU not subject to any counter activity from the side of the European Commission.

According to the Art. 288 (3) of the Treaty on the Functioning of the European Union (supra note 41) a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. In the result, Directives are not directly applicable and shall be transposed into national laws (see generally SACHA PRECHAL, DIRECTIVES IN EC LAW (2nd completely rev. ed. 2005)).


Art. 17 (1) of the Equal Treatment Directive


Supra note 42, paras. 9-11

Art. 5.1 (2) of the Law On Insurance Companies and Supervision Thereof (Latvian Herald, 30.06.1998., nr. 188/189 [published in Latvian]), and Regulations No 1002 of 08.09.2009. of the Cabinet of Ministers No 1002 “Provisions on the use of different attitude to determine insurance premiums and indemnities” (Latvian Herald, 11.09.2009., No 145 [published in Latvian])


See, for instance, EGGERS, PICKER & FOSS, GOOD FAITH AND INSURANCE CONTRACTS 120, 212 (2nd ed. 2004); MACGILLIVRAY, supra note 2, at 414
was challenged before the Constitutional Court of Belgium which requested preliminary ruling\textsuperscript{58} from the ECJ on the compatibility of this derogation with the principle of equality and non-discrimination enshrined in the Art. 6 (2)\textsuperscript{59} of the Treaty on European Union\textsuperscript{60}.

**ECJ’s reasoning**

The ECJ’s reasoning was based on the principle of non-discrimination and equality prohibiting different treatment in comparable legal situation, inter alia, by gender. The ECJ observed that the Art. 5 (1) of the Equal Treatment Directive was provided to abolish any discriminatory practice till the moment when the Directive shall be transposed, i.e., till December 21, 2007. The ECJ concluded that the derogation included in the Art. 5 (2) of the above directive “allows insurers apply the unequal treatment without any temporal limitation”\textsuperscript{61} since it may be extended for the every next five years period as stated above. The ECJ then went on by concluding that “there is a risk that the EU law may permit the derogation from the equal treatment of men and women [...] to persist indefinitely”\textsuperscript{62}. In the result, such derogation was found to be contrary to the objective of the above Directive and Art. 21\textsuperscript{63} and 23\textsuperscript{64} of the Charter of Fundamental Rights of the European Union\textsuperscript{65} as *expressis verbis* stated in the judgment\textsuperscript{66}. In that way, the ECJ followed the recommendation of the Attorney General who proposed to declare the above provision invalid on similar grounds but with different transitional period which is the next issue to be discussed.

By considering invalidity of the above derogation, the ECJ addressed the issue as from which date such invalidity should take place\textsuperscript{67} stating that the derogation provided in the Art.5 (2) of the Equal Treatment Directive should be “invalid upon the expiry of an appropriate transitional period”\textsuperscript{68}, i.e., from December 21, 2012.

On the one hand, such court’s approach for determining the above date was different from the proposal of the Attorney General\textsuperscript{69} suggesting the transitional period of three years from announcement of the judgment, i.e., till March 01, 2014.

\textsuperscript{58}\textsuperscript{58} “A reference for a preliminary ruling is a request from a national court of a Member State [of the EU] to the Court of Justice of the European Community to give an authoritative interpretation on a Community act or decision on the validity of such an act” (MORTEN BROBERG & NIELS FENGER, *supra* note 48, at 1

\textsuperscript{59}\textsuperscript{59} The Art. 6 (2) refers to the obligation of the EU to “accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”, therefore obviously referring to the Belgium court meant Art. 6 (1) providing for recognition of “the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the ‘Treaties’. Cf. *supra* note 40, at paras. 16-17

\textsuperscript{60}\textsuperscript{60} The Treaty on European Union (Consolidated version). OJ, C 83, 30.3.2010., p. 13-45

\textsuperscript{61} *Supra* note 42, paras. 26, 31

\textsuperscript{62} *id*, para. 31

\textsuperscript{63}\textsuperscript{63} This Art. provides for the prohibition of “[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”.

\textsuperscript{64}\textsuperscript{64} This Art. provides for the equality of men and women by stating that equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

\textsuperscript{65}\textsuperscript{65} Charter of Fundamental Rights of the European Union. OJ, C 83, 30.3.2010., p. 389 - 403

\textsuperscript{66} *Supra* note 42, para. 32

\textsuperscript{67}\textsuperscript{67} For the temporal effect of a preliminary ruling of the ECJ, see generally BROBERG & FENGER, *supra* note 57, at 445-457

\textsuperscript{68} *Supra* note 42, para. 33

\textsuperscript{69} *Supra* note 47, para. 80
On the other hand, it was different from the ECJ’s approach in the case C-82/10\(^{70}\) where the request for the transitional period was denied though it concerned infringement of the Member state and consequently demanded different approach\(^{71}\).

Though the above ECJ’s conclusions are clear, they cause several controversial issues.

First, the ECJ did not substantiate why the calculation of insurance premiums and benefits based on the gender factor were \textit{per se} found discriminatory. Moreover, the ECJ did not provide any substantiation why different amount of premiums and/or benefits for men and women if made according to the accurate actuarial data should be considered discriminatory - they treated men and women differently as being in different, non-comparable factual circumstances as stated in the beginning of this essay. Furthermore, the ECJ did not substantiate how the ECJ’s approach corresponded to the previous ECJ’s judgments where the ECJ had found that the use of actuarial data in the calculation of the insurance premiums and benefits should be taken into account\(^{72}\). As justly concluded by the Attorney General, the previous ECJ’s judgments were subject to the question whether different treatment complied with the principle of equal pay being a part of employment\(^{73}\). However, such Attorney’s General conclusion cannot in any way alter the previously made ECJ’s conclusion admitting necessity for different gender treatment which was at the same time excluded by the ECJ in the discussed case.

Nonetheless, it is necessary to mention that use of the gender factor shall not be considered as putting only women in unfavorable situation but rather both genders depending on the particular factual circumstances. Such opinion is testified by the Attorney General stating that in the proceedings before the ECJ there were discussed two examples which were also referred to in the beginning of this essay: “[w]omen have – from statistical point of view – a higher life expectancy than men and serious traffic accidents are – from a statistical point of view – more often caused by men than by women”; also, “women – from a statistical point of view – take advantage of more medical benefits than men”\(^{74}\).

Besides, it seems that the European Commission who proposed the draft Equal Treatment Directive\(^{75}\) and the Council which adopted this Directive did not submit any evidence before the ECJ testifying that the discussed derogation contained in the Art. 5 (2) of this Directive permitting use of the gender factor was based on the accurate actuarial data. The evidence issue was not discussed by the ECJ, but was addressed by the Attorney General stating that “[e]ven when asked, the [European] Commission was unable to provide a plausible explanation for its sudden change of mind”\(^{76}\). As stated above, the initially proposed draft Directive did not contain any derogation which however was introduced during the legislative procedure by the Council. Likewise, none of the above institutions contradicted the argument that “many other factors play an important role in the evaluation of the abovementioned insurance risks”\(^{77}\). Therefore, it is no surprise that the Attorney General concluded

\(^{70}\) Case C-82/10 \textit{European Commission v Ireland} [2011] ECR 00000 - VHI


\(^{72}\) \textit{Supra} note 42, paras. 73-74

\(^{73}\) \textit{Supra} note 47, para. 55

\(^{74}\) \textit{Supra} note 47, para. 53. Cf. \textit{JERRY & RICHMOND, supra} note 2, at 109

\(^{75}\) \textit{Supra} note 47

\(^{76}\) \textit{Supra} note 47, para. 22

\(^{77}\) \textit{Supra} note 47, para. 62
(and the Court obviously implied) that there were a lot of other factors (other than gender) influencing, for instance, length of life such as stressful professional activities, habits or taking any stimulants which were neglected by above institutions at all.

Second, as regards the date when the judgment takes effect, the ECJ did not provide any substantiation whether the particular date shall be chosen. Instead, the ECJ simply hold on to the date when the transitional period finishes and the Member states should decide whether to maintain this derogation for another five year period. By doing so, the ECJ confused the effect of invalidity of the discussed provision (which simultaneously makes this provision inapplicable *ex tunc*) with the effect of application of this provision by stating in the place of Member states that no further extension of derogation should be provided. If the provision is invalid, it is invalid *per se* as it was proposed by the Attorney General and only further decision on the temporal effect of this judgment would be whether it enters into force immediately, i.e. from delivering of the judgment, with retroactive effect or after expiry of some period of time. The ECJ however did not proceed in such way but rather was trying to combine two contradictory conclusions: if the derogation is invalid, the court cannot even rely on it; on the other hand, the court terminated the effect of this derogation based on the derogation itself as it would be valid.

Surely, such controversial approach does not in any way influence the operative part of the judgment declaring invalidity of the derogation provided in Art. 5 (2) of the Equal Treatment Directive but rather gives insight how unsafe was the ECJ in its substantiation. It is interesting that also Advocate General had doubts whether the discussed derogation should be declared invalid by stating that “[s]hould the Court nevertheless consider Art. 5 (2) of Directive 2004/113 to be valid, the provision would, as a derogating provision, have to be interpreted restrictively.

Third, the ECJ had never considered whether such derogation may be proportionate as requested by the Art. 52 of the Charter of Fundamental Rights of the European Union. According to the Art. 52 (1) any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the EU or the need to protect the rights and freedoms of others.

As justly pointed out, “[a]t no stage in the judgment did the CJEU [abbreviation of the full name of the ECJ] at least consider this issue as relevant to Art. 52. It could be argued that unisex premiums and benefits were considered in line with the passage of the Equal Treatment Directive at the time, were not deemed appropriate, and therefore an indefinite opt-out was allowed.” Though, this provision could open debate whether the use of the gender factor if based on accurate actuarial data may be justified as mentioned above, still without any substantiation the ECJ did not even considered this provision leaving the door open for possible adaptations in future. This conclusion would be appropriate if the ECJ would re-examine the discussed judgment in future as it happened before in several notable cases.

---

78 Id, paras. 62-64
79 BROBERG & FENGER, supra note 57, at 446
80 Supra note 47, at 72
occasions. As in this regard stated in the legal literature, “[a]lthough the ECJ seeks to achieve consistency in its judgments, its precedents are not binding in the English sense; it always remains free to depart from previous decisions in the light of new facts”\textsuperscript{82}.

This controversial judgment of the ECJ right away triggered reaction from insurance industry which was cold and negative both from the point of view of opinions expressed in the mass media\textsuperscript{83} and opinions by insurers associations, for instance, Association of British Insurers\textsuperscript{84}.

Finally, it would be appropriate to discuss the proposal by the Advocate General to follow the U.S. Supreme Court’s approach in the above mentioned leading cases\textsuperscript{85}, namely Los Angeles Dep’t of Water & Power v. Manhart and Arizona v. Norris, though this proposal was not addressed by the ECJ. Based on the description of the effective U.S. and EU regulation, this proposal by the Attorney General seems erroneous due to several reasons.

First, as the federal regulation prohibits any gender discrimination in insurance being a part of employment, it is for the states to regulate the individual (private) insurance (insurance outside employment relations). However, a majority of states\textsuperscript{86} does not prohibit the use of the gender in the individual (private) insurance. The federal regulation “limits an insurer’s ability to classify risks when the insurer’s policy is offered through an employer rather than directly to the public”\textsuperscript{87}. Therefore, the proposal to follow such practice was contrary to the factual and legal situation of the discussed case.

Second, in none of the above leading cases the U.S. Supreme Court reviewed the validity of the legal norm allowing use of the gender factor as it was done by ECJ in the discussed case but ruled on the compatibility of the respective annuities’ practice to the effective law.

Third, except the insurance schemes being part of employment regulated by the federal law, the U.S. courts tolerated gender factor by stating that “actuarially

\textsuperscript{82} JOSEPHINE STEINER & LORNA WOODS, EU LAW 45 (10th ed. 2009)
\textsuperscript{83} See, for instance, Jill Insley & Rupert Jones, ECI gender ruling hits insurance costs, available at http://www.guardian.co.uk/money/2011/mar/01/ecj-gender-ruling-insurance-costs (by stating that “young men under the age of 25 are now likely to see premiums decrease by an average of 10%, and in some cases 25%” and “car insurance premiums for women under the age of 25 are expected to rise by an average of 25% by the end of 2012, but by up to 60% for the youngest drivers, which could translate into an extra £500-£1,000 a year for some”); James Slack, EU equality ruling ‘will cost British taxpayer £1billion’: Young women drivers and retired men to suffer, available at http://www.dailymail.co.uk/news/article-1361190/EU-equality-ruling-cost-British-taxpayer-1bn.html (arguing that “insurance firms will have to raise £936million more capital to cover themselves against the ‘uncertainty’ caused by the ruling”); Insurance gender ruling and you, http://www.bbc.co.uk/news/business-12608777 (by referring to the British Insurance Brokers' Association whose representative said that “young men's premiums will fall a little, perhaps up to 10%, but young women's will rise more, perhaps up to 30%” and “an annual car insurance bill for a young woman will go up by £400.”).
\textsuperscript{84} ABI News release, March 01, 2011, European Court of Justice gender ban is disappointing news for UK insurance customers says the ABI, available at http://www.abi.org.uk/Media/Releases/2011/03/European_Court_of_Justice_gender_ban_is_disappointing_news_for_UK_insurance_customers_says_the_ABI_1.aspx (by quoting Maggie Craig, ABI’s Acting Director General, who said that “[t]he judgment ignores the fact that taking a person’s gender into account, where relevant to the risk, enables men and women alike to get a more accurate price for their insurance”).
\textsuperscript{85} Supra note 47, para. 70
\textsuperscript{86} Supra note 34
\textsuperscript{87} Gaulding, supra note 1, at 1655
sound discrimination cannot be unfair” [internal reference omitted] and therefore admitted the lawfulness of such practice. It was a clearly opposite approach taken both by the Attorney General and the ECJ in the discussed case admitting the use of gender factor as unlawful per se.

Finally, twenty years ago the ECJ adopted the same approach as the U.S. Supreme Court in the two cases discussed above prohibiting different treatment by gender in annuity issue being as a part of employment.

Therefore, the ECJ adopted more far-going approach than the U.S. Supreme Court in the issue of use of the gender factor in calculating insurance premiums and benefits.

**Conclusion**

Unlike the U.S., the ECJ resolved question on lawfulness of the use of the gender factor in calculating insurance premiums and benefits in the insurance law by prohibiting such practice. Nonetheless, both the U.S. and European insurers have serious challenges to overcome. In the EU, the insurance industry shall face the difficulty to bring its practice for calculating the insurance premiums and benefits into the line with the EU law till the December 21, 2012. For the U.S. insurers, difficulty is connected with more complex situation as the use of the gender factor is prohibited in the part of states requiring therefore using appropriate adaptations in their practice. Whether or not other states will introduce statutory prohibitions for the use of the gender factor remains to be seen. The question which is clear is that the US insurance industry will have to be ready to refuse from the use of the gender factor in the health insurance as from January 01, 2014.

---

88 Id, at 1662
89 See supra notes 39-40