

Developments

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

*By Felipe Temming**

A. Introduction

The reference for preliminary ruling concerns the validity of Article 5(2) of Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services (hereinafter “Directive 2004/113”).¹ The legal issue is the hotly debated question of whether and to what extent the sex of an insured person can be taken into account as a risk factor in the formulation of private contracts in insurance and related financial services.

Quoting a North American precedent, Van Gerven, Advocate-General (hereinafter “AG”), in his famous opinion in the 1993 case *Ten Oever*, recalled the prevailing and inherent insurance principle that normally governs the formation of insurance contracts. The subsidization of poorer risks by better risks would seem to be more common when it came to insure the flabby and fit under equal conditions, he remarked. However, the principle of treating different classes of risks as though they were the same for purposes of group insurance seemed all of a sudden be suspended when conflicting with the statistically proven difference in life expectancy between men and women. In the end Van Gerven, AG, had been in favor of gender-neutrally calculated insurance premiums and benefits in the area of occupational social pension schemes.²

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¹ EC Directive 2004/113 of 21 December 2004, 2004 O.J. (L373) 37.

² Joined Opinions of Advocate General Van Gerven in Cases C-109/91, C-110/91, C-152/91 and C-200/91, *Ten Oever and Others*, 1993 E.C.R. I-4879, at paras. 27-39 and 66.

Due to the ECJ's 1 March 2011 judgment in the case *Association Belge des Consommateurs Test-Achats ASBL and Others*,³ it is certain that this insurance principle also applies to the factor "sex." The ECJ therefore, considers the possibility of calculating sex-specific premiums and benefits to be direct discrimination on the grounds of sex, which cannot be justified. It follows that, from 21 December 2012 at the latest, unisex premiums and benefits will be mandatory for insurance contracts concluded from that date onwards.

The ECJ does not explicitly address the question of whether existing insurance contracts will be excluded from the effects of this judgment. In the event that these contracts would be included, the *Deutsche Aktuarvereinigung* (German Association of Actuaries) estimated that financial reserves that would be necessary to fulfill these existing contracts would have totaled approximately 30 billion Euros. However, recital 18 (phrase 3) and recital 19 (phrase 4) of Directive 2004/113 suggest that this judgment does not concern existing contracts or contracts entered into prior to 21 December 2012. This leads to a two-tier transitional regime. On the first tier, Member States that had not made use of the derogating provision laid down in Article 5(2) of Directive 2004/113, have to adhere to a transitional period of up to three years until they had to implement unisex premiums and benefits (21 December 2007, Article 5(1) of Directive 2004/113). On the second tier, those other Member States have to adhere to a transition period of five years (ending on 21 December 2012). Admittedly, this is merely a theoretical distinction because all Member States made use of the derogation clause, either in part or in total.⁴ New references for a preliminary ruling cannot be excluded with certainty. This would especially concern the question of whether contracts that have been concluded before 21 December 2012 will have to be adjusted and, thus, switch over to unisex premiums and benefits.⁵ In her opinion, Kokott, AG, expressly argued in favor of this adjustment.⁶

³ Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 907-909 (2011).

⁴ See Yves Thiery, *The opinion of A.G. Kokott on gender discrimination in insurance: effects for the insurance market*, ZEITSCHRIFT FÜR GEMEINSCHAFTSPRIVATRECHT (GPR) 28, 29 (2011); Judith Kerschbaumer, *Schluss mit dem kleinen Unterschied – EuGH verlangt Unisex-Tarife* (Stop the minor differences - ECJ requires unisex rates), ARBEITSRECHT IM BETRIEB (AiB) 363 (2011).

⁵ See e.g. Christa Tobler, *Case note on Case C-236/09: Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres*, 48 Common Market Law Review (CML Rev.) 2041, 2057 (2011); Dagmar Felix & Roya Sangi, *Unisex-Tarife in der Privatversicherung – Eine auch kritische Auseinandersetzung mit der Forderung des EuGH nach geschlechtsneutraler Tarifierung* (Unisex rates in the private insurance - A critical examination of the claim of the ECJ in gender-neutral pricing), ZEITSCHRIFT FÜR EUROPÄISCHES SOZIAL- UND ARBEITSRECHT (ZESAR) 257, 262-263 (2011) – no retroactive effect, but adoption of unisex tariffs in all contracts that have been entered into before 22 December 2012; Ulrich-Arthur Birk, *Pflicht zu Unisextarifen in der betrieblichen Altersversorgung?* (Obligation to [have] unisex rates in occupational pension schemes?), DER BETRIEB (DB) 819 (2011); *contra* Reinhold Höfer, *Zur Umsetzung der "Unisex-Entscheidung" des EuGH* (To implement the "unisex" decision of the ECJ), DER BETRIEB (DB) 1334, 1335 (2011) – no retroactive effect and no adjustment of existing contracts; Christian Rolfs & Nathalie Binz, *EuGH erzwingt ab Ende 2012 Unisex-Tarife für alle neuen Versicherungsverträge* (Court gives until the end of 2012 for the enforcement of unisex rates for all new insurance contracts), VERSICHERUNGSRECHT (VersR) 714, 716, 718 (2011); Norbert Reich, *Non-*

B. Facts of the Case

I. The Directive 2004/113/EC

Directive 2004/113 is based on Article 19(1) TFEU (ex-Article 13 EC). Pursuant to Article 1, the TFEU aimed to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, in order to put into effect the principle of equal treatment between men and women in the Member States. The material scope of this directive affects the important area of the formation of insurance contracts.⁷ This is because within the countries of the EU, these types of contracts are often concluded and commonly use sex as an actuarial factor. They have a two-sided character, as they do not necessarily disadvantage solely the group of women.

Regarding health and pension insurance, the statistically noticeable longer life expectancy of women has a negative impact on women. As far as the former type of insurance is concerned, the different calculation of premiums has also been explained with the higher likelihood of women utilizing particular medical services, such as birth-related services. The contrary applies to *Risikolebensversicherung* (term life insurances). In this case, women can benefit from their longer life expectancy and the earlier death risk negatively affects the

Discrimination and the many Faces of Private Law in the Union – Some Thoughts After the “Test-Achts” Judgment, THE EUROPEAN JOURNAL OF RISK REGULATION (EJRR) 283, 287 (2011); Kai Purnhagen, *Zum Verbot der Risikodifferenzierung aufgrund des Geschlechts – Eine Lehre des EuGH zur Konstitutionalisierung des Privatrechts am Beispiel des Versicherungsvertragsrechts?* (Kai Purnhagen: The prohibition on risk differentiation based on sex – Is this a doctrine of the ECJ on the constitutionalisation of private law at the instance of insurance contract law?), EUROPARECHT (EuR) 690, 703-704 (2011); Christian Armbrüster, *EuGH: Geschlechtsspezifische Unterscheidung bei Versicherungstarifen verletzt EU-Grundrechte-Charta* (Justice Gender discrimination in insurance rates hurt the EU Charter of Fundamental Rights), 314339 KOMMENTIERTE BGH-RECHTSPRECHUNG LINDENMAIER-MÖHRING (LMK, 2011); Björn Kahler, *Unisexstarife im Versicherungswesen – Grundrechtsprüfung durch den EuGH* (Unisex rates in the insurance industry - Of fundamental rights by the ECJ), NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 894, 896 (2011); Dirk Looschelders, *Aktuelle Auswirkungen des EU-Rechts auf das deutsche Versicherungsvertragsrecht unter besonderer Berücksichtigung der geschlechtsspezifischen Tarifierung* (Current impact of EU law on the German insurance contract law with particular emphasis on gender), VERSICHERUNGSRECHT (VersR) 421, 428 (2011); *contra* Jan D. Lüttringhaus, *Europaweit Unisex-Tarife für Versicherungen!* (Europe-wide unisex rates for insurance), EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EuZW) 296, 299 (2011) – no retroactive effect, but possibly adjustment of existing contracts.

⁶ Cf. Opinion of Advocate General Kokott in Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres* [hereinafter “*Consommateurs Test-Achats et. al.*”], at para. 81, available at: www.curia.eu (last accessed: 23 December 2011); *Financial Times Deutschland, Kein Unisex für Alte – Gleiche Versicherungstarife für Männer und Frauen ab Ende 2012 / Pflicht gilt für Neukunden, nicht für Altverträge* (No unisex rates for older persons - equal insurance conditions for men and women from the end of 2012 onwards/ Obligation concerns new customers, no application for already existing contracts), FTD, Dec. 21, 2011.

⁷ See e.g. Gregor Thüsing & Konrad von Hoff, *Private Versicherungen und das Allgemeine Gleichbehandlungsgesetz* (Private Insurance and the General Equal Treatment Act), VersR 1 (2007).

group of men. One must bear in mind that statistical differences in life expectancy vary according to which life table is being used with regards to the manifold types of insurance contracts.⁸ According to the *Statistisches Bundesamt* (German Federal Agency for Statistics), between 2007 and 2009 the difference in life expectancy between men and women amounted to approximately five years in favor of the latter. However, pertinent figures vary enormously.⁹ In addition, it is worth mentioning that statistical data that regards sex as a risk factor does not necessarily need to be linked to life expectancy. As far as vehicle insurances are concerned (for example third-party motor vehicle liability insurance) women have to pay lower premiums because, from a statistical point of view, serious traffic accidents are more often caused by men than by women. Again, men are at a disadvantage.

In this context, Directive 2004/113 is designed to put an end to this discriminating practice and provides in its Article 5(1) that Member States shall ensure that, in all new contracts concluded after 21 December 2007, 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. Interestingly enough, this principle is immediately narrowed by Article 5(2). Pursuant to this paragraph, Member States could decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk, based on relevant and accurate actuarial and statistical data. This far-reaching derogation was combined with two obligations imposed on the Member States *vis-à-vis* the Commission. The first was to inform the latter about the legal situation, and the second was to thoroughly review their decision to permit unisex premiums five years after 21 December 2007. The Commission was to draw up a summary report, which would include a review of the current practices of Member States in relation to Article 5 of Directive 2004/113, with regard to the use of sex as a factor in the calculation of premiums

⁸ A period life table is based on the mortality experience of a population during a relatively short period of time (e.g. for one calendar year), and enables one to calculate the mortality of an average person at a given age within this period. However, the resulting life expectancy does not represent the real life expectancy of a single person. In contrast, a generation life table or cohort life table takes into account that life expectancy depends on age, as well as the year of birth. Thus, trends in the development of mortality can be considered, too. Average life expectancy calculated on the basis of generation life tables can be used as an adequate estimate for the real life expectancy of a given birth cohort. Depending on the type of life table and the year it was calculated, the difference in remaining life expectancy of a 65-year-old man can vary from 12.4 up to 24.6 years. Furthermore, there are differences with regard to the extrapolation of data to estimate the future trend of life expectancy. They depend on the way that the insurance contract is financed (tax, capital funding, pay-as-you-go, possibility of contribution increase) and what type of risk is insured (e.g. age, health or care). Another important aspect is the extent of conservative risk calculation an insurer is allowed to apply to his favor.

⁹ Deutsche Aktuarvereinigung, *Sterbetafeln – Handwerkzeug der Aktuar: Verlängerung der Lebenserwartung – wie gehen Aktuar damit um?* (Mortality Tables, Hand Tools of Actuaries: Extension of Life Expectancy, As Actuaries Go With It, 2007), available at: <http://aktuar.de/custom/download/Folien-DAV-Werkstattgesprach-Sterbetafeln.pdf> (last accessed: 23 December 2011); see also Kerschbaumer, *supra* note 4 at 363, 364; Höfer, *supra* note 5, at 1334, 1335; Birk, *supra* note 5.

and benefits (Article 16 of Directive 2004/113). The Member States should review their decision five years after 21 December 2007. However, Member States could only make use of the derogation clause in Article 5(2) of Directive 2004/113 where domestic legislation had not already applied the unisex rule.¹⁰

II. The Effect of Article 5(2) Directive 2004/113/EC: An Indefinite Exemption Clause

Thus, the possible effect of the derogation clause in Article 5(2) of Directive 2004/113 was that the principle of gender-neutrally calculated premiums and benefits enshrined in Article 5(1) could not be ubiquitously realized within the EU, should the majority or even all Member States continue with their discriminating practice.

This apprehension proved true insofar as all Member States allowed the retention of sex-specific differences in insurance premiums and benefits, in total¹¹ or in part, even after the transitional period had expired.¹² This concerned already existing contracts, as well as new contracts (concluded from 21 December 2007 onwards). As the Directive 2004/113 only sets out an obligation incumbent on the Member States to inform and review their legal situation with regard to Article 5, it was consequently possible that Member States could retain the permission to use sex as an actuarial factor for insurance premiums and benefits forever. This is because a compulsory reform of Article 5 initiated by the Commission concerning this matter is not provided for in the Directive 2004/113.

In Belgium, pursuant to the "Law of 10 May 2007" combating discrimination between men and women, which was amended by the "Law of 21 December 2007" regarding the treatment of sex in insurance matters, this derogation applies only to life assurance contracts.¹³ Despite this narrow exception, the Belgium Constitutional Court (*cour constitutionnelle*) doubted the validity of the derogation clause laid down in Directive 2004/113. As the Law of 21 December 2007 makes use of the derogation provided for under Article 5(2) of Directive 2004/113, the Belgium Constitutional Court first decided to

¹⁰ Recital 19 of Directive 2004/113/EC; see also, *supra* note 4.

¹¹ The German legislature, for instance, had exempted all kinds of private insurance contracts from the prohibition to use sex as a factor in the calculation of premiums and benefit. See the Allgemeines Gleichbehandlungsgesetz (General Equal Treatment Act), sect. 20(2) and 19(1)(2), Aug. 18, 2006, Bundesgesetzblatt (BGBl) I, 1897 1910. However, the exception proves the rule as so-called private Riester pension contracts as well as private long-term care insurances have to provide for unisex premiums and grant corresponding benefits: see *Gesetz über die Zertifizierung von Altersvorsorge- und Basisrentenverträgen* (Act on the Certification of Basic Pension and Annuity Contracts), sect. 1(1)(1), 23(1), Jun. 26, 2001, BGBl 1 S, 1768), taken in conjunction with *Sozialgesetzbuch XI* (German Social Code), sect. 110(2)(2) lit. (d), 110(3)(3), May 26, 1994, BGBl 1 S, 1014.

¹² See *supra* note 4.

¹³ *Moniteur belge* 66175 (31 December 2007).

stay the action for annulment and make a reference for preliminary ruling seeking to ascertain from the European Court of Justice if Article 5(2) of Directive 2004/113 is compatible with primary EU law, in particular with fundamental rights.

C. Reasoning of the ECJ

I. Article 5(2) of Directive 2004/113 is Invalid

The ECJ shares the doubts of the Belgium Constitutional Court and holds the derogation clause of Article 5(2) of Directive 2004/113 is invalid, effective 21 December 2012. The legal yardstick applied by the ECJ is Article 21 and Article 23 of the Charter of Fundamental Rights of the European Union (hereinafter “the Charter”), in conjunction with Article 6(2) EU, although Directive 2004/113 came into force well before 1 December 2009. But like in previous judgments¹⁴ the ECJ obliges the EU legislature to adhere to its self-imposed normative guidelines.¹⁵ Recital 4 of Directive 2004/113 explicitly refers to Article 21 and Article 23 of the Charter. It follows from that the EU legislature would act contradictory if this reference was just paying mere lip service to the Charter. Recalling the principle of estoppel, the principle of *venire contra factum proprium*, and the Charter’s reaffirmative character, it is justifiable to measure the derogation clause of Article 5(2) of Directive 2004/113 against these Charter provisions, whose unwritten counterparts formed part of primary law well before 1 December 2009.¹⁶ The reaffirmative character of the Charter, as well as the special nature of human rights, are able to distinguish this kind of reference to EU soft law in a directive’s or regulation’s recital (as it was the case with regard to the Charter before it came to force) from references to other kinds of EU soft law.¹⁷

On the decisive one-and-a-half pages of its judgment, the ECJ not only stresses that the EU legislature is bound by fundamental rights, but also emphasizes the EU legislature’s positive obligation, derived from Article 3(2) EU and Article 8 TFEU, to combat social exclusion and discrimination and to promote social justice, social protection, and equality between men and women when exercising their competence conferred upon in Article 19 TFEU (ex-Article 13 EC).

¹⁴ See joint Cases C-92/09 and C-93/09, Volker and Markus Schecke and Eifert, EuZW 939, para. 46 (2010); Case C-540/03, Parliament v. Council, 2006 E.C.R. I-5769, at paras. 4, 38 (“Family Reunification”).

¹⁵ *Consommateurs Test-Achats et. al*, supra note 6, at para. 17 (2011).

¹⁶ Cf. Opinion of Advocate General Kokott in *Consommateurs Test-Achats et. al*, supra note 6, at para. 31.

¹⁷ For a skeptical review, see Purnhagen, supra note 5, at 690, 697-698, with regard to the Draft Common Frame of Reference (DCFR), which is already being cited by several Advocates General.

II. Irresolvable Conflict with Principle of Coherence

Thereafter, the ECJ mentions the important hurdle which the EU legislature has to abide by when enacting a legal act like Directive 2004/113: "when such action [based on Article 19 TFEU] is decided upon, it must contribute, in a coherent manner, to the achievement of the intended objective, without prejudice to the possibility of providing for transitional periods or derogations of limited scope."¹⁸ It follows that, in the view of the ECJ, it would be consistent with the principle of coherence to provide for a transitional period of three years in Article 5(1) of Directive 2004/113 in order to implement the application of the rule of unisex premiums and benefits gradually because the use of actuarial factors related to sex was widespread in the provisions of insurance contracts when the Directive 2004/113 was enacted.

In contrast to the aforementioned transitional period it is, however, contradictory to enact a provision like Article 5(2) of Directive 2004/113. In the ECJ's opinion, this provision does not constitute a derogation of limited scope. Instead, there is a risk that EU law may permit the derogation from the principle of equal treatment between men and women provided for in Article 5(2) of Directive 2004/113 to persist indefinitely. The ECJ continues by outlining that such a provision, which enables the Member States in question to maintain – without temporal limitation - an exemption from the rule of unisex premiums and benefits, would work against the achievement of the objective of equal treatment between men and women - which is the purpose of Directive 2004/113 - and would be incompatible with Article 21 and Article 23 of the Charter. That provision must, therefore, be considered to be invalid upon the expiry of an appropriate transitional period.¹⁹ The deadline set by the ECJ is 21 December 2012 and this date refers to the five-year period when, after having transposed the Directive 2004/113, Member States should re-examine the justification for exemptions laid down in Article 5(2) of Directive 2004/113.²⁰

¹⁸ *Consommateurs Test-Achats et. al*, *supra* note 6, at para. 21; Tobler, *supra* note 5, at 2041, 2051.

¹⁹ *Consommateurs Test-Achats et. al*, *supra* note 6, at paras. 31-33.

²⁰ Recital 19, *supra* note 10.

D. Comment and Appraisal

I. A Historic Judgment

The judgment of the ECJ's Grand Chamber is, indeed, correct.²¹ It is a historic judgment with precedential effect in other proceedings before the ECJ²² and will be considered a milestone in combating discrimination based on sex. It undertakes another step towards the constitutionalization of European Private Law.²³ Given the EU's limited competency in the wider areas of private law prior to the recent treaty revisions, this constitutionalization is a relatively young process.

Additionally, the ECJ's ruling can be seen as a glaring setback to the lobbying organizations of the insurance sector, as well as to part of the EU legislature (most likely the Council of the EU), which must have been swayed by these lobbying groups.²⁴ The reason is more or less obvious: Article 5(2) of Directive 2004/113, a provision that was not contained in the

²¹ Tobler, *supra* note 5, at 2041, 2047 *et seq.*; Felix & Sangi, *supra* note 5, at 257, 261; Birk, *supra* note 5 at 819; Kerschbaumer, *supra* note 4, at 363, 365; Rolfs & Binz, *supra* note 5 at 714, 716, 718; Reich, *supra* note 5, at 283, 287 *et seq.*; *contra* Looschelders, *supra* note 5, at 421, 425 *et seq.*; Purnhagen, *supra* note 5, at 690, 693 *et seq.*; Lüttringhaus, *supra* note 5, at 296 *et seq.*; Höfer, *supra* note 5, at 1334; Armbrüster, *supra* note 5; Kahler, *supra* note 5, at 894 *et seq.*

²² Cf. Case 66/80, ICC, 1981 E.C.R. 1191, at paras. 13-15.

²³ Tobler, *supra* note 5, at 2041, 2048-2049; Purnhagen, *supra* note 5 at 690, 693-695. In contrast, the foundations of the process of constitutionalization of German Private Law were already laid in the 1950s, cf. BVerfG NJW 257-258 (1958); RAINER WAHL, HERAUSFORDERUNGEN UND ANTWORTEN: DAS ÖFFENTLICHE RECHT DER LETZTEN FÜNF JAHRZEHNTE (Challenges and Responses: Public Law of the Last Five Decades) 32-35 (2006). It should be noted that the principle of equality is by no means a foreign concept in private law, cf. MICHAEL GRÜNBERGER, PERSONALE GLEICHHEIT. DER GRUNDSATZ DER GLEICHBEHANDLUNG IM ZIVILRECHT (Personal Equality: The Principle of Equal Treatment in Civil Law, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1895366 (last accessed: 23 December 2011); FELIPE TEMMING, ALTERSDISKRIMINIERUNG IM ARBEITSLEBEN (Age Discrimination in Working Life) 88 (2008).

²⁴ Cf. Kurt Pärli, *Verbot geschlechtsspezifischer Prämien bei Versicherungsverträgen* (Prohibiting gender-based premiums for insurance contracts), HAFTUNG UND VERSICHERUNG (HAVE/REAS) 153, 157-158 (2011); Tobler, *supra* note 5, at 2041, 2053, 2060 (2011); Press Release, *Preliminary Agreement on Gender Equality Directive. European insurers welcome opportunity to continue using gender in pricing* (Comité Européen des Assurances), Oct. 4, 2004, available at: www cea eu/uploads/Modules/Newsroom/communiqu183.pdf (last accessed: 23 December 2011); Elisabeth Schrödter (MoEP), *Der Europäische Gerichtshof fordert Unisexstarife*, 1 EUROPA SOZIAL 2 (2011), available at: www.elisabeth-schroedter.de/media/europa-sozial/EuSoz11-1web.pdf (last accessed: 23 December 2011); Ines Kopischke, *Staat und private Altersvorsorge. Entscheidungsprozesse und Debatten zu "Unisex-Tarifen" in der Politik der Europäischen Union und der Bundesrepublik Deutschland* (State and private pensions. Decision-making processes and debates on "unisex rates" in the policy of the European Union and the Federal Republic of Germany), 18 ARBEITSPAPIER 46-60 (2010), available at: www.uni-bielefeld.de/en/soz/personen/Leisering/pdf/Arbeitspapier-18neu-IK-Staat-und-private-Altersvorsorge.pdf (last accessed 23 December 2011); Daniela Kuhr, *Männer. Frauen. Menschen* (Men. Women. People.), v. 2.3 SÜDDEUTSCHE ZEITUNG (2011), available at: www.sueddeutsche.de/geld/2.220/versicherungs-urteil-des-eugh-maenner-frauen-menschen-1.1066618 (last accessed: 23 December 2011).

Commission's original proposal for this Directive, was on trial. Furthermore – and in line with the view upheld by the then-Commission during the proceedings in the case *Ten Oever* almost 20 years ago²⁵ – the present Commission declared itself firmly against allowing differences based on sex in respect of premiums and benefits of insurance contracts and considered them to be encroaching upon the right not to be discriminated against on the grounds of sex. Against this background, it was all the more surprising that, in this reference for preliminary ruling, the Commission then took the view, right up until the oral hearing, that Article 5(2) of Directive 2004/113 did not infringe the principle of equal treatment between men and women, but rather was an expression of that principle.²⁶

Among others, it must have been this inexplicable and unconvincing stance of the Commission that caused Kokott, AG, to make a clear case for unisex premiums and benefits²⁷ and, thus, to position herself against sex-specific actuarial factors.²⁸ In essence, the only difference between her opinion and the ECJ's ruling is that Kokott, AG, favored a transitional period which was 15 months longer than the one finally adopted by the ECJ (i.e., the three years beginning to run with the delivery of the judgment, ending on 1 March 2014, rather than on 21 December 2012).

II. The Outstanding Significance of the Prohibition of Discrimination on the Grounds of Sex

Once again, this judgment proves that justifying direct discrimination based on the grounds of sex will be but a mere theoretical possibility. As with the prohibition of discrimination on the grounds of nationality (and disability, race or ethnic origin), the ECJ applies a (very)

²⁵ Joined Opinions of Advocate General Van Gerven, *supra* note 2, at paras. 34-39, at para. 28.

²⁶ Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, COM (2003) 657 final of 5 November 2003, at 6-9.

²⁷ Cf. Opinion of Advocate General Kokott in *Consommateurs Test-Achats et. al*, *supra* note 6; *contra* Hans-Peter Schwintowski, *Geschlechtsdiskriminierung durch risikobasierte Versicherungstarife?* (Gender discrimination through risk-based insurance rates?), *VersR* 164 (2011); Ulrich Karpenstein, *Harmonie durch die Hintertür? Geschlechtsspezifisch kalkulierte Versicherungstarife und das Diskriminierungsverbot* (Harmony through the back door? Gender-specific rates calculated insurance and non-discrimination), *EuZW* 885 (2010); Holger M. Sagmeister, *Geschlechtsspezifische Versicherungstarife tatsächlich europarechtswidrig?* (Gender-specific insurance rates actually contrary to European law?), *VersR* 187 (2011).

²⁸ Cf. Opinion of Advocate General Kokott in *Consommateurs Test-Achats et. al*, *supra* note 6, at paras. 70, 72. Nowhere in her opinion does Kokott, AG, conclude sex-specific insurance premiums could be justified if they are necessitated because of clear biological differences between men and women (*cf.* paras. 52, 61-69 of her opinion). If at all, she has generally suggested direct discriminations on the grounds of sex could be justified under certain conditions, *cf.* para. 60: "... only permissible if it can be established with certainty that there are relevant differences between men and women which necessitate such discrimination."

strict scrutiny test with respect to the former. This is more than justifiable,²⁹ even more so as the Member States themselves – in virtue of their role as the Masters of the treaties – strengthened and reinforced this prohibition of discrimination at the level of primary EU law, as the above quoted Article 3(2) EU and Article 8 TFEU clearly indicate.

With regard to the special and long-standing principle of equal pay now enshrined in Article 157(1) TFEU (ex-Article 141(1) EC), justifiable direct discrimination is virtually ruled out.³⁰ Regarding occupational pension schemes and the pertinent contributions made by the employees, Van Gerven, AG (expressly), as well as the ECJ (*obiter dicta*) argued against the application of actuarial factors that used sex as one of the determining risk factors.³¹ This stance has now also been adopted by Kokott, AG.³² Although the ECJ did not expressly transfer this view to the Directive 2004/113, it is submitted that this line of argumentation can be generalized.³³

III. Starting Point: Fundamental Rights

The legal starting point which the ECJ, as well as Kokott, AG, have chosen is fully appropriate: the EU legislature is bound by the fundamental rights of the EU. It is immaterial that Article 5(2) of Directive 2004/113 constitutes an opening clause in favor of the Member States, because otherwise it would be possible to circumvent this legal adherence to higher-ranking primary EU law.³⁴ Furthermore, the question of whether the legal yardstick is Article 21 and Article 23 of the Charter, in conjunction with Article 6(2) EU, needs not be answered. This is because the prohibition of gender discrimination was an accepted general principle of EU law long before the Treaty of Lisbon and Charter came

²⁹ See TEMMING, *supra* note 23, at 473 *et seq.*

³⁰ Very clear in *e.g.* Case C-356/09, Christine Kleist, NZA 1401, 1403, at paras. 41-43 (2010).

³¹ Joined Opinions of Advocate General Van Gerven, *supra* note 2, at paras. 34-39; Case C-152/91, David Neath v. Hugh Steeper Ltd., 1993 E.C.R. I-6935, at para. 31; Case C-200/91, Coloroll Pension Trustees Limited v. Russel and Others, 1994 E.C.R. I-4389, at para. 80; *see also* Marita Körner, *Unisex-Tarife und Entgeltgleichheitsgrundsatz bei der Riester-Eichel-Rente* (Unisex rates and equal pay principle in the Riester-Eichel pension scheme), *Neue Zeitschrift für Arbeitsrecht (NZA)* 760, 762 *et seq.* (2004); Felipe Temming, *Unisex-Tarife auf dem verfassungsrechtlichen und europarechtlichen Prüfstand* (Unisex Rates on the constitutional and European law test), *ZESAR* 72, 76 *et seq.* (2005).

³² *Cf.* Opinion of Advocate General Kokott in *Consommateurs Test-Achats et. al*, *supra* note 6, at para. 69.

³³ *Contra* Looschelders, *supra* note 5, at 421, 427, 428. It is submitted that the ECJ's reasoning also means that the financial source with which the insured person pays its premiums is totally irrelevant.

³⁴ Felix & Sang, *supra*, note 5, at 257, 258-259; *contra* Looschelders, *supra* note 5, at 421, 425– but *see also* Case C-540/03, Parliament v. Council, 2006 E.C.R. I-5769, at paras. 71, 76 (“Family reunification”).

into force.³⁵ The same applies to the principle of equal treatment of men and women and the corresponding mandate to the EU legislature, which were prominently enshrined in ex-Article 2 EC and ex-Article 3(2) EC (now Article 3(3) subparagraph 2 EU and Article 8 TFEU). Not even critics of this judgment can seriously contest this point.³⁶

However, the lines of legal argumentation to declare Article 5(2) of Directive 2004/113 invalid adopted by Kokott, AG, on the one hand, and the ECJ, on the other, differ to a great extent and this is noteworthy. While the former analyses the justifiability of direct discrimination on the grounds of sex by means of statistical data in a detailed manner and negates this possibility in the end, the ECJ in contrast resorts to a principle of coherence. The ECJ applies this principle in the areas of age discrimination (however not totally free of inconsistencies!³⁷) and tax law,³⁸ for example.

IV. Concrete Legal Yardstick: Principle of Coherence

The legal source of the principle of coherence, but above all the prerequisites of its application and its legal impact, urgently need dogmatic contouring.³⁹ Some thoughts can be offered here. In German constitutional law, this principle is known as the "requirement of consistency"⁴⁰ and it is rooted, among others, in the general principle of equality (Article 3(1) Fundamental Law⁴¹). Thus, it can be a legal yardstick for lower-ranking law.⁴² This principle requires that the legislature establish consistency not only within the whole

³⁵ Case 43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [hereinafter "Defrenne II"], 1976 E.C.R. 455, at para. 12; Case 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [hereinafter "Defrenne III"], 1978 E.C.R. 1365, at paras. 26-27.

³⁶ See e.g. Kahler, *supra* note 5, at 894.

³⁷ Introduced in Case 88/08, *David Hütter v. Technische Universität Graz*, 2009 E.C.R. I-5325, at paras. 46-47; Case C-341/08, *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe and Others*, NJW 587-592 (2010), at paras. 53 *et seq.* These decisions have been inconsistently applied in Case C-45/09, *Gisela Rosenblatt v. Oellerking Gebäudereinigungsgesellschaft mbH* [hereinafter "Gisela Rosenblatt"], NZA 1167-1171 (2010), with an affirmative case note by Jobst-Hubertus Bauer & Martin Diller, *EuGH – Rosenblatt – rosiges oder dorniges Blatt für Altersgrenzen?* (ECJ - Rosenblatt - Rosy or thorny leaf for age limits?), DB 2727 (2010).

³⁸ Examples given by Kahler, *supra* note 5, at 894, 897, and also in notes 43 and 44.

³⁹ *Id.* – However it is not convincing to describe the principle of coherence as a form of reduced scrutiny by means of a fundamental right; see also Purnhagen, *supra* note 5, at 690, 696.

⁴⁰ German: *Gebot der Folgerichtigkeit*

⁴¹ See generally, Grundgesetz der Bundesrepublik Deutschland (The German Basic Law), available at: www.gesetze-im-internet.de/englisch_gg/index.html (last accessed: 23 December 2011).

⁴² *Contra* Purnhagen, *supra* note 5, at 690, 696-697 (2011), who distinguishes between secondary EU law and national legislation of Member States. However, this aspect is immaterial.

legal order, but also within special areas of law and pertinent subsystem created therein.⁴³ It obliges the legislature to give objective and comprehensible reasons for what it is enacting and to explain when deviating from a principle. The Federal Constitutional Court has also named this requirement the “concept of systemic consistency” or “systemic justice”⁴⁴ and it is a well-known concept, especially in the area of tax law.⁴⁵

However, the Federal Constitutional Court differentiates between an infringement of the principle of consistency on the one hand and an infringement of the principle of equality on the other,⁴⁶ thereby granting the legislature a certain margin of appreciation, which also depends of the complexity of the subject matter. This is because an infringement of the principle of consistency does not necessarily mean the principle of equality has likewise been encroached upon. This is only the case if the chosen regulation falls short of attaining the legislature’s goal in principle.⁴⁷ Roughly speaking, the requirement of consistency and the concept of systemic consistency primarily have a disciplinary effect on the legislature because it demands that the legislature act logically when enacting and inserting new legal rules into the legal order.

The ECJ applies the principle of coherence within other areas of EU law, too. Many such cases concern fundamental freedoms, as can be seen in the cases concerning the gambling law,⁴⁸ advertising,⁴⁹ and health.⁵⁰ Nonetheless, this principle has also recently played a

⁴³ Lerke Osterloh, *Article 3 in KOMMENTAR ZUM GRUNDGESETZ* (Commentary on the Constitution, Michael Sachs ed., 6th ed., 2011) margin numbers 98-103; PAUL KIRCHHOF, VII HANDBUCH DES STAATSRECHTS (Handbook on State Law) 118 (Josef Isensee & Paul Kirchhof ed., 3rd ed., 2007), margin numbers 176-181; FRANZ-JOSEPH PEINE, SYSTEMGERECHTIGKEIT (Justice System, 1985); CHRISTOPH DEGENHART, SYSTEMGERECHTIGKEIT UND SELBSTBINDUNG DES GESETZGEBERS ALS VERFASSUNGSPOSTULAT (The Justice System and the Self-Binding of the Legislature as a Constitutional Postulate, 1976).

⁴⁴ See PEINE, *supra* note 43.

⁴⁵ E.g. BVerfG NJW 48, 49 ff. (2009); BVerfG NVwZ 568, 571 (2005); BVerfG Aktuelles Steuerrecht (AktStR) 476, 477 (2000); BVerfG NJW 1815, 1816 (1992); BVerfG NJW 1815, 1816 (1992).

⁴⁶ See PEINE, *supra* note 43.

⁴⁷ E.g. BVerfG NJW 1815, 1816 (1992); BVerfG NZA 161, 168 (1990); BVerfG NJW 2231, 2233 (1988).

⁴⁸ See for example, 84 Entscheidungen des Bundesverfassungsgerichts (Decisions of the Federal Constitutional Court, BVERFGE) 239 (271) (Ger.).

⁴⁹ Case C-64/08, Ernst Engelmann, EuZW 821, 822, at para. 35 (2010); Case C-46/08, Carmen Media Group Ltd., NVwZ 1422, 1424, at para. 55 (2010); Case C-243/01, Piergiorgio Gambelli, 2003 E.C.R. I-13031, at para. 67; Case C-42/07, Liga Portuguesa de Futebol Profissional and Bwin International, 2009 E.C.R. I-7633, at paras. 59-61.

⁴⁹ Case C-500/06, Corporación Dermoestética SA, 2008 E.C.R. I-5785, at paras. 39-41.

⁵⁰ Case C-169/07, Hartlauer, 2009 E.C.R. I-1721, para. 55.

prominent role as regards age discrimination.⁵¹ But, it does not disclose its doctrinal origins. Furthermore, it seems to have a bigger impact and effect on Member States' legislation than its German counterpart. By availing itself of this principle, the ECJ in the case *Test Achats* gives the impression that it is taking a rapid shortcut through the task of testing the legality of sex-specific differences in premiums and benefits in light of higher-ranking EU law. However, bearing in mind the close relationship between the principle of coherence and the principle of equality, it is arguable that the application of the former principle is nothing more than an analysis of Article 5(2) of Directive 2004/113 in the light of the principle of equality. This is because the general dogmatic structure of scrutiny is the same. Above all, it is about the appraisal of reasons adduced to justify Article 5(2) of Directive 2004/113. The way of appraisal is set by the level of scrutiny *in casu*. In the case *Test Achats*, the level of scrutiny depends on whether the differentiation drawn is on the grounds of sex, which triggers a very strict scrutiny test and, therefore, the application of a proportionality test. The similarity of the principle of coherence and the prohibition on the discrimination on the grounds of sex derives from the fact that both stem from the principle of equality. The prohibition on the discrimination on the grounds of sex is a special principle of equality and it is this common trait that allows the implementation of the principle of coherence within Article 21 and Article 23 of the Charter.

This could explain why the principle of coherence in discrimination cases only appears within the justification - respectively the proportionality test⁵²— which becomes indirectly apparent in paragraphs 21 and 32 of the judgment⁵³. Because, should the measure chosen by the EU legislature not work toward the attainment of the chosen or already prescribed purpose in a consistent way, it cannot be suitable or apt in the first place and, therefore, would not meet the test of proportionality.⁵⁴ The legal review of the interrelation between the purpose of an act and the chosen measure is an inherent element of the principle of

⁵¹ Case C-341/08, *Domnica Petersen*, 2010 E.C.R. I-47, para. 53; Case C-88/08, *David Hütter*, 2009 E.C.R. I-5325, para. 47.

⁵² This also applies to the area of fundamental freedoms as they prohibit restrictions as well as discriminations at the same time. Fundamental freedoms grant a special prohibition of discrimination on the grounds of nationality (in contrast to the general prohibition laid down in Article 18 TFEU), as well as a liberty impeding mere restrictions that do constitute neither direct nor indirect discrimination.

⁵³ In the area of age discrimination see e.g. Case C-250/09, *Vasil Ivanov Georgiev*, NZA 29, 32, at paras. 55-56 (2011)., Should a fundamental right (*i.e.* not an equality right) be the main legal yardstick and one wishes to analyze the case under the aspect of coherence, as well, the correct legal yardstick would be a given fundamental right in conjunction with Article 20 of the Charter. Article 20 of the Charter is where the principle of coherence is rooted; c.f. *Luzius Wildhaber, Protection against Discrimination under the European Convention on Human Rights*, *BALTIC YEARBOOK OF INTERNATIONAL LAW* 71 (2002).

⁵⁴ E.g. Case C-341/08, *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe and Others*, NJW 587, 590-591, at paras. 58-62 (2010).

proportionality and concretizes the level of suitability and necessity.⁵⁵ Thus, it is not indefensible to refrain from striking a balance with conflicting fundamental rights of the other private party involved in this private dispute, in this case Article 16 of the Charter (freedom to conduct a business). Such aspects have to be considered only at the level of appropriateness – subsequent to the affirmation of suitability and necessity.⁵⁶ Having in mind the prominent standing the ECJ attributes to the principle of equal treatment between men and women, just like the prohibition of discrimination on the grounds of sex, this could be one reason for the apodictic style of its reasoning. It should be recalled that, in the groundbreaking case *Marshall I*, the ECJ needed only a single, concise paragraph to reject the establishment of lower mandatory retirement ages for women in 1986.⁵⁷

Regarding Article 5 of Directive 2004/113 and in light of the foregoing, it is convincing to apply the principle of coherence and to, thereby, catch the inconsistency. Recitals 18 and 19 of Directive 2004/113 make it evident that the EU legislature establishes a principle of rule and exception as a starting point as far as Article 5 of Directive 2004/113 is concerned. Contrary to the submissions the Council put forth later, the ECJ concludes from the foregoing that Directive 2004/113 is based on the assumption that, for the purposes of applying the principle of equal treatment for men and women, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.⁵⁸ If that is the case, Article 5(2) of Directive 2004/113 completely inverts the principle that insurance premiums and benefits be gender-neutrally computed. This is because it takes away all the protection that Article 5(1) of Directive 2004/113 gives the individual, and that, above all, for an indefinite period of time (no compulsory reform of Article 5(2) of Directive 2004/113). The former clause clearly does not have the effect of a “derogation of limited scope” all the more because even the first option (the possibility of providing for transitional periods⁵⁹) runs totally dry. For Member States that had not provided for unisex premiums and benefits so far and do not want to introduce them gradually, this legal situation is being perpetuated rather than gradually abolished. However, having the principle of equal treatment between men and women within the countries of the European Union being applied outright and at the same time not at all regarding the same subject matter leads to patchy and inconsistent situation and runs

⁵⁵ This applies above all to the principle of proportionality in the area of public law. With regards to the legal situation in Germany, see MARCUS BIEDER, DAS UNGESCHRIEBENE VERHÄLTNISSMÄßIGKEITSPRINZIP ALS SCHRANKE PRIVATER RECHTSAUSÜBUNG (2007); MICHAEL STÜRNER, DER GRUNDSATZ DER VERHÄLTNISSMÄßIGKEIT IM SCHULDVERTRAGSRECHT (2010).

⁵⁶ *Contra* Lüttringhaus, *supra* note 5, at 296, 298; Looschelders, *supra* note 5, at 421, 426; Felix & Sangi, *supra* note 5, at 258, 259.

⁵⁷ Case 152/84, M. H. Marshall v Southampton and South-West Hampshire Area Health Authority, 1986 E.C.R. 723, at para. 36.

⁵⁸ *Cf.* Tobler, *supra* note, at 2041, 2050-2056.

⁵⁹ See *Consommateurs Test-Achats et. al*, *supra* note 6, at para. 21.

totally counter to one of the most important political objectives of the ECJ that is, the uniform application of EU law in all the Member States.⁶⁰

V. "Derogations of Limited Scope" – Possible Leeway for European Legislature?

The ECJ does not answer the obvious question of what it would consider a justifiable derogation of limited scope when sex-specific actuarial factors are being used in the area of the formation of insurance contracts. However it is submitted that the margin of discretion the EU legislature enjoys is more than narrow,⁶¹ all the more because Kokott, AG, considers the requisites set out in Article 5(2) of Directive 2004/113/EG to be too global and, thus, not apt to meet the test of proportionality⁶²: "[t]he use of a person's sex as a kind of substitute criterion for other distinguishing features is incompatible with the principle of equal treatment for men and women. It is not possible in that way to ensure that different insurance premiums and benefits for male and female insured persons are based exclusively on objective criteria which have nothing to do with discrimination on grounds of sex."⁶³ Should a new case reach the ECJ, it is likely that other Advocate Generals will concur with her or Van Gerven's opinion. In addition, it has to be noted that, pursuant to Article 19 TFEU, the Council needs to reach unanimity in order to reform Article 5 of Directive 113/2004. "In that sense, *Test-Achats* is here to stay," as Tobler aptly puts it.⁶⁴

VI. No Detrimental Treatment Based on Mere Group Membership

Finally, the ECJ's ruling is noteworthy because the debate as to the legitimacy of sex-specific insurance premiums and benefits raises a general problem that is not only linked to differences on the grounds of sex, but also, for example, to ones on the grounds of age. In both of the cases, the point is whether and, in particular, to what extent a human right or a fundamental right (within the meaning of Article 21 of the Charter) can allow the legislature, social partners (unions, employers' associations, works councils), or an individual employer to standardize their rules and framework by means of crude elements

⁶⁰ ULRICH HALTERN, *EUROPARECHT* (European Law, 2nd ed., 2007), at margin number 598; Purnhagen, *supra* note 5, at 690, 695.

⁶¹ Looschelders, *supra* note 5, at 421, 429; *C.f.* Case C-356/09, Christine Kleist, NZA 1401, 1403, at para. 41-43 (2010).

⁶² *Cf.* Opinion of Advocate General Kokott in *Consommateurs Test-Achats et. al*, *supra* note 6, at paras. 51, 61, 64-65.

⁶³ *Id.* at paras. 67.

⁶⁴ Tobler, *supra* note 5, at 2041, 2060; Financial Times Deutschland, *supra* note 6.

or proxies and, consequently, to treat the contractual partner (respectively, employees) to a greater extent as a group member rather than as an individual.⁶⁵

Age and sex are simple distinctions and easy to grasp. They minimize transaction costs and the examination of the individual case. However, it is doubtful that the premise that sex stands as a proxy is totally true. It 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.⁶⁶

There is research, for example, concerning the mortality of man and women in Bavarian monasteries of friars and convents proving that, under identical living conditions, the difference in average life expectancy is constantly between zero and two years, in favor of women. It is inferred from this finding that the rest of the gender-specific differences in mortality could consequently be attributed to behavioral and environmental causes. Other studies suggest that behavioral and environmental factors would also be crucial (for example: marital status, socioeconomic factors, employment/unemployment, area of residence, and smoking or eating habits). The pertinent research can be summed up to the effect that lifestyle can be conceived as a multidimensional factor that has a greater causal impact on the individual's life expectancy than the person's sex.⁶⁷ At 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.⁶⁸ 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." To provide an equal balance within the community of the insured persons is a basic principle of private insurance contracts.⁶⁹

The legal reason why sex cannot be used as a proxy is the existence of the prohibition on the discrimination on the grounds of sex. It is a human right and deviating from it demands

⁶⁵ See GABRIELE BRITZ, EINZELFALLGERECHTIGKEIT VERSUS GENERALISIERUNG (2008); TEMMING, *supra* note 23; PURNHAGEN, *supra* note 5, at 690, 698-702.

⁶⁶ Felix & Sangi, *supra* note 5, at 257, 260; Rolfs & Binz, *supra* note 5, at 714, 717; Even Looschelders, *supra* note 5, at 421, 426 (2011) admits this fact; also see Lüttringhaus, *supra* note 5, at 296, 298.

⁶⁷ Cf. Opinion of Advocate General Kokott in *Consommateurs Test-Achats et. al.*, *supra* note 6, at paras. 62-63; TEMMING, *supra* note 31, at 72, 73-74, with references concerning pertinent research in notes 16 and 17.

⁶⁸ *Id.* at para. 66.

⁶⁹ Because of these findings, I consider the concept of overinclusiveness to be more convincing than does Purnhagen, *supra* note 5, at 690, 701.

a strict scrutiny test.⁷⁰ Thus, if one applies this type of test as regards this prohibition, it is submitted that the use of sex as a proxy for life expectancy will not meet the test of necessity within the principle of proportionality. This is because mere correlation does not suffice when strictly scrutinizing this prohibition of discrimination. Causality is all that matters. Thus, other criteria (i.e. behavioral and environmental factors), which are resistant to manipulation and are, thus, not too dynamic, have to be chosen instead and must be in accordance with higher-ranking EU law. Another possible way of calculating and managing risk could be through *sekundäre Prämiendifferenzierung* (secondary differentiation of premiums).⁷¹ All in all, the ECJ's ruling and even more so the opinion of Kokott, AG,⁷² point toward a greater consideration of individual risks in the area of gender discrimination and is, thus, less group-oriented; this is in accordance with the individualistic notion of human rights as a basic principle. The contrary applies to the area of age discrimination: There, the ECJ has not yet found a consistent approach to tackle the pressing demographic problems of our labor market in an ageing society.⁷³ Even "wiggly lines" have been certified for the corresponding case law delivered by the ECJ in Luxembourg.⁷⁴ The ECJ's basic approach seems to be that, within the generally accepted span of working life (15 years until general retirement age), this prohibition of discrimination triggers an intermediate or even strict level of scrutiny, including the application of the principle of coherence, whereas from general retirement age onwards this prohibition of discrimination is hardly capable of even combating the most severe form of age discrimination (i.e. mandatory age retirement).⁷⁵

⁷⁰ The main reason that a strict level of scrutiny is justifiable is the fact that sex is a personal trait which cannot be easily altered, cf. TEMMING, *supra* note 23, at 473 *et seq.* From an insurer's perspective, it follows from that fact the insured person is less capable of influencing the risk to the disadvantage of the insurer. Interestingly, the reason for the attractiveness to use sex as a risk factor in insurance contracts is the same reason that it is so thoroughly questioned from a normative point of view.

⁷¹ Rolfs & Binz, *supra* note 5, at 714, 716-717.

⁷² Cf. Opinion of Advocate General Kokott in *Consommateurs Test-Achats et. al.*, *supra* note 6, at paras. 46, 62, 66-67.

⁷³ Ulrich Preis & Felipe Temming, *Der EuGH, das BVerfG und der Gesetzgeber - Lehren aus Mangold II* (The European Court of Justice, the Federal Constitutional Court and the legislature - lessons from Mangold II), NZA 185 (2010).

⁷⁴ Ulrich Preis, *Schlangenlinien in der Rechtsprechung des EuGH zur Altersdiskriminierung* ('Wiggly' lines in the ECJ's case law on age discrimination), NZA 1323 (2010).

⁷⁵ Cf. *Gisela Rosenblatt*, *supra* note 37, on the one hand, and Case C-447/09, Reinhard Prigge u.a., NZA 1039-1044 (2011), and Case C-555/07, Seda Küçükdeveci, 2010 E.C.R. I-365 on the other.

E. Consequences of the Judgment

How the insurance sector will react to this groundbreaking judgment remains to be seen. If the contractual clauses remain unaltered and, therefore, do not differentiate as to the risk factors that really stand behind the proxy sex, premiums will meet at an average or – even more likely – at the higher level in each case.⁷⁶ It is arguable the whole collective of insured persons will bear the additional costs.⁷⁷ An increase in premiums could be observed with regard to the so-called Riester pension (a capital funded old-age-pension), which is partly subsidized by the state.⁷⁸ Thus, certain insurance contracts would become more expensive for women (vehicle insurances or life assurance); others will become more expensive for the male counterpart (health insurance, pensions insurance). As all insurance companies across business segments are bound to offer unisex premiums and benefits, the danger of adverse risk selection is low and the question, therefore, is moot.⁷⁹

Nevertheless, as far as Germany is concerned, Section 20(2) phrase 1 of the *Allgemeines Gleichbehandlungsgesetz* (General Equal Treatment Law) and Section 12(1) No. 1 of the *Versicherungsaufsichtsgesetz* (Insurance Oversight Law) infringe EU law with respect to the equal treatment between men and women, as well as the prohibition of discrimination on the grounds of sex, in conjunction with Article 51(1) of the Charter.⁸⁰ They will have to be set aside, effective 21 December 2012. The ECJ's ruling will also have a precedential effect in the area of occupational pension schemes: If Article 5(2) of Directive 2004/113 is invalid the same must consequently apply for Article 9 lit. (h) of Directive 2006/54, which allows the use of sex as an actuarial factor in this area.⁸¹ In this context, the *Lindorfer* case, which dealt with the same problem in the area of pensions for the public service of the EU,⁸² also deserves mention. Furthermore, the *obiter dicta* in the ECJ's case law concerning occupational pension schemes within the framework of Article 157(1) TFEU also point towards the necessity to apply gender-neutral actuarial factors.⁸³

⁷⁶ Reich, *supra* note 5, at 283, 290; Thiery, *supra* note 4, at 28, 30; Rolfs & Binz, *supra* note 5, at 714, 717; Purnhagen, *supra* note 5, at 690, 702.

⁷⁷ Purnhagen, *supra* note 5, at 690, 702.

⁷⁸ Hofer, *supra* note 5, at 1334; Rolfs & Binz, *supra* note 5, at 714, 715.

⁷⁹ Rolfs & Binz, *supra* note 5, at 714, 717; *contra* Looschelders, *supra* note 5, at 421, 427.

⁸⁰ See also Case C-540/03, Parliament v. Council, 2006 E.C.R. I-5769 ("Family reunification").

⁸¹ Kerschbaumer, *supra* note 4, at 363, 364-365; Höfer, *supra* note 5, at 1334, 1335; Birk, *supra*, note 5, at 819.

⁸² Case C-227/04 P, Maria-Luise Lindorfer v. Council, 2007 E.C.R. I-6767 with a case note by Katharina Miller, *Geschlechtsdiskriminierung bei versicherungsmathematischen Berechnungen* (Gender discrimination in actuarial calculations), Streit 73 (2008).

⁸³ See *supra* note 31.

In contrast, it is doubtful that this uncompromising stance of the ECJ will be the same if it has to deal with cases where individuals are discriminated against on the grounds of age.⁸⁴ The case law indicates that the ECJ has already established a hierarchy with regard to the prohibited grounds listed in Article 21 of Charter.⁸⁵ In this context, the prohibition of discrimination on the grounds of age does not enjoy by far the same legal impact as is the case with sex, disability, sexual orientation, race, or ethnic origin. The same applies to nationality (Article 18 TFEU).

⁸⁴ Picked up by Thiery, *supra* note 4, at 28, 30; Lüttringhaus, *supra* note 5, at 296, 297.

⁸⁵ Compare Case C-356/09, Christine Kleist, NZA 1401-1404 (2010) and *Gisela Rosenblatt*, *supra* note 37; see also Felipe Temming, *The Palacios Case: Turning Point in Age Discrimination Law?*, European Law Reporter (ELR) 382, 388-390 (2007).