



In the opinion of Advocate General Juliane Kokott it is not compatible with EU fundamental rights to take the sex of an insured person into account as a risk factor in insurance contracts

The use of actuarial and statistical factors based on sex infringes the prohibition of discrimination on grounds of sex

Directive 2004/113/EC¹ prohibits discrimination on grounds of sex in the access to and supply of goods and services.

Directive 2004/113 also in principle prohibits sex from being taken into account as a factor in calculating insurance premiums and benefits in respect of insurance contracts which were concluded after 21 December 2007. However, a derogation² is provided for in the directive which allows Member States to permit sex-specific differences in insurance premiums and benefits in so far as sex is a determining risk factor and that can be substantiated by relevant and accurate actuarial and statistical data. That derogating provision is under examination in the present case.

The consumer organisation Association Belge des Consommateurs Test-Achats and two private individuals brought an action before the Belgian Constitutional Court for annulment of a Belgian provision transposing Directive 2004/113. Thereupon, the Belgian Constitutional Court asked the Court to rule on the compatibility of the derogation in Directive 2004/113 with higher-ranking law, namely with the principle of equal treatment for men and women under European Union law.

In her Opinion of today Advocate General Juliane Kokott emphasises first the great importance of the principle of equal treatment of men and women under EU law. Strict standards must therefore be imposed in the present case. Differences in treatment could at most be justified by clearly demonstrable biological differences between the sexes.

Secondly, the Advocate General discusses whether the positions in which men and women find themselves with regard to the determining risk factors in respect of insurance services may differ significantly legally. In that regard, the Advocate General is of the opinion that the exception in question does not relate to any clear biological differences between insured persons. On the contrary, it concerns cases in which different insurance risks can at most be associated statistically with gender. However, many other factors also play an important role in the evaluation of insurance risks. Thus, the life expectancy of insured persons is above all strongly influenced by the economic and social conditions of each individual, such as, for example, the kind and extent of the professional activity carried out, the family and social environment, eating habits, consumption of stimulants and/or drugs, leisure activities and sporting activities.

The Advocate General takes the view that it is legally inappropriate to link insurance risks to a person's sex. Differences between people, which can be linked merely statistically to their sex, must not lead to different treatment of male and female insured persons when insurance products are developed. In that connection, the Advocate General points out, in particular, that gender is a

¹ 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 (OJ 2004 L 373, p. 37).

² Article 5(2) of Directive 2004/113.

characteristic which, like race and ethnic origin, is inseparably linked to the insured person as an individual and over which he has no influence. In addition, a person's gender, unlike, for instance, his age, is not subject to any natural changes.

The Advocate General concludes that the use of risk factors based on sex in connection with insurance premiums and benefits is incompatible with the principle of equal treatment for men and women under European Union law. She therefore proposes that the Court should declare the relevant derogating provision in Directive 2004/113 to be invalid.

For reasons of legal certainty the Advocate General however takes the view that that declaration of invalidity should only have effect for the future. In addition, she proposes a transitional period of three years following the delivery of the judgment by the Court.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355