Developments

Injustice by Generalization: Notes on the *Test-Achats* Decision of the European Court of Justice

By Erich Schanze[*]

A. Introduction: The *Test-Achats* Case

On 11 January 2013 the German quality newspaper "Süddeutsche Zeitung" reported about the effects of introducing the new unisex insurance tariffs mandated by a decision of the European Court of Justice on 1 March 2011.[1] The result is summarized in the headline: "Für alle teurer" ("More expensive for all"). According to a study the leveling of gender specific risks led to largely insignificant benefits for the former disadvantaged sex but to partially dramatic rises of the premium of those who were formerly considered better risks. The insurance industry which has been operating a dual structure since 21 December 2012 is considered to be the winner of the legal change.

The reference is the notorious case *Association belge des Consommateurs Test-Achats ASBL et al*.[2] The preliminary ruling concerns the claim of a Belgian consumer association and, in particular, two Belgian gentlemen, Mr. van Vugt and Mr. Basselier who felt discriminated against – despite the existing anti-discrimination policy of the EU – since they were charged a higher premium in their life insurance than women of the same age and health. The Court voided Art. 5 (2) of the Council Directive 2004/113 EC of 13 December 2004, which provides for a general rule, banning actuarial factors related to sex in the provision of insurance and other financial services, but also provides for a derogation of this rule by allowing Member States to maintain proportionate differences in individuals' premiums and benefits.

The actuarial tables show that men are a significantly higher risk in life insurance. The Court, on its face, tackles a contradiction in the Directive. This legislation starts from the broad rule that the use of gender is "discriminatory" as such, even in structuring private

[*]Professor Dr. Dr. h.c. Erich Schanze LL.M. (Harv.), Universitätsstrasse 6, 35032 Marburg, Germany. http://www.schanze.com. Email: e@schanze.com. This is an abridged online version of a paper to be published in a printed version in June 2013 in a Festschrift in honor of Professor Jan-Fridthjof Bernt, former rector of the University of Bergen and colleague at the Faculty of Law at Bergen.

[1] Andreas Jalsovec, *Für alle teurer* (Costly for all), 9 SÜDDEUTSCHE ZEITUNG 19 (2013).

[2] Case C-236/09, *Association des Consommateurs Test-Achats ABSL, Yann van Vugt, Charles Basselier v. Conseil des ministres*, 2011 E.C.R. I-00773, available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-236/09 [hereinafter *Test-Achats*](last accessed: 1 February 2013).

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transactions. In view of this rule the subsequent "privilege" of allowing the use of gender in the specific setting of insurance pricing might look odd. The judges were confronted with drafting inconsistencies, produced on the European crossroads of civil rights alacrity and realists' fatigue. If an activity or factor is stigmatized as discriminatory (to use gender as a discriminatory criterion), the stigma cannot be removed by excepting a subgroup of "discriminatory" cases. The judges had to do away with it in some way. Instead of looking at the general rule and its inherent contextual problems, which will be outlined in this contribution, they took the easy way out, and smartly deleted the exception to the general rule without examining the doubtful premises of the whole regulation.

The legal result of this sweeping analysis is straightforward. The Court petrifies the general notion that the use of an actuarial classification based on gender is discriminatory as such. The Court's decision is final for all Member States because it involves the violation of basic rights. It cannot be revised by any parliamentary or other political decision in one of the Member States in the future. Accordingly, on 13 January 2012 the Commission issued guidelines[3] following basically the ruling of the Court. From 21 December 2012 onwards all insurances and other financial services within the Union will have to be offered solely with unisex tariffs "without any possible exception"[4]. In fall of 2012 we saw a run of customers for signing "old", "cheaper" insurance contracts. There will be a costly dual insurance regime for a long time in the future. For insiders it was obvious that the industry would appreciate the windfall chance of "adjusting" the premium systems.

Before *Test-Achats* and its implementation by the Commission, the use of gender as a rating factor varied between the Member States of the EU, with an uneven differentiation between the insurance products. Most States allowed its use in all sectors; Belgium, Cyprus and the Netherlands showed a mixed picture.[5] In the United States of America, we find variations from State to State, with a strong bent toward allowing the use.[6] Only the State

[3] European Commission, Guidelines on the Application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-239 (*Test-Achats*), COM (2011) 9497 final (Dec. 22, 2011), *available at:* http://ec.europa.eu/justice/gender-equality/files/com_2011_9497_en.pdf [hereinafter European Commission*, Guidelines*](last accessed: 1 February 2013).

[4] *Id.* at para. 5.

[5] *Id.* at Annex 1-2.

[6] At the time of writing, a comprehensive draft article on this matter appeared on the Internet: Ronen Avraham, Kyle Logue & Daniel Schwarcz, *The Anatomy of Insurance Anti-Discrimination Laws* (University of Michigan Law School Public Law and Legal Theory Research Paper Series No. 289, August 2012), *available at:* http://ssrn.com/abstract=2135800; for the special case of pensions the US Supreme Court has declared unequal treatment of men and women concerning the contributions or benefits of pension plans as inconsistent with the Civil Rights Act of 1964, *see City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370 (1978) (contributions); *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris,* 463 U.S. 1073, 103 S. Ct. 3492 (1983) (benefits); I am grateful to my colleague John H. Langbein, Yale Law School, for directing my attention to these cases.

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of Montana prohibits the use of gender as a rating factor for all insurance products.[7] This is, however, a highly debated political issue in this State. A recent bill abandoning this rule passed the Montana House, but was vetoed by the governor;[8] the revision came up again in the 2012 Montana campaign.[9]

The (former) UK Financial Secretary to the Treasury (now Minister of State for Work and Pensions) Mark Hoban commented on the decision of the EU Commission to follow essentially the ruling of the ECJ, speaking before the House of Commons on 20 June 2012: "The government were very disappointed with this result, which it expects to have a negative impact on consumers . . . The judgment goes against the grain of the common sense approach to equality which the UK government wants to see [*sic*]."[10]

In the European academic legal literature we see some eye-rubbing. After more or less elegant exegetic exercises in the wording of some relevant European legislation, some express a final feeling of uneasiness with the result.[11] Others are excited; they feel that we witness a major cultural achievement, the hallmark of anti-discrimination jurisprudence.[12] Still, others defend the technical reasoning of the Court as an inescapable "logical" consequence of the legal principle of equality embodied in the Council Directive of 2004.[13]

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[7] Avraham, Logue & Schwarcz, *supra* note 6. The authors point out that the distinction by gender in life insurance is prohibited in North Carolina, *id.* at 33, 37. They base their finding on 11 North Carolina Administrative Code 12.0304 which relates to discrimination in the insurance application process for health and life insurance, Correspondence between Kyle Logue and Erich Schanze (Oct. 5, 2012) (on file with author).

[8] H.B. 283, 62nd Leg., Reg. Sess. (Mont. 2011), *available at*: http://data.opi.mt.gov/bills/2011/billpdf/HB0283.pdf (vetoed by Governor Brian Schweitzer on 6 May 2011, last accessed: 1 February 2013).

[9] Rich Sherlock, *Unisex Insurance the Right Choice for Montana* THE BOZEMAN DAILY CHRONICLE, June 4, 2012 (obviously my personal favorite newspaper), *available at:* http://www.bozemandailychronicle.com/opinions/article_ae0e005e-ae5d-11e1-8e85-001a4bcf887a.html .

[10] *See* Out-Law.Com, *UK will obey barmy Euro unisex-insurance rules from 2013*, THE REGISTER (July 5, 2012), http://www.theregister.co.uk/2011/07/05/gov_will_implement_ecj_insurance_ruling_on_gender_but_only_for_new_contracts/.

[11] *See e.g.*, Philippa Watson, *Equality, Fundamental Rights and the Limits of Legislative Discretion: Comment on Test-Achats*, 36 (6)EUROPEAN LAW REVIEW 896, (2011) (She seems to endorse the general policy line but then obviously feels at the end of the paper that not every different treatment is discriminatory); In a similar vein *see* Eugenia Caracciolo di Torella, *Gender equality after Test Achats*, 13(1) ERA FORUM 59; for a current account of the literature see the internet publication of *Test-Achats*, *supra* note 2.

[12] E.g. Felipe Temming, *Case Note – Judgment of the European Court of Justice (Grand Chamber) of 1 March 2010: ECJ finally paves the way for unisex premiums and benefits in insurance and related financial contracts*, 13 GERM. L.J. 105 (2012), *available at* http://www.germanlawjournal.com/pdfs/Vol13-No1/PDF_Vol_13_No_01_105-123_Developments_Temming.pdf.

[13] E.g. Jean-Marc Binon, *21 décembre 2012: 'L'Apocalypse maya' pour le sexe en assurance?*, 118 (3) REVUE DE DROIT COMMERCIAL BELGE 22 (2012).

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In most legal statements there is an overt or implicit satisfaction that the Court remained unimpressed vis-à-vis the "economic" representations of the European insurance lobby. Many commentators blame the industry for having pushed the strange exception to the "principle" of "gender neutrality" in the Anti-Discrimination Directive of 2004. They were probably unaware of the "eclipse" of public choice inherent in these representations.

A serious consideration of who is really benefiting from the ruling is absent in the legal literature. However, there might be even a good *legal* reason for engaging in this exercise. No doubt, we are here in the heights of civil rights jurisprudence, and it seems plain that these rights cannot be traded for money. Nevertheless, decisions like *Test-Achats* concern the regulation of an industry. Starting in 2005, the European Commission has mandated a system of regulatory impact analysis.[14] This policy addresses legislative acts in the Union. However, is the Court completely exempt from this fundamental policy if the judges are engaged in regulatory legislation, as in the instance before us? Is Minister Mark Hoban's statement on the contradiction of the ruling to the "grain of common sense approach to equality" purely political rhetoric? The deeper questions are: What do we want to achieve if we legislate on gender equality? Do we talk about symmetries or about discrimination? What is the role of highest European court if confronted with confused legislation?

B. The Stony Road to Actuarial Justice

Lawyers do not like to calculate. Risk and uncertainty are alien terms. Statistics are a nightmare.

In 1961, Guido Calabresi published his first article on accident law[15] which would eventually be incorporated in his highly influential book *The Costs of Accidents - A Legal and Economic Analysis*.[16] Together with R.H. Coase's article on "The Problem of Social Cost,"[17] Calabresi's work is considered to be the starting point of the law and economics

[14] *See* EU Commission, *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: Smart Regulation in the European Union*, COM (2010) 543 final (Oct 8, 2010); EU Commission, *Impact Assessment Board Report for 2011*, SEC (2012) 101 final (Feb. 1, 2012).

[15] Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961); Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Cost*, 78 Harvard L.J. 713, 716 (1965). The second article inspired me to enter into law and economics in 1968/9. Later, I translated it into German: HEINZ-DIETER ASSMANN, CHRISTIAN KIRCHNER & ERICH SCHANZE, ÖKONOMISCHE ANALYSE DES RECHTS (2nd ed. 1993).

[16] GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

[17] R.H. Coase, *The Problem of Social Cost*, 3 *Journal of Law & Economics* 1 (1960). This paper is considered the most cited paper in economics, and it is specifically cited as one of the two papers for awarding the Nobel Memorial Prize to R.H. Coase in 1991.

movement.[18] Today, tackling policy problems in tort law, without considering the methodology presented by Calabresi, would look odd.

In a nutshell, Calabresi names two objectives of automobile accident law: compensation of victims and deterrence of accidents. While deterrence is largely a matter of criminal sanctions, compensation will, in his view, only be achieved by strict liability backed by mandatory insurance. To avoid free riding, the insurance pool has to be sensitive to risk factors. This leads to a methodology of separating and detailing risk-prone "activities" which have to be distinguished and classified by "comparisons".

In the 1960's the scheme used in German car insurance was a classification based on engine horsepower (hp). My first Beetle had 34 hp, and I paid the specified sum in the bracket which, due to representations of VW, hiked dramatically above 34 hp. The French worked with tax *cheveaux vapeur* (CV), hence the legendary 2CV, and its own insurance class. This was a gender neutral solution which allowed the insurance industry to obscure both their overheads and all kinds of cross subsidies.

Calabresi turns the lawyers' view to the fact that a male driver of 21 with an *Austin Healy 3000* is a different "activity" than a lady in her best age driving a *Rover 3 Litre*. Driven by more competition and economic insight, the existing actuarial knowledge of significant risk factors entered into the insurance system, its tariffs, and *bonus/malus* policies during the last 40 years. This led to much more sophisticated incentive schemes, as well as a considerably more just allocation of contributions to the insurance pools and the pay-off structures. For better or worse, gender is - in most insurance branches - a significant biological, and hence "objective", easily observable, risk factor. Women have to pay higher premiums in those instances, where their longer life expectancy increases the total payout, and in health insurance, where the costs of pregnancy and childbirth are included - a debatable point, indeed. Otherwise, women are mostly the "better" risks, sometimes with a dramatic distance to men.

It is interesting that important European languages differ at this point for expressing the mechanisms of separating and detailing risks, and allotting liabilities and payments. In the English and French technical usage of risk analysis we talk about "discriminating factors" or "facteurs discriminatoires" for developing risk classifications. A German would be less inclined to use the term "diskriminieren" in this instance; this term still has a clear negative bent. The word "unterscheiden" or "differenzieren" (to distinguish) would be used. The official language of *Test-Achats* is French; most debates about "discrimination" and the European Directive on this matter are in English.

[18] Erich Schanze, *Ökonomische Analyse des Rechts in den U.S.A. – Verbindungslinien zur realistischen Tradition*, *in* ÖKONOMISCHE ANALYSE DES RECHTS, *supra* note 15 at 2, 2-3.

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The terms "discrimination" and "distinction" and the underlying involvement in a classification of activities relate to a general jurisprudential problem that has been developed in the work of Gabriele Britz as "injustice by generalization" ("Generalisierungsunrecht").[19] There is an inherent injustice in any statistical classification and its use for developing norms of general application. If I use age, gender, wealth, qualification, status, or even the general character of my car (e.g. sports car, family car, SUV) as a relevant "discriminating" factor, a single person who is associated with this factor may be perfectly able showing in the individual case, that she or he may never be part of this risk, attitude, performance, or other characteristic, relevant for the classification. She or he suffers a necessary personal injustice by virtue of the general application of a norm.

On closer inspection, the discriminatory or mere distinctive nature of a classification is related to history, the societal context, exercised derogatory attitudes, and the sensitivity of groups and individuals related to it. This point will be treated below. Before, I will argue that a shift of reference to gender neutrality does not resolve potential discrimination problems. It constitutes a new classification in itself which may produce a new kind of "discriminatory" injustice by generalization. This requires a short impact assessment[20] of gender neutral tariffs.

C. Whose Benefit? A Short Exercise in Secondary Effects of Gender Neutral Tariffs

An economic analysis of banning the use of the primary risk factor of sex in the calculation of insurance premiums and benefits shows problematic consequences.[21] Considering the

[19] GABRIELE BRITZ, EINZELFALLGERECHTIGKEIT VERSUS GENERALISIERUNG 15 et seq. (2008); Kurt Pärli, Verbot geschlechtsspezifischer Prämien bei Versicherungsverträgen, 1(2) HAFTUNG UND VERSICHERUNG (HAVE) / RESPONSABILITÉ ET ASSURANCES (REAS) 153, 158 (2011) [hereinafter Britz, *Einzelfallgerechtigkeit*]. Gabriele Britz is a judge at the German Constitutional Court.

[20] On the methodology of legal impact assessment and its problems, see Erich Schanze, *Assessing the Impact of Economic Law*, *in* ECONOMIC LAW AS AN ECONOMIC GOOD: ITS RULE FUNCTION AND ITS TOOL FUNCTION IN THE COMPETITION OF SYSTEMS 65 (Karl M. Meessen ed., 2009).

[21] Oxera, *Gender and Insurance: Unintended Consequences for Unisex Insurance Pricing,* OXERA AGENDA (March 2011), http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/Oxera-article---Gender-and-insurance-(post-ruling)_1.pdf?ext=.pdf [hereinafter Oxera, *Gender and Insurance*]; Oxera, *The use of gender in insurance pricing: analyzing the impact of a potential ban on the use of gender as a rating factor* (Association of British Insurers, Paper No. 24, 2010), *available at* http://www.abi.org.uk/Publications/54902.pdf (This study is a short sequel of the broader analysis of Oxera's study for the Association of British Insurers). Both sources are industry related economic analyses, but, in my view, there is no doubt in the seriousness of both studies. See also Hato Schmeiser, Tina Störmer, & Joel Wagner, *Unisex Insurance Pricing: Consumers' Perception and Market Implications* 23 (University of St. Gallen, Working Papers on Risk Management and Insurance No. 112, 2012), available at: http://www.ivw.unisg.ch/forschung/grundlagenforschung/~/media/internet/content/dateien/instituteundcenters/ivw/wps/wp112.ashx [hereinafter Schmeiser *et al.*, *Unisex Insurance Pricing*].

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effect of factors other than sex in insurance pricing, the new "neutral" price still has to take account of the factual gender mix in the pool. For example, gender related private choices of the insured are not affected by the Directive. A preference for colors of cars of the different sexes, or attitudes towards housing, dressing or vacationing, for example, may lead back to gender sensitive actuarial fact sets.

The example in a recent study[22] starts from the realistic assumption that a larger cohort of women drives less powerful cars than men. If horse power or engine size are being used as risk factors, the weighted average unisex prices will still reflect part of the differences in risk that relates to gender. From the premises of the European policy one might argue that in these cases the "discrimination" is not made public. But obviously, we would have to scrutinize the intensity of the "discriminatory character" of the "secondary factors". The study concludes: "In policy terms, it would therefore be necessary to specify how significant the actual risk differential would need be, combined with the level of gender correlation, to make a factor acceptable as a pricing factor".[23]

To break this down into a workable legal rule is obviously a heavy task. It would likely confront us with a significant lack of legal certainty, and would encourage a race for loopholes and circumvention stratagems.[24]

The pricing restriction associated with unisex tariffs will likely lead to the development and use of new factors for risk calculation. If an easily observable and relevant factor like gender is ruled out, the insurers will resort to more complex direct and indirect factors which might, in some instances, intrude even more into the personal sphere of the individual. In all likelihood they would be also costlier. Oxera cites the potential use of psychometric tests, detailed medical information, lifestyle choices, and telematics, that is, factors monitored in real life being tracked down while driving.[25] Moreover, targeted marketing of insurance (e.g. in the relevant magazines), bundling insurance with other single-gender-attractive goods, or directly addressing mainly the "cheaper" cohort, are sales policies, which we will likely see in the future.[26]

A recent consumer survey by the University of St. Gallen analyzes ethically acceptable price differences for differentiated insurance premiums, including the risk criterion of gender, in

[22] Oxera, *Gender and insurance*, *supra* note 21 at 2 with statistical data.

[23] Oxera, *Gender and insurance*, *supra* note 21 at 3.

[24] On this *see* Erich Schanze, *Hare and Hedgehog Revisited: The Regulation of Markets That Have Left Regulated Markets*, 151 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 162 (1995).

[25] Oxera, *Gender and insurance*, *supra* note 21 at 3-4.

[26] Oxera, *Gender and insurance*, *supra* note 21 at 4.

the UK, Germany, France, Italy and Switzerland.[27] They look at four dimensions: (1) the implications of the general policy perspective concerning the structure of key products in the relevant countries, (2) an analysis of the different views on price calculation, (3) an analysis of the impact of the risk factor 'gender' in comparison to other factors, and (4) the customer perspective on risk factors and an assessment of the customers' opinions on the fairness of price differences.

The empirical study shows that concerning the methodology of pricing, the gender criterion is accepted but gender and age are the least accepted among other criteria, especially in annuity and health insurance. Concerning gender specific price differences, the highest acceptance is found in motor insurance followed by health and life, as well as annuity insurance. "[T]he results show, that, despite the ECJ judgment, the gender criterion is seen far less discriminatory than judged by the court." In view of the higher overall cost, the study expects regulatory arbitrage which means it may move policyholders away from the general jurisdiction of the EU.[28]

From a judicial point of view, one might argue that the consumers' perspective is irrelevant for obtaining an "enlightened" rights-oriented view of the matter.[29] But exploring this argument would lead to the conundrum of paternalism, the battle for competences, and the issue of democratic legitimacy in the EU which is beyond the scope of this paper.

D. Equality and Compensation: Solidarity and Affirmative Action

"Equality is a polymorphous concept which carries a number of different meanings. Its referent may be the right of political participation, the system of income distribution, the social and legal position of disfavored groups".[30] Anti-discrimination policies are equality issues addressing the *change* of the social and legal status of individuals and groups. In the classical legal paradigm these legal policies are, in a sense, unidirectional, commanding and enforcing respect for the equal dignity of individuals or groups who are affected by prejudice or the denial of rights in a given state of society. This point is also reflected in the framework of the European Treaty. Indeed, in *Test-Achats* the Court recites "Article 3 (3) TEU, which provides that the European Union is to combat social exclusion and

[27] Schmeiser et al., *Unisex Insurance Pricing*, *supra* note 21..

[28] Schmeiser et al., *Unisex Insurance Pricing*, *supra* note 21 at 18. Candidates for legal arbitrage are *Switzerland*, and the EAA States *Norway, Iceland* and *Liechtenstein*. The EEA States are not legally obliged to follow post-signing EU law, including its interpretation by the European Court of Justice, *see* Agreement of the European Economic Area article 6, Jan. 1, 1994, 1801 U.N.T.S.3.

[29] This seems to be an implicit assumption in most legal commentaries of *Test-Achats*: *see supra* notes 11-13.

[30] EDGAR BODENHEIMER, JURISPRUDENCE - THE PHILOSOPHY AND METHOD OF THE LAW 229 (rev. ed. 1974).

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discrimination and to promote social justice and protection, equality between men and women . . . and with Article 8 TFEU, under which, in all its activities, the European Union is to aim to eliminate inequalities, and to promote equality, between men and women."[31]

Obviously, the Court starts from the correct premise that anti-discrimination measures are working in a process. They are directed towards change, in a tension between fact and aspiration, safeguarding and promoting the dignity, autonomy and opportunity of those who have been disparaged.[32] However, in a sort of judicial self-restraint, the Court takes for granted that the use of actuarial factors related to sex *is* discriminatory as such. In this concept, "discrimination" works in every direction. "Consequently, it was permissible for the EU legislature to implement the principle of equality for men and women – more specifically, the application of the rule of unisex premiums and benefits - gradually with appropriate transitional periods."[33] The targets of the "discrimination" in the case, two men, should have inspired the Court to have a second look. There is neither an analysis of the relevant problem of "injustice by generalization", nor do we find a sensibility for the historical context of discrimination against women, including the specific, much debated issue of women in health insurance, carrying the burden of birth.[34]

This leads to the institutionalization of measures of solidarity. Solidarity implies compassion and redistribution. In this aspect, it goes beyond using gender "neutral" criteria, as obviously contemplated by the EU legislation and its endorsement by the Court. It cannot be achieved by the stroke of a pen. The calibration of redressing disadvantages associated with overt historical discrimination is a complex task which has to start from the bottom of fact sets and the development and application of criteria, and not by re-iterating first principles, and by an indifference regarding unintended consequences.

Society has to make difficult democratic choices concerning the fine lines how of far measures of compensation are workable in view of existing entitlements, responsible budgeting, and externalities. If we are prepared to take rights seriously, these complex

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[31] *Test-Achats*, *supra* note 2 at para. 19.

[32] *Test-Achats*, *supra* note 2 at para. 20 ("In the progressive achievement of that equality. . . "; for a detailed and (in this part illuminating) discussion of this problem *see* JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG - BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS 499-515 (1992) (includes ample references to the excellent treatment by DEBORAH L. RHODE, JUSTICE AND GENDER - SEX DISCRIMINATION AND THE LAW (1989) : "...die Verwirklichung von Grundrechten [ist] ein Prozeß, *der die private Autonomie gleichberechtigter Bürger nur im Gleichschritt mit der Aktivierung ihrer staatsbürgerlichen Autonomie* sichert," *Id.* at 515). In my view *autonomy* alone does not capture core problem, but it is rather our conception of the essentials of a *dignified life* (in his Frankfurt lecture on Kant, Max Horkheimer used the term: "*anständiges Leben*"), which allows a judgment on when a discriminatory criterion turns wrong.

[33] *Test-Achats*, *supra* note 2 at para. 23.

[34] *See* Britz, *Einzelfallgerechtigkeit*, *supra* note 19 at 110-113.

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societal choices have to be reflected in legislative and judicial acts. The great pains of formulating good policy in the five opinions in the *Bakke* case[35] are in sharp contrast to the laconic statements in *Test-Achats*[36]. This seems to be not just a matter of the different styles of writing judgments in the US and the EU. If we look once again at the lacking quality of the legislation to be examined by the European Court of Justice, there may have been a latent fear of *getting lost in translating* a half-cooked European anti-discrimination policy, and hurting the precarious but most ambitious current state of the European legislation process.[37]

E. The Role of the European Court of Justice: Legal Smartness or Common Sense?

The simplicity of gender neutrality as a pervasive policy not only for public interventions but also for regulating private choices is perplexing. In the past, in most States legislation and courts agreed on making a difference between the operation of anti-discrimination rules in the public and private spheres. It is plain that many choices in society between private parties may be considered discriminatory by those who are rejected. In a competitive market there are product choices, in which the motivations are left unchecked. There may be one job, and two equally talented applicants. Even marital choices may be regarded as "discrimination". This rough differentiation between a "direct effect" of fundamental rights and "extended effects" (German term: "Drittwirkung") has led to subtle case law.[38]

Insurance is a borderline case. Even if the industry is privately organized, the notion of pooling risks, which is attached to the "private" insurance contract, embraces a notion of publicity. It is no wonder that this industry attracted anti-discrimination regulation, basically operating on a branch-by-branch basis, including the treatment of individual obvious or latent discriminatory practices. The 2012 St. Gallen and US studies, mentioned above,[39] treat the variations of a detailed framework in various States, including the question whether there is a significant demand for further regulation.

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[35] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); The five opinions in the 5 to 4 split court in *Bakke* demonstrate a concern about matters of equality which does not find any intellectual counterpart in the reasoning within the proceedings of *Test-Achats*. One could argue that race is not gender, and that *Test-Achats* is not formally an affirmative action case. That misses the point because, as a matter of fact, *Test-Achats* concerns, if at all, a sort of reverse discrimination. *See also Gratz v. Bollinger*, 539 U.S. 244; *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[36] *Test-Achats*, *supra* note 2.

[37] In the light of the subsidiarity principle the naïve observer wonders why the European legislation is tackling these issues so prominently.

[38] For detail *see* Britz, *Einzelfallgerechtigkeit*, *supra* note 19 at 140-207.

[39] Schmeiser et al., *Unisex Insurance Pricing*, *supra* note 21 ; Avraham et al., *supra* note 6.

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Norway is one of the most energetic and successful promoters of anti-discrimination policies. The Norwegian insurance law ("Forsikringsvirksomhetsloven") confirms in the area of life insurances in chapter 9 section 3a that sex may be a factor for determining the person's coverage of risk and for calculating the premiums and benefits.[40]

Test-Achats is a case in which the European Court of Justice *legislates by decision* a rights issue in a manner which is not consonant with the function and responsibility of a high court with competence to make final decisions. The irreversible nature of the judgment should have necessitated special caution. The inquiry in the nature of the matter and its consequences is, at best, superficial. If a high political representative of a large Member State can make a claim, supported by evidence that a decision "goes against the grain of the common sense approach to equality", this is not helpful for the recognition of the Court and the state of the Union. There may be "logical" reasons for "amending" ill-reasoned contradictory legislation in the EU, but that does not relieve the Court from investigating whether the consequences of a decision are reasonable and adequate concerning the complexity of the issue.

Test-Achats will likely not become a classic in civil rights jurisprudence, but rather an example of an issue, for which *the time was not ready to legislate*. The generality of the decision may arouse interest, and even excitement in some circles. It is a disservice for the matter of equality of gender. Looking at the effect to consumers it appears to be an irony that a consumer organization started this lawsuit.

[40] Lov om forsikringsselskaper, pensjonsforetak og deres virksomhet mv [Law on Insurance Companies, Pension Funds, and their Activities]., § 9-3a "Kjønn som faktor ved bergning av risiko" [Gender as a factor in calculating risk], as amended by statute of 4 June 2010 (source: IKR. 4 June 2010 iflg. Res 4 June 2010, 771) (Nor.). In the materials there is an extensive discussion of the law in the light of one complaint in Norway, and the EU regulation. In the requisite procedure Norway has implemented the original *Directive* as part of the *EEA Agreement*. In the enactments and considerations Norway has avoided the flawed wording of the *Directive* but has rather taken a pragmatic attitude for implementing the *insurance* issue in its proper close legislative context. The associated move to equal treatment of contributions for and benefits of *pensions* (for the US, *see* sources cited *supra* note 6) does not produce a convincing additional argument for "symmetrical equality" in the sense of *Test-Achats*. It underlines the necessity of both a case-by-case approach and of a better understanding what discrimination is about. It is up to the Norwegian legislature and eventual relevant litigation before the *EFTA Court* whether Norway or one of the other EEA States will follow the "overshooting" ruling of *Test-Achats*. I am grateful to my colleagues Karl Harald Søvig and Sigrid Eskeland Schütz, University of Bergen, for providing me with the relevant texts, translation and materials, and discussion; of course, all misunderstandings remain mine.