JUDGMENT OF THE COURT (Grand Chamber)

1 March 2011 *

In Case C-236/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour constitutionnelle (Belgium), made by decision of 18 June 2009, received at the Court on 29 June 2009, in the proceedings

Association belge des Consommateurs Test-Achats ASBL,

Yann van Vugt,

Charles Basselier

v

Conseil des ministres,

* Language of the case: French.

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and A. Arabadjiev, Presidents of Chambers, E. Juhász (Rapporteur), G. Arestis, A. Borg Barthet, M. Ilešič, L. Bay Larsen, P. Lindh and T. von Danwitz, Judges,

Advocate General: J. Kokott,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 1 June 2010,

after considering the observations submitted on behalf of:

— Association belge des Consommateurs Test-Achats ASBL, Mr van Vugt and Mr Basselier, by F. Krenc, avocat,

— the Conseil des ministres, by P. Slegers, avocat,

— the Belgian Government, by L. Van den Broeck, acting as Agent, and P. Slegers, avocat,

— Ireland, by D. O'Hagan, acting as Agent, and B. Murray, BL,

— the French Government, by G. de Bergues and A. Czubinski, acting as Agents,

— the Lithuanian Government, by R. Mackevičienė, acting as Agent,

— the Finnish Government, by J. Heliskoski, acting as Agent,

— the United Kingdom Government, by I. Rao, acting as Agent, and D. Beard, Barrister,

— the Council of the European Union, by M. Veiga, F. Florindo Gijón and I. Šulce, acting as Agents,

— the European Commission, by M. Van Hoof and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 September 2010,

gives the following

Judgment

1 This reference for a 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 (OJ 2004 L 373, p. 37).

2 The reference has been made in proceedings brought by the Association belge des Consommateurs Test-Achats ASBL, Mr van Vugt and Mr Basselier against the Conseil des ministres (Council of Ministers) of the Kingdom of Belgium for annulment of the Law of 21 December 2007 which amended, as regards the treatment of gender in insurance matters, the Law of 10 May 2007 combating discrimination between men and women (*Moniteur Belge* of 31 December 2007, p. 66175; 'the Law of 21 December 2007').

Legal context

European Union ('EU') law

3 Directive 2004/113 was adopted on the basis of Article 13(1) EC. Recitals 1, 4, 5, 12, 15, 18 and 19 in the preamble to that directive are worded as follows:

'(1) In accordance with Article 6 of the Treaty on European Union, the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States, and respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950] and as they result from the constitutional traditions common to the Member States as general principles of Community law.

...

(4) Equality between men and women is a fundamental principle of the European Union. Articles 21 and 23 of the Charter of Fundamental Rights of the European Union ("the Charter") prohibit any discrimination on grounds of sex and require equality between men and women to be ensured in all areas.

(5) Article 2 of the Treaty establishing the European Community provides that promoting such equality is one of the Community's essential tasks. Similarly, Article 3(2) of the Treaty requires the Community to aim to eliminate inequalities and to promote equality between men and women in all its activities.

…

(12) To prevent discrimination based on sex, this Directive should apply to both direct discrimination and indirect discrimination. Direct discrimination occurs only when one person is treated less favourably, on grounds of sex, than another person in a comparable situation. Accordingly, for example, differences between men and women in the provision of healthcare services, which result from the physical differences between men and women, do not relate to comparable situations and therefore, do not constitute discrimination.

…

(15) There are already a number of existing legal instruments for the implementation of the principle of equal treatment between men and women in matters of employment and occupation. Therefore, this Directive should not apply in

this field. The same reasoning applies to matters of self-employment insofar as they are covered by existing legal instruments. The Directive should apply only to insurance and pensions which are private, voluntary and separate from the employment relationship.

…

(18) The use of actuarial factors related to sex is widespread in the provision of insurance and other related financial services. In order to ensure equal treatment between men and women, the use of sex as an actuarial factor should not result in differences in individuals' premiums and benefits. To avoid a sudden readjustment of the market, the implementation of this rule should apply only to new contracts concluded after the date of transposition of this Directive.

(19) Certain categories of risks may vary between the sexes. In some cases, sex is one but not necessarily the only determining factor in the assessment of risks insured. For contracts insuring those types of risks, Member States may decide to permit exemptions from the rule of unisex premiums and benefits, as long as they can ensure that underlying actuarial and statistical data on which the calculations are based, are reliable, regularly up-dated and available to the public. Exemptions are allowed only where national legislation has not already applied the unisex rule. Five years after transposition of this Directive, Member States should re-examine the justification for these exemptions, taking into account the most recent actuarial and statistical data and a report by the Commission three years after the date of transposition of this Directive.'

4 The purpose of Directive 2004/113 is defined as follows in Article 1 of that directive:

'The purpose of this Directive is to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.'

5 Article 4(1) of Directive 2004/113 provides:

'1. For the purposes of this Directive, the principle of equal treatment between men and women shall mean that:

(a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity;

(b) there shall be no indirect discrimination based on sex.'

6 Article 5 of Directive 2004/113, which is entitled 'Actuarial factors', provides:

'1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, 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.

2. Notwithstanding paragraph 1, Member States may 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. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.

3. In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits.

Member States may defer implementation of the measures necessary to comply with this paragraph until two years after 21 December 2007 at the latest. In that case the Member States concerned shall immediately inform the Commission.'

7 Article 16 of that directive, which is entitled 'Reports', provides:

'1. Member States shall communicate all available information concerning the application of this Directive to the Commission, by 21 December 2009 and every five years thereafter.

The Commission shall draw up a summary report, which shall include a review of the current practices of Member States in relation to Article 5 with regard to the use of sex as a factor in the calculation of premiums and benefits. It shall submit this report to the European Parliament and to the Council no later than 21 December 2010. Where appropriate, the Commission shall accompany its report with proposals to modify the Directive.

2. The Commission's report shall take into account the viewpoints of relevant stakeholders.'

8 Under Article 17(1) of Directive 2004/113, Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 21 December 2007 at the latest and to communicate the text of those provisions to the Commission forthwith.

National law

9 Article 2 of the Law of 21 December 2007 states that that law implements Directive 2004/113.

10 Article 3 of that law sets out the provision which replaces Article 10 of the Law of 10 May 2007 combating discrimination between men and women, which concerned the treatment of gender in insurance matters.

11 The new Article 10 of the Law of 10 May 2007 is worded as follows:

'1. By way of derogation from Article 8, a direct proportionate distinction may be drawn on the basis of gender for the purposes of calculating insurance premiums and benefits where sex is a determining factor in the assessment of risk on the basis of relevant and accurate actuarial and statistical data.

That derogation shall apply only to life assurance contracts within the meaning of Article 97 of the Law of 25 June 1992 on non-marine insurance contracts.

2. With effect from 21 December 2007, costs related to pregnancy and maternity may not under any circumstances continue to result in differences in insurance premiums and benefits.

3. The Banking, Finance and Insurance Committee shall collect the actuarial and statistical data referred to in paragraph 1, publish them by 20 June 2008, then publish updates every two years, and post them on its website. This data shall be updated every two years.

The Banking, Finance and Insurance Committee shall be authorised to require the institutions, undertakings and individuals concerned to supply the data required for this purpose. It shall specify which data are to be sent, how and in what form.

4. The Banking, Finance and Insurance Committee shall provide the European Commission with the data at its disposal in accordance with this article by 21 December 2009 at the latest. It shall forward the data to the European Commission whenever they are updated.

5. The legislative Chambers shall, by 1 March 2011, assess the application of this article on the basis of the data referred to in paragraphs 3 and 4, the European Commission report referred to in Article 16 of Directive 2004/113/EC, and the situation in the other Member States of the European Union.

That assessment shall be made on the basis of a report submitted to the legislative Chambers by an Assessment Committee within two years.

By decree deliberated in the Council of Ministers, the King shall lay down the more detailed rules relating to the composition and appointment of the Assessment Committee, as well as the form and content of the report.

The Committee shall report in particular on the effects of this article on the market situation and shall also examine segmentation criteria other than those related to sex.

6. This provision shall not apply to insurance contracts concluded under a supplementary social security scheme. Such contracts shall be subject exclusively to Article 12.'

The facts in the main proceedings and the questions referred for a preliminary ruling

12 The applicants in the main proceedings brought an action before the Cour constitutionnelle (Constitutional Court) (Belgium) for annulment of the Law of 21 December 2007 transposing Directive 2004/113 into Belgian law.

13 They claimed that the Law of 21 December 2007, which implements the derogation provided for in Article 5(2) of Directive 2004/113, is contrary to the principle of equality between men and women.

14 In so far as the Law of 21 December 2007 makes use of the derogation provided for under Article 5(2) of Directive 2004/113, the Cour constitutionnelle decided, on the view that the action before it raises an issue concerning the validity of a provision of an EU directive, to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 5(2) of Directive 2004/113 … compatible with Article 6(2) [EU] and, more specifically, with the principle of equality and non-discrimination guaranteed by that provision?

2. If the answer to the first question is negative, is Article 5(2) of the Directive also incompatible with Article 6(2) [EU] if its application is restricted to life assurance contracts?'

Consideration of the questions referred

15 By its first question, the national court asks, in substance, whether Article 5(2) of Directive 2004/113 is valid in the light of the principle of equal treatment for men and women.

16 Article 6(2) EU, to which the national court refers in its questions and which is mentioned in recital 1 to Directive 2004/113, provides that the European Union is to respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Those fundamental rights are incorporated in the Charter, which, with effect from 1 December 2009, has the same legal status as the Treaties.

17 Articles 21 and 23 of the Charter state, respectively, that any discrimination based on sex is prohibited and that equality between men and women must be ensured in all areas. Since recital 4 to Directive 2004/113 expressly refers to Articles 21 and 23 of the Charter, the validity of Article 5(2) of that directive must be assessed in the light of those provisions (see, to that effect, Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063, paragraph 46).

18 The right to equal treatment for men and women is the subject of provisions in the FEU Treaty. First, under Article 157(1) TFEU, each Member State must ensure that the principle of equal pay for men and women for equal work or work of equal value is applied. Secondly, Article 19(1) TFEU provides that, after obtaining the consent of the European Parliament, the Council may take appropriate action to combat

discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

19 While Article 157(1) TFEU establishes the principle of equal treatment for men and women in a specific area, Article 19(1) TFEU confers on the Council competence which it must exercise in accordance, inter alia, with the second subparagraph of Article 3(3) TEU, which provides that the European Union is to combat social exclusion and discrimination and to promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child, 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.

20 In the progressive achievement of that equality, it is the EU legislature which, in the light of the task conferred on the European Union by the second subparagraph of Article 3(3) TEU and Article 8 TFEU, determines when it will take action, having regard to the development of economic and social conditions within the European Union.

21 However, when such action 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.

22 As is stated in recital 18 to Directive 2004/113, the use of actuarial factors related to sex was widespread in the provision of insurance services at the time when the directive was adopted.

23 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.

24 Thus it was that the EU legislature provided in Article 5(1) of Directive 2004/113 that the differences in premiums and benefits arising from the use of sex as a factor in the calculation thereof must be abolished by 21 December 2007 at the latest.

25 By way of derogation from the general rule requiring unisex premiums and benefits established by Article 5(1) of Directive 2004/113, Article 5(2) of that directive grants certain Member States – those in which national law did not yet apply that rule at the time when Directive 2004/113 was adopted – the option of deciding 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 risks based on relevant and accurate actuarial and statistical data.

26 Under Article 5(2) of Directive 2004/113, any decision to make use of that option is to be reviewed five years after 21 December 2007, account being taken of a Commission report. However, given that Directive 2004/113 is silent as to the length of time during which those differences may continue to be applied, Member States which have made use of the option are permitted to allow insurers to apply the unequal treatment without any temporal limitation.

27 The Council expresses its doubts as to whether, in the context of certain branches of private insurance, the respective situations of men and women policyholders may be

regarded as comparable, given that, from the point of view of the modus operandi of insurers, in accordance with which risks are placed in categories on the basis of statistics, the levels of insured risk may be different for men and for women. The Council argues that the option provided for in Article 5(2) of Directive 2004/113 is intended merely to make it possible not to treat different situations in the same way.

28 The Court has consistently held that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified (see Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 23).

29 In that regard, it should be pointed out that the comparability of situations must be assessed in the light of the subject-matter and purpose of the EU measure which makes the distinction in question (see, to that effect, *Arcelor Atlantique et Lorraine and Others*, paragraph 26). In the present case, that distinction is made by Article 5(2) of Directive 2004/113.

30 It is not disputed that the purpose of Directive 2004/113 in the insurance services sector is, as is reflected in Article 5(1) of that directive, the application of unisex rules on premiums and benefits. Recital 18 to Directive 2004/113 expressly states that, in order to guarantee equal treatment between men and women, the use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals. Recital 19 to that directive describes the option granted to Member States not to apply the rule of unisex premiums and benefits as an option to permit 'exemptions'. Accordingly, Directive 2004/113 is based on the premiss that, for the purposes

of applying the principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.

31 Accordingly, there is a risk that EU law may permit the derogation from the equal treatment of men and women, provided for in Article 5(2) of Directive 2004/113, to persist indefinitely.

32 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, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.

33 That provision must therefore be considered to be invalid upon the expiry of an appropriate transitional period.

34 In the light of the above, the answer to the first question is that Article 5(2) of Directive 2004/113 is invalid with effect from 21 December 2012.

35 In view of that answer, there is no need to address the second question.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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 is invalid with effect from 21 December 2012.

[Signatures]