Adjudicating on Equality: Combating sex discrimination in private insurance in the EU

Deborah Mabbett
Department of Politics
Birkbeck, University of London
Malet St London WC1E 7HX
Email: d.mabbett@bbk.ac.uk

Abstract:
The privatisation of pensions, health and care insurance raises the spectre that victories in the long battle for equal treatment for women within ‘breadwinner-based’ welfare states will be reversed in a larger war against discrimination by private insurers. Insurers have often been successful in defending their practices in technical regulatory policy venues. This paper discusses how the EU institutions provided opportunities to tackle sex discrimination in private insurance, culminating in a decision by the European Court of Justice outlawing discrimination. The discussion shows both the potential and limitations of pursuing equality through the judicial application of non-discrimination rights. It is argued that these rights have limited efficacy as the basis for distributive social policy, but they are nonetheless important in providing sources of norms for the fair conduct of market relationships.


This paper is based on my article ‘Polanyi in Brussels or Luxembourg? Social Rights and Market Regulation in European Insurance’ forthcoming in Regulation and Governance, 2013. An earlier version was published in the LSE European Institute’s ‘Europe in Question’ (LEQS) series (‘A Rights Revolution in Europe? Regulatory and judicial approaches to nondiscrimination in insurance’ LEQS Paper No. 38, May 2011). Work on this paper was partly done during research leave at the Hanse-Wissenschaftskolleg (Bremen) in 2009-10 and at Wissenschaftszentrum Berlin in 2010. Many thanks to those institutions for supporting this research and to participants in the Field 2 seminar at BIGSSS, Bremen and the workshop on ‘Economic and Social Values in the EU after Lisbon’ (LSE, June 2010) for helpful comments. Thanks also to Damien Chalmers, Waltraud Schelkle, Joni Lovenduski and the editors and anonymous referees for Regulation and Governance for extensive comments, and to Commission officials who provided insights and explanations at meetings in Brussels on 20-21 Sept 2010. All remaining errors are my own responsibility.
Adjudicating on Equality: Combating sex discrimination in private insurance in the EU

1. Introduction
The privatisation of pensions, health and care insurance raises the spectre that victories in the long battle for equal treatment for women within ‘breadwinner-based’ welfare states will be reversed in a larger war against discrimination by private insurers. Women are routinely classified as higher risk than men in these areas of private insurance, where longevity is a significant factor. One solution is to regulate insurers. But is it politically possible and technically feasible to impose such regulation?

This question is particularly pertinent in Europe, where regulation has a cross-border dimension. Within countries, governments have considerable means to shape privatised welfare, and there are a number of instances where discrimination has been prohibited or limited (Gilbert 2006, Leisering and Vitic 2009). However, where there is cross-border competition between insurers, equality in one country can be undermined by different regulatory regimes elsewhere. It was in this setting that the European Commission brought forward a proposal for a ‘Gender Directive’ in 2003 to extend the existing law on sex discrimination, previously confined to employment, to the provision of goods and services. The proposal included a prohibition on sex discrimination in insurance rating; in other words, a requirement for unisex tariffs. However, the proposal was rejected by member states, largely because of pressure from the insurance industry. This suggests that supranational re-regulation for welfare faces a high bar, as organised industry interests can readily outweigh fragmented and nationally-oriented social policy interests.

Subsequently, the validity of the revised directive, which permitted sex discrimination by insurers subject to some conditions, was challenged in the Belgian constitutional court by the consumer association Test-Achats. The case was referred to the European Court of Justice (ECJ) which ruled that the ongoing practice of sex discrimination in insurance was a derogation from the principle of equal treatment between men and women. It effectively restored the Commission’s original proposal, and insurance discrimination was outlawed throughout the EU in December 2012.

In short, the industry prevailed in the regulatory process, but the principle of equality prevailed before the Court. The following discussion explains why the outcome was different in the regulatory and judicial venues, and considers the implications. The case shows both the potential and limitations of pursuing equality through the judicial application of non-discrimination rights. The potential is evident: the insurance market has been reconstituted by insisting on sex equality as a fundamental right. But does this help to promote equality? Many commentators are doubtful that rights can generate collectively-equalising outcomes. For Scharpf, for example, rights are irredeemably individualistic, creating ‘new social liberties’ alongside economic liberties in a secondary process of negative integration. The expansion of the Court’s rights-based case law does not represent ‘progress toward the social embeddedness of

1 Case C-236/09, Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres, Judgment of 1 March 2011.
the European economy or .. the judicial recognition of the values of social solidarity.’ (Scharpf 2010, p.222) The following discussion challenges Scharpf’s view in some respects, but also shows that the ruling has limitations in addressing the distributive issue at stake. It is quite possible that, in the end, outlawing sex discrimination will make little difference to the terms on which men and women obtain insurance, so the problem that insurance privatisation tends to exacerbate the inequality in retirement income between women and men will remain.

2. The prohibition on discrimination as social policy
The Commission’s proposal for a prohibition on discrimination on grounds of sex in insurance was accompanied by an explanatory memorandum which set out a number of arguments in support. Social policy arguments took up the bulk of the text in the memorandum. The Commission drew attention to the trend in member states towards the privatisation of social insurance, particularly pensions, and argued that privatisation was tending to magnify the disadvantages faced by women in the labour market. A key issue was the rise in ‘defined contribution’ pensions, where a pension fund is invested during working life and then used to purchase an annuity on retirement. Employers are required under existing equal pay law to make the same contributions to funds for women as for men, but this will produce lower pensions (annuities) for women. The Commission noted that, while equal treatment was established in statutory social insurance, ‘the move towards private provision is undermining this principle’ (CEC 2003, p.8). One concrete way to counter this trend was to end the use of actuarial factors related to sex. This would change insurance industry practices to protect women’s pensions: a legitimate social policy goal, given that women as a group are at high risk of having inadequate provision.

The Commission brought forward its proposal under the competence established by Article 13(1) of the European Treaty, as amended at Amsterdam in 1997 (now Article 19), which stated that ‘the Council may take appropriate action to combat discrimination’. This provision is in the ‘citizenship’ chapter of the Treaty, and its context is the drive to establish a constitutional foundation of fundamental rights for citizens of the Union. The scope of fundamental rights has been expanded through the ‘meeting of social rights and constitutionalizing narratives’ that has gone on since the 1990s (Smismans 2010, p.53; see also Kelemen 2011, pp.46-52). Social rights have been discursively joined to human rights and to the four market freedoms (of goods, services, capital and labour).

This has created a rich resource for legislative and judicial initiatives, but the fundamental rights frame has its own limitations. There were two ways in which it was not well-suited to being instrumentalised to pursue the social policy objective of combating the effects of insurance privatisation. First, it only addressed discrimination on grounds of sex, allowing insurers to find other discriminators, such as lifestyle factors. Allowing discrimination on the basis of lifestyle factors may be fair, but it will not help women’s pensions, as women are more likely to have the lifestyle markers for a long life. A social policy approach would be to put everyone in the same risk pool, as social insurance does.

Second, while the social policy goal pertained specifically to pensions, the fundamental right extended to all insurance. Arguments that were convincing in the
pensions context lost force when applied across the board. For example, motor insurance had to be included as well as pensions, meaning that women could lose as well as win from a unisex reform. The British Equal Opportunities Commission (EOC) undertook a cost-benefit analysis of unisex tariffs, in effect rejecting the principled application of rights in favour of an instrumental approach. It found that elimination of gender factors ‘would bring a complicated mixture of gains and losses to both sexes’. Even the effect on women of unisex annuities was mixed, as many women depended on the annuity of a male partner (EOC 2004). As a result, the EOC refrained from taking a stand against the use of sex as a factor in insurance. The wide scope of the measure was, in short, an obstacle to instrumentalising non-discrimination to achieve social policy goals.

The converse point, that a narrow frame aids the instrumentalisation of rights, is made by Leisering and Vitic (2009). They analyse the political debate surrounding the adoption of unisex tariff amendment to the Riester pension scheme in Germany. They suggest that the measure succeeded because social policy, rather than legal arguments, were relied on by the German campaigners. Riester pensions were closely connected to the statutory pension system, and could therefore be made subject to social policy norms. Close proximity and substitutability between private and social insurance meant that the private scheme was affected by political pressures and policy processes which were similar to those found in cognate areas of social policy.

The difficulty of creating a coalition in support of the proposal was compounded by debate over the application of the principle of non-discrimination in the insurance context. For some academic commentators, it was evident that ‘sex-based actuarial factors run directly contrary to the essence of anti-discrimination laws which require that workers be regarded on the basis of their individual characteristics and not on the basis of gender stereotypes’ (Barnard 2006, p.531). However, for other lawyers working from different national traditions, sex-based factors might sometimes be justifiable. In German law, differential treatment of men and women can be based on ‘biological’ determining factors, while discrimination arising from ‘social’ factors is prohibited (Kopischke 2006, pp.79-80). This distinction produced a debate about whether women’s longer life expectancy was due to social factors around lifestyle, working patterns and nutrition, or due to biological differences between the sexes. If the difference was really biological or genetic, then sex really was the relevant determinant and not just a proxy for other factors, so its use could be justified. However, others rejected this logic of justification. The Committee on Women’s Rights in the European Parliament argued that ‘the use of the “gender” factor […] constitutes discrimination since [this factor is] beyond the control of the individual concerned’ (EP 2004, p.26). Lifestyle factors (‘e.g. smoking, alcohol consumption, stress factors, health awareness’) are ‘more objective criteria’ and should be used instead. In short, legal argumentation about the use of sex in insurance rating was inconclusive.

3. Industry opposition to the proposal
It might seem natural that insurers would oppose regulation that limited their ability to classify policy-holders according to their ‘true’ risk. However, there is not much that is natural about insurance classification. The key issue for the insurance industry as a whole is to limit adverse selection: in other words, to avoid a situation where those
who are high risk take out insurance, while low risks seek alternatives (such as saving on their own account). For individual insurers, there is an incentive to discriminate beyond what is necessary to prevent adverse selection, in order to gain a competitive advantage by offering lower premiums to low-risk customers. However, any advantage is likely to be short-lived, as other insurers follow suit. The end result is that a competitive insurance industry has a tendency to discriminate too much, and one of the tasks of an industry association is to prevent the undue differentiation of risks (Wilson 1977, Crocker and Snow 2000).

Insurance associations are aided in this task by their role in the collection and dissemination of data which allows insurers to estimate risks. In Europe, the industry operates under a Block Exemption Regulation (BER) from competition rules, permitting the pooling and sharing of data between insurers. ‘Agreements on joint calculations, tables and studies for the purpose of assessing risk’ are allowed. This exemption permits the continuance of the widespread practice in EU member states of insurers sharing data to produce estimates of claims probabilities which are statistically more robust than those that can be generated by a single insurer. One consequence is that national associations can maintain self-denying ordinances on the use of certain kinds of data. For example, restrictions on the use of genetic information prevail throughout Europe. While in some countries these restrictions are legislated; in others they are the subject of voluntary agreements (Mattheissen-Guyader 2005). These agreements can be understood as a form of self-regulation designed to pre-empt the prospect of legislation, and with it the politicisation of risk classification.

While market competition heightens insurers’ incentives to use information to identify different risk groups, the production of information is a non-competitive, or pre-competitive, process. Insurance services are constituted by the availability of data to enable risks to be calculated, and the sharing of data for that purpose is necessary to establish the market and allow it to thrive. Indeed, the BER on pooled industry data is defended with the argument that it facilitates the entry of competitors into the market by giving them access to information which enables them to price risks. The main source of data is claims history, so insurers are most confident in pricing products according to the information they have used in the past. An innovative insurer could use other data, available for example from public statistical agencies, but this is subject to ‘basis risk’ (the risk that the insurer’s customer base does not match the population sample used in public data). The result is that there is a considerable amount of convention and inertia in risk classification practices.

Furthermore, there is a long history of tacit social regulation of risk classification, but it is not a distinguished history. For example, reviewing the impact of single market deregulation on the German insurance industry, Rees and Kessler (1999, p.383) noted that the national regulations had arguably served a social purpose, and that there were ‘equity grounds’ for arguing that ‘risk categorization should be less finely differentiated than might be the case if left to the market, so that higher and lower risks are pooled and socially desirable cross-subsidization takes place.’ However, they were critical of the obscure principles of regulation that Germany applied; they thought such rules should be ‘clear, explicit and [...] publicly debated’. To this assessment that market regulation was insufficiently transparent, other commentators added criticisms of the dominant role of the industry. Everson (1996) suggested that
existing competition-suppressing regulatory regimes in insurance owed more to corporatist interest accommodation than to a coherent theory, whether based on welfare economics or rights.

For the industry, maintaining control over risk classification and suppressing public debate means insisting that existing practices are competitive and market-oriented, and rejecting the application of social policy ideas and norms. In the debate over the Gender Directive in the European Commission, this position was largely supported by the Competition Directorate. It saw social policy arguments as Trojan horses which allowed national authorities to retain the barriers that the single market project was trying to remove (Winterstein 1999). Some member states had prohibitions on sex discrimination in at least some areas of insurance (for an overview, see Peraita 2007), but these were often states in which competition was underdeveloped. Thus there was general resistance to the intrusion of social norms into an area which, in the eyes of competition-minded observers, should be governed by technical requirements. This perspective on the appropriate basis for market regulation was reflected in the eventual compromise in the Gender Directive.

4. The Compromise Directive
The formulation that eventually found its way into Article 5(2) of the Gender Directive was that discrimination in insurance should be allowed, provided it was supported by published information on differences in risk according to sex. This compromise promoted the value basis that one might expect to find in an integrated market: that the industry’s practices should be rational, technically sound and supported by statistical evidence. It also provided that individual member states could prohibit discrimination if they chose: thus national level social regulation would (continue to) be possible. However, it was not clear whether a state that prohibited discrimination could prevent a discriminating insurer from another state from offering cross-border services.

At first sight, the compromise was favourable to the industry: it accepted that discrimination may be justifiable according to criteria that are relevant to insurance. Many in the industry saw the agreement as protecting the status quo, although some (particularly in the UK and Ireland) railed against the publicity requirements (MacDonnell 2005). It was pointed out, perhaps rather opportunistically, that the data publication requirements of the Gender Directive could be invoked to justify the practice of sharing data among insurers against the challenge that it restricted competition. In the course of the debate over the renewal of the industry’s BER, the main European insurance association (the Comité Européen des Assurances, CEA) argued that the exemption would be ‘needed’ in the context of Article 5(2) because ‘[c]ooperation in this field would help to ensure the reliability and accuracy of the actuarial and statistical data on which the calculations are based.’ This position was endorsed by the Pan-European Insurance Forum (PEIF), a group of CEOs of major insurance companies. They argued that failure to renew the BER would present ‘an additional barrier to public-interest sharing of data, for instance around the Gender Directive..’. The Austrian Insurance Association (VVO) noted that, as a consequence

---

of its data pooling functions, it already published the information required by the
Gender Directive on its website.

Following the passage of the Directive, the Commission established a Forum on the
Implementation of Article 5, with representatives from member state governments,
the insurance industry, consumers and equal treatment bodies. The Commission
prepared for the first Forum meeting in September 2009 with a questionnaire. It asked
for respondents’ views on whether sex was really a ‘determining factor’ in risk
assessment, whether published data were accurate, relevant and reliable, and whether
published data were ‘enabl[ing] consumers to understand the relevance of sex to
assessments of their premiums’. These questions suggest that the Commission had
accepted the justifiability of sex differentials, but sought to ensure that insurers’
practices were transparent and accountable to consumer advocates. Not everyone
accepted this way of looking at the issues: a response jointly prepared by AGE (the
European network for older people), the European Women’s Lobby (EWL), and
Belgium’s Test-Achats criticized the assumptions behind the questionnaire and
argued that ‘insurance companies should .. not be allowed .. to use technical
argumentation about actuarial issues to dismiss their legal obligations in regard to

One might imagine that the discussion between insurers and consumer advocates
would be a dialogue of the deaf: one side seeking ways of continuing to conduct
business as usual, the other seeking radical reform. In practice, the lines between the
two groups were not so clearly drawn. While insurers insisted on the importance of
statistically robust risk classification, they already had a well-established track record
of avoiding contentious approaches to classification: for example, the industry offered
no protest at the inclusion of insurance in the Race Directive. Insurers have also got
used to being unable to discriminate between the different EU nationalities. In other
words, the apparent principled conflict between risk-rating and non-discrimination
was in practice a matter of finding boundaries between the acceptable and
unacceptable use of personal information. Advocates of unisex tariffs argued that sex
should be treated in the same way as race and ethnicity. Opponents drew the line
differently, proposing that sex was a relevant factor in the same way as age or
disability.

While practices varied across countries and sectors due to specific political and
historical developments, the community of expertise in insurance generally upheld the
use of sex factors in risk rating. However, there were some opposing voices, and
statistical studies did not always endorse insurers’ practices. For example, Rothgang
et al (2005) examined sex differentials in health insurance premiums in Germany and
argued that they were inadequately justified by the available statistics. More
generally, large errors have affected actuarial projections of longevity in recent years,
and some commentators have argued that failure to take sufficient note of lifestyle
changes has contributed to these errors. One inference that might be drawn is that
projections have relied too heavily on standard assumptions about male and female
lifestyle patterns, and direct use of lifestyle indicators could produce better forecasts
(Hudson 2007). This view has been endorsed by the head of pensions strategy at the

---

3 The Forum is hosted by Equinet, the European Network of Equality Bodies. Documents from the
Forum can be found at http://www.equineteurope.org/890971.html (last accessed July 2012).
major UK insurer, Legal and General. Adrian Boulding has argued in favour of unisex rating, even in life insurance and annuities. His position is particularly striking as he is a member of the pensions committee of the Association of British Insurers, although he was not able to shift the majority view there, which was trenchantly opposed.

Another factor undermining the defence of sex discrimination was that the prohibition on discrimination was firmly established in the area of employment, and this had implications for occupational pensions and therefore for the pricing of annuities. Specifically, employers had to ensure that ‘defined benefit’ pensions were equalized between men and women, as these count as part of ‘pay’. Cases decided in the early 1990s had established that equal pay did not extend to requiring unisex rating in occupational pensions, although this produced some anomalous results (Barnard 2006, pp.530-1). Since then, the legal foundations of equal treatment have been extended. A staff case decided in 2007, Lindorfer, successfully challenged the Commission’s use of different actuarial values for men and women in calculating the years of service to be credited to its pension scheme when taking up employment. Lawyers began to advise pension scheme sponsors that the adoption of unisex rating might protect them from costly legal challenges.

5. The ECJ overturns the regulatory compromise
In March 2011, the ECJ’s Grand Chamber ruled in Test-Achats that Article 5(2) would cease to be valid from December 2012. While a derogation from equal treatment might be allowed as a transitional measure so that the industry could adjust, this had to end after a reasonable period of time. It should be noted from the outset that there was nothing inevitable about the Court’s decision. Discrimination in insurance had been upheld by national courts (Civic Consulting 2010, p.17). Different legal traditions pointed to various ways of interrogating and rationalizing discrimination. As it happened, the Court’s decision avoided addressing the substantive issue of whether discrimination was justifiable. Instead, the judgment relied upon the Directive’s description of tariff differentials in insurance as ‘exceptions’ to equal treatment. In other words, risk rating by sex is discrimination because the Directive says it is so. For the Court to forego the opportunity to determine such a question itself suggests that the Grand Chamber may have had difficulty reaching agreement: the brevity of the judgment and its reliance on this legalistic manoeuvre may have been the result of a search for the ‘lowest common denominator’ to gather the support of the majority of judges.

However, notwithstanding these contingent features, the decision was characteristic of the Court’s fundamental rights jurisprudence. The Advocate-General’s (AG’s) Opinion (which is much more detailed than the Judgment) lets us see how approaching the issue as one of equality rights rather than social policy shapes the outcome. Three features are notable. First, fundamental equality rights should be applied uniformly. The Advocate-General resisted the high degree of sectoral and

---

4 See http://www.moneymarketing.co.uk/channels/corporate-adviser/boulding-calls-on-uk-to-support-eu-unisex-annuity-drive/1022263.article (last accessed July 2012)
cross-national variation that the compromise directive allowed. Second and relatedly, the scope of fundamental rights should be as wide as possible. While existing legislation treated employment as a special area of application for equality rights, the Court embraced the opportunity to expand their scope. Third, framing around rights favours legal reasoning over technical argumentation. The community of expertise that sought to justify special treatment of the insurance sector with economic and statistical analysis apparently exerted little influence on the Court.

Taking these points in turn: Inconsistency across member states in the application of unisex tariffs was highlighted in the Opinion. AG Kokott argued that the principle of equal treatment had to be applied in the same way across all member states, whereas the Directive envisaged variation. ‘In some Member States it is possible for men and women to be treated differently with regard to an insurance product whereas in other Member States they must be treated in the same way with regard to the same insurance product. It is difficult to understand how such a legal situation could be the expression of the principle of equal treatment under European Union law.’ (para 23). It was not open to the Council to permit diversity, given that equal treatment is a fundamental right.

In general, the Court has been respectful of the idea that social regulation should be confined to employment. In all European countries, labour law has developed as a distinctive area of law in which freedom of contract is restrained by collective social regulation. However, the creation of fundamental rights competences in the ‘citizenship’ chapter of the Treaty opened up the possibility of regulating markets more widely, and the Court embraced the opportunity to move beyond ‘worker citizenship’. A particular attraction was that applying unisex tariffs beyond employment provided a chance to remedy the anomalies produced in the Court’s own case law on equal pension rights in employment, following the path opened up by Lindorfer (above).

Technical arguments that insurance was a special case in applying the norm of non-discrimination were not rejected by the AG outright (para 47). However, she did not accept the statistical case for discrimination. The Council, Kokott argued, ‘does not do justice to the complexity of the problem’ by setting up a procedure which relies on statistical verification (para 65). For her, relevant issues were that a person has no influence over their gender (para 50), and that the provision at issue ‘does not focus on any clear biological differences’, but instead is concerned with a statistical association (para 52). The AG was concerned not only with market integration and transparency but also with establishing an appropriate value basis for discrimination.

Judicial freedom to ignore the opposition of a large community of expertise was enhanced by Kokott’s confidence that unisex rates would not ‘give rise to a serious danger to the financial equilibrium of private insurance systems’ (para 68). One obvious reason for the Court to take this view is that, as we have seen, several countries did require unisex rating in some areas of insurance. A close analysis might show that this is most sustainable when insurance is mandatory or heavily supported by fiscal incentives, and that the development of purely voluntary products is impeded by unisex rating. However, the regulatory approach did not establish this as a clear distinction, so the Court can hardly be criticized for failing to recognize it. The case of Lindorfer, noted above, also supported the AG’s view that differential tariffs were not
necessary for financial stability. While that case was being decided, the Commission introduced unisex actuarial tables, and the Judgment in *Lindorfer* placed importance on this fact, which it took to demonstrate that unisex rating was sustainable.

In its approach to social policy, the Opinion shows the difference between the judicial application of principles and the welfare calculus that the Commission had favoured. The approach taken by AG Kokott suggests that the Court should be a progressive force, modernizing as well as unifying the legal code governing the single market. However, this eagerness to be seen as progressive in the development of rights is not reflected in a willingness to take on the tasks of a social policy maker, weighing up the gains and losses for distributional equality between men and women. It is striking that the AG was uninterested in whether unisex tariffs will benefit or disadvantage women: she noted that some tariffs will go up but there would be lower premiums for ‘the other sex’ (para 68). There is no instrumental reasoning in the Opinion: it is concerned with establishing that the principle of equal treatment should govern the operation of the single market, regardless of the consequences.

6. Conclusion

The process by which sex discrimination in insurance has come to be prohibited in the EU illuminates several issues about the potential for the regulation of ‘private welfare’, to achieve social policy goals. The initial rejection of the Commission’s proposal shows how privatisation brings new industry actors into the policy process who are capable of resisting social regulation, particularly by invoking their technical expertise and understanding of how ‘the market’ works. Comparing national and supranational re-regulation, it seems likely that industry influence is more pronounced at the supranational level. Not only is there a reverence for open and competitive markets in supranational venues (reflected in DG Competition’s support for the industry in rejecting social regulation), but also social policy interests continue to have primarily a national orientation.

Into this gap in supranational policy-making have stepped campaigning organisations oriented towards upholding fundamental rights. The ECJ has turned out to be a receptive venue for rights claims. The judicial space creates opportunities for David-and-Goliath battles which minimally-resourced civil society actors can sometimes win. Arrayed against Test-Achats in the case discussed here were the Commission and the Council, and the Irish, French, Lithuanian, Finnish and UK governments, along with the Belgian respondents. Compared with the legislative and regulatory processes coordinated by the Commission, the Court would seem to be a more open and in some senses more democratic venue (Cichowski 2006).

However, we can also see that the judicial interpretation of equality rights is not completely aligned with social policy goals. Rights are ambiguous resources that may operate in a variety of ways: as symbolic gestures, as agenda-setting and coalition-forming devices, or as instruments in developing a policy to achieve defined goals (Simon 2004, Somek 2011). The European Commission sought to make instrumental use of rights. We can expect that the instrumental approach of the Commission is widely shared by policy-makers who are interested in taking up specific social policy opportunities presented by general statements of rights. In many countries, legislatures have adopted prohibitions on sex discrimination in employment. These measures are framed as promoting both efficiency and equality. By contrast,
legislative action against sex discrimination in insurance has been much more limited, as it is constrained by the belief that discrimination in risk classification is often efficient and that the distributional gains from prohibiting sex discrimination are limited.

The insurance industry has been quick to argue that the abolition of discrimination will be harmful: it is claimed that premiums for all will go up, instead of settling in the middle range between those charged for men and women. The discussion above of the way the industry works suggests that this may indeed happen initially, as insurers are uncertain about the effects of changing established classification (particularly about the degree of adverse selection that may result). However, this should not be the long-term effect, unless the industry is even more collusive than I have indicated. The Court has made it clear that insurers may discriminate between insureds on other grounds than sex. Insurers will now search for alternative discriminators, which will limit the risk of adverse selection. If the industry finds the ‘lifestyle’ correlates of women’s longer life expectancy in their occupations, family histories and other indicators, then the effect on annuity rates for many women will also be limited.

However, I would reject the implication that the promotion of equality rights in this instance is at best a waste of time and at worst damaging to the industry. The case has exposed shadowy self-regulation by the industry to greater scrutiny and control. Conventions on risk classification have been maintained by national associations. They have adopted voluntary commitments, as well as influencing risk classification through their data-pooling functions. The national regulation of private insurance is conventional, opaque and industry-dominated, not solidaristic or democratic. Market integration has introduced an element of publicity and politicisation. More broadly, the Court has exposed the conventions underpinning the market to scrutiny and challenge. While the distributional effects are uncertain, deliberation over the social norms that govern the functioning of insurance markets deepens social policy debates and challenges the unaccountable concentration of market power.

References


Civic Consulting (2010) Study on the use of age, disability, sex, religion or belief, racial or ethnic origin and sexual orientation in financial services, in particular in the


