Polanyi in Brussels or Luxembourg?

Social Rights and Market Regulation in European Insurance

Abstract

The decision of the Court of Justice of the European Union to ban sex discrimination in insurance has shown the potential reach of the principle of non-discrimination. This paper discusses the different positions taken by participants in the policy process leading up to the decision, in order to reveal the potential and limitations of non-discrimination as the basis for market-regulatory social policy. It is shown that the European Commission’s initial support for prohibiting insurance discrimination faltered with the realization that the measure would have little efficacy as a distributive social policy. It was left to the Court to assert that non-discrimination rights are constitutive for European markets, regardless of their functional and instrumental limitations. The Court’s focus was on the market-integrative potential of rights as sources of norms for the conduct of insurance relationships. It is argued that this form of constitutive regulation is distinct from distributive social policy as it does not require that outcomes are egalitarian, but rather that the processes governing market relations should respect fundamental rights.

Keywords: rights, social regulation, discrimination, European Union, Gender Directive, insurance, risk, Polanyi
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Social Rights and Market Regulation in European Insurance

1. Introduction

Of the various paths that have been taken to promote supranational social policy in Europe, the development of rights to promote equality by prohibiting discrimination has been the longest and most steadily trodden. Non-discrimination rights have served both economic and social integration. Non-discrimination on grounds of nationality levers open markets while also promoting access to social security for migrant workers (Caporaso and Tarrow 2009). Non-discrimination on grounds of sex levels the terms of market competition while also demonstrating a commitment to social progress (Ellis 2005, p.22). Embracing this world of economic integration supported by social rights, the EU has steadily expanded the scope of non-discrimination law while extending the market freedoms enjoyed by EU citizens.

The creation of these justiciable individual rights has been criticized for undermining the national bases of social solidarity. Scharpf (2010, p.222) has argued that non-discrimination rights are irredeemably individualistic, creating ‘new social liberties’ alongside economic liberties in a secondary process of negative integration. As non-discrimination rights expand at the European level, established social policy institutions at the national level are undermined. Collective bargaining is weakened by rules allowing foreign workers access to domestic labor markets. The provision of health care and other public services is damaged by the mobility of service users,
while the financial viability of welfare states more generally is threatened by the free entry of claimants and exit of taxpayers.

Important in this analysis is a critical account of the role of the Court of Justice of the European Union (CJEU). For critics, implementation by courts is a central limitation of pursuing social policy through rights. Courts are limited by their institutional design to upholding individual rights: ‘they are ill-equipped to create schemes for redistribution’ (Höpner and Schäfer 2012, p. 6). In the specific context of the EU, the CJEU is a threat to national social policy-making capacity. While member states can defend themselves in the EU’s legislative process, the CJEU can ride roughshod over their preferences through case law based on extensive interpretations of Treaty rights (Scharpf 1999, 2010).

The CJEU is also a central player in more positive accounts of the interpretation and dissemination of non-discrimination rights. For Caporaso and Tarrow (2009, p.595) the Court is central because of its openness to transnational interest groups: thus the Court ‘plays a key role in linking supranational legalization with transnational mobilization’. It has assumed this role partly because the Council of Ministers is ‘paralyzed by the veto’ and the Commission is tied to the Council (2009, p.604), but also because it is the natural venue for resolving disputes that arise out of economic interdependence. However, migrant workers’ rights have been developed by legislation as well as court cases: in that instance the Council and the Court ‘have teamed up to provide an impressive legal structure’ (2009, p. 607). Polanyi is in Brussels, as well as Luxembourg.
This article contributes to the debate between the critics of the Court and its advocates through a close analysis of the CJEU’s decision in Test-Achats\(^1\) that the practice of sex discrimination in private insurance must cease from the end of 2012. The development of EU law and policy on non-discrimination in private insurance is an exemplary case through which to examine how rights have been taken up by EU institutions. The Court’s decision overturned a compromise formulated in the EU’s legislative process, in the form of a ‘Gender Directive’\(^2\), which provided that discrimination should be allowed, provided that it was supported by published data on differences in risk. The Commission’s acceptance of this formulation, which it subsequently defended before the Court, illustrates that, even within the European institutions, there are different interpretations of the appropriate use of rights as instruments for constituting or embedding markets and for pursuing distributive goals.

The case allows us to examine the different meanings that can be attached to ‘social policy’: specifically to the claim that markets are stabilized by social policies that embed them in social relationships. Caporaso and Tarrow are clear that these policies are not confined to tax-benefit redistribution. Embedding can also be achieved by ‘the positioning of markets within a broader set of social and political rules and cultural understandings that make them work not only more efficiently but also more equitably’ (Caporaso and Tarrow 2009, p.598). But this definition slides over the debate about whether the process of European integration has re-regulated markets with an undue regard for efficiency relative to equity.

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\(^1\) Case C-236/09, Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres, Judgment of 1 March 2011.

Majone (1993) proposed that the EU could carve out a distinctive space of social regulation by seeking policies that promoted both values. Majone’s analysis relied on the concept of market failure to equip supranational regulators with ideas, and he saw the process of re-regulation being led by the Commission and regulatory agencies rather than by the CJEU. However the concept of market failure has proved too limited, at least in the hands of supranational regulators, to find a rich vein of policies in the way that Majone proposed. Competition policy, always first on the list of market failure corrections, has dominated over social regulation. Majone (1993, p.168) sought to assimilate non-discrimination to his account, but it is argued below that rights-based regulation is different to market failure-correcting regulation, despite some common ground.

Not only is the balance between efficiency and equity elusive, but also the concept of equity is open to competing interpretations: it can refer to distributional equality, but it can also refer to equity in the sense of evenhandedness or fairness. This paper shows that the promulgation of non-discrimination rights at the EU level can serve to bring considerations of equity into market regulation, but the concept of equity upheld by the Court is distinct from equality, and does not rest on calculating distributional outcomes. Instead, it is concerned with establishing norms of fairness based on rights in market relationships. Thus rights work as market-regulatory instruments in a distinctive way. Not only is rights-based regulation different to market failure regulation; it is also distinct from (re)distributive social policy.

These arguments are developed as follows. The next section considers the relationship between rights-promotion and market failure-correction as it appears in the workings
of the EU institutions. While both the Commission and the Court share an orientation towards market integration, it is argued that the structure of the Commission creates more barriers to social regulation outside the established social policy domain of employment.

The conflicting interpretations within the Commission and among its interlocutors of how non-discrimination rights should correctly be applied to insurance are summarized in section three. DG Employment, which initiated a proposal to prohibit discrimination, started from a fundamental rights narrative but was primarily interested in advancing social policy arguments for non-discrimination. The limitations of these arguments are discussed, in order to explain why the proposal failed to obtain strong support from potential social policy constituencies.

The discussion then turns to consider the position of the insurance industry. Commentators have argued that rights-based supranational re-regulation occupies ‘unclaimed territory’ separate to national social policy (Streeck 1996, p.76; see also Caporaso and Tarrow 2009, p.602). In this case the territory is not really empty, but it is filled with practices that are not politicized domestically. Section 4 shows that discrimination in insurance is heavily influenced by conventions upheld by insurance associations. National markets are located within social and political rules and norms, but these are only occasionally subject to political debate. The industry thrives on the taken-for-grantedness of its practices: indeed, we can see this presumptive acceptance as ‘embedding’ of a kind.
The opening-up of a European-level debate about discrimination was an uncomfortable experience for the industry, requiring it to ‘argue and resist’ rather than being able to get on with business as usual (Moran 2010, p.396). Section 5 considers the insurance industry’s response to the compromise directive, which provided that insurance classifications should be based on statistical evidence, which the industry should be required to make public. This compromise could be seen as balancing the economic goal of efficient risk classification with the legal requirement for discrimination to be justified. Risk classification was framed as a technical matter, amenable to statistical justification. While many in the industry were confident in this approach, others predicted that ongoing public scrutiny would be unsettling and destabilizing.

The Test-Achats decision is discussed in section 6. The promotion of market integration by establishing a common norm was the central reason for the Court’s decision. Its desire to assert that non-discrimination was a fundamental right that should govern markets across Europe was not accompanied by any calculation of the efficacy of the measure as a social policy. Section 7 concludes by assessing the implications of the case for our understanding of the ‘embeddedness’ of markets and the potential for supranational regulation to promote solidarity based on rights.

2. Between Brussels and Luxembourg

An account of differences between the CJEU and the Commission in their approach to regulation has to begin by acknowledging their similarities. Many analyses of the EU’s institutional dynamics emphasize how the Commission and the Court work
closely together to pursue their common interest in the supranational expansion of competence. Kelemen (2011) argues that the Commission supports the creation of justiciable rights to make up for its own lack of implementation capacity, while Martinsen (2009) and Wasserfallen (2010) show how the Commission takes up Court decisions and codifies them in proposals for directives.

Furthermore, both institutions embrace the development of rights within this common project. While much of its technical expertise is focused on market failure-correcting regulation, the Commission has also been active in promoting non-discrimination rights. It has proposed directives implementing these rights and skillfully steered them through the Council of Ministers, often to the surprise of observers (Geddes and Guiraudon 2004). To some extent, non-discrimination is aligned with the market failure approach. Discrimination can be the result of barriers to open competition, which is a form of market failure. This alignment is most evident in non-discrimination on grounds of nationality, and the Internal Market and Competition directorates are particularly attached to this principle.

In combating sex discrimination, the alignment is not so straightforward. Sex discrimination is often not a failure of the market as such but a result of the social context (specifically, family relationships and the household division of labor) within which markets operate. This has called forth a widened interpretation of market failure, which retains the idea that corrective measures can simultaneously enhance both efficiency and equality. This interpretation is expressed in the idea of social policy as a ‘productive factor’ which moves social conventions and economic relations towards better use of the labor force. This approach has been embraced by
the Commission, but importantly it is focused on employment. It has supported a
division of tasks in the Commission in which social policy has become equated with
employment regulation, while the ‘economic’ directorates promote market efficiency
through competition and integration.

This division is not an idiosyncrasy of the Commission: on the contrary, it is a
standard feature of social regulation. The limitation of policy against sex
discrimination to the area of employment is characteristic of legal codes in the
European member states and beyond. Some countries have specific extensions, for
example into housing or credit markets, but employment has been the focus of this
form of regulatory social policy. Prohibitions on sex discrimination in insurance have
followed for forms of insurance connected with the employment relationship, such as
occupational pensions, but wider prohibitions are not often found. Some states
regulate against discrimination in compulsory insurance, such as third party motor
insurance, but prohibitions on all discrimination (ie ‘community rating’ or the
requirement to offer the same terms to all customers) are more widespread than
prohibitions relating specifically to sex (Carter 1986, de Wit 1986). The privatization
of social insurance has created specific pressures for legislation to prohibit sex
discrimination, in European member states as well as beyond (Gilbert 2006), but these
pressures are confined to privatized welfare (mainly pensions), rather than extending
across all types of insurance.

The special place of employment in social regulation is a feature of judicial as well as
regulatory practice, and it cannot be claimed that the CJEU is not cognizant of it or
that it has systematically failed to uphold a distinct set of principles in labor law.
However, the Court has recently been criticized for neglecting the special social place of employment regulation, blurring the boundary between employment and the provision of services (Kilpatrick 2009, pp.196 ff.). Conversely, it has expanded the scope of social regulation in some areas where it has escaped the constraints of the ‘worker citizen’ and created rights that are not confined to employment (de Witte 2009). De Witte argues that constitutional fundamental rights, which apply to the relationship between states and citizens, have increasingly been extended ‘horizontally’ to apply to relations between citizens. Horizontality originated in ‘the piecemeal adoption of legislation targeting particular forms of discrimination’, particularly in employment, but it has been increasingly caught up in a constitutionalizing logic which goes beyond targeted applications driven by specific social policy concerns (de Witte 2009, p.519).

While fundamental rights jurisprudence cuts across established policy boundaries, policy-making in the Commission is organized in directorates which have distinct policy orientations. Strikingly, non-discrimination and fundamental rights have not found a natural home in a directorate. Responsibility has moved around between the Justice Directorate and Employment and Social Affairs (Kelemen 2011, pp.48-9). The latter directorate is periodically renamed: at the time the Gender Directive was being debated, it had acquired the additional element of ‘Equal Opportunities’. While the Employment and Social Affairs Directorate normally works with competences provided by the ‘Social Policy’ chapter of the Treaty, which is primarily concerned with employment regulation, in the early 2000s it enjoyed unexpected success with directives relying on Article 13, part of the ‘citizenship’ chapter of the Treaty. It followed a strategy of linking social policy to fundamental rights, and this was the
environment in which it initiated the process which was to lead to the *Test-Achats* decision.

3. Debating the norms governing discrimination in insurance

The origins of the *Test-Achats* case lie in the Commission’s proposal in 2003 for a ‘Gender Directive’ to extend the existing law on sex discrimination, previously confined to employment, to the provision of goods and services. The Gender Directive was brought forward under the competence established by Article 13(1) of the European Treaty, as amended at Amsterdam in 1997 (now Article 19). This did not establish a fundamental right of non-discrimination: instead it stated that ‘the Council may take appropriate action to combat discrimination’, thus giving competence to define the scope of anti-discrimination measures to the legislative authorities. The proposal for a directive put forward in 2003 included a prohibition on sex discrimination in insurance rating; in other words, a requirement for unisex tariffs.

The lead directorate in preparing the proposal was Employment and Social Affairs (hereafter: DG Employment), and, as noted above, it followed a strategy of linking fundamental rights and social policy. Specifically, it framed the proposal in legal, social and market-integrative terms, arguing that they all pointed in the same direction, towards the desirability of eliminating sex discrimination. This section traces in turn how these arguments fared in the subsequent debate.

DG Employment argued that ‘equal treatment for women and men is a fundamental right and .. the freedom to set tariffs must be subject to that right.’ (CEC 2003, p.7)
Regardless of the risk parameters, discrimination is ‘morally unacceptable’ (CEC 2003, p.8). This legal argument was subject to some reservations, even on its own terms. 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.

Social policy arguments took up the bulk of the text in the explanatory memorandum. The Commission drew attention to the trend in member states towards the privatization of social insurance, particularly pensions, and argued that privatization
was tending to magnify the disadvantages faced by women in the labor 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 the pensions (specifically, pensions based on purchasing an annuity) of a group at high risk of having inadequate provision, ie women.

However, the fundamental rights frame was not well-suited to being instrumentalized to pursue this social policy objective, for two reasons. First, it only addressed discrimination on grounds of sex, allowing (even encouraging) 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 compulsory 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 favor 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 instrumentalizing non-discrimination to achieve social policy goals.

The converse point, that a narrow frame aids the instrumentalization of rights, is made by Leisering and Vitic (2009). They analyze 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 market integrative argument for unisex tariffs was that member states could not eliminate discrimination without the risk of undercutting by businesses in other member states: thus, ‘it is necessary to co-ordinate a move towards a unisex approach across the Union’ to prevent unfair competition (CEC 2003: 11). This argument established the EU’s competence to regulate, but it did not explain why unisex rating should be the basis for fair competition. Here the Commission tried to link
harmonization to modernization, arguing that the technical basis for the use of sex factors was not well-established, and was being undermined by social change. It claimed that ‘progressive insurance companies are in the process of developing new and more accurate means of predicting risk. As they do so, and as a consequence of competition, they will be able to reduce the importance of sex in their calculations and base their prices on sex-neutral criteria’ (CEC 2003, pp.6-7). As the discussion below shows, there was a grain of truth in this argument. However, the attempt to link non-discrimination to market integration faced a major obstacle. Insurance markets had supposedly been integrated as part of the single market process, culminating in the passage of the Third Life and Non-Life Insurance Directives in 1992. This market-integrative process had not involved any harmonization of risk-rating practices, and indeed harmonization was seen as a threat to open competition, as the following section explains.
4. Market integration and discrimination in insurance

As is well-known, harmonization may be needed to facilitate market integration, but integration can also occur by allowing companies to expand their home state practices into new markets through mutual recognition. In creating the single market in insurance, the Commission promoted harmonization of solvency and other prudential regulatory requirements, which can be seen as necessary institutions for maintaining market confidence and stability. It did not promote harmonization of risk-rating, however. Instead, it apparently held to the view that open competition would produce efficient risk-rating. As one of the standard accounts put it: ‘[t]he liberalization and deregulation of the insurance business in Europe aimed ultimately at creating an integrated European insurance market with companies providing consumers with the widest choice of innovative insurance products on offer at the best price.’ (van der Ende et al. 2006, pp.7-8) This opens the way to an increase in discrimination through finer classifications of risk, but this is a good thing, as it ‘allows premiums to be set at a level which is more commensurate to real risk.’

In practice, the Commission’s embrace of competition in risk classification was rather selective. In the course of promoting market integration, it took legal action against national authorities which maintained price regulation (in the form of rating tables), but it also allowed the industry 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. The effect of this strategy was to disempower national governments but empower national associations of insurers; in other words to promote self-regulation. National associations continue to occupy an important role in the establishment of conventions about rate-setting practices, including maintaining 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).

Market competition should heighten insurers’ incentives to use information to identify different risk groups. However, 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 has been seen as 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.

At the same time as the debate on the Gender Directive was going on, the insurance BER came up for renewal. In 2000, the Commission produced a report on the barriers
to growth in cross-border insurance provision. While most of its analysis focused on barriers erected by member states, it also noted that agreements between insurers and decisions by associations of insurers came within the remit of anti-competitive measures (CEC 2000, p.22). When the time came to renew the BER, DG Competition initiated a consultation, indicating that it was not in favor of renewal. Its main argument was that reforms to competition exemption and enforcement procedures made the BER unnecessary, but its position can also be seen as a sign of dissatisfaction with the slow advance of cross-border competition in insurance. The industry mobilized strongly to defend the BER, particularly the part concerned with sharing the data used to calculate risks. The insurance associations and companies which responded to the consultation all argued in favor of the BER, emphasizing the special nature of the insurance industry and the danger that coverage available to consumers would be reduced by the legal uncertainty that removal of the BER would create. This campaign was successful.

Given that risk classification in insurance is not a truly competitive process, the resistance of DG Competition to social regulation of risk classification is somewhat puzzling. One explanation is that, from a competition policy perspective, social policy and ‘general good’ provisions were seen 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.

3 The responses to the consultation can be found at http://ec.europa.eu/competition/consultations/2008_insurance_ber/index.html (last accessed July 2012)
This critical perspective on social policy arguments for market regulation gained strong support from economists, even those who acknowledged that social regulation might sometimes be workable. 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. For example, 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.

In summary, it is arguable that the opposition of DG Competition to the unisex tariff proposal was misguided, because the proposal was based on a coherent principle of non-discrimination. Whereas diverse national regulations impeded competition, the proposal would have uniform application, which could facilitate market access. However, any such argument was overridden by a more 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.
5. After the Directive: The industry response

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. At first sight, this formulation is favorable to the industry: it accepts 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. It was even 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.

However, not all industry observers were happy with Article 5(2), arguing that ongoing scrutiny was a slippery slope that would eventually lead to further regulation.

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4 Source: See note 3.
(MacDonnell 2005). This section discusses why there was some validity to this objection. A weakness in the industry’s position was that risk rating practices were strongly influenced by established conventions, as noted above. There had been less convergence and change in practices as a result of the creation of the single market than might have been expected. Wils (1994) had predicted that the liberalization of the European insurance market would bring profound changes in risk rating practices and heightened controversy over the issue of discrimination. However, the inertia of the industry and the work of its associations prevented this from happening. This is not to say that there were no changes as a result of the insurance directives (see eg Schwarz and Wein (2005) for an analysis of changes in risk rating in German motor insurance), but the effects were muted by industry caution.

The theoretical case for expecting convergence in risk rating under open competition appears to be strong. In a competitive market, firms will search for efficient classifiers that enable them to offer lower premiums to good risks. Other firms will have to follow suit and adopt the classifier. If they do not do so, they will lose market share and find that their remaining customers self-select towards a higher risk profile. However, studies in the economics of insurance suggest that competitive processes will not produce an efficient level of classification. The standard finding is that individual firms may overinvest in (costly) information, beyond the efficient level that counters adverse selection (Crocker and Snow 2000). This is particularly likely if the most risk-averse consumers (those most likely to buy insurance) also have lower risk profiles. Refinements in classification bring enhanced profits to the ‘first mover’ but the end result may damage all the firms, and this creates an incentive to collude to prevent excessive differentiation of risks (Wilson 1977). A strategic actor like an
industry association can therefore be expected to try to dampen innovation in risk classification.

The preference of industry associations for restraining excessive risk differentiation is compounded by their desire to avoid the politicization of classification practices. One of the risks in the creation of the single European market was that debates about the legitimacy of various forms of discrimination would be opened up. For example, some countries had regulatory ‘bonus-malus’ systems in which motor insurers were required by law to follow a common scheme for adjusting premiums when insureds were involved in accidents, and the Commission indicated that it regarded these schemes as anticompetitive (CEC 2000, p.23). In Belgium, the statutory scheme was phased out at the beginning of 2004, amid considerable controversy. The consumer organization Test-Achats became involved, arguing that the arrangements that insurers had put in place for identifying ‘aggravated risks’ were flawed and unfair (BEUC 2002, pp.3-4). Premium loadings for young drivers became very heavy, causing political intervention to persuade insurers to lower rates for this group (CEA 2007, pp.53-4).

The delicacy of the industry’s position can be appreciated by examining the processes that followed 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

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5 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).
‘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 human rights’ (AGE et al. 2009, p.3).

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 major UK insurer, Legal and General. Adrian Boulding has argued in favor 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 defense 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.

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6 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)
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, Lindorfer7, 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.

6. The CJEU overturns the regulatory compromise

In March 2011, the CJEU’s Grand Chamber ruled in Test-Achats that the ongoing practice of sex discrimination in insurance was a derogation from the principle of equal treatment between men and women that could not be permitted indefinitely. It ruled that Article 5(2) would cease to be valid from December 2012, effectively restoring the Commission’s original draft of the Directive which envisaged a move to unisex tariffs with an extended transition phase. This section examines the basis for this decision.

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. Different legal traditions pointed to various ways of interrogating and rationalizing discrimination, as shown in the discussion above of the legally-inspired debate about

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whether female longevity was biologically or socially determined. However, 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 maneuver may be the result of a search for the ‘lowest common denominator’ to gather the support of the majority of judges.

However, other aspects of the judgment were characteristic of the Court’s fundamental rights jurisprudence. The key was to establish that non-discrimination was a fundamental right that extended across all areas of the Union’s activity (specifically, in this context, beyond employment). As noted above, Article 13 (now 19) of the Treaty gave the Community legislature the competence to determine how the principle of non-discrimination should be developed and applied in goods and services markets. However, the Court argued that this competence had to be exercised subject to the fundamental right of non-discrimination, which it found in the Charter of Fundamental Rights. This states that any discrimination based on sex is prohibited and that equality between men and women must be ensured in all areas (Judgment, paras 16-17). While the Charter is not a competence-granting or self-executing legal instrument, the Court was still able to use the Charter to review the way the Community legislature exercised its powers.
There is more than a hint of sleight of hand in the process by which non-discrimination has come to be constituted as a fundamental right, but the institutional logic of the process is evident. Commentators have noted the Court’s interest in maintaining its prestige and power in the Community legal system vis-à-vis national courts (Mattli and Slaughter 1998). This points to a particular assertiveness in any question concerned with ‘rights’, as the Court seeks to pre-empt the risk that it might turn out to be a weaker defender of rights than national courts. At the same time, 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 labor). This has allowed the Court to advance economic and social integration despite blockages in the legislative process.

While the judgment relied on fundamental rights reasoning, the Advocate-General’s (AG’s) opinion gives us a sense of more prosaic reasons why the legislative compromise was unacceptable. Three reasons emerge. First, the AG resisted the high degree of sectoral and cross-national variation that the settlement allowed. Second, the community of expertise that sought to justify special treatment of the insurance sector with economic and statistical analysis exerted little influence when legal analysis pointed towards a clear answer. Third, the AG seized the chance to remedy the anomalies produced in the Court’s own caselaw on equal pension rights in employment, following the path opened up by Lindorfer (above). The result was that, whereas the regulatory division of competence within the Commission supported
special policies for employment-related insurance, the judicial application of fundamental rights eliminated that boundary.

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.

The possibility that insurance might be a special case in applying the norm of non-discrimination was 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). We see here the German legal reasoning also advanced during the debate over the Directive. 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.

Lindorfer was an employment case, and other cases concerned with unisex rating have also been brought under employment law and equal pay provisions. The Court has often been respectful of the idea that social regulation should be confined to employment. Not only do lawyers see labor law as a distinctive area of law, but analyses of the social ‘embeddedness’ of market relationships in the Polanyite tradition also focus on employment. 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’. While the Commission had also seized the chance to bring forward directives under the ‘citizenship’ competence, its approach and
expertise maintained a clear distinction between regulations applying to employment and those affecting goods and services markets.

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 favored. 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.

7. Conclusion

For Caporaso and Tarrow (2009), social rights are an antidote to the economic freedoms promoted by the EU. For Scharpf (2010), they are individual liberties in another guise, and they undermine collective institutions of social solidarity. The account of the application of non-discrimination rights to insurance advanced here challenges both interpretations.

This paper has argued that supranational social regulation based on rights is concerned with the constitution of integrated markets rather than the attainment of
specific distributive outcomes, and this makes it difficult to compare the efficacy of national and supranational measures. The regulation of risk classification in insurance may have little effect as a measure to promote solidarity in the sense of equality of outcomes. Non-discrimination on one ground (sex) does not create solidarity in insurance when separation of risk pools can freely be done on other grounds, and the CJEU has made it clear that insurers may discriminate between insureds on other grounds than sex. If insurers can find 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 not be great. In this example, we see both the potential and limitations of rights. Their potential is that they provide principles or norms to govern market transactions; their limitation is that their effects on outcome measures of welfare are ambiguous.

Caporaso and Tarrow (2009) eventually chose the title ‘Polanyi in Brussels’, although early drafts of their paper located Polanyi in Luxembourg, the home of the CJEU. They argued that the Court played a key role in embedding the single market because it could surmount the decision traps of the legislative process. However, the hand of the Commission is evident in several of the examples they cite, and possible substantive differences between legislative and judicial policy-making did not detain them. In this paper, I have argued that the difference alerts us to the distinction between the instrumental use of rights as a vehicle for framing social policy initiatives, and the principled application of rights as norms that should be upheld regardless of the consequences.
Scharpf’s (2010) critique of the CJEU’s rights jurisprudence emphasizes the conflict between supranational decision-making and national social policy. His central claim is that the Court undermines the solidarity achieved by national institutions. The Commission is often culpable in siding with the Court, but judicial policy-making is the central problem, because member states can defend their social policies in the legislative arena. However, the Court cannot be accused of overriding democratically-legitimated national social policy preferences in the Test-Achats case. Conventions on risk classification have been maintained through self-regulation 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 engendered politicization, rather than displacing national democratic control.

The leading protagonists in the debate on ‘social’ Europe share a common weakness: they focus on the collective and redistributive institutions of the welfare state, to the exclusion of the norms and conventions that constitute markets. Caporaso and Tarrow’s analysis of the social security rights of migrants has been justly criticized for failing to consider how social security systems have to be collectively financed and maintained (Höpner and Schäfer 2012). However, these critics have been drawn into exaggerating the extent to which domestic markets are regulated for social policy purposes. In insurance, national markets have been self-regulated to stay within the boundaries of acceptable discrimination while offering consumers a degree of choice through competition. The preference of insurers for avoiding public scrutiny and debate is reflected in their subdued responses to the Court’s decision, suggesting that
they would like nothing better than to exit the public gaze and return to a position in which their expertise is uncontested and their classification decisions are silently accepted.

The *Test-Achats* case alerts us to the difference between two processes whereby non-discrimination rights can be invoked to re-regulate markets. One process is distributive social policy: the use of non-discrimination as an instrument of social regulation to achieve desired outcomes related to promoting equality. The other process is the revisiting and possible disruption of the social conventions that underpin markets, where the taken-for-grantedness of existing discriminatory practices is challenged. The general expectation may be that the position of those discriminated against will be improved, but this expectation is held without specifying precise social policy goals. In the account offered here, the Commission is characterized as a policy-oriented body, while the Court upholds rights in a less instrumental way. The case shows that the CJEU has established a uniquely powerful position in applying non-discrimination norms, not only because of its capacity to overrule national processes of social policy-making, but also because, under the guise of market integration, it is prepared to revisit market-constitutive norms which vary across the member states.

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