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## Abstract

In a recent decision, the European Court of Justice has ruled that insurers cannot discriminate on grounds of sex in setting premiums or determining benefits. This paper discusses the background to this decision. It asks whether we are seeing a US-style 'rights revolution', fuelled by judicial activism, as suggested by Dobbin *et al*'s hypothesis of 'the strength of weak states' or Kagan and Kelemen's account of 'adversarial legalism'. It is shown that neither of these theories captures the distinctive nature of the ECJ's intervention. An industry-friendly policy was pursued in regulatory venues, but this was overridden by the ECJ's interpretation of the fundamental right of equal treatment. However, it is also shown that the judicial defence of fundamental rights is a weak basis for social policy, and does not foreshadow a revolution in the development of social rights in Europe.


**Keywords**: Adversarial legalism, discrimination, Gender Directive, insurance, weak state

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# A Rights Revolution in Europe? Regulatory and judicial approaches to nondiscrimination in insurance

## 1. The Regulatory and Judicial Politics of Nondiscrimination Rights

Does the EU's expanding lexicon of equality and nondiscrimination rights provide the basis for a 'rights revolution' in Europe? The pioneering measures taken against sex discrimination in employment have now been extended to other grounds: race, age, disability, religion and sexual orientation. The prohibition on race and sex discrimination extends beyond employment, to include markets for goods and services. The scope of these grounds has thus come to resemble the prohibition on discrimination on grounds of nationality, one of the foundational principles of economic integration in Europe. Could the expanded equality rights provide a platform for a European-level social union, complementing the economic union?

In a sense, Europe has already had its own rights revolution, because the processes of market integration have been driven by rights claims, albeit often by businesses seeking to exercise economic freedoms. But the idea of a rights revolution advanced by American commentators drew attention to the extension of rights beyond property and contract, to encompass social and political rights such as due process in administrative procedure, freedom of speech and religion, and prohibitions on discrimination based on personal characteristics such as race and sex (Epp 1998, p.7). The formulation and exercise of these rights saw new patterns of political mobilisation, and engaged the courts in extended processes of mediating claims coming from households as consumers and workers seeking to exercise rights against big business or the state.

In Europe, nondiscrimination has a double face, as a social right and as a market-conforming principle. Nondiscrimination has been advanced as a distinct mode of social regulation, particularly in employment. At the same time, it serves the process of economic integration, for example when consumers seek rights to transact across borders or workers seek employment in other countries. Within the European Commission, different directorates tend towards different orientations. Nondiscrimination directives are proposed and shepherded by the Employment and Justice directorates, where they are framed as 'social' and 'citizenship' rights. But the Competition and Internal Market directorates largely accept the rights agenda, because it is normally broadly compatible with market integration. This makes the nondiscrimination frame particularly attractive to the Commission. However, it does not tell us whether nondiscrimination rights in Europe are the basis of distinct social regulatory processes or are a mere handmaiden of competitive market integration.

The discussion in this paper focuses on the regulation of discrimination in insurance, because insurance is a critical case for examining this question. Openness to competition can be expected to intensify problems of discrimination in insurance. If nondiscrimination rights are a handmaiden to the market, we would expect to find the EU institutions developing interpretations of discrimination that endorse those industry practices likely to facilitate market integration. Conversely, if social policy objectives rather than industry preferences shape policy, distinct social regulatory principles could be allowed to stand in the way of market integration.

The application of nondiscrimination rights to insurance became a highly salient issue with the proposal for a directive[1] prohibiting sex discrimination in the provision of goods and services (the 'Gender Directive'). Article 4 of the proposal provided that the use of sex as a factor in the calculation of insurance premiums would be prohibited. It set out a timescale for implementation which allowed

[1] Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, COM(2003) 657 final

member states a six-year postponement, provided they would 'compile, publish and regularly update comprehensive tables on the mortality and life expectancy of women and men'. In Art 5(2) of the final directive, agreed by the Council in 2004[2], member states were allowed to maintain differential factors indefinitely, although they would have to produce relevant data on the use of sex as a determining actuarial factor. They were also obliged to review their decision in 2012, aided by a report to be produced by the Commission.

This compromise could be interpreted as an illustration of regulatory negotiation and problem-solving. The following discussion shows that the industry dominated the regulatory process. The principle of nondiscrimination contained sufficient ambiguity to be accommodated to existing market practices, with some adjustments. However, this is not the end of the story, because nondiscrimination rights are also subject to judicial interpretation. The ECJ approached the application of nondiscrimination to insurance in a different way to the regulatory policy community. Thus the impact of nondiscrimination rights turned out to hinge on the relationship between regulatory and judicial policy-making. To put it bluntly, it appears that nondiscrimination rights are the handmaiden of competitive market processes when they are developed and implemented by industry-dominated regulatory policy communities, but they acquire more autonomy when they are interpreted and applied by the ECJ.

Literature inspired by American commentaries on the 'rights revolution' gives us (at least) two different perspectives on this situation. One interpretation is that the rights revolution reveals 'the strength of weak states' (Dobbin and Sutton 1998; Lieberman 2002). In short, the 'weak state' produces vague and ambiguous laws and does not invest executive agencies with the power to provide authoritative interpretations of their application. Paradoxically, such laws may turn out to have a strong impact, as activists search out channels for using the law and incumbent economic actors seek to reduce the uncertainty the law creates. The wholesale characterisation of the US as

[2] Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

a 'weak state' has been justly criticised, but the kernel of the argument may be preserved as an account of the potential strength of vague laws in a state with weak social policy-making capacity. The EU's recent nondiscrimination laws are such laws: vagueness and ambiguity have been essential to their passage through the EU's decision-making processes (Geddes and Guiraudon 2004). Despite the attempts of member states and the Commission to produce definitive interpretations of the Directive in the course of transposition, the availability of recourse to the ECJ has meant that regulators have not been able to control the interpretation and dissemination of an ambiguous measure.

Other commentators are much less inclined to find strength in executive weakness. A leading critique is Kagan's (2001) theory of 'adversarial legalism', where opportunities for efficient regulatory negotiation are impeded by recourse to the courts. Kelemen (2004, 2011) has suggested that the EU is vulnerable to adversarial legalism, albeit in a particular form that he terms 'Eurolegalism'. Whereas American adversarial legalism is driven by the organisation of interests to make claims, facilitated by opportunities for class actions and the potential for vast damages, Eurolegalism is more strongly marked by the effects of competition for authority between levels of government in Europe. This competition produces legalism, in the form of lengthy and detailed regulations. It also produces court cases, insofar as the relative weakness of the Commission encourages it to turn to the ECJ. The Commission uses compliance actions before the ECJ to limit the discretion of national governments. Thus '[t]he fragmentation of power at the federal level encourages an adversarial, litigious approach to regulation that reduces the discretion of states in implementing federal statutes.' (Kelemen 2004, p.2)

Both these theories, in their different ways, posit that regulatory and judicial processes are closely linked. Dobbin (2009) emphasises that there are two-way processes of communication between self-regulatory practices and judicial norms. Corporations anticipate judicial rulings and take advance steps to comply; courts look at corporate 'best practice' in deciding what norms to set. Kelemen proposes that the Commission uses the ECJ to make up for its own lack of power, the suggestion being that the two institutions pursue common goals. By contrast, this paper highlights the apparent autonomy of the ECJ. The Commission endeavoured to avoid a legalistic approach to the implementation of the Gender Directive, establishing a regulatory network and promoting a compromise between industry and consumer interests that was permissive of existing discriminatory practices. The ECJ, however, has taken on the development and application of nondiscrimination law in a way that pays little heed to the Commission and the industry.

The argument advanced here is that it is necessary to pay attention to the nature of nondiscrimination rights as *fundamental* rights to understand the way that they have developed in the EU. Nondiscrimination is therefore distinct from other rights which are legally enforceable but not fundamental, such as the right to compensation for air travel delays (to take an example discussed in Kelemen 2011, pp.1-4). The ECJ's insistence on the fundamentalism of certain rights has seen it acting autonomously to interpret and develop these rights. The consequence is that rights are not a mere handmaiden to market integration. However, it is also argued here that, viewed as a form of social regulation, fundamental rights have distinct limitations. In short, they are not instrumental in achieving social policy goals, and may indeed achieve very little at all.

## 2. Discrimination in European insurance markets

Buyers of insurance, like workers seeking employment but unlike consumers in most markets, do not enjoy anonymity in the relationship they enter into. On the contrary, they are required to disclose information about themselves that insurers can use to assess and classify the risk they present. Risk assessment entails discrimination, in the sense of drawing distinctions between one buyer and another. This discrimination may be justified: industry representatives are often supported by economists in insisting that it is. This section provides a brief introduction to insurance economics to explain why economic theory does not provide definite answers to the question of how much discrimination there should be. As Advocate

General Kokott put it in her recent *Test-Achats* opinion, risk classification involves 'political, economic and social choices'[3]. After reviewing the economic arguments, this section shows how discrimination issues were (or were not) perceived and addressed during the '1992' process of creating a single market in insurance. Some advocates of insurance market integration in Europe argued that more competition would lead to more discrimination, and that this would be efficient. In practice, however, this process was largely suppressed.

To begin with insights from economics into conditions for efficiency in insurance markets. A standard criterion for efficiency in insurance markets is 'actuarial fairness'. This criterion states that those insured should get out, on average, what they pay in, less some reasonable level of administration costs. If payouts are less than is actuarially fair, insurers will be making excess profits. However, this efficiency-oriented concept of actuarial fairness is silent about the size of the risk pool that should be used to calculate the average rate of claims. There is no economic principle that says that small pools are fairer than large pools. Within any pool, there will always be some who 'win' in the end, and others who receive less than they paid in.[4] Thus, both unisex insurance and sex-differentiated insurance (for example) can be actuarially fair in the sense of ensuring that there are no excess profits, although in public debate the concept of actuarial fairness is often invoked to suggest that all available information should be used to differentiate risk pools.

Another economic concept relevant to efficiency in insurance markets is market completeness. An efficient market economy offers participants opportunities not only to enter 'spot' or current exchanges but also to make future, state-contingent contracts. A complete set of such contracts would allow people to insure themselves against both financial risk and 'classification risk' (Crocker and Snow 2000, pp.249, 273), which refers to the possibility of finding oneself classified as high risk. Clearly, there is less classification risk in large insurance pools than in insurance markets

[3] Case C-236/09, Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres, Opinion of A-G Kokott delivered on 30 September 2010, para 47.
[4] These issues have been exhaustively discussed in the American literature; see e.g. Abraham (1986).

where participants are separated by risk characteristics. It follows that pooled insurance is more efficient on the market completeness dimension, because separated insurance leaves people to bear classification risk.

However, this efficiency result is turned on its head once the possibility of adverse selection is considered. Adverse selection may arise when those seeking insurance know their own riskiness or probability of claiming. Some low-risk individuals may then choose not to take up the pooled contract. Their refusal to participate in pooling means that more insurance contracts may be concluded if classification is allowed, depending on whether an efficient classifier (one that correctly distinguishes low and high risk groups) can be found. While there is an efficiency loss from exposing people to classification risk, this is countered by the gain from insuring low risk groups who would otherwise not take out insurance.

Along with moral hazard, adverse selection is the major market failure affecting insurance. One remedy for adverse selection is to make insurance compulsory, but competitive markets may find an alternative remedy. One way that insurers compete is by identifying groups with low risk characteristics that can be separated from the rest of the insurance pool by offering them more favourable terms. These groups may be identified in many ways: by consumption choices, occupation, place of residence, age, sex and so on. Making markets more competitive should therefore reduce adverse selection, by promoting the use of information to differentiate risks.

From this perspective, far from discrimination being a sign of market failure, it is a solution to market failure in insurance. Furthermore, if regulators endeavour to limit discrimination by insurers, the problem of adverse selection will reappear, producing 'regulatory adverse selection' (Hoy 2006). Advocates of insurance market liberalisation in Europe have argued that competition produces a more efficient insurance market. Competition leads to insurance premiums being more finely differentiated with respect to the probability of claiming. Finer classification of risk 'allows premiums to be set at a level which is more commensurate to real risk' (van der Ende *et al*. 2006, p.8), which is a sign of a market efficiently using information.[5]

These ideas might suggest that the liberalisation of the European insurance market would bring profound changes in risk rating practices and heightened controversy over the issue of discrimination. Contemporary commentators did draw attention to the discrimination issue (Wils 1994), but in practice it did not figure much in responses to the Third Life and Non-Life Insurance Directives (both passed in 1992). There were several reasons for this. First, discrimination on grounds of sex (as well as age, disability and other 'discrimination grounds') was permitted in most countries before market liberalisation got underway. Rating tables produced by regulators or insurance associations differentiated premiums according to long-established criteria. These were characterised more by their conformity to the assumptions and preferences of the parties represented in the regulatory process than by adherence to principles of nondiscrimination. Assessing the changes to the Germany regulatory regime wrought by the single market, Rees and Kessler (1999, p.383) acknowledged 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'. Everson (1996) advanced a similar assessment, suggesting that existing competition-suppressing regulatory regimes could not defend themselves effectively on nondiscrimination grounds, as their practices owed more to corporatist interest accommodation than to a coherent theory, whether based on welfare economics or rights.

A second, related, factor was that insurers proceeded rather cautiously in introducing new bases for risk rating once the Directives came into force. Each

[5] The literature on the economics of insurance suggests that competitive pressures will not necessarily produce the level of risk differentiation that most efficiently combats adverse selection. This is not the place to review these arguments, except to note that insurers may have an incentive to collude to prevent excessive differentiation of risks (Wilson 1977).

market demonstrated considerable inertia in practices, which can be explained by insurers' uncertainty about the impact of new factors and their reliance on historical rating information. Indeed, having promulgated insurance directives to promote competition, the Commission immediately granted the industry a Block Exemption Regulation (BER), 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 permitted 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 generated by a single insurer.

In other words, while incentives to use information to identify different risk groups are heightened by market competition, the production of that information is a non-competitive, or pre-competitive process. We see here the force of Prosser's (2006) critique of the market failure theory of regulation as presupposing that the market can potentially exist without regulation. 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.

Choices about what data to collect and pool have been made through time without much engagement of public policy actors. 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.

This is not to imply that there was no innovation in risk rating practices as a result of the creation of the single market, although other changes in the industry - notably a tendency towards concentration – have been more pronounced and more closely studied (see eg Fenn *et al*. 2008). Changes in risk rating in German motor insurance were examined by Schwarz and Wein (2005). They found that the regulatory changes initiated by the European directives had produced an increase in the range of risk-rating characteristics used, and a shift towards rating on driver characteristics such as age and sex, whereas the previous ratings had relied on non-driver characteristics such as vehicle type. They found strikingly different patterns of diffusion for different characteristics, with some classifications being introduced and then withdrawn, some used only as a 'niche' strategy by a few insurers, and others exhibiting delayed implementation. Sex fell into the latter category, with about 40% of insurers giving discounts to single women by 2003. More generally, they identified several puzzles in the diffusion pattern, with some apparently effective discriminators being shunned by insurers.

Motor insurance was a controversial case, even among insurance economists. Because third party insurance is mandatory, efficiency gains from risk classification to counter adverse selection are lacking. However, classifications to counter moral hazard by rewarding careful driving may be efficient. At the same time, classification has redistributive effects which may be politically salient, for example if insurance becomes prohibitively expensive for young drivers. Furthermore, insurers may use classifications for strategic marketing purposes (charging higher premiums to those with the least elastic demand), rather than reflecting differences in risk. These issues were debated in some EU countries following the implementation of the third generation of insurance directives. In particular, some countries had regulatory regimes for '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 (Lemaire 1995). The Commission indicated that it regarded these schemes as anticompetitive. In Belgium, the statutory scheme was phased out at the beginning of 2004, amid considerable controversy. The consumer organisation Test-Achats became involved, arguing that the arrangements that insurers had put in place for identifying 'aggravated risks' were flawed and unfair (BEUC 2002: 3-4). Premium loadings for young drivers became very heavy, causing political intervention to persuade insurers to lower rates for this group (CEA 2007: 53-4). However, such examples of politicisation were rare. Consumer associations did not often get involved in debates over risk classification, perhaps believing that the creation or elimination of cross-subsidisation was a zero-sum game for their members.

Genetic discrimination was another area where there was public debate about insurers' practices, which came to the fore in the early 2000s. Members of the European Parliament pushed for EU-wide regulation, and some states legislated against the use of genetic information (Mattheissen-Guyader 2005). However, insurers in several countries, including Germany and the UK, reached voluntary agreements limiting the use of genetic data, indicating that in some countries the sector had the capacity to self-regulate in order to avoid the politicisation of risk classification.

Two other factors can be mentioned as restraining innovation in risk classification and helping to suppress the potential conflict between promoting competition and restraining discrimination. At the time of the third generation directives, the determination of risk classifications remained connected with solvency regulation in a number of countries. Price control was a traditional method used by national authorities to ensure solvency. The price control approach had been developed on the theory that insurance markets were vulnerable to ruinous competition, whereby competitive reduction of premiums would eventually lead to firms being unable to honour their commitments. In the 1980s and 1990s, this approach to solvency was replaced by one based on assessing risks and determining adequate reserves. Regulatory guidance could still be given on how risks should be classified for solvency purposes (including the specification of relevant risk categories), but these risk categories did not have to be used for pricing products or determining 'customer facing' risk classes. Thus the regulation of solvency could be detached from the regulation of discrimination. This process was completed with the implementation of 'Solvency II' in the consolidating insurance directive passed in 2009.[6]

Finally, the insurance directives contained significant exemptions that permitted member states to continue to regulate discrimination by insurers. First and foremost, they excluded 'insurance forming part of a statutory system of social security'. Furthermore, Article 54 of the Third Non-Life Insurance Directive provided that contracts covering health risks which served 'as a partial or complete alternative to health cover provided by the statutory social security system' could be subject to regulation by the host member state to protect the 'general good'. Examples of regulations permitted by this measure have included requirements imposed on private providers to maintain open enrolment with 'community rating', which means that there is no differentiation between customers according to risk characteristics (Thomson and Mossialos 2007). A further development restraining risk classification came with the judgment in *Albany* and the associated cases in 1999 (Mabbett 2000), where the ECJ effectively exempted from competition law certain occupational pension arrangements, by upholding anti-competitive provisions of collective agreements between unions and employers on the grounds that these were needed to maintain insurance pools and prevent excessive selection of risks.

In summary, the Commission promoted market integration through competition in insurance as in other industries. While this produced some pressures for increased discrimination, this was restrained in areas where it could have produced political contention. The element of self-restraint by insurers suggests that the constitutive regulation of insurance markets, through which risks are defined and calculated, contract terms developed, and policy-holders' expectations shaped, is not governed by norms of unbridled free competition. Instead, insurance associations are active in finding acceptable practices. In the single market regime, a block exemption from competition rules facilitates industry coordination of practices and standards. The effect of market liberalisation (specifically, the third generation of directives) was to

[6] Directive 2009/138/EC on the taking up and pursuit of the business of insurance and reinsurance.

limit the powers of national regulatory authorities, but the block exemption continued to allow cooperation and coordination through industry associations. Thus market-constitutive regulation was made more 'decentred' in Europe as the single market project proceeded. In place of 'command and control' regulation by public authorities, standard-setting and information-sharing occurred within the industry.

# 3. Discrimination in insurance as an issue for social policy and fundamental rights

This section examines the arguments that the Commission put forward for insurance regulation in its proposal for a Gender Goods and Services Directive, looking in particular on the Commission's efforts to instrumentalize the principle of nondiscrimination for social policy purposes. The focus of social policy concern was pensions, or more specifically annuities. Annuities insure their holders against the risk of living a long life. If sex discrimination is allowed, women find that a given pension fund purchases a lower annuity than a man would obtain, because of their longer life expectancy.

The explanatory memorandum accompanying the Commission's proposal for the Gender Directive drew attention to the trend in member states towards the privatisation of social insurance, particularly pensions. The Commission argued that privatisation had the potential to magnify the disadvantages faced by women in the labour market. A key issue was the rise in funded, 'defined contribution' (DC) 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.

However, the use of a fundamental rights competence to pursue a social policy goal encountered an immediate problem. The fundamental right necessarily extended to all insurance, whereas the social policy goal pertained specifically to pensions. 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, therefore, an obstacle to instrumentalizing nondiscrimination to achieve social policy goals.

A similar point is made by Leisering and Vitic (2009), who 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 and rights-based arguments, were relied on by the German campaigners. Riester pensions were closely connected to the statutory pension system, and were therefore 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 Commission could have tried to address the pensions problem specifically, for example by promoting a measure for pensions analogous to Article 54 on health insurance (see above), allowing member states to regulate private pensions that were substitutive for statutory social insurance. But this was not attractive to either the Competition and Internal Market Directorates of the Commission or to DG

Employment. For the former, such a provision would be tantamount to accepting that market integration in pensions would not proceed, and that areas of private insurance related to social insurance would remain a member state competence. For the latter, such an approach would give up the Commission's opportunity to strengthen its contribution to social policy by shaping the rules governing private provision. The institutional interests of both the 'social' and 'market' wings of the Commission pointed towards finding a way to regulate private pensions at the European level.

Thus a fundamental rights approach was attractive. But this approach also pulled the Commission away from social policy and into a more legalistic discussion. For some lawyers, 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: 531). For others, 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: 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. The argument was that 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.

From the perspective of the social policy goal which had motivated the proposal, these arguments missed the point, which was to change insurance industry practices in ways which would protect the pensions of a group at high risk of having inadequate provision, specifically women. Allowing discrimination on the basis of lifestyle factors would not achieve this, 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. But the fundamental right at issue was effective only in addressing the gender ground, not other drivers of inequality.

While much of the Commission's rationale for the Directive was framed in terms of social policy and rights, it was also concerned to establish that its position was consistent with economically-rational regulation. Thus it attempted to challenge the technical basis for the use of sex factors. It argued that '[s]tudies show that sex is not the main determining factor for life expectancy. Other factors have been shown to be more relevant, such as marital status, socio-economic factors, employment/ unemployment, regional area, smoking and nutrition habits' (CEC 2003, p.6). The Commission acknowledged that sex might be a 'proxy for other indicators of life expectancy' and that sex was a relatively easy-to-use factor in risk classification, but it argued that this was an inadequate normative justification for a discriminatory practice. It also suggested that sex discrimination was old-fashioned, claiming 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). While the Commission's claim that sex may not be the most efficient predictor of longevity finds some support in the technical literature, as discussed further below, it was not able to win this argument against the determined resistance of the industry.

The Commission might have been on firmer ground if it had been able to claim that standardisation of risk classification practices was necessary to ensure fair competition in the internal market in insurance. This was the position taken by France (which had a unisex rule for some annuities), which argued that different risk classification practices across member states could give rise to distortions of competition.[7] However, the Gender Goods and Services Directive was the wrong frame for this argument, which would need to be developed across the spectrum of risk classification practices, not just with reference to sex.

Finally, the Gender Directive appeared to provide an opportunity to remedy long-standing anomalies in the law on equal pay. The ECJ had determined that 'pay' includes occupational pension entitlements, so employers must ensure that their provisions are equal for men and women. However, if the insurers of pension schemes are using different actuarial factors for men and women, this becomes technically complex and produces anomalous results. For example, if the occupational scheme promises specified benefits (a 'defined benefits' or DB scheme), then employers have to pay higher contributions on behalf of women than men, and women transferring out of a DB scheme have to receive a higher lump sum. These difficulties could be eliminated if insurers used unisex factors in occupational pensions. Some member states require this, but the EU had been unable to legislate to establish a general rule, as the insurers underwriting pension provision are outside the scope of the employment-based social policy provisions of the Treaty.

The Gender Directive promised a solution, as it could achieve a unified approach across markets in goods and services and employment relationships. However, a number of member states resisted provisions that would effectively alter the existing law governing equality in employment. In their view, the Gender Directive was meant to extend the coverage of nondiscrimination law to goods and services, not to further strengthen the law on employment.[8] This rather formalistic position is an indicator that at least some member states did not wish to address substantive policy problems with the Gender Directive. The Commission was forced to 'clarify' that the Directive would not affect any insurance or pension related to employment.[9]

[7] France entered a reservation to this effect on the directive when it was finally agreed, noting that 'the legislation applicable in relation to parity in premiums and benefits for men and women must be the same for all insurance companies operating in a given Member State, regardless of their countries of origin.' (Statement entered in the Council Minutes, EPSCO Council 4 Oct 2004, 13137/04 ADD 1)
[8] I am grateful to Commission officials for explaining this to me.
[9] Note from the Presidency to the Council (EPSCO) 9426/1/04, Brussels 24 May 2004, p.4

In summary, the Commission was not able to attach the insurance provisions of the Gender Directive to substantive social policy purposes in the course of getting agreement to the Directive. Thus the claims of Scharpf (1999) and others that EU-level social policy is blocked by the demands of unanimity are confirmed, even though the Directive was eventually passed. The obstacles to substantive agreement reflected the abiding influence of the different regulatory regimes for social and private insurance, with social policy concerns assigned to the competence of the member states. This fuelled the disinclination of many member states to adopt a substantive measure at the European level.

# 4. After the Directive: The regulatory settlement

In 2004, the Gender Directive was agreed on the basis of a compromise suggested by the Presidency, to the effect that the use of sex-based actuarial factors could be allowed indefinitely, provided it was based on objective statistics. Article 16 envisaged that the Commission would review evidence from the member states on the operation of this derogation from nondiscrimination and submit a report to the Parliament and Council. In an annex to the Council conclusions[10], the Commission indicated that it would establish a working group to carry out this review, with representatives from member state governments, the insurance industry, consumers and equal treatment bodies. It subsequently acted on this by convening a Forum on the Implementation of Article 5 of the Gender Directive.[11] This section first examines the work of the Forum, and shows how a compromise position on risk classification was reached and taken up by the Commission. This position was consistent with the promotion of further market integration, and with the insurance industry's exemption from competition rules (the BER), which allowed the sharing of data to facilitate risk classification. Thus the regulatory policy community arrived at a

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[10] Minutes of the 2606th meeting of the Council (ESPCO), 27 October 2004, http://register.consilium.eu.int/pdf/en/04/st13/st13369.en04.pdf.

[11] 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 Dec 2010).

solution to the problem of managing the impact of nondiscrimination rights on insurance. This was not a static settlement - questions were raised about some industry practices – but insurers' autonomy in risk classification was otherwise preserved.

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 the Belgian consumer organization 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 the insurers and the identity group representatives such as AGE and EWL 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. Their acceptance of restrictions on the use of genetic data provided a recent illustration; similarly 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, for example by levying higher motor insurance premiums on foreign drivers. In other words, the apparent principled conflict between risk-rating and nondiscrimination 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. For the industry, it was important to stick with this line, as data on the sex of applicants is one of the most consistently available and reliable pieces of information insurers have. By contrast, prohibitions on ethnic and religious classifications did not challenge established actuarial practices.[12]

The Commission favoured drawing the line in a way that accepted existing practices in the insurance industry, subject to the requirement that they should be supported by published data. It refined this approach in its subsequent proposal for a Directive covering age and disability (as well as religion and sexual orientation), introduced in 2008. Outlining the rationale for this proposal, the Commission argued that '[t]he use of age or disability by insurers and banks to assess the risk profile of customers does not necessarily represent discrimination: it depends on the product.'[13] For these groups, the Commission developed a line of argument about how a more competitive insurance market in Europe could see some groups getting better coverage: for example, long-established age limits on travel insurance could be removed by new competitors which provided 'niche' products. On this perspective, abolition of risk factors was not the remedy for countering exclusion from insurance: rather, better consumer information that allowed people to find competitive premiums that were fair and proportionate was required. This argument was extensively developed in a report on the use by the financial services industry of all the 'discrimination grounds' listed in Article 13 (now 19) produced for the Commission (Civic Consulting 2010).

With widespread, but not unanimous, agreement on this approach, the focus of discussion shifted to the publication requirements. Consumer organizations argued

[12] Insurers have, however, been accused of indirect discrimination among ethnic groups, through postcode rating or through their marketing strategies.
[13] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final, p.5.

for improved access to data and more transparency about industry practices. Insurers proposed that the industry should not be required to publish data which showed exactly how a premium had been arrived at, as this would limit competition. Of course competition was already limited by the block exemption regulation (BER) governing several insurance industry practices, including the sharing of data used to calculate risks. The BER was due for renewal in 2010, and the industry mobilized strongly to defend it, particularly in its application to joint calculations, tables and studies. 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.[14]

This campaign was successful: the data-sharing part of the BER was retained, although other parts were ended. Consumer organisations won a small victory: the renewed BER required that consumer organisations, although not individuals, should have access to the data. In other words, insurers could be called to account by organised interests, which could therefore monitor the overall working of the market. Insurers would have to explain their practices, but would not have to deal with enquiries from individual consumers.

Consumer organisations were not, in any case, necessarily inclined to engage with insurance rating issues. In some countries, such as Germany and Austria, consumer organisations had long been represented in regulatory processes and accepted the technical explanation of rating practices. Other problems, such as refusals to insure

[14] The responses to the consultation can be found at http://ec.europa.eu/competition/consultations/2008_insurance_ber/index.html

or terminations of policies, produced more complaints and provided a readier basis for engagement. Similarly, equality bodies, while showing a sporadic interest in insurance issues (for example, indirect race discrimination arising from postcode rating), have not been very active in taking the rights agenda forward in this area, presumably because they feel that the technical basis for risk rating is well established.

One consequence is that the number of complaints about discrimination reaching courts and insurance ombudsmen has been small. Furthermore, there are more complaints about age and disability discrimination than about sex (Civic Consulting 2010, p.17). Courts have tended to apply a 'proportionality test' in response to complaints of discrimination, asking whether the premium loading is proportionate to the increased expected cost faced by the insurer. The Civic Consulting report suggested that the wording in the Gender Directive, which allows 'proportionate differences' in premiums and benefits, was consistent with prevailing legal interpretations. However, not all insurance associations were so confident. The UK industry operated in compliance with the Sex Discrimination Act of 1975, which included a loosely-phrased exemption for insurance, allowing insurers to discriminate on gender grounds, provided it was with reference to 'actuarial or other data from a source on which it was reasonable to rely' and the treatment was reasonable 'having regard to that data and any other relevant factors'. UK insurers took the view that the Directive significantly tightened this exemption. The ABI argued that the Directive created a 'lack of legal certainty where a company's premium rates could be challenged at any time for not being close enough to published data tables' (ABI 2009, p.11).

The British position gives us some insight into the potentially destabilising effects of regulatory integration. UK regulatory and judicial institutions accepted prevailing rating practices, but the ABI feared that the application of European criteria could destabilise that acceptance. The Commission believed it had established a basic regulatory consensus across Europe about the parameters of acceptable discrimination; the ABI pointed to different norms and practices established in different member states.

Why were UK insurers particularly concerned? One explanation is that the UK market is more competitive in its institutions and practices than other European markets. One indicator is that the ABI does not collect and publish as much industry data as some of its counterparts. For example, the ABI used to collect motor insurance claims data from its members which it aggregated and circulated, broken down by major risk classes, including sex. In the mid-1990s, this practice ceased. '[S]everal of the larger insurers declined to participate as they felt they gained little additional insight from the aggregated data and indeed that their competitors were benefiting. As more insurers dropped out, the aggregated data became increasingly unrepresentative and the scheme was wound up.' (UK response, Peraita 2007). If insurers rely on rate tables which are produced by a government-sponsored agency or association, and these tables identify relevant characteristics for discriminating between insureds, then sellers can be confident that these bases for discrimination are authoritatively established as acceptable. But if insurers generate data themselves, and innovate in the selection of characteristics for discrimination in order to gain a competitive advantage, then there is no authoritative interpretation of what constitutes an appropriate use of a characteristic to determine a difference in premium.

A key factor in cultivating a regulatory consensus was that insurance industry risk rating practices were well-entrenched: even, one might say, 'embedded' in social norms and expectations. However, market integration undermined the taken-for-grantedness of these norms, because practices varied across countries for no obvious reason. To take the example of motor insurance, a number of states require unisex rating. There is no apparent pattern to this. Some central European states, along with Cyprus, did not utilise the derogation in Article 5(2) of the Gender Directive, perhaps because of a lack of adequate data or an inclination to adopt European directives in full. In the Netherlands and Belgium, the case against sex differentiation in mandatory insurance was comprehensively aired. Academic commentators contributed to the debate (Thiery and Van Schoubroeck 2006). In Belgium, Test-Achats adopted the position that rating should reflect the individual's driving record, not his or her immutable characteristics.[15]

The community of expertise in insurance has generally upheld the use of sex factors in risk rating. However, there are some opposing voices, and statistical studies have not always endorsed 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 favour of unisex rating, even in life insurance and annuities.[16] His position is particularly striking as he is a member of the ABI's pensions committee, although he has not been able to shift the majority view in the ABI, which is trenchantly opposed.

In summary, the regulatory policy community was not unanimous in its view of sex discrimination in insurance. However, the regulatory debate adopted some common parameters. Insurers' sensitivity to social norms and EU imperatives was evident in their acceptance of prohibitions on race and nationality discrimination. Boundaries in the acceptable use of information were acknowledged, and staying inside the boundaries was a way to make sure that insurers enjoyed autonomy in setting premium levels and differentials. Particular markets were subject to controls for social policy reasons, but established practices were both necessary to combat adverse selection and defensible as reflecting statistical differences in risk. There was

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[15] See http://www.test-achats.be/la-discrimination-dans-les-assurances-s513603.htm
[16] See http://www.moneymarketing.co.uk/channels/corporate-adviser/boulding-calls-on-uk-to-support-eu-unisex-annuity-drive/1022263.article

scope for innovations in technical analysis and these could conceivably lead to amendments in the use of sex factors, but any such amendments would have to be based on a careful assessment of the effects on risk selection. Furthermore, premiums had to be based on the best statistical estimates of loss, as cross-subsidies between risk groups would not be sustainable in a competitive market.

## 5. The ECJ overturns the regulatory settlement

In March 2011, the ECJ's Grand Chamber ruled in *Test-Achats*[17] 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 equality with an extended transition phase. This section examines the Advocate-General's opinion in *Test-Achats*, along with the very terse judgment (it is succinct even by the standards of the ECJ). It also looks at the Court's approach in *Lindorfer*,[18] a case involving a Commission employee in which various *obiter dicta* were forthcoming that were significant for *Test-Achats*. The central question is this: why did the ECJ not follow the regulatory approach outlined in the previous section? National courts had not overturned industry practices, being willing to accept technical arguments about the proportionality of the industry's approach. Why did the ECJ see the issues differently?

We begin with Advocate-General Jacobs' opinion in *Lindorfer*. Ms Lindorfer had challenged the terms on which her pension rights were transferred to the Community employees' pension scheme, on grounds of sex, age and nationality discrimination. Only the sex discrimination complaint was upheld, where the complaint concerned the use of different actuarial values for men and women in

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[17] Case C-236/09, Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres, Judgment of 1 March 2011.
[18] Case C-227/04P, Maria-Luise Lindorfer v. Council of the European Union, Judgment of 11 Sept 2007.

calculating the years of service to be credited when Ms Lindorfer took up employment in the Commission. AG Jacobs produced several different reasons for upholding the complaint. First, he questioned the claim that different actuarial values were necessary for sound financial management, pointing out that using average values for men and women would leave the income and expenditure of the scheme unchanged (para 49). Second, he drew attention to the inconsistency between the scheme applying to transfer rights and the scheme covering established employees, where men and women paid equal contributions despite their different expected stream of benefits. He added a definite view on how equality of benefits should be understood: what mattered was that each employee received a pension for life of a certain 'weekly, monthly or yearly amount… The total paid out by the time of the recipient's death is completely irrelevant..' (para 68). Thus he applied the methodology of equal pay to the assessment of pension benefits.

Third, Jacobs reflected more generally on the potential to justify the unequal treatment at issue. He pointed out that the use of different actuarial factors was an example of *direct* discrimination, and suggested that the law only allowed for justifications to be brought to bear on *indirect* discrimination. Citing the US Supreme Court, he questioned whether the different treatment of women as a class was permissable, as it involved 'ascribing to individuals average characteristics of a class to which they belong' (para 59). It would clearly be unacceptable to ascribe characteristics on the basis of ethnicity, and 'I cannot see that the use of sex rather than ethnic origin can be any more acceptable' (para 60).

The previous section discussed how the Forum on Article 5(2) addressed this question. In effect, its answer was that the use of sex was more acceptable because it was well-established and embedded in industry practices, including the collection of relevant statistics. For Jacobs, the normality of sex classifications was not persuasive, as the question at issue concerned the fundamental right of equal treatment in employment, which is not an entrenched norm but an ongoing project.

The *Lindorfer* case was not decided by the Court after Jacobs' opinion was brought down, because another Court decision on age discrimination apparently reopened some of the issues, and a new hearing was convened. Jacobs' successor as the UK Advocate General, Sharpston, produced another opinion. She endorsed Jacobs' approach, in particular arguing that the Court should be prepared to apply the general principle of equal treatment without being dependent on its precise expression in directives. This position was adopted in the final judgment, with the formulation that relevant passages in directives and regulations 'are specific expressions of the general principle of equality' (para 50), an approach which left the Court with wide scope for interpretative manoeuvre.

Not that the Court really used this scope to deviate far from regulatory norms in its decision in *Lindorfer*. The Court endorsed Jacobs' view of the inconsistency in the Commission's practices, which arguably arose from the incomplete coverage of relevant directives and regulations. The ability to cut through this inconsistency by invoking a general principle was useful to the Court. However, it also relied on a less legalistic argument. Sharpston had noted that the Commission had introduced unisex actuarial tables in 2004, thereby tacitly confirming Jacobs' claim that different factors were not necessary to the sound financial operation of the scheme. The judgment also placed importance on this fact (para 58). Thus we can see the Court reading back from changes in employer practices to justify the development of legal principles, an example of the two-way communication that Dobbin and Sutton (1998) emphasised.

The Court's formulation and interpretation of the general principle of equal treatment was central to the case brought by Test-Achats. It argued that Article 5(2) was invalid because it contravened this general principle. Arrayed against it in the Court were the Commission and the Council, and the Irish, French, Lithuanian, Finnish and UK governments, along with the Belgian respondents. The very structure of this David-and-Goliath case indicates how judicial and regulatory processes differ, both in procedure and content. A consensual and negotiated process with these participants could never reach the view arrived at by the Court. Nor would a regulator be in a position to test the instructions of the legislature against wide constitutional principles.

Advocate-General Kokott's opinion provides a number of further examples of how a judicial and a regulatory logic can differ. Unlike the opinions reviewed above, Kokott did go into the question of whether the statistical association between sex and life expectancy or driving proficiency can justify discrimination. For her, relevant issues are 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 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). The practical grounds for using sex as an indicator rather than relevant social factors are dismissed: sex should not be used 'for reasons of convenience' (para 66). It is also striking that Kokott is uninterested in whether unisex tariffs will benefit or disadvantage women: she notes that some tariffs will go up but there will be lower premiums for 'the other sex' (para 68). There is no instrumental reasoning in the opinion: the principle of equal treatment should be followed unless there was a serious danger to the financial equilibrium of private insurance.

However, there are other arguments in the judgment which do strike a chord with the regulatory debate. In particular, Kokott argued that social changes have changed the relationship between life expectancy and sex, which would seem to imply that there was scope for an empirical resolution of this issue. However, Kokott's point in drawing attention to these social changes was not to enter an empirical discussion but to link equal treatment to an evolving and progressive project, setting up a rationale for changing the rules governing insurers now but not earlier.

Kokott also drew attention to the way in which the regulatory settlement tolerated different practices across the member states. The derogation from equality in Article 5(2) could only be used 'where national legislation has not already applied the unisex rule' (Recital 19 of the Directive). The effect is 'that 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' (para 23). This could not be an expression of equal treatment. We can also note that it posed a difficulty for the operation of a single insurance market in Europe, with the question of whether a discriminating insurer could enter a nondiscriminating market remaining, at that stage, unresolved.

Finally, we can note that Kokott, and Jacobs, invoked the caselaw of the US Supreme Court which has upheld unisex tariffs in occupational pensions. We can interpret the US references as an attempt on the part of the Advocates General to strengthen their authority by invoking supranational legal norms. Equally, this instance of the globalisation of law could be seen as following a regulatory logic: EU insurers, the inference is, will not be disadvantaged in competitive markets by adhering to a constitutive basis also found elsewhere.

In summary, we can find both institutional and ideational reasons why the ECJ did not uphold the regulatory consensus. It was apparently uninfluenced by the strength of industry opinion weighed against it. Instead it relied on the idea that common norms should govern the operation of the single market, which effectively gave great weight to those states that had adopted the unisex principle. The Court insisted on consistency in other ways too. It extended the unisex principle by analogy from employment into other areas, instead of allowing each regulatory domain to arrive at its own set of rules. The analysis was principled rather than instrumental and practical. Factors that had been important in the regulatory discussion, notably the accuracy of the statistical foundation for discrimination and the requirements for publication of data, received very little attention. Finally, the Court asserted higher constitutional authority over delegated regulatory authority. It held that it is not open to the Commission and the Council to substantially and indefinitely derogate from the constitutional principle of equal treatment. Thus it invoked a higher order of law against the compromises made in regulatory venues.

## Conclusion

This paper has asked whether we are seeing a rights revolution in Europe, specifically through the widening application of the principle of nondiscrimination. The answer turns out to depend on what we think the distinctive characteristics of a rights revolution are. For Kelemen, 'rights' refer generally to the bases for legal claims, rather than specifically to fundamental rights. He does not succumb to the rhetoric of 'revolution' but draws attention to the pervasive legalism engendered by the federal structure of governance in Europe. For Dobbin and Sutton, the particular nature of nondiscrimination and other general rights statements is significant, because their generality and ambiguity creates uncertainty which produces anticipatory innovations in corporate practices and a dialogue between corporate best practice and judicial interpretation. This paper has argued that fundamental rights are distinct from other kinds of legal claims because the ECJ has established considerable autonomy in interpreting and applying fundamental rights.

Anticipatory adjustment in regulatory or self-regulatory venues is not completely absent from the story related here. There was some introspection about risk classification practices among the regulatory policy community, and analysis did reveal some anomalies. Some industry actors urged progressive adaptation to new norms. On the whole, however, the industry was confident of its technical expertise and willing to exercise its power in regulatory venues to prevent adjustment. Furthermore, the Commission's endeavours to reduce legal uncertainty were conservative: it did not promote changes in industry approaches. It might have been thought in the Commission that convening a forum and providing access to information to consumer organisations could set in motion a reform dialogue. There was little sign of this, but then not much time elapsed before the Court intervened.

The gap between the approaches of the Court and the Commission that emerges in the case of insurance challenges the 'Eurolegalism' analysis which sees the two institutions acting in concert to empower the federal level of regulation in Europe relative to the member states. It suggests instead that the involvement of the ECJ in the interpretation of fundamental rights introduces a legal logic of interpretation which is distinct from a regulatory logic. Specifically, the Court has applied equality between men and women as a fundamental principle in constituting relationships between buyers and sellers in the European market, but it has not been concerned with instrumentalizing this principle for social policy purposes. Once satisfied that discrimination was not necessary to ensure the financial soundness of insurance, it undertook no further economic analysis. Whereas the regulatory process attached primary importance to statistical evidence, the Court questioned the use of statistical generalisations. Procedural aspects of the regulatory compromise - specifically the creation of a forum in which different views could be aired and issues raised – did not interest the Court; nor did it pay much attention to the weight of expert economic opinion.

The result was evidence of a 'rights revolution' in the specific sense that the existence of a fundamental right was invoked to overrule long-established practices and to sweep away the regulatory consensus that had supported them. However, amidst the drama of this process, it is important to recognise the limitations of what has been done. The rhetoric of a rights revolution is linked to an idea that the economic interests promoted by the classic rights of property and contract might be countered by the recognition of social rights that empower groups that are economically or politically excluded. The rights revolution in this context means empowering households against 'big business': specifically for Europe, it means a a social dimension of European integration achieved by enabling households to exercise rights as a corrective and counterweight to the influence of industry. It was noted in the introduction that many instances have arisen in Europe where nondiscrimination rights have been used to challenge monopolies or to break open domestic markets, but these situations generally arise when nondiscrimination rights are bracketed with competitive market freedoms. Thus the case of insurance was a critical case for examining the 'free standing' power of nondiscrimination rights which are not aligned with market openness and liberalisation.

At first sight, the ECJ has passed the test of establishing autonomous social rights. On a closer look, however, its achievement is rather limited. It 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 dramatic. More generally, the Court has not been concerned to promote 'solidarity': in other words, to encourage the formation of larger, less differentiated risk pools that emulate those provided by social insurance. This rights revolution has not been a social policy revolution.

It is well-established that there are tensions in Europe between processes of market integration and processes that maintain welfare states. The rights revolution brings in a third process. This paper has suggested that this process need not merely be the handmaiden of market integration, but nor is it a process that contributes instrumentally to social policy. While equality rights can be pursued by regulatory means, regulatory processes are dominated by industry interests. The development of more rights for households as consumers and workers is likely to be a highly judicialized process, and this will shape the development of equality rights in particular and peculiar ways.

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