

cepStandpoint

Equal Treatment through Discrimination

Legal errors in the European Court of Justice's judgement of 1 March 2011, which declares that gender-based insurance premiums and services are not in line with EU law

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Core Issues

- ▶ According to the Court of Justice, Art. 5 (2) of the “Unisex Directive”, which allows for gender-related insurance premiums and services, infringes the prohibition of discrimination pursuant to Art. 21 and 23 of the EU Charter of Fundamental Rights. Consequently, only unisex tariffs must be offered as of 22 December 2012.
- ▶ The judgement errs in many aspects:
 - (1) The Court of Justice did not examine the compatibility of Art. 5 (2) of the Unisex Directive in relation to the fundamental rights of the Charter of Fundamental Rights, but to the legislator's pronouncements regarding the objectives of the Directive.
 - (2) The Court of Justice's interpretation of the legislator's formulation of objectives with regard to the Unisex Directive is objectively wrong.
 - (3) The Court of Justice is wrong to negate the fact that there are objective reasons for gender-related unequal treatment due to actual differences between men and women.
 - (4) The Court of Justice ignores the necessity to consider fundamental rights, even though in the present case several fundamental rights of equal importance collide.
- ▶ The obligation created by the judgement to apply unisex tariffs is in itself an obligation to discriminate and thus infringes the Charter of Fundamental Rights.
- ▶ The European legislator must level the consequences of the judgement; this is in fact made possible through only minimal clarification in the Unisex Directive:
 - (1) Art. 5 (2) of the Unisex Directive should specify that different gender-related calculations of premiums and services do not constitute discrimination if there are biologically and/or statistically provable differences between men and women.
 - (2) The recitals must clarify that these cases concern the unequal treatment of unequal facts provided by the Charter of Fundamental Rights and the case-law of the Court of Justice, and not that they constitute “permitted” discrimination.