

MYKOLO ROMERIO UNIVERSITETAS
TEISĖS FAKULTETAS
VERSLO TEISĖS KATEDRA

KAMILĖ SOVAITĖ
EUROPOS VERSLO TEISĖS STUDIJŲ STUDENTĖ

“TEST ACHATS” CASE: IMPACT ON LIFE INSURANCE CONTRACTS

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Darbo vadovas: Doc.dr. Tomas Talutis

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TABLE OF CONTENTS

INTRODUCTION	3
1. LIFE INSURANCE CONTRACTS	6
1.1 Definition of a life insurance contract in the national law of Lithuania	6
1.2 Life insurance contracts in a doctrine	9
1.3 Directive 2002/83/EC – “Life assurance directive”	10
1.4 Life insurance – contract formation	11
1.5 Risk in life insurance contracts	14
1.6 Utmost good faith principle and evaluation of risk process in insurance	16
2. CONCEPT OF EQUALITY	19
2.1 Gender Equality in European Union Treaties	19
2.2 Concept of Discrimination	21
2.3 Aristotelian formula of Equality	23
2.4 Recent European Union „Anti-discrimination“ directives.....	23
2.5 The Gender Directive - 2004/113/EC	25
2.5.1.Criticism on the Gender Directive.....	27
3. “TEST ACHATS“ CASE: CONSEQUENCES TO LIFE INSURANCE CONTRACTS	29
3.1 Preliminary ruling of the European Court of Justice in the “Test Achats” case	29
3.2 Advocate General’s opinion in the “Test Achats” case	32
3.3 European Commission guidelines on the application of Council Directive 2004/113 in the light of judgment of ECJ in “Test Achats”	33
3.3.1 Contracts to which unisex rule is applied – “new contracts”	33
3.3.2 Contracts that “Test Achats” does not have impact on	35
3.3.3 Possible gender-related practices after “Test Achats”	36
3.4. Criticism on the “Test Achats” case. Impact to life insurance business.....	38
CONCLUSIONS	42
BIBLIOGRAPHY	44
SUMMARY	47
SANTRAUKA.....	49

INTRODUCTION

Statement of topic: The life insurance business from its start till today has developed. Secure life and saving for a bad day was the interest of people from the ancient times. In the times of Roman Empire, there existed groups of citizens, called ‘Collegiums’ or ‘Sodalitas’.¹ The groups had variety of goals; one of those was to assist members and their families with the costs of funerals. Observing funerary rights in the Empire was complex and expensive, often tied to specific religious rites.²

From the start of formation of life insurance in the ancient times it has developed remarkably in the middle ages and later. Before insurance was established in the late 17th century, "friendly societies" existed in England, in which people donated amounts of money to a general sum that could be used for emergencies.³ As the example shows, life insurance was formed starting with the types of solidarity groups.

Independent life insurance business in Lithuania started after 1990⁴ together with the legislation of the Law on Insurance of the Republic of Lithuania, which was amended in 1996, 2003 and is still being changed by today, with the latest amendment to come into force on January 1, 2014⁵.

It is important to mention that the last few years, by some of the authors called “revolutionary”, might be considered as having a great impact to life insurance business. As we will see the topic of this work – the European Court of Justice case 236/09 “Association belge des Consommateurs Test-Achats ASB and Others v Conseil des ministres” (the “Test Achats” case)⁶ contributed to making a discussion in life insurance business.

“Test Achats” – is a name of a case, brought up to the European Court of Justice in 2009 (preliminary ruling - in 2011). As we will see from this work, it has an effect to life insurance industry. A very controversial question of discrimination and gender equality in public goods and services was the ground of this case. The issue raised in the Belgian law on non-marine life insurance and sex discrimination and lead to preliminary ruling in the European Union law.

¹ Premier Choice Group, Health insurance specialists; <http://www.pch.uk.com/article-ancient-insurance.php>; [accessed 2013-09-01]

² Premier Choice Group, Health insurance specialists; <http://www.pch.uk.com/article-ancient-insurance.php>; [accessed 2013-09-01]

³ Amicable society, <http://www.aviva.com/about-us/heritage/companies/amicable-society/>; [accessed 2013-09-01]

⁴ Kontautas T. Draudimo sutarčių teisė. Vilnius: Justitia, 2007.

⁵ Law on Insurance of the Republic of Lithuania// Valstybės žinios. 2012-11-03, No. 127-6385.

⁶ Judgment of the Court (Grand Chamber) of March 1, 2011 European Court of Justice, case C-236/09 Association belge des Consommateurs Test-Achats ASB and Others v Conseil des ministres; available online at: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=236/09&td=ALL>

After the European Court of Justice delivered its preliminary ruling in the “Test Achats” case, there can be no more discrimination between men and women in the life insurance contracts. To be more specific, calculating the premiums at the individual level cannot be solely based on gender as actuarial factor. The European Court of Justice delivered its preliminary ruling on 1 March, 2011. There was a transitional period for the insurance companies to comply with a ruling which ended 21st December, 2012.

This **work is a current topic** as the ruling of the European Court of Justice means that after a transitional period (which ended at 21st December, 2012) all member states of the European Union, are not able to use gender as one of the main actuarial factor when concluding life insurance contracts.

Object of the Master thesis is evaluation of impact of a preliminary ruling of the European Court of Justice in the “Test Achats” case banning use of gender as an actuarial factor in the calculation of insurance premiums and benefits in the light of principle of freedom of contract, specific nature of life insurance contracts, as well as possible practical implications on the insurance market.

Goal of the Master thesis: is to reveal characteristics of life insurance contract, as a specific type of insurance contract in the group of insurances and to determine the possible consequences to life insurance contracts after the “Test Achats” case.

The goal will be achieved using these **objectives**:

1. To reveal a concept of life insurance in Lithuanian national law, as well as in the European legal context;
2. To reveal the main types and features of life insurance contracts;
3. To analyze the Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access and to supply of goods and services (the “Gender Directive“)⁷ and it’s impact on life insurance industry;
4. To analyze the preliminary ruling of the European Court of Justice declared in the “Test Achats” case;
5. To analyze and evaluate the “Test Achats” consequences to life insurance contracts.

⁷ Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access and to supply of goods and services. //Official Journal of the European Union, 21 December, 2004. L 373, P. 37.

In order to analyze the topic, **the sources** from insurance specialists will be used: *T. Kon-tautas, M. Clarke, J. Lawry, P. Rawling, J. Birds, J. N. Hird, S. Sheaf, N. Cooke*. The legal acts are an essential part of this work – the European Union legislature, such as one of the European Union main treaties - the Treaty on Functioning of the European Union⁸ (TFEU), The Charter of the Fundamental Rights of the European Union⁹ (the Charter), from the secondary European Union legislation – the Gender Directive, the Communication from the European Commission – guidelines on the application of the Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 “Test Achats”¹⁰ (EC guidelines), and supplementary but most significantly the case itself – the “Test Achats” case. Additionally, from the national legislation – the Civil Code of the Republic of Lithuania, the Law on Insurance of the Republic of Lithuania will be analyzed.

The goals of the master thesis will be reached by using: 1) comparative, 2) analytical, 3) logical, 4) systemic **methods**. These methods will be used in a manner of complexity in order to reveal a topic.

Structure of a work: The Master thesis consists of table of contents, introduction, three parts, conclusions, list of a literature and summary in English and Lithuanian languages. The first part is dedicated to disclose a concept of life insurance contract and its peculiarities, the second part will present a gender equality overview that is the legal background of the “Test Achats” case, the last – third part will join the first two parts into one – the “Test Achats” case which will be analyzed together with its consequences to life insurance business.

⁸ Treaty on the Functioning of the European Union.//Official Journal of the European Union, 2008. C 115/47.

⁹ The Charter of the Fundamental Rights of the European Union.// Official Journal of the European Communities, 26 October 2012. C 326.

¹⁰ European Commission guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats), available online at:

http://ec.europa.eu/justice/gender-equality/files/com_2011_9497_en.pdf

1. LIFE INSURANCE CONTRACTS

For a purpose to reveal an impact to life insurance contracts after the European Court of Justice ruling in “Test Achats” case, first of all we should look to the definition of life insurance contracts as a whole. This chapter will provide with the provisions of legal acts, also a concepts provided in a doctrine. First of all, we will look at the Lithuanian national law and in the doctrine. As life insurance is a broad definition and there are many groups of life insurance products, this chapter will give the definitions of the main types of life insurance and will concentrate mainly on the perception of life insurance in Lithuania. Even though the types of life insurance contracts can differ from country to country, the essential peculiarities of life insurance stay the same.

This chapter will also refer to the main principles of the civil law and insurance law – respectively - the freedom of contract principle, and the utmost good faith principle. As insurance is a tool for spreading a risk, and if the risk materializes, spreading consequences of it – this chapter will also define, what is the role of the risk in life insurance. Lastly, as the work is related to the gender equality question overlapping with life insurance contracts, we will define what is a place of gender as an actuarial factor in life insurance contracts.

1.1. Definicion of a life insurance contract in the national law of Lithuania

According to the Lithuanian national law, the main branches of insurance contracts are classified into two main types: life insurance and non - life insurance. Article 6.988 of the Civil Code of the Republic of Lithuania (the Civil Code)¹¹, defines the branches and forms on insurance – dividing the branches into life and non-life insurance. The same provision is transmitted into the Law on Insurance of the Republic of Lithuania. (the Law on Insurance)¹² There is some criticism about this classification in a doctrine. Kontautas T., Lithuanian doctor of social science and law and author of a monograph “Insurance Contract Law” in his study of Lithuanian insurance law explains that this classification came from the European Union directives¹³ according to the granting of the licenses for insurance companies and which is based on the types of activities the insurance compa-

¹¹ Civil Code of the Republic of Lithuania // Valstybės žinios. 2011-06-21, No. VIII-1864.

¹² Law on Insurance of the Republic of Lithuania // Valstybės žinios. 2013-09-18, No. IX-1737, Article 7.

¹³ Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance.// Official Journal of the European Union, 2002. L 345.

nies run – life insurance or non-life insurance activity based insurance companies.¹⁴ Nevertheless, the classification is criticized, it is still used.

Life insurance is a broad definition. It is defined in the Law on Insurance that life insurance is the insurance which is referring to interests of assets, related with life of a natural person and (or) accumulation of capital, when concerning (the fact of) insurance events which can be:

- a. death of insured person, or
- b. termination of a contract prescribed in it, or
- c. due to other insured event – one-off, or periodical insurance indemnities are paid.¹⁵

From this definition in the Law on Insurance, we can see that life insurance is not only the type of insurance where the insurance indemnities are paid in the occurrence of an insured event - death of the insured person, but it is also a way of investing and saving money. The insurance event does not only have to be the date of a death of the insured person but can also be the defined date of a termination of a contract. This shows that life insurance is a specific type of insurance, which is separate from the other insurances like health, motor, civil liability, etc.

The types of life insurance can be classified further, as the Law on Insurance¹⁶ defines, these life insurance groups are below:

- 1. Marriage and birth insurance;
- 2. Life insurance, related with investment funds, when a risk of investment belongs to insured person and the insurer – (provision is valid from 1st January 2014)¹⁷;
- 3. A tontine (investment plan for raising a capital)
- 4. Pension funds;
- 5. Other life insurance, which is not described in the ones above.

For a better understanding of life insurance contracts, we will give a short description of each group of the life insurance:

¹⁴ Kontautas T. *Draudimo sutarčių teisė*. Vilnius: Justitia, 2007. P.36.

¹⁵ Law on Insurance of the Republic of Lithuania // *Valstybės žinios*. 2013-07-01, No. IX-1737, Article 2, point 34.

¹⁶ Law on Insurance of the Republic of Lithuania // *Valstybės žinios*. 2013-07-01, No. IX-1737, Article 7.

¹⁷ The provision, that an investment risk can belong only to the life insurance policy holder was criticized, therefore the provision is amended in the Lithuanian Republic Law on Insurance // *Valstybės žinios*. 2012-11-03, No. 127-6385; (valid from 1st January, 2014.)

1. Marriage and birth insurance group – includes life insurance types when and insurance indemnity is paid in the event of a marriage or a birth of a child.¹⁸

2. Life insurance, related with investment funds (Investment funds portfolio)¹⁹ – when the risk or part of a risk of investments, earned in a period of validity of this type of insurance contract belongs to the policy holder, and the earning of these funds is closely related with investment funds or a change of some particular indexes. This group of life insurance does not include tontines.

3. Tontine is an investment plan for raising a capital. In tontines, “associations of subscribers are set up with a view of jointly capitalizing their contributions and subsequently distributing the assets thus accumulated among the survivors or among the beneficiaries of the deceased.”²⁰

4. Pension funds can also be considered as the types of life insurance. Pension funds are regulated by separate laws than the Law on Insurance. Such legal acts in Lithuania are: the Law on Pension Accumulation of the Republic of Lithuania²¹, the Law on Professional Pension Accumulation of the Republic of Lithuania²² and the Law on Additional Voluntary Pension Accumulation of the Republic of Lithuania.²³

To sum up, from the types of life insurance we can see the different functions that life insurance serves: a regular saving plan, financial help in a case of accident, incomes gained when retired, financial security of a spouse, gift to children.

We can see that there is a variety of life insurance policies – which can be defined by such an events like child birth or marriage, not only the death of an insured person. Furthermore the types of investing funds can differ when there is one investor – or even a group of them – in tontines.

¹⁸ <http://www.compensalife.eu/lt/glossary.asp>

¹⁹ <https://ib.swedbank.lt/private/investor/lifeInsurance/investmentProduct>

²⁰ Ioanis R. Analytical survey of the types of insurance classes in the EU. Opinion of the consortium comprised of: PricewaterhouseCoopers Risk Management (Belgium), ZAO PricewaterhouseCoopers Audit, (Moscow), IKRP Rokas & Partners Law Firm, McGraw-Hill International (UK) Limited (Standard and Poor's).

²¹ Law on Pension Accumulation of the Republic of Lithuania // Valstybės žinios. 2012-11-13, No. IX-1691.

²² Law on Professional Pension Accumulation of the Republic of Lithuania // Valstybės žinios. 2012-12-20, No. X-745.

²³ Law on Additional Voluntary Pension Accumulation of the Republic of Lithuania // Valstybės žinios. 2012-12-20. No. VIII-1212.

Additional pension funds, excepted from the ones regulated by the state can also be a type of life insurance.

Life insurance in the insurance market life insurance takes a big place. Regarding the type of life insurance contract, the time of termination of life insurance contract differs too.

1.2. Life insurance contracts in a doctrine

For a more detailed analysis of life insurance contracts in a context of other types of insurances, we can look at a monograph of Lithuanian doctor of social science and law Kontautas T. “Insurance contract law”²⁴ where the types of insurance contracts and their peculiarities are presented. Life insurance contract, according to Kontautas T., is a type of contract which has an increasing popularity and which is not only the contract where, as mentioned before, talking about the Law on Insurance, insured person is paid an indemnity in the event of death but it is also an important form of saving funds. Life insurance covering the death risk is not that often met in a practice as life insurance with a purpose of saving capital.

It is also stated in Kontautas T. monograph, that a compensation principle does not apply in a life insurance contract. Differently from the damage type of insurances (including wealth insurance, civil liability insurance and health insurances) where the insurance indemnities are paid according to the sum of the resulted damage (but the sum not extending the damage), in life insurance contracts – a sum equal to the insurance sum or the part of that sum is paid in case of occurrence of insured event. At this point, in order to avoid any confusion, it is important to mention that insurance does not have a function of compensation, but insurer has a duty to pay the indemnity in a case of insured event. It is a contractual duty to provide with security of insurance (not to compensate). Therefore life insurance is called a “sum insurance”.

Another peculiarity of a life insurance contract is that it is a long - term contract. For a comparison - another types of insurance contracts, “like health, wealth, civil liability insurance contracts are usually concluded for a year. In opposite, in life insurance contracts the validation of contract is extended into the term of ten years or even more.”²⁵

To compare with the English doctrine of life insurance:

²⁴ Kontautas T. *Draudimo sutarčių teisė*. Vilnius: Justitia, 2007.

²⁵ *Ibid.* P.31.

A professor of commercial law of the University of Sheffield – John Birds, classifies insurances into two groups - life insurance and other contracts of insurance. “Talking about the life insurances, there is a great variety of forms of life insurance, ranging from whole life insurance, an undertaking to pay a certain sum on the death of the life insured whenever it occurs, to endowment policies whereby the insured receives a sum if he survives beyond a certain and to modern devices which combine an element of life insurance with a more substantial element of investment in securities or property.”²⁶ The author broadly classifies the life insurance contracts into the ones relating with investment function and the others which are not related to the investment but to the life of a person.

1.3. Directive 2002/83/EC – “Life assurance directive”

The latest of the European Union Directives concerning life insurance is the “Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance” (“Life Assurance Directive”).²⁷

The Life Assurance Directive divides life insurance groups according to the form of activities and splits them into self-employed activity of direct insurance and the operations which are subject to the administrative state authorities responsible for supervision of private insurance.

The first group concerns the activities defined below:

The following kinds of assurance where they are on a contractual basis:

(a) life assurance which comprises, in particular, assurance on survival to a stipulated age only, assurance on death only, assurance on survival to a stipulated age or on earlier death, life assurance with return of premiums, marriage assurance, birth assurance;

(b) annuities;

(c) supplementary insurance carried on by life assurance undertakings, that is to say, in particular, insurance against personal injury including incapacity for employment, insurance against death resulting from an accident and insurance against disability resulting from an accident or sickness, where these various kinds of insurance are underwritten in addition to life assurance;

²⁶ Birds J., Hird J. N. Birds' modern insurance law. London: Sweet and Maxwell, 2004. P.9.

²⁷ Official Journal L 345, available online at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0083:EN:HTML>

(d) the type of insurance existing in Ireland and the United Kingdom known as permanent health insurance not subject to cancellation;

A second group requiring state supervision for private life insurance, according to directive, includes:

(a) tontines whereby associations of subscribers are set up with a view to jointly capitalising their contributions and subsequently distributing the assets thus accumulated among the survivors or among the beneficiaries of the deceased;

(b) capital redemption operations based on actuarial calculation whereby, in return for single or periodic payments agreed in advance, commitments of specified duration and amount are undertaken;

(c) group pension funds, i.e. operations consisting, for the undertaking concerned, in managing the investments, and in particular the assets representing the reserves of bodies that effect payments on death or survival or in the event of discontinuance or decrease of activity;

(d) the operations referred to in (c) where they are accompanied by insurance covering either conservation of capital or payment of a minimum interest;

(e) etc.

These are the groups of life insurance according to the Life Assurance Directive, which extends the scope of life insurance types in the European level, mainly dividing them into the private life insurances (life assurances, annuities, supplementary life insurances and permanent health insurances in UK and Ireland) and the ones which require state supervision, and which are related to an investment: tontines, capital redemption operations, group pension funds, etc.

1.4. Life insurance – contract formation

As we have already discussed some of the peculiarities of the life insurance and their types, we will analyze how the life insurance contracts are concluded. The common rules of insurance contract formation shall be applied to the life insurance contracts. “the rules of law governing the formation of contracts of insurance are the same as those which govern the formation of most other

kinds of contracts: the ritual matching of offer and acceptance. “²⁸ The English scholar states the importance of the traditional basis of any contracts which is an offer and an acceptance.

Insurance contract formation is determined by Clarke M. through an easy example: “In a simple case the person seeking cover (called ‘the applicant’) considers insurance described in some form of advertisement brochure (invitations to treat). Then, with a reference to brochure or advertisement, the applicant responds with a written application – proposal for insurance (offer) – to the insurer, who accepts it or rejects it.”²⁹ The example shows the free will in insurance contracts - to accept or simply reject the terms or conditions offered by an insurer to any consumer. The similar is stated in Article 6.990 of the Civil Code of the Republic of Lithuania³⁰, which determines the procedure for execution of the insurance agreement as the following:

“An insurance agreement shall be made when the insurer accepts the proposal (application) of the insured submitted to the insurer, or when the insured accepts the insurer's proposal to enter into the agreement. In the cases determined by the rules of the type of insurance, the application of the insured shall be made in writing. In such case the form and the contents of the written application shall be determined by the insurer.”

This legal provision reflects to Clarke’s M. explanation of conclusion of insurance contract, it also sets the form for the insurance contract – it has to be a written agreement.

Clarke M. explains the process of concluding insurance agreement further that “‘If, however, the insurer does not reject it outright but responds with policy terms, terms which differ from those expressed or implicit in the applicants original offer, the insurer’s response is a counter-offer, for the applicant to accept or reject. If the applicant rejects the insurer’s counter-offer and comes back with a further proposition, he makes a further counter-offer, which the insurer may accept or reject, and so on.”³¹

It can be questioned why these obvious legal rules of law are mentioned in this work, however, for the purpose of the further problematic and analysis of this work, it is important to understand that a life insurance contract is a contract, which is formed completely on the free will basis. In other words, the **freedom of contract** principle governs here. “Usually the terms of the insurer are

²⁸ Clarke M. Policies and Perceptions of Insurance Law in the Twenty First Century. Oxford: Oxford University Press, 2005. P.84.

²⁹ Ibid.

³⁰ The Civil Code of the Republic of Lithuania // Valstybės žinios. 2011-06-21, No. VIII-1864.

³¹ Clarke M. Policies and Perceptions of Insurance Law in the Twenty First Century. Oxford: Oxford University Press, 2005. P.84.

already prepared and given to the consumer.”³² However, as the author explains, there is still some space left for the negotiation between the insurance company and the person, seeking to have an insurance policy.

From the explanation of life insurance contract formation, we can come to conclusions about the life insurance market - which as a free market, meaning that, insurers want policy holders but the right to choose is perfectly free, both to insurers and the persons seeking to have insurance policy. The same applies to life insurance contracts. It can be proved with one more example of Clarke M.³³ The author describes the possibility of negotiating terms of an insurance contract as a feature of free market. However from the economic point of view, “for most standard insurance risks negotiation is neither viable nor wanted – by either side: standard terms reduce transaction costs and thus premiums.”³⁴ This states that on a regular basis, standard terms are offered by the insurer. However there is still a solution to this issue as it is explained “The market, it is said, is still free because, although applicants may not be able to change the terms offered by insurer A, they still can turn elsewhere for different terms to insurer B or insurer C.”³⁵ The example proves that both parties are free to choose before entering into an agreement.

On the other hand, looking from the perspective that the standard terms are usually offered for the applicants, especially concerning life insurance contracts, it could be discussed if the freedom of contract principle does not decrease here. The life insurance pre-contractual terms are easily accessible and the interested ones can even find them without leaving home nowadays. In this way, the applicant has a right to choose only between the variety of life insurance products offering companies but does not have that much right to negotiate.

To sum up, we can say that a life insurance contract, as the other types of insurance contracts, is concluded with a completely freewill and with an absolute trust between the insurer and the person seeking a cover. There is a chance for negotiation between the insurer and the policyholder, however usually standard forms are used, which save the time and costs, however decrease the impact of principle of the freedom of contract. Nevertheless, the consumer still has a right to choose between the life insurance companies. And the ones who are not willing to accept the conditions of-

³² For example, “Swedbank life insurance SE” life insurance products and pre-contractual terms can be found online at: <https://ib.swedbank.lt/private/insurance/life/incomeProtection?language=ENG>;

Ergo life insurance: <http://www.ergo.lt/en/pages/private/life-insurance> ;

Term life insurance at Metlife, available online at: <http://www.metlifeamplico.lt/en/Individual/Find-Our-Products/Life-Insurance/Term-life-insurance.html> .

³³ Clarke M. Policies and Perceptions of Insurance Law in the Twenty First Century. Oxford: Oxford University Press, 2005. P.86.

³⁴ Ibid.

³⁵ Ibid. P.87.

ferred by one insurance company can choose from the variety of offers by the other insurance companies. And that is a ground and essence of a free market.

1.5. Risk in life insurance contracts

After introduced to the formation of life insurance contracts, let's look at the other important element to all types of insurance contracts – a risk. It is described in the book of Clarke M., that “a main role of insurance is to spread a risk, and if the risk materializes, to spread the resulting damage.”³⁶ The insurance contract is a risk contract, although there is some discussion about life insurance particularly, as the risk contract and that not all the types of life insurance contracts shall be understood as risk contracts. These peculiarities will be explained bellow.

We can find a *risk* definition in different sources:

According to legal acts, in the Law on Insurance of the Republic of Lithuania, insurance risk is defined as “a possible threat for the insured object”.³⁷

In a monograph of Kontautas T.³⁸, it is mentioned that a risk – as “a possible threat for an insured object, must be expressed in every insurance contract, as one of the main insurance contract conditions. During the formation of insurance contract, it is not precisely clear when the insurer will have a duty to pay an insurance indemnity, what size the indemnity will be which depends on the insurance risk – when the insurance risk will materialize.”

In Commonwealth law, the risk is defined through actuary's point of view: “To actuaries, risk is the “probability that a particular adverse event occurs during a stated period of time or results from a ‘particular challenge’, where an adverse event is an occurrence producing harm.”³⁹ A statement shows that risk is related with particular events causing harm, following that in calculating the premiums, it is the main tool for insurers: “nonetheless, to insurers, probability matters greatly in order to rate a risk and calculate premium”.⁴⁰

“Risk is a domain of insurance. Risk pertains to a future event, one that may also be possible, probable, contingent, fortunate or unfortunate. In any case, one that is feared for its possi-

³⁶ Clarke M. Policies and Perceptions of Insurance Law in the Twenty First Century. Oxford: Oxford University Press, 2005. P.251.

³⁷ Law on Insurance of the Republic of Lithuania // Valstybės žinios. 2013-07-01, No. IX-1737. Article 2, para 20.

³⁸ Kontautas T. Draudimo sutarčių teisė. Vilnius: Justitia, 2007. P.66.

³⁹ Clarke M. Policies and Perceptions of Insurance Law in the Twenty First Century. Oxford: Oxford University Press, 2005. P.2.

⁴⁰ Ibid.

ble consequences to property. Insurance gives a current value to risk and ascribes it a cost – an insurance premium or fee. <...> Insurance is what gives a price to risk in the economic sense, a monetary value, which is really what quantifies value.”⁴¹

These statements show the importance of risk in insurance. Summarizing the written above, risk is an unforeseen threat for the insured object, risk is one of the essential elements to every insurance contract and materialization of risk is a consequence of the payment of insurance indemnity, which cannot be seized before the conclusion of insurance contract. Especially risk is important for the actuaries – who mathematically evaluate the probability of events and assess the unforeseen consequences in order to minimize the impacts of financial losses.

However there are some questions raised on the risk in life insurance contracts. Especially, when it comes to the types of life insurances which are related with investment function. The life insurance contract, related with investment funds – is a different insurance contract, which shows that an insurer does not in absolute ways have to pay the indemnity to the insured in the event of risk materializing. Or, in other words, risk is understood more broadly, not dependent on the happening of a particular event but more as a risk of investment. And it usually depends on the termination of a life insurance contract, when insurer has a duty to pay the indemnity to the policy holder in life insurance contracts, related with investment funds. This shows the specialty of life insurance contracts, comparing with the other types of insurance contracts.

Defining a risk in life insurance, we can split it into two types - the risk of a death, and the risk related with investment. The risk of investment is a more often case, in life insurance industry.

Although the risk in life insurance is not a direct risk, and sometimes should be treated differently comparing with other insurance contracts, there are some factors, defining risk in life insurance contracts, which need to be considered in the process of contract formation – as mentioned before, insurer has a right to some kind of information from the person seeking to be insured, and the insured on the other side, gets an insurance cover, when information about health, profession, age and other factors is evaluated by actuary.

To summarize, we see that the insurance contract, including a life insurance contract, cannot be formed without classifying and measuring the risk. Although, the fairness and classification of risks can sometimes become an issue – and as we will see later, it is closely related to the problematic of this work.

⁴¹ Lowry J. and Rawlings P. Insurance law: cases and materials. London: University College London, 2004. P.3.

1.6. Utmost good faith principle and evaluation of risk process in insurance

Insurers are not able to insure risks without classifying them, and any classification must distribute risk. “It is the right of the insurer to evaluate the risk, if it can be insured, and to set the conditions of the insurance”.⁴² The person, seeking particular insurance cover has the duty to disclose information to the insurer, which can be essential when evaluating a risk. The insurer has a right to check insurer’s wealth or to ask the person seeking insurance cover to check a health. Article 6.993 of the Civil Code of the Republic of Lithuania refers to the “obligation to disclose information”.⁴³ It applies to both parties – not only a person seeking the insurance cover but as well to the insurer.

The said article of the Civil Code relates to another important principle, a specific principle in insurance – **utmost good faith**. Both parties have to deal in good faith before entering into the insurance agreement.

First of all, from the point of view, of the insured - prior entering into agreement, the insured,

*“shall inform the insurer about all the circumstances which could have material effect on the probability of the occurrence of the insured event and the amount of potential loss in such event in respect of such event (the risk of insurance) if the insurer does not and should know such circumstances.”*⁴⁴

The provision stipulates that an insured, shall not hide the important information from the insurer, especially the facts, that could be important to the materializing of the risk.

The same article of the Civil Code also applies to the other party - an insurer:

“During the execution and validity term of the insurance agreement the insurer shall provide the insured the following information: the name of the insurer, the type of the insurance company, the address of the insurer's division or the insurer's representative (if the insurance agreement is executed in any other place than the insurer's registered office), the procedure for settlement of the disputes arising from or related to the insurance agreement, the behavior of the insurer when the insured breaches the conditions of the in-

⁴² Kontautas T. Draudimo sutarčių teisė. Vilnius: Justitia, 2007. P.69.

⁴³ Civil Code of the Republic of Lithuania // Valstybės žinios. 2011-06-21, No. VIII-1864. Article 6.993.

⁴⁴ Ibid., Article 6.993, part 1.

surance agreement, possible cases of increase of the risk of insurance as well as other information referred to in the legal acts regulating the insurance activities.”⁴⁵

The provision also puts a duty on the insurance company to provide the insured with appropriate information, such as name and type of insurance company, its address and the procedure of dispute settlement, the possibilities of increase of the risk in insurance and legal regulations, related to insurance.

The Article 6.994 of the Civil Code, provides that an insurer has a right to evaluate the risk of insurance. Article 6.994 part 2 relates to a life insurance and the particular information, which the insurer can seek to obtain, when assessing risk in life insurance:

“If the insurance interest is related to the life and health of a natural person, the insurer shall be entitled to demand from the insured the documents confirming the age, condition of health, profession of the insured (covered person), and other circumstances relevant for the risk of insurance.”

As we see from this legal provision, the insurer has a right to information necessary for the insurance contract. And the main factors for assessing the risk in life insurance contract can be: age, condition of health, profession. There can be other factors too but the Lithuanian legislator mentions those as the main ones.

To summarize, the evaluation of risk process requires some information which both parties, the insurer and the policy holder (or the insured) have to disclose to each other, doing that in a good faith. Especially, the life insurance contracts are the type of contracts, where specific personal information is required. In other words, insurer is allowed to obtain the information regarding the health, age, gender and on the other side, an insured gets a cover, based on accurate calculations.

Furthermore, an insured always seeks fairness when evaluating the risk. So does the insurer. “Fairness between insurance buyers in general implies that there should be a fair distribution of the risks insured.”⁴⁶ However, the evaluation of risk process and as the consequence the distribution of risk may seem to raise some issues between the insured ones: “Classification, therefore, raises issues of fairness between people affected. It is not, however, an issue which is important as instinct suggests.”⁴⁷ And although the classification of risks may effect some people’s thinking in a way that the distribution of risk might be unfair, as the author says, it is not a real issue. Referring back to the

⁴⁵ Ibid., Article 6.993, part 8.

⁴⁶ Clarke M. Policies and Perceptions of Insurance Law in the Twenty First Century: Oxford University Press. 2005. P. 290, 291.

⁴⁷ Ibid.

previous chapter, in the days of a free market economy – the policy holder usually has an option to choose from the variety of life insurance companies offering different contractual conditions.

2. CONCEPT OF EQUALITY

Although gender equality question from the first point of view might look quite a distinct topic in a relation with life insurance contracts described in previous chapter, as we will see these two separate subject matters – equality rights and the freedom to provide the services can sometimes cross each other. The classification of risk in insurance is an issue closely related to the further analysis of this work – “Test Achats” case. Having in mind that the calculation of life insurance risk is based on the factors, such as health, age, gender, etc., the factors have to be differentiated and the calculations cannot be done without particular assessments. In this way sometimes causing the issues, which sometimes may be consider as unequal treatment.

First of all, the topic of equality will be introduced with the European Union treaties, establishing the rights to the equal treatment, including the gender equality. The concept of discrimination will be revealed, as well as the perception of equality.

Moreover, this chapter will shortly introduce with some recent directives, released by the European Union authorities, concerning the gender equality rights and showing the areas of possible discrimination cases, and most importantly the Gender Directive was an object of issue in the “Test Achats” case.

2.1. Gender equality in the European Union treaties

The treatment of men and women has changed remarkably with years and the equality protection guaranteed in the European Union legislation only prove that. Looking from the beginning of the European Union, one of the first areas in protection of human rights was a gender equality area. Equality of genders is guaranteed in a set of the European Union documents.

First of all, the oldest of the documents in the European Union level is the Treaty establishing of Rome 1957, which not only established the European Union, but established the protection for equal pay for equal work between men and women (now Article 157 of the Treaty on Functioning of the European Union). The Article 119 of the Rome Treaty sounded as follows:

*“Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.”*⁴⁸

This right of equal pay for equal work between men and women was supported further using the sex discrimination which is to be avoided:

“Equal pay without discrimination based on sex means:

*(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job.”*⁴⁹

The Treaty of Amsterdam (1997) promotes the equality between men and women as one of the essential tasks of the European Community. Article 6a of Treaty of Amsterdam says that: *“The European Council, acting unanimously with the European Commission and the European Parliament, should take appropriate actions to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”*⁵⁰ The Treaty of Amsterdam through this general provision puts a framework for fighting any kind of discrimination in European society, including sex discrimination.

The Treaty of Lisbon (2007)⁵¹, Article 1a, sets out the core values of the European Community: *“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”*

As we see the Treaty of Lisbon prohibits the discrimination and promotes the equality between men and women.

One of the newest documents, which is still in force is The Charter of Fundamental Rights of the European Union (7th October 2000, now 26th October 2012). Article 21 of the Charter of Fundamental Rights of the European Union prohibits “any discrimination based on grounds such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any oth-

⁴⁸ The Treaty of Rome, 25 March, 1957, Article 119, part 1, available online at: http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf; [accessed 2013-10-30]

⁴⁹ Ibid.

⁵⁰ The Treaty of Amsterdam 2 October, 1997, amending the treaty of European Union, the treaties establishing European Communities and certain related acts// Official Journal of the European Communities, C340/1, Article 6a, available online at http://eur-lex.europa.eu/en/treaties/dat/11997D/tif/JOC_1997_340_1_EN_0005.pdf

⁵¹ The Treaty of Lisbon 17 December 2007, Article 1a // Official Journal of the European Communities <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF>

er opinion, membership of a national minority, property, birth, disability, age or sexual orientation, as well as any discrimination on the grounds of nationality.”⁵²

Article 23 of The Charter of Fundamental Rights of the European Union, secures the equality between men and women, stating that “equality between women and men must be ensured in all areas, including employment, work and pay.”⁵³

2.2. Concept of discrimination

The discussion on the equality rights cannot be commenced without analysis of the discrimination definition, which is the essential element, in the evaluation process whether human rights are infringed or not.

Discrimination – according to the online Cambridge dictionary, is “a treatment of a person or particular group of people differently, in a way that is worse than the way people are usually treated.”⁵⁴ In politics and government, it can be treated, as a prejudice against people and a refusal to give them rights.⁵⁵

Discrimination in law usually is categorized into “direct” and “indirect” discrimination. The General Act of Equal Treatment (2006), incorporating four of Anti-Discrimination Directives of the European Union into German law defines “the direct discrimination as a type of discrimination which occurs when a person is treated less favorably in the same situation than the other person would be.”⁵⁶ The example of direct gender discrimination is provided after defining direct discrimination: “A woman earns markedly less than a male colleague for the same work. This constitutes a case of *direct discrimination on grounds of sex*.”⁵⁷

⁵² The Charter Of the Fundamental Rights Of The European Union 7th October, 2000 //Official Journal of the European Union, C-83/389, Article 21; >>> now the Charter of the Fundamental Rights of the European Union, 26th October 2012// Official Journal of the European Communities C 326, Article 21, available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0391:0407:LT:PDF>

⁵³ Ibid. Article 23;

⁵⁴ http://dictionary.cambridge.org/dictionary/american-english/discrimination_1?q=discrimination, [accessed 2013-10-23].

⁵⁵ Ibid.

⁵⁶ Act implementing European Directives putting into effect the principle of Equal Treatment Treatment// Federal Anti-Discrimination Agency, available online at: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg_in_englischer_Sprache.pdf?blob=publicationFile [accessed 2013-10-30].

⁵⁷ Ibid.

The promoting equality English website⁵⁸ provides such definitions on direct and indirect discrimination:

Direct Discrimination

Direct discrimination occurs when someone is treated less favorably than another person because of a protected characteristic they have or are thought to have, or because they associate with someone who has a protected characteristic.

Indirect Discrimination

This already applies to Age, Race, Religion or Belief, Sex, Sexual Orientation and Marriage and Civil Partnership. It is now extended to cover Disability and Gender Reassignment.

Indirect Discrimination can occur when you have a condition, rule, policy or even a practice in your organization that applies to everyone but particularly disadvantages people who share a protected characteristic.

The Law on Equal Opportunities between Men and Women of the Republic of Lithuania⁵⁹ also gives the definitions on direct and indirect discrimination.

Article 2, part 4 defines a *direct discrimination* which is a less favorable treatment because of a gender, as in the similar circumstances another person would, is or will be treated.

Article 2, part 5 defines an *indirect discrimination* which can be an act or omission, legal norm, evaluation criteria or practice, which are formally equal between men and women, but in the process of implementation people of one gender are possibly to be treated less favorably than people of the other gender, unless that act or omission, legal norm, evaluation criteria or practice can be justified by a legitimate aim, and that legitimate aim is being reached by appropriate and necessary means.

To sum up, in law two types of discrimination are defined. Direct discrimination is more obvious than indirect discrimination, which is not so apparent but also exists. Both types of discriminations are against the law and both can be justified, if having a legitimate aim.

The European Commission has presented a handbook – how to represent a discrimination claim.⁶⁰ The handbook answers a question if discrimination can ever be justified with a positive an-

⁵⁸ <http://www.equality-law.co.uk/news/106/66/Types-of-discrimination-definitions/> [accessed 2013-11-02].

⁵⁹ Law on Equal Opportunities between Men and Women of the Republic of Lithuania // Valstybės žinios. 1998, No. 112 3100.

⁶⁰ The European Commission “How to present a discrimination claim? Handbook on seeking remedies under the EU Non-discriminative directives”, 2011

swer. Direct and indirect discriminations can be justified on different basis. The European Commission handbook says that direct discrimination can be justified on the basis of ground-specific exceptions. Indirect discrimination can be justified on the basis of a general test.

2.3. Aristotelian formula of Equality

As in the “Test Achats” case, the situation of unequal treatment of men and women in insurance has been discussed, let us look closer to the meaning of equality and assessment of comparability. “The Aristotelian formula of equality, which has been applied in many legal systems, all areas of law, bases its notion of equality on concepts of similarity and difference. According to this definition, equality requires a similar treatment of similarly situated people and the different treatment of differently situated people.”⁶¹ In other words, “justice requires that the things that are like should be treated alike and the things that are unlike should be treated as unlike in proportion to their unlikeness.”⁶² The formula is described as providing framework for evaluating legal claims regarding unequal treatment and it is the basis for the right of equality in specific contexts.

In “Test Achats” case, the question of equality of men and women was raised – gender discrimination in service of insurance. However, the natural question raises here - can women and men stand at the comparable situation? Also, can there a situation of discrimination arise without any specific circumstances? “Test Achats” has generally questioned discrimination in insurance services, without weighing the difference of men and women. Besides, the claim was brought to the Court without specifying particular event of the unequal treatment.

2.4. Recent Anti-Discrimination directives of the European Union

“The General Equal Treatment Act”⁶³ (Germany, 2006), implements four anti-discrimination directives into the German law which are following the before mentioned European

http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf [accessed 2013-11-01]

⁶¹ Kamir O. Framed – Women in Law and Film. USA: Duke University Press, 2006. P.14.

⁶² Tobler C. A case study into the development of the legal concept of indirect discrimination under EC law. United Kingdom: Intersentia. 2005.

⁶³ The Directives on equal treatment of the European Union - http://www.antidiskriminierungsstelle.de/EN/TheAct/EU-Directive/eu-directive_node.html

Union treaties and taking the measures to combat discrimination in the areas of race, sex, ethnic origin, religion or belief, disability, age or sexual orientation. This specific General Equal Treatment Act has been chosen as an example to this work, because it consolidates recent European Union Directives on the Equality rights and protect against discrimination in different areas. Classified to the types of areas effected, the directives are below:

1. The Council Directive 2000/43/EC (29th June, 2000) implementing the principle of equal treatment irrespective of race or ethnic origin (*“European Racial Equality Directive”*).

The directive creates a framework to fight all kinds of discrimination on grounds of racism or those which have occurred on grounds of ethnic origin.

2. The Council Directive 2000/78/EC (27th November, 2000) establishing a general framework for equal treatment in employment and occupation. Through the *“Directive on Employment”*, the European Union pursues the objective of creating a general framework to combat discrimination on grounds of religion or belief, disability, age or sexual orientation in employment and occupation.⁶⁴

3. The Council Directive 2002/73/EC (23rd September, 2002) amending the Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions The directive creates a framework for putting the principle of equal treatment of men and women into effect, with regard to their access to employment, vocational training and promotion as well as with regard to working conditions.

4. The Council Directive 2004/113/EC (13th December, 2004) implements the principle of equal treatment between men and women in the access to and supply of goods and services (*“Gender Directive, Civil Law”*). This directive, except for the employment relations, serves for gender equality purpose and creates a framework to combat gender-specific forms of discrimination in connection with the access to and supply of goods and services.

⁶⁴ The Directives on equal treatment of the European Union - http://www.antidiskriminierungsstelle.de/EN/TheAct/EU-Directive/eu-directive_node.html

2.5.The Gender Directive - 2004/113/EC

Above we have mentioned some of the European Union directives, fighting the discrimination problem. Although, these are not the only directives, we have mentioned them as the recent ones and relevant ones.

Further, we will pay more attention to the Gender Directive⁶⁵ - implementing a principle of equal treatment between men and women in the access to and supply of goods and services. The directive prohibits both direct and indirect sexual discrimination in the provision of goods and services in the European Union. The directive was a legal background of the “Test Achats” case, which will be represented in a further chapter.

The Gender Directive made reference to the before mentioned articles 21 and 23 of the Charter of Fundamental Rights of the European Union (the Charter), prohibiting any discrimination on grounds of sex and require equality between men and women to be ensured in all areas. The directive defined equality between men and women as the fundamental principle of the European Union.

The directive applies to both types of discrimination based on sex: direct and indirect. Direct discrimination is defined as when one person is treated less favorably on grounds of sex, than another person in a comparable situation. It gives an example of differences between men and women in healthcare services, which result from physical differences between men and women – which is not the comparable situation and therefore does not constitute a discrimination.

Article 2 (b) of the Gender Directive gives a definition of indirect discrimination, when an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (It is noticeable that the same definition is implemented in the previously mentioned Law on Equal Opportunities between Men and Women, Article 2.5).

The directive applies to insurance and pensions which are “private, voluntary and separate from the employment relationship”.⁶⁶ The directive does not apply to the matters of employment and occupation, which are already covered by existing documents, neither does it apply to the content of

⁶⁵ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. (OJ 2004 L 373, P. 37), available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:en:PDF>

⁶⁶ Ibid.

media, advertisement or education. The European Commission's website⁶⁷ indicates the scope of application of the Gender Directive that it effects all people and organizations, both in the private and public sector, that make goods and services available to the public. And these goods and services are offered outside the area of private and family life. From this provision, we can see that a directive has an effect on previously analyzed life insurance contracts.

The most important to our work is Article 5 of the directive. Article 5 .1 refers to actuarial factors in insurance and directly refers to insurance contracts, stating that "Member States shall ensure that in all new contracts concluded after 21st December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits."⁶⁸

The first part of Article 5 refers to the sex as actuarial factor, prohibiting the discrimination in insurance, effecting the life insurance as well, based on this actuarial factor.

However, the second part of the same Article 5 (5.2.) was a derogation, enabling difference in premiums in insurance, based on proportionality principle. It said that:

*"<...> Member States may decide by the same date – before 21st December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.<...>"*⁶⁹

Lithuania, was one of the countries, which used that derogation in insurance.

Article 5 of the Directive was the most discussed one, and the most important in Test Achats case. It reflects to the previously mentioned fairness in distribution of risks issue. Firstly, prohibiting any kind of discrimination in insurance sector, and with the second part – a derogation, leaving some freedom for the Member States to decide whether to leave the different premiums and benefits in insurance for the men and women, when it has a ground which can be justified.

⁶⁷ http://ec.europa.eu/justice/gender-equality/rights/goods-services/index_en.htm [accessed 2013-10-25].

⁶⁸ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, (OJ 2004 L 373, P. 37), Article 5.1.

⁶⁹ Ibid.

2.5.1. Criticism on the Gender Directive

After its adoption, the Gender Directive has made a lot of discussions and achieved not the most positive reaction from insurers.

The possible negative consequences of a directive were described in Clarke M. study on insurance: “Implementation of a directive would require changes in the current UK legislation, section 45 of the Sex Discrimination Act 1975, which allows gender discrimination effected by reference to actuarial and other data from a source on which it was reasonable to rely”⁷⁰ The author arguments that allowance of gender discrimination which has a ground – is a reasonable reliance and stays with the opinion that a reference to actuarial factors in calculating the payments for different risks should amount in different prices.

Krois C., a scholar on the Columbia Journal of European Law, has submitted his summarizing opinion on the Directive 2004/113/EC in this way: “Directive imposes severe restrictions on the right to freedom of contract” or “a threat to the entire insurance industry resulting in less accurate pricing”.⁷¹

According to Kontautas T., Lithuanian insurers, who are members of European insurance association, have also negatively met the Gender Directive and insurers have strongly denied that insurers never discriminated policy holders. “Oppositely, by the implementation of the directive, when the different insurance risks are to be insured at the same rate, this was more likely to cause the discrimination.”⁷² The author supports the statement with a possible outcome that women will end up paying the higher motor insurance premiums, and men paying higher life insurance premiums.

As Kontautas T. defines, the consequences of the Gender Directive: “Lithuanian legislators have followed the Directive and changed certain articles of the Law on Insurance. These changes have foreseen that insurer does not have a right to look at the gender of a person seeking a cover (or a gender of a third party for which the cover is made), as a factor which could have an effect on insurance risk, unless this calculation of risk is based on the actuarial and statistical data prepared by

⁷⁰ Clarke M. Policies and Perceptions of Insurance Law in the Twenty First Century. Oxford: Oxford University Press, 2005. P.292.

⁷¹ The Columbia Journal of European Law, http://www.cjel.net/print/12_1-krois/ [accessed 2013-11-11].

⁷² Kontautas T. Draudimo sutarčių teisė. Vilnius: Justitia, 2007. P.101.

the Insurance Supervision Committee of the Republic of Lithuania, which is reliable and regularly updated. In this way, Lithuania have chosen a way how to implement a derogation of a directive.⁷³

Summarizing the opinions of Insurance associations, T. Kontautas makes a conclusion that a “Gender Directive was a consequence of a European legislators wrongly understanding the essence of insurance and the risk assessment methods.”⁷⁴

To conclude the above, The Gender Directive was a first directive prohibiting the discrimination between men and women in the access and to supply of goods and services, particularly in insurance, as one of the services. The adoption of the directive has been followed by strong debate, especially between the insurers who have denied the discrimination issue in insurance, reasoning the differentiation of men and women in calculation of insurance premiums and benefits as an indispensable element of insurance business.

⁷³ Ibid.

⁷⁴ Ibid. P.102.

3. “TEST ACHATS” CASE

3.1. Preliminary ruling in the “Test Achats” case

The consideration on gender equality did not end with the Gender Directive but was extended even more with “Test Achats” case.⁷⁵

“Test Achats”, established in 1957, is a Belgium organization⁷⁶, seeking to inform, represent and defend consumers in the areas like competition, food safety, the environment and the financial sector and other areas where “Test Achats” has a long-track record of activities on behalf of Belgian and European consumers.

“Test Achats” is also a name of a case, initiated by the same Belgium consumer organization and referred to the European Court Of Justice on 29 June 2009, by the Constitutional Court of Belgium. The reference for a preliminary ruling concerned the validity of Article 5.2. of Gender Directive discussed in a previous chapter. The reference has been made in proceedings brought by the Belgium consumer association “Test Achats”, ASBL, and two individuals Mr. van Vugt and Mr. Basselier against the Council of Ministers of the Kingdom of Belgium for annulment of the Belgium national Law of 21 December 2007 which amended, as regards the treatment of gender in insurance matters, the Law of 10 May 2007 combating discrimination between men and women (*Moniteur Belge* of 31 December 2007, p. 66175; ‘the Law of 21 December 2007’).⁷⁷

The invalidity of the Article 5 (2) of the Gender Directive was questioned in accordance to the previously mentioned document - the Charter of the Fundamental Rights of the European Union, Articles 21 and 23 (*Article 21 – Non discrimination, Article 23 - Equality between men and women*⁷⁸), prohibiting gender discrimination in all areas.

⁷⁵ European Court of Justice, Case C 236-09, 2009, Association belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres; available online at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-236/09>

⁷⁶ Consumers international > Member directory [http://www.consumersinternational.org/our-members/member-directory/Test-Achats%20\(Executive\)](http://www.consumersinternational.org/our-members/member-directory/Test-Achats%20(Executive))

⁷⁷ European Court of Justice, Case C236-09, 2009, Association belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres; <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-236/09>

⁷⁸ The Charter of the Fundamental Rights of the European Union, 2000, OJ C364/1, Articles 21 and 23. http://www.europarl.europa.eu/charter/pdf/text_en.pdf

The considerations of the European Court of Justice in the “Test Achats” were the following:

First of all, The European Court of Justice (ECJ) in case “Test Achats” has commented the Gender Directive⁷⁹ - as prohibiting all kinds of discrimination based on sex in the access to and supply of goods and services.

In principle, according to the directive, “a use of gender as a factor in the calculation of insurance premiums and benefits in relation to insurance contracts entered into after 21 December 2007 is prohibited”⁸⁰:

Article 5(1) of the directive relates to actuarial factors and prohibition of sex as actuarial factor in insurance:

*“Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.”*⁸¹

Article 5(1) as a general rule prohibited the use of sex as a factor in the calculation of insurance premiums and benefits. However, the derogation – Article 5(2) of the Gender Directive allowed the exemption from that rule, which Members States could still use.

*“Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of the review to the Commission.”*⁸²

As Article 5(2) states, the exemption from the unisex premiums and benefits rule was permitted as long as it can be ensured that actuarial and statistical data on which the calculations are based is reliable, regularly updated and available to the public.

⁷⁹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37)

⁸⁰ Ibid. Article 5.1.

⁸¹ Ibid.

⁸² 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, Article 5.2.

The ECJ also has based its legal opinion on Article 8 of TFEU⁸³, which is stating that the European Union shall aim to eliminate inequalities and to promote equality between men and women in its all activities. The ECJ has said on its consideration that in order to achieve this purpose of equality promotion, there time period must be precisely determined when to implement these measures.

In the recital 18 to the Gender Directive the use of actuarial factors related to sex was mentioned as a widespread in the provision of insurance services at the time when directive was adopted. Consequently it was permissible for the European Union legislature to implement the equality principle for men and women (the application of unisex premiums and benefits) “gradually, with appropriate transitional periods”.⁸⁴

However, the Gender Directive did not specify the time length during which the differences in counting premiums and benefits in insurance may continue to be applied. Based on this, the Court has made the conclusion, that use of this option allows unequal treatment between men and women. And it is allowed “without any temporal limitation”.⁸⁵

Accordingly, the Court has stated that “there is a risk that EU law may permit the derogation from the equal treatment of men and women, provided by the directive, to persist indefinitely.”⁸⁶

The Court has stated in his consideration that “a permission which lets to use the derogation from the calculation of unisex premiums and benefits without any temporal limitation works against the achievement of the objective of equal treatment between men and women and must be considered to be invalid upon the expiry of the transitional period.”⁸⁷

Consequently, the ECJ has ruled that “in the insurance sector, the derogation from the general rule of unisex premiums and benefits is invalid with effect from 21 December 2012.”⁸⁸ Meaning that Article 5(2) of the Gender Directive is invalid.

In this way, the ECJ, seeing the threat for a different treatment to arise because of unspecified time for different calculation allowed in insurance premiums and benefits, has abolished dero-

⁸³ Treaty on the Functioning of the European Union (OJ 2008, C 115/47) , Article 8
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF>

⁸⁴ Judgment of the European Court of Justice, case C236/09 Association belge des Consommateurs Test-Achats ASB and Others v Conseil des ministres, Para 23.

⁸⁵ Ibid. Paragraph 26.

⁸⁶ Ibid. Paragraph 31.

⁸⁷ Judgment of the European Court of Justice, case C236/09 Association belge des Consommateurs Test-Achats ASB and Others v Conseil des ministres. Paragraph 32.

⁸⁸ Ibid. Paragraph 36.

gation from the general rule of the Gender Directive, leaving a rule without an exception and banning the differentiation based on gender in insurance.

3.2. Advocate General's opinion in the "Test Achats" case

An opinion of Advocate General Juliane Kokott coincided with the Opinion of the European Court of Justice in the "Test Achats" case.

In the opinion of Advocate General, J. Kokott: "it is not compatible with the European Union fundamental rights to take sex of the insured person into the account as a risk factor in insurance contracts. The use of the sex-based actuarial and statistical factors infringes the prohibition of discrimination"⁸⁹

In her opinion, the Advocate General emphasized the importance of the equal treatment between men and women in the European Union, promoted by the EU law. The Advocate General commented that strict standards were to be applied in the "Test Achats" case. According to the Advocate J. Kokott - differences in treatment of men and women could be justified by not more than "clearly demonstrable biological differences between men and women".

Furthermore, the Advocate stated that particularly in the insurance, the exception in question – did not relate to any clear biological differences between men and women. And provided with the other important factors in the process of assessing the risk in insurance – life expectancy depends and is strongly influenced "by the economic and social conditions of each individual, the kind of an extent of the professional activity carried out, the family and social environment, eating habits, consumption of stimulants and drugs, leisure and sporting activities."⁹⁰

Finally, the Advocate General J. Kokott stated that gender is a factor which is not changing through the human life, unlike the age. And gender is a factor over which a human has no influence – it is inseparable characteristics. Therefore, differences between people which are merely statistically linked to their gender must not lead to the different treatment.

⁸⁹ Advocate General's Opinion in Case C-236/09. PRESS RELEASE No 93/10 // The European Court of Justice. Luxembourg, 2010-09-20.

⁹⁰ Ibid.

3.3. European Commission guidelines on the application of Council Directive 2004/113 in the light of judgment of ECJ in “Test Achats”

The European Union’s Justice Commissioner Viviane Reding commented on the “Test Achats” decision: “It is now up to the insurance industry to ensure that there is a smooth transition to fully equal treatment of men and women in insurance. The European Commission will leave vigilant in how the industry implements ECJ’s ruling.”

The application of the European Court of Justice ruling in the “Test Achats” was left to decide in the national level for the insurance industries. However the European Commission has prepared guidelines for a better practical understanding how to apply the Court’s ruling in the national level.

This will help us to analyze easier how the unisex rule should now be implemented in insurance contracts and what effect does it have on specifically the life insurance contracts.

In the introduction of the “European Commission guidelines on the application of Council Directive 2004/113 in the light of the judgment of ECJ in “Test Achats” (“the guidelines”)⁹¹, it is mentioned that gender differentiation is currently allowed in at least one type of insurance contract in Member States. Particularly, life insurance is an insurance contract where sex can be used as a risk-rating factor in all Member states. It means that a “Test Achats” ruling will have an effect to all these Member states and life insurance contracts concluded.

Generally, the guidelines⁹² provide with the information that from 21 December 2012 the Member states will have to use the unisex rule provided in Article 5(1) of the Gender Directive without any exemptions in relation to calculation of premiums and benefits to new contracts.

3.3.1. Contracts, to which unisex rule is applied – “new contracts”

It is noticeable, that European Commission specifies “new contracts” which are concerned by the “Test Achats” ruling. Further, it will be explained what the “new contracts” shall mean.

⁹¹ European Commission guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats), available online at: http://ec.europa.eu/justice/gender-equality/files/com_2011_9497_en.pdf

⁹² Ibid. Paragraph 2.5.

Guidelines do not give the definition of the “new contract”, neither allow the national law give a reference to “new contract” (in the first chapter of this work, we have analyzed a variety of different perceptions of life insurance contracts). This could lead to different interpretation and breach of a principle of uniformity through the European Union.

Guidelines provide its own interpretation - a list of the insurance contracts which should be concerned as new contracts and in this way effected by “Test Achats” ruling obligated to apply a unisex rule:

1. „Contracts concluded from the first time as from 21 December 2012. If the offer is made before the date 21 December 2012 but accepted as from date 21 December 2012 will have to comply with the unisex rule.”⁹³

2. „Agreements between the parties concluded as from 21 December 2012, to extend the contracts concluded before that date which would otherwise have expired.”⁹⁴

According to European Commission guidelines, the date of 21 December 2012 has a significant role and the distinction between new and already existing contracts is important. Two types of life insurances will be effected – the ones concluded first time from the date of 21 December 2012 and the ones where the consent of policy holder is required to extend the life insurance contract after 21 December 2012 which would otherwise expire.

From a point of view of the contract formation – offer and acceptance, the life insurance contracts, which will be effected are classified bellow in the table:

1. New life insurance contracts - from the date of 21 December 2012 – (offer and acceptance from 21 December 2012)	2. New life insurance contracts, where offer was made before 21 December 2012, but the latest expression for acceptance – from 21 December 2012	3. Existing life insurance contracts, requiring the consent of a policy holder to extend the contract, from the 21 December 2012 (“new” offer and acceptance to extend the validity)
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⁹³ European Commission guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats), paragraph 12 (a)

⁹⁴ Ibid. Paragraph 12 (b)

As the guidelines state, just a specific new insurance contracts will be effected by the “Test Achats” ruling, serving the purpose, according to European Commission, to avoid a sudden rearrangement of the market.

The guidelines mention that life insurance contracts are the contracts, where gender as a risk rating factor is used in all Member States. Therefore we can come to the conclusion, that life insurance contracts should be broadly effected by “Test Achats” case. Specifically, the contracts which were newly concluded from the date of 21 December 2012, and the life insurance contracts, requiring the consent of a policy holder for an extension after the date of 21 December 2012.

3.3.2. Contracts that “Test Achats” does not have impact on

It is also important to point out which contracts will not be effected by the “Test Achats” case and will not have to follow the unisex rule in the calculation of insurance premiums and benefits. The European Commission guidelines also serve for this goal, giving four examples of the contracts which should not be concerned as “new contracts”:

1. The automatic extension of pre-existing contract e.g. a cancellation notice, is given by a certain deadline as a result of the terms of that pre-existing contract;⁹⁵
2. The adjustments made to individual elements of an existing contract, such as premium changes, on the basis of predefined parameters, where the consent of the policy-holder is not required (for instance, a premium increase by a percentage based on claims experience)⁹⁶;
3. The taking out, by the policy holder of top-up or follow-on policies, whose terms were pre-agreed in contracts concluded before 21 December 2012, where these policies are activated by the unilateral decision of a policy-holder. For example, when the insured person wishes to increase the amount invested through a life insurance product.⁹⁷

⁹⁵ European Commission guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats), paragraph 13 (a).

⁹⁶ Ibid. Paragraph 13 (b).

⁹⁷ Ibid. Paragraph 13 (c).

4. The mere transfer of an insurance portfolio from one insurer to another which should not change the status of the contracts included in that portfolio.⁹⁸

To summarize, we can see from the guidelines which insurance contracts will not be affected by the “Test Achats” ruling and to which the unisex rule in the calculation of insurance premiums and benefits will not apply. These are the contracts with automatic extension of pre-existing contract (without policy holder’s consent); adjustments made to individual elements of an existing contracts where the consent of a policy holder is not required; taking out top-up or follow-on policies whose terms were pre-agreed in contracts concluded before 21 December 2012 (where these policies are activated by a unilateral decision of a policy-holder) and the mere transfer of insurance portfolio from one insurer to another.

It is important to note that a risk-rating based on gender on a general level still remain possible. And only calculation of premiums and benefits based on gender at individual level is prohibited.

3.3.3. Possible gender-related practices after Test Achats

The guidelines provide with the gender-related insurance practices which remain possible after “Test Achats” ruling:

1. Reserving an internal pricing - insurers still have a right to collect gender-base information for internal risk assesment, to calculate technical provisions in line with insurance solvency rules and to monitor their portfolio mix from an aggregate pricing perspective.⁹⁹
2. Reinsurance pricing: reinsurance contracts are contracts between an insurer and a reinsurer. It remains possible to use gender in the pricing of these products, as long as they do not lead to gender differentiation at individual level.¹⁰⁰

⁹⁸ Ibid. Paragraph 13 (d).

⁹⁹ Ibid. Paragraph 2.2. 14.

¹⁰⁰ Ibid. Paragraph 2.2. 14.

3. Marketing and advertising areas are also excluded as provided by the Article 3 (3) of the Directive 2004/113/EC¹⁰¹ - targeting insurance portfolio advertisement to particularly men and women remains possible.

4. Life and health underwriting¹⁰² - the guidelines explain an application of unisex rule - premiums and benefits for women and men for the same type of insurance can not be different simply because of their gender. If there are other risk factors, such as health status or family history, and they are related with particular gender, these risk factors related to gender can still remain in the calculation process. The guidelines provide with the examples of family history of breast cancer or obesity, which effect men and women not the same way and require the gender knowledge (in other words, insurers are allowed to ask questions about gender-specific diseases).

5. Article 5.4 of the Directive¹⁰³ does not prevent differences in treatment, when calculating insurance premiums and benefits if the calculation is based on legitimate aim and means to achieve this aim are appropriate and necessary. The guidelines provide with an examples for this clause - breast cancer, uterus or prostate cancer.

To sum up, the “Test Achats” ruling does not impact all insurance contracts exhaustively. The contracts concerned as impacted by the judgment are “new contracts”, meaning newly concluded life insurance contracts from the date of 21 December 2012, or the existing contracts, requiring the consent of the policy holder for an extension of a contract, when a consent has to be given after the date of 21 December 2012. The areas, excluded from the ruling are regulated in the Gender Directive and in them the calculation of different insurance premiums and benefits for men and women remain. These areas are excluded from the impact of “Test Achats” judgment: employment and professional life area (occupational pensions and annuities are excluded from the impact of the judgment - only to private pension schemes as a type of life insurance the unisex rule will apply), general internal insurance company pricing, reinsurance pricing, marketing and advertising, life and health underwriting and different calculations for genders based on legitimate aim.

¹⁰¹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37), Article 3 (3).

¹⁰² European Commission guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats), paragraph 14.

¹⁰³ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37), Article 4.5.

3.4. Criticism on the Test Achats case. Practical consequences to life insurance business

As we have mentioned before, the “Test Achats” case has an impact on life insurance contracts. We have analyzed the ECJ considerations and reasoning in “Test Achats” case, the European’s Commission practical guide on the implementing the new unisex rule from the ending of year 2012. In this chapter we will pay more attention to the reaction of the insurance industry regarding “Test Achats” decision which is an answer to practical consequences of a case.

“Test Achats” received a huge amount of critics from the associations of insurers all over Europe.

First of all, the Association of British Insurers commented on the case that “a gender ban is disappointing news for insurance customers of United Kingdom.”¹⁰⁴ It is an expected reaction from the United Kingdom, “where the state intervention into the private insurance sector is relatively smaller than in the other counties.”¹⁰⁵ Association of British insurers commented that a Court decision will effect such products which take account of the risk differences between men and women, such as motor insurance and some annuities. The Association comments that for life insurance, women pay less to reflect their longer life expectancy, while pension (annuity) income for males is often higher as men usually have fewer years in retirement.

Maggie Craig, ABI’ Acting Director General, criticized “Test Achats” judgment as ignoring the fact that taking person’s gender into account, which is relevant to the risk, leads to more accurate pricing for both men and women.

The French financial service company “Scor”, providing life reinsurance products, reacted on the clause of the European Commission issued guidelines of a “new contracts” and predicted the bigger number of the life insurance contracts concluded before 21 December 2012 to be kept by women. Company commented that “for life insurance policies sold to female lives from December of 2012, it would be more expensive for these lives to take a new policy, so they are potentially more likely to keep their old policy and not lapse and re-enter.”¹⁰⁶

¹⁰⁴European Court of Justice gender ban is disappointing news for UK insurance customers says ABI:ABI news releases. <https://www.abi.org.uk/News/News-releases/2011/03/European-Court-of-Justice-gender-ban-is-disappointing-news-for-UK-insurance-customers-says-the-ABI> , [accessed 2013-10-10].

¹⁰⁵ Kontautas T. Draudimo sutarčių teisė. Vilnius: Justitia, 2007. P.20.

¹⁰⁶Implications of the European Commission guidance on Test Achats ruling: Scor inform. January 2012. http://www.scor.com/images/stories/pdf/library/scor-inform/scor_inform_jan12_testachat_en.pdf, [accessed 2013-10-15]

The German newspaper “Frankfurter Allgemeine” with a strong criticism called the “Test Achats” judgment a “unisex nonsense”. An article commented that a decision of judges in the “Test Achats” case “forces the private insurance industry to uniform insurance premiums for men and women but does not fix the justice, nor does it give benefit to the consumer, or gives more transparency to an already confused market. Instead, a judgment violates the freedom of contract because it demands the private insurance agents to make their contractual content.”¹⁰⁷ The judgment was commented as having a great impact to life insurance industry, and as for the life insurance, life policies will be more expensive than average, however it is questionable if they will offer more of the protection.

Sheaf S., general insurance practice leader and Cooke N., senior life actuary, from the “Grant-Thornton” assurance, tax and advisory firm have commented on the possible consequences of the judgment to life insurance contracts: “In most affected products (the notable exception being annuities) it is females who will lose out with equality of rates and men, who will gain, in contrast to most areas of sexual discrimination.”¹⁰⁸ And the important to notice here is that although the judgment was seeking the equal treatment, in the end the impacted parties – women and men will not have an equal effect of the judgment.

As the insurers analyze the judgment “It is a major exercise to undertake that will take time to get right (overhaul pricing processes to ignore gender).”¹⁰⁹ An insurance practice leader and the senior actuary see the three options on how to change the pricing process that insurers have:

- 1) Change of the premium rates – which means rises for one sex and falls for another;
- 2) Secondly, the insurers might use different rating factors in insurance or increase an impact of the existing ones, there may be fewer, factors like weight or occupation may then start to produce a wider range of premiums. - “The task of insurers will now be to find the other underlying risks, identifiers that sit behind the gender differences.”¹¹⁰
- 3) Change of the policy benefits. „This might result in products focused on female health risks, for example that men will not want to buy and vice versa.”¹¹¹

¹⁰⁷ Der Unisex Unsinn: Frankfurter Allgemeine. Wirtschaft.

<http://www.faz.net/aktuell/wirtschaft/versicherungen-der-unisex-unsinn-1641284.html>, [accessed 2013-10-27].

¹⁰⁸ Sheaf S., Cooke N. Insurance evolution: Spring edition, 2011 [Grant Thornton, available online at:

http://www.grant-thornton.co.uk/pdf/Insurance_Evolution.pdf

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

From the analysis of the insurers, we can conclude, that insurers by the ruling, are put to additional work in order to find the ways, how to fill the gender as an actuarial factor gap and that gap in life insurance products could be quite big.

Finally, coming back to the ECJ ruling in the “Test Achats” case and the critics received afterwards, another issue is the way itself the ECJ has come to the decision, questioning the equal treatment on the factor of gender, but not mentioning the other factors in the same group, falling under the protection: “The UK’s Equality Act (2010) is derived from EU directives and it prohibits discrimination against anyone with a ‘protected characteristic’. There are nine protected characteristics which are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, gender and sexual orientation. The most worrying item on the list is age, which at present has a very similar exemption to that which will be lost to gender pricing from the end of 2012.”¹¹²

Insurers criticize the way European Court of Justice came to its decision, forgetting the other factors falling within the same scope, and notifying that with a reference to life insurance contracts – age could be another disputed factor. However, nothing regarding the age factor was mentioned in the case. The insurers predict that elimination of age as a factor would lead to even more dramatic consequences.

Dr. Eugenia Caraciolla di Torella from the University of Leicester, has expressed an opinion that “The way the ECJ reached its decision “waters down” the very message that it aimed to send.”¹¹³ The ECJ’s reasoning itself was criticized in the “Test Achats” case, for instance, according to the Aristotelian formula of equality if men and women can be at the comparable situation – when measuring the possibility of discrimination, which the ECJ answered by positive answer. Furthermore, if the rule can be left without an exception – there was no suggestion for the amendment of the article 5(2) of the Gender Directive, but the ECJ took the ultimate measure in the “Test Achats” case and strictly abolished the derogation.

Finally, despite of the criticism from insurers received in the “Test Achats” case, in the reports of the Association of Life Insurers of the Republic of Lithuania¹¹⁴ for instance - reports in a year 2013, there are not seen any changes in the life insurance market but only the rise of popularity of the life insurance contracts. This leads to the conclusion, that even though two years have passed

¹¹² Ibid.

¹¹³ Caracciolo di Torella E. Gender equality after “Test Achats”. ERA Forum, June 2012, Volume 13, Issue 1, pp 59-69, available online at <http://link.springer.com/article/10.1007%2Fs12027-012-0248-x> .

¹¹⁴ <http://www.gda.lt/>

from the preliminary ruling of the ECJ in the “Test Achats” case and considering the specific nature of a long-term life insurance contract, for a real impact to be seen, there still need more time to pass.

CONCLUSIONS

1. From a variety of life insurance contracts, we can conclude that it is a type of insurance that is not that easily defined with one definition and a contract holding an important position in insurance sector, with its popularity increasing. In this way, a huge amount of insurance contracts are affected by the ruling in “Test Achats” in the European Union. The case impacts insurance types - where a gender was used as an actuarial factor in the calculation of insurance premiums and benefits. These are the motor vehicle insurance and life insurance contracts - where gender as an actuarial factor was used in all Member States.

2. Although life insurance contract is specific type of insurance contract, the main legal principles like freedom of contract, utmost good faith remain and are to be applied.

3. Insurance contracts, generally, are the risk contracts and it is important to understand that an evaluation of risk is an essential part in a process of insurance, done by professional actuaries using professional methods, and gender as a measurement tool is used for differentiation and aiming to acquire accurate data.

4. Despite the fact that gender equality question is an old issue, “Test Achats” is a first case where in the European Union level gender equality was questioned in the access to and supply of goods and services.

5. Even though adoption of the Gender Directive and the European Court of Justice preliminary ruling in “Test Achats” has been welcomed with a lot of criticism from the insurance associations, the judgment is to be followed.

6. The unisex rule in calculation of unisex insurance premiums and benefits applies for the “new contracts”, as defined by the European Commission, which are the life insurance contracts firstly concluded as from the date of 21 December 2012, and to the existing life insurance contracts, requiring a consent of a policy holder for the extension of a contract, and that contract has to be given from 21 December, for the unisex rule to apply. Therefore, to see the impact of the judgment, it is important to clearly distinct the new and already existing contracts, also the contracts which require the consent of insurance policy holder from the automatically extended contracts.

7. The judgment excluded the specific areas, to which the unisex rule in a calculation of insurance premiums and benefits is not be applied and these are: employment and professional life related life insurance products, general internal insurance company pricing, reinsurance pricing, marketing and advertising, life and health underwriting and different calculations for genders based

on legitimate aim. These practices remain possible to be used, only the gender differentiation which comes to an individual level is not allowed.

8. As a preliminary ruling of the European Court of Justice in “Test Achats” is quite new and as life insurance contracts are long-term contracts, it will take more years to notice an impact of the judgment to the life insurance business. The recent two years, after the judgment came into force, mostly influenced not only the insurers, who had to find a way how to fill a “gender-gap” but also the legislators who had to change the laws, implementing new requirements under the European Union law.

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“Test Achats” case: impact to life insurance contracts

Kamilė Sovaitė

Mykolas Romeris University

SUMMARY

The European Court of Justice on 21st March, 2011 has delivered a preliminary ruling in Case C-236/09, Association belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres - “Test Achats” case. The case was initiated by the Belgian consumer organization – “Test Achats” and two private individuals – Mr. van Vugt and Mr. Basselier, who considered the Belgium law of 21 December 2007 as incompatible with the European Union directive 2004/113/EC (the Gender Directive) implementing the principle of equal treatment between men and women in the access and to supply of goods and services. A claim was referred the Constitutional Court of Belgium for the annulment of this law.

Generally, the Gender Directive, regarding the insurance sector, imposed “unisex” calculation of premiums and benefits for men and women. The Constitutional Court of Belgium referred to the European Court of Justice questioning the lawfulness of the derogation provided in Article 5(2) of the Gender Directive which was allowing the Member States, concerning the insurance sector, to enable the differences in calculation of insurance premiums and benefits between men and women, if those differences were based on the actuarial data and reliable statistics which is regularly updated and available to the public. Most of the Member States had used this derogation, including the Republic of Lithuania.

The European Court of Justice assessed the validity of derogation in the light of the Charter of the Fundamental Rights in the European Union and the Treaty of Functioning of the European Union which prohibit any kind of discrimination, including gender discrimination as one of them. According to the fact that derogation in Gender Directive was not limited in time, the European Court of Justice ruled that this provision is invalid, after the transitional period, 21 December, 2012.

The preliminary ruling of the European Court of Justice effected the insurance sector, especially life insurance business, where gender as actuarial factor is inherent in the process of calculating insurance premiums and benefits in all 28 Member States. The case was highly discussed and criticized, especially from the side of insurers who denied the fact of discrimination in insurance and in the specific life insurance contracts. “Test Achats” case led to discussing such questions as, if the principle of the freedom of contract was not breached and if the European Court of Justice did not overstep its power. On the other side, the topic of gender equality was a subject of debate again, promoting it as one of the main human rights and requiring the insurance sector to evaluate the terms of life insurance contract conditions for men and women once again.

„Test Achats” bylos įtaka gyvybės draudimo sutartims

Mykolo Romerio Universitetas

Kamilė Sovaitė

SANTRAUKA

2011–ųjų metų, kovo 21 dieną, Europos Sąjungos Teisingumo Teismas priėmė preliminarų nutarimą byloje „C-236/09, Association belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministers” – “Test Achats” byloje. Bylą inicijavo Belgijos vartotojų teisių organizacija “Test Achats”, kartu su dviem privačiais asmenimis – ponais van Vugt ir Basselier. Bylą inicijavę asmenys, kartu su vartotojų teisės ginančia organizacija “Test Achats” kreipėsi į Belgijos Konstitucinį Teismą, dėl 2007-ųjų metų, gruodžio 21 dienos Belgijos įstatymo, prašydami jį panaikinti. Prašymas panaikinti įstatymą buvo grindžiamas jo neatitikimu moterų ir vyrų lygybės principui, įtvirtintu 2004-ųjų metų gruodžio 13-os dienos Europos Tarybos direktyvoje dėl moterų ir vyrų lygių galimybių prekių ir paslaugų teikimo sferoje. Belgijos Konstitucinis Teismas kreipėsi šiuo klausimu dėl preliminaraus sprendimo į Europos Sąjungos Teisingumo Teismą.

2004-ųjų metų gruodžio 13-os dienos Europos Tarybos direktyvoje įtvirtinta bendra nuostata, nustatanti vienodą (nepaisant lyties) draudimo įmokų ir išmokų skaičiavimą tarp vyrų ir moterų. Direktyvos 5(2) numatė galimą išlygą nuo bendros taisyklės, kuri leido valstybėms narėms draudimo sektoriuje atlikti ir skirtingus įmokų ir išmokų skaičiavimus, jei tie skaičiavimai gali būti pagrįsti patikima statistine informacija, bei tinkamais aktuariniais skaičiavimais, taip pat su sąlyga, kad ši informacija yra viešai prieinama bei reguliariai atnaujinama atitinkamų institucijų. Dauguma valstybių narių pasinaudojo šia leidžiančia nukrypti nuostata, įskaitant ir Lietuvą.

Europos Sąjungos Teisingumo Teismas, remdamasis Europos Pagrindinių Žmogaus Teisių Chartija, bei Sutartimi dėl Europos Sąjungos Veikimo nuostatomis, užtikrinančiomis lyčių lygybę, įvertino direktyvoje, leidžiančios nukrypti nuostatos, legitimumą. Remiantis faktu, jog leidžianti nukrypti nuostata nebuvo apibrėžta laiko skalėje, Europos Sąjungos Teisingumo Teismas paskelbė nuostatą negaliojančią nuo 2012-ųjų metų gruodžio 21-os dienos.

Europos Sąjungos Teisingumo Teismo preliminarus nutarimas turėjo įtakos draudimo sektorių, ypač gyvybės draudimo sutartims, kur lytis, kaip aktuarinis faktorius yra neatskiriamas gyvybės draudimo įmokų bei išmokų skaičiavime visose 28-iose valstybėse narėse. Byla buvo palydėta daugybe diskusijų, bei kritikos, ypač iš draudikų pusės, kurie neigė diskriminaciją draudime apskritai, bei specifiniame gyvybės draudime, kuriam byla turėjo daugiausia įtakos. „Test Achats“ byla taip pat sukėlė nerimą dėl tokių klausimų kaip galimo sutarčių laisvės principo pažeidimo, bei sukėlė diskusiją dėl galimo Europos Sąjungos Teisingumo Teismo savo paties galių viršijimo. Žvelgiant iš kitos pusės, lyčių lygybės tema vėl buvo iškelta, pabrėžiant lyčių lygybę, kaip vieną svarbiausių žmogaus teisių, bei priverčiant draudimo sektorių peržvelgti ir įvertinti gyvybės draudimo sutarties sąlygas moterims ir vyrams, vengiant galimos diskriminacijos, bei kiek galima labiau atsižvelgiant į vartotojų teisių užtikrinimą.