



SEX AND THE LEVEL PLAYING FIELD: EQUALITY IN EU PENSION PROVISION

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Equal treatment is a fundamental principle of European Union law, applying not only to dealings with individuals but also with countries, industries and companies. But what is the EU system of equal treatment and how does it, or should it, be applied to pensions and pension providers? And will it help or hinder the development of effective EU pension policies?

On 1 March 2011, the EU Court of Justice's judgment in the *Test Achats* case drew immediate and widespread attention to EU equal treatment policy in relation to gender and insurance outside the workplace.¹ Although the *Test Achats* judgment overturned part of an EU law that allowed limited gender-based pricing, the reasoning on equal treatment used by the Court is exactly the same as it has applied to economic 'level playing field' disputes between producers in industrial sectors. It is also applicable to the current EU review of the IORP Directive.

The ongoing EU review of the IORP directive is intended in part to ensure consistency in the regulatory treatment of different types of pension provider, including between insurers and occupational pension funds, and 'consistency' here means 'equal treatment.' EU laws on pension provision must also ensure equal treatment between providers. Given this obligation to ensure equal treatment, EIOPA's response to the European Commission's Call for Advice on the review of the IORP directive may result in some very new approaches to achieving consistency in a Europe of diverse pension systems.

Equality in the EU: one principle for all – men, women, IORPs and life insurers

The *Test Achats* case revolved around the validity of a provision in the EU's Gender Directive that allowed Member States to opt out of another provision in the same Directive that required insurers to use unisex pricing. The line of reasoning in the Court's judgment focused its arguments not on gender discrimination as such but rather on the legal relationship between two specific provisions in the Gender Directive.² In addition, the judgment relies on the legal principle of equality applicable to all EU legislation. This principle of equality was partly developed in cases dealing with industrial disputes involving producers active in, for example, the metal, sugar and tobacco sectors. It is this principle that is relevant to the discussion on how to achieve regulatory consistency between pension providers in the EU.

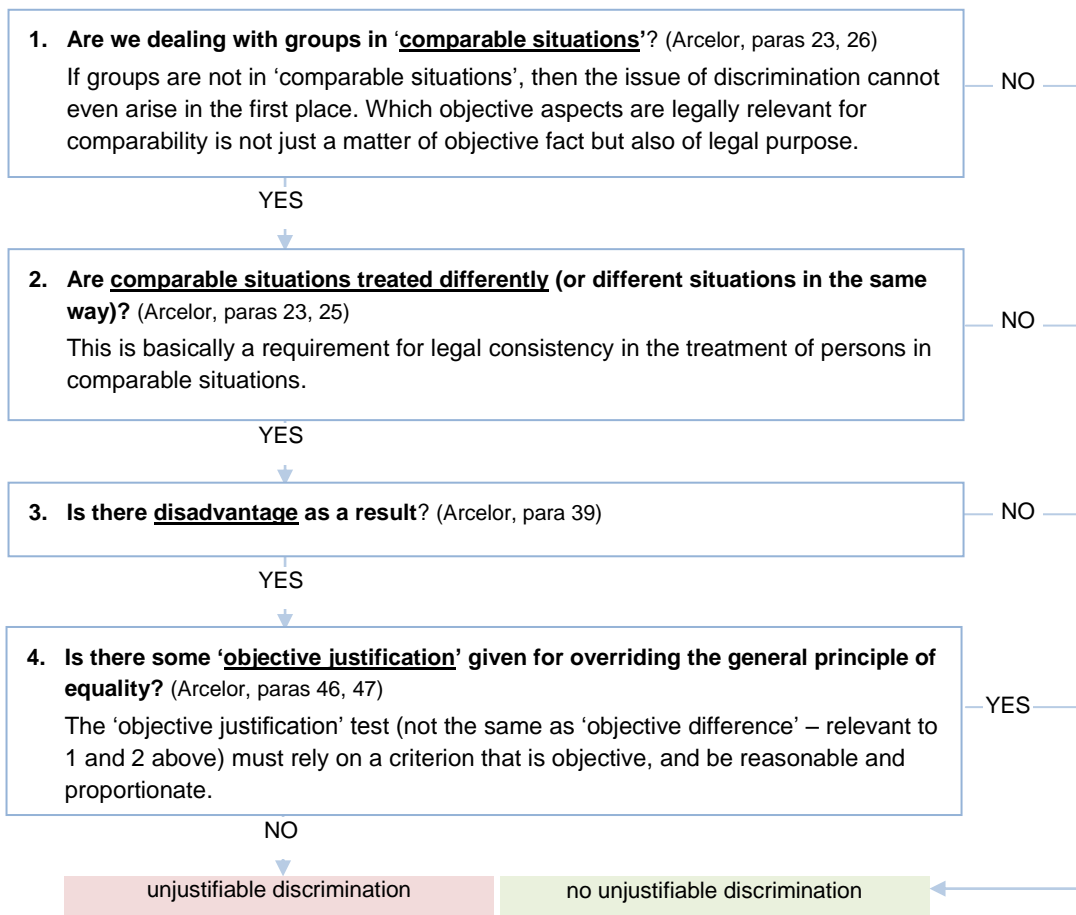
¹ In 2009, *Test Achats*, the Belgian consumer association, brought an action before a Belgian court challenging legislation that was supposed to implement the EU Gender Directive [2004/113/EC](#). As a question of EU law was involved, the Belgian Court asked for the view of the EU Court of Justice. [Case C-236/09](#), *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des Ministres*, 1 March 2011.

² Article 5(1) and Article 5(2).

The EU equality principle is sometimes presented as being exclusively about *consistency*, treating objectively like situations in a like manner and objectively different situations differently. But this is not the whole story. Apart from ensuring that degrees of difference and similarity are proportionately taken into account, it is also about deciding when higher policy (or even pragmatic) considerations may require otherwise relevant objective similarities or differences to be ignored. In other words, discrimination may be justifiable in some circumstances but these circumstances require objective justification. Diagram 1 illustrates the EU legal equality test for identifying unjustifiable discrimination, clearly separating the issues of ‘*objective difference*’ from those of ‘*objective justification*’ which are often at risk of being conflated.

Diagram 1: The EU legal equality test for identifying unjustifiable discrimination

The Court’s test for unjustifiable discrimination is applicable to any area of EU law. It is not limited to gender or other human rights issues. In *Test Achats* the Court relied heavily on the *Arcelor*³ case which sets out a four-stage test for unjustifiable discrimination between members from two different groups:



Unlike EU secondary legislation on discrimination, such as Directive 2004/113/EC, in neither in *Test Achats* nor in *Arcelor* is there any reference to ‘direct’ or ‘indirect’ discrimination and so there is no apparent restriction of the objective justification issue to indirect discrimination.

³ Case C-127/07, *Arcelor Atlantique et Lorraine and Others*

Test Achats and gender discrimination - a special non-discrimination rule for the insurance sector⁴

In autumn 2010, the opinion of Advocate General Juliane Kokott,⁵ an official advisor to the Court, triggered public interest. Yet in its judgment, the Court did not rely on her arguments. Instead it found that, given its legal context, the Gender Directive could not consistently combine a general requirement for unisex pricing, which was formulated in a way that implied that there were no objective differences between men and women *that should be taken into account*, with a general derogation that allowed Member States to opt out. The Court did not, however, rule that gender-based pricing was in itself incompatible with the Treaty. Nor did it rule that there were no objective differences between men and women; only that the 'premiss' of the EU legislators had been that they were (deemed to be) in comparable situations.

Test Achats – some open questions

The judgment still leaves many questions open as regards EU anti-discrimination policy and gender:

Is gender-based pricing compatible with EU law?

The judgment did not say that gender-based pricing on the basis of objective differences is in itself incompatible with EU law. Although it is clear that insurance companies will have to comply with the Test Achats judgment, space has been left for a differently formulated directive that may allow some forms of gender-based pricing.

Why did the Court apply only part of the Arcelor analysis?

The Court made significant use of the *Arcelor* logic but it did not consider 'step 3' (existence of disadvantage) and 'step 4' (existence of other overriding considerations). For example, if it were generally accepted that women live longer than men on the basis of their biological constitution, then would it be disadvantageous to women if the same capital saved over the same working life as men produces lower periodic benefits? It may be counter-argued that objectively viewed, the career-profile of many women, including long periods spent as carers, simply makes this an unrealistic basis for ensuring that women are not disadvantaged as pensioners and that corrective policy action is needed. As the Court seems to have stopped short, at 'step 2' of the *Arcelor* analysis, we do not know which arguments would have been proposed.

What about the Advocate-General's arguments?

The Court did not endorse or otherwise pursue lines of argument raised by Advocate General Kokott in her opinion including her suggestions that the use of risk factors for pricing in insurance that do not reflect personal choice was 'inappropriate,'⁶ and that reliance on gender-differentiated statistics could itself reflect discrimination⁷

These issues remain open in the EU's anti-discrimination policy debate. Even Kokott's morally convincing example of the unacceptability of linking premiums and benefits to race and skin colour, if translated into a more general ban on any characteristics that do not reflect personal choice raises

⁴ Article 4 of the Gender Directive sets out a general non-discrimination rule for everyone. It can take into account objective difference. Article 5(1) is a special rule for insurers. It cannot take into account objective difference.

⁵ **Opinion** of Advocate General Kokott, 30.09.2010 in Case C-236/09

⁶ See paragraphs 49 and 50 of her opinion.

⁷ See Section 3 of her opinion, for example paragraphs 57 and 61. The argument is that statistical correlation alone is insufficient to show that the differences are really rooted in sex, when other factors could play a role.

yet further issues (for example, to what extent can personal choice itself reflect biological constitution, and would a ban on the use of gender-based statistics mean that insurers need more invasive information about behaviour and health of individuals?). These issues have important economic and political implications for the efficient provision of insurance – and pension products – in a market economy. It is clear that the *Test Achats* judgment is not the last that we will be hearing from the EU on gender discrimination.

Equal treatment and pension providers – IORP reform

The EU Commission is expected to present its proposal to amend the IORP Directive towards the end of 2012.⁸ It is clear from the Call to Advice to EIOPA that one of its reasons for launching the review is its sense that EU rules for pension providers need greater consistency, particularly with regard to risk-based supervision. Consistency implies treating similar situations similarly, that is, 'equal treatment' in the sense of the *Arce/lor* judgment. EIOPA's draft response⁹ explicitly identifies the need to ensure consistency. The challenge that EIOPA and the EU institutions face is that unlike the relatively simple distinction between men and women, European pensions provision systems are very diverse. Ensuring consistency in the face of diversity means being able to identify real differences and to take them proportionately into account.

Consistency and competition

Talk about 'level playing fields' often risks mixing up consistency and competition issues. Yet the requirement for legal consistency is conceptually distinct from the question of competition. A requirement for regulatory consistency across members of two or more groups still applies even in the absence of competition. In *Test Achats*, the Court did not need to consider whether men and women were in competition with each other before it addressed the issue of consistency: there can be disadvantage simply by double standards being applied to equivalent situations.

So even if IORPs and life insurers do not compete, the duty to ensure regulatory consistency still holds. However, where there is competition, the requirement for consistency becomes economically more pressing. Whether there is competition between the two classes of pension provider has proved to be a highly contested matter. If our model of competition presupposes direct consumer choice between identical pensions products, then there is not always competition.

However, competition between non-homogeneous products is possible. Furthermore, the Court of Justice of the European Union has already held in a line of landmark cases involving pension funds and life insurers in the Netherlands that they compete, even though some pension funds have a social purpose and may be organized differently, and it does not preclude one set of providers enjoying a privileged status under national law as providers of a service of general interest (for example, compulsory membership).¹⁰ The Court ruling does not mean that all IORPs across Europe are providers of services of general economic interest or that all IORPs embody some form of collective agreement.

⁸ On 7 April 2011, the EU Commission issued a Call for Advice to EIOPA on the reform of the IORP Directive. EIOPA has until 15 February 2012 to respond. EIOPA will not only provide technical guidance to the EU Commission but, indirectly, it will also indicate the appetite for change amongst the EU Member States.

⁹ See <https://eiopa.europa.eu/consultations/consultation-papers/index.html> for EIOPA's *Response to Call for Advice on the review of Directive 2003/41/EC: second consultation*.

¹⁰ Cases **C-67/96, 'Albany'**; **C-219/97 'Drijvende Bokken'**; **C-115-117/97 'Brentjens'**.

More generally, taking a multi-pillar pension system as a whole, even if there is no direct competition between homogeneous pension products, levels of demand for private pensions are influenced by assessments of the adequacy and security of state and occupational pensions. Where the pension providers use pre-funding and are classed as economic actors, such as life insurers and occupational pension funds, it is hard to disagree with the Court's conclusion that they compete. European competition rules begin to be legally relevant even if choice of provider and benefit types may be restricted by regulation. Interestingly, in a recent Commission decision on state aid case involving the UK's NEST scheme, the EU Commission using information from the UK and the UK concluded that, in the UK, occupational pensions and life insurers compete.¹¹ Making an explicit link to the IORP Directive, the Commission concluded that 'the pensions market is part of the internal market for financial services and cross-border trade and investment activity in the sector across Europe is substantial.'

Consistency and diversity

Given the diversity of national pension systems, how can the EU legislator ensure that 'IORP II' meets EU equality standards? If it does not, in the worst case, it could face a legal challenge from one or another disgruntled group of pension providers.

Applying the EU's equal treatment logic, understanding whether there are legally relevant similarities and differences between providers-types is the crucial first step. Only then can inconsistent treatment be identified (step 2). If there is inconsistent treatment, this has to result in disadvantage (step 3). Even then, the Court has made clear that the different treatment of otherwise similar cases, and vice-versa, may be justifiable (step 4). However, the reasons for this should be spelled out and also need to satisfy the requirements for 'objective justification'.

The first question is whether IORPS and life insurers providing pensions are in comparable situations. Looking at their basic features, both provide retirement benefits and both use what the Court of Justice calls the 'principle of capitalization' to do this, so both are economic actors in competition with each other even where there is a social dimension.¹² Furthermore, if life insurers providing pensions in an occupational context satisfy the definition of an IORP in the IORP Directive, i.e. they are IORPs, then it is questionable whether the EU should have two sets of rules for the same type of provider.

Yet even if they are comparable in important ways, there are differences not only between life insurers and IORPs but also amongst IORPs themselves. The extent of the social dimension of IORPs may vary from Member State to Member State. Not all IORPs are based on the Dutch model. Not all embody inter- or intra-generational solidarity.

The challenge of the IORP review is to make the diversity of European pensions more manageable. The diversity of national pensions systems reflects basic social policy decisions taken within individual Member States, over which the EU has limited say. The nature and quality of an occupational pension, the product definition, is determined by Member States as part of its

¹¹ 'State aid N 158/2009 – United Kingdom, Establishment of the National Employment Savings Trust - NEST' **decision** of 6 July 2010, published March 2011. This is an interesting assessment that places occupational pensions and life insurance in the same 'voluntary' pension pillar and sees them as belonging to the same relevant market.

¹² See paragraph 79 in Albany: 'Neither the social objective pursued, nor the fact that it was non-profit-making, nor the requirements of solidarity, nor the other rules concerning, in particular, the restrictions to which the managing organisation was subject in making investments altered the fact that the managing organisation was carrying on an economic activity.'

competence for social policy.¹³ Financial services providers such as IORPs and life insurers acting in the workplace have to deliver products that meeting the national standards. The EU's internal market rules are there to ensure that pensions providers can deliver products that meet the diverse standards.

Can a practicable common methodology cope with diversity and promote cross-border activity?

Member States may face similar problems as to how to support their pensioners but they have developed different solutions. If there are different solutions to the same problem, it is hard to sign up without qualification to a blanket demand for 'same risks, same rules,' as the same risks may have been adequately treated by different means and so different rules may be justified. Nevertheless, 'same problems, different solutions' does not eliminate the need for common overarching principles and also, where there are no real differences between situations, the same rules should apply.

This is why it is particularly important to have a common methodology for identifying relevant differences and similarities between pensions systems and providers. Only then can we be sure of treating similar situations similarly and different situations differently. It is clear that there is a will to do this in the preparation for IORP II in the attempt to develop a common system of valuation and to take account of different security mechanisms on the basis of a risk-based, economic approach.¹⁴ EIOPA also explores the possibility of distinguishing 'grades' of pension commitment (unconditional, conditional, and discretionary).¹⁵ It even considers the idea of confidence security levels being set at national level.¹⁶

The implications of this are far-reaching. Effectively, it takes seriously the idea that product definition in the area of occupational pensions is a matter for Member States to decide. However, is what it is proposing in terms of measurement, classification and description too sophisticated, perhaps too invasive and, maybe even too revealing politically? It may turn out that there is no clear answer to what the current product standards for certain pensions are. If this is the case, then a process that re-examines and classifies pensions risks straining a lot of 'social partnerships,' as classification may quickly turn into a process of renegotiation.

Even if a common methodology is a practicable way to cope with Europe's pensions diversity, the implications for cross-border pensions are challenging. Currently, this aspect of the interaction between social policy requirements and financial services requirements is not explicitly dealt with by the IORP Directive. If the approach is correct and is made more explicit, could, for example, a Belgian cross-border IORP practicably ensure that the pension products it exports to the Netherlands meet Dutch product requirements (for example, as to confidence level or type of commitment) and its Spanish products, Spanish standards? Even if it could, national supervisors would have to be familiar with the financial services implications of national variation. It could be that in the long term, such a system might promote mutual trust between Member States. However, unless special arrangements are put in place for cross-border schemes involving more than one host

¹³ Or in some cases at sub-national level, collectively between social partners.

¹⁴ See the *Response to Call for Advice on the review of Directive 2003/41/EC: second consultation*, Section 8, particularly on the 'holistic balance sheet.'

¹⁵ See the *Response to Call for Advice on the review of Directive 2003/41/EC: second consultation*, sections 9.3.105-9.3.121.

¹⁶ See the *Response to Call for Advice on the review of Directive 2003/41/EC: second consultation*, sections 10.3.34-10.3.43.

State, for example, by the relevant Member States allowing a common product standard, it is hard to believe there will be a sudden flourishing of cross-border schemes.

Consistency and transparency in pension provision

Regulatory consistency is not just about the relationship between IORPs and life insurers. It is ultimately about the relationship between people and their pensions.

The pensions landscape across Europe is complex even within individual Member States. Pillar systems imply a mix of different classes of provider offering their own type of products. People need to build up their pension pots faced by a rich diversity of providers and pension types. How much needs to be put aside and with whom? How do they make comparisons? What is the trade-off between levels of security and adequacy? The current patchwork of rules does not make it easy to answer these types of questions.

One way or another, Member States themselves need to make this sort of assessment to see if their pensions systems will be adequate and sustainable. It is only possible to compare different pensions in such a diverse environment if the similarities and differences between products can be better understood. A common methodology not only ensures consistency but it is also the basis for improved transparency.¹⁷ The lack of sufficient transparency in pensions is one important problem that IORP II could address. As national budgets tighten and more people are expected to take more responsibility for planning for their own retirement, they will require clear and comparable information. Only this will enable them to understand their financial positions and to plan adequately for the future.

In the *Arcelor* case, the ferrous metal industry lost its case for unequal treatment at the final hurdle: the Court found the ferrous and non-ferrous sectors to be comparable (Step 1) and also that the EU rules in question discriminated against steel producers (Step 2) and also that they suffered economic disadvantage (Step 3). However, the Court reasoned that pragmatic considerations meant that the sheer number of the non-ferrous providers and the novelty of the approach meant that there was a pragmatic objective justification for the unequal treatment.

How would such an analysis play out in terms of IORPs and life insurers? Some may think that the fact that here are said to be some 140,000 IORPs in the EU and some 5,000 insurers also requires 'administrative feasibility' to be taken into account. But other factors also need to be taken into account. In the *Arcelor* case, the scale of the involvement of the ferrous industry in the issue justified a pragmatic approach. Are we really in a similar situation with life insurers and IORPs?

The equal treatment cases of the Court of Justice tend to focus on cases where rules are applied inconsistently between two groups and one group is discriminated against. In the case of pension provision there may be two groups of providers being treated inconsistently. But we should also bear in mind that, if the present inconsistent and opaque system continues, ultimately those that risk being disadvantaged are Europe's citizens.

¹⁷ It is also arguable that when a Member State decides which financial institutions are to be preferred providers of occupational pensions for its system, it must be able to compare the strengths and weaknesses of the different providers and their regulatory systems otherwise the decision can only be arbitrary.