

## Test-Achats: A Systematic Approach

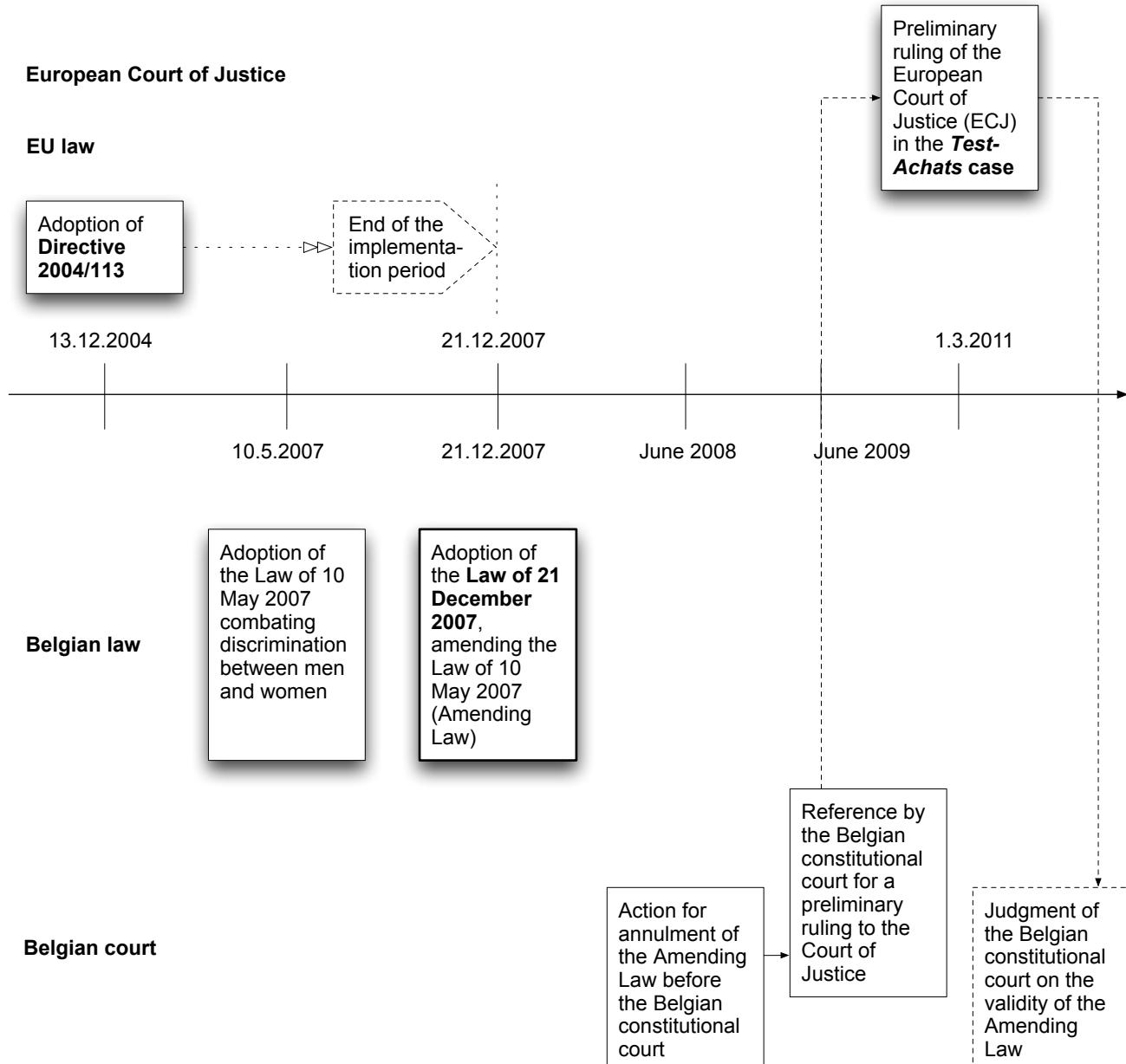
Time line in the *Test-Achats* case

Test-Achats Chart 1

**Topic:**

The *Test-Achats* case has to be seen against the background of the adoption of an EU Directive and of the Belgian law implementing it, and of the court cases both on the national and on the EU level concerning this legislation.

Adoption of laws and court cases from a temporal perspective



# **Test-Achats: A Systematic Approach**

## The EU law background: Art. 5 of Directive 2004/113

## Test-Achats Chart 2

## **Topic:**

Directive 2004/113, which implements the principle of equal treatment between men and women in the access to and supply of goods and services, contains a specific provision about equal treatment for men and women in the field of insurance services. The text adopted in 2004 provides for a derogation possibility in relation to different 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.

## **Art. 5 of Directive 2004/113 on insurance**

## **Background: legislative history**

- Unisex premiums and benefits in the legislative proposal:  
The European Commission's proposal for the Directive provided that insurance services would be fully subject to the principle of equal treatment, *though following a transitional period*. The Commission at that time expressly spoke about the comparability of men and women for insurance purposes.
  - In the course of the legislative procedure, the Council of Ministers introduced an "exemption" (in fact: a derogation) from the principle of equal treatment.

Insurance under Art. 5 of Directive 2004/113

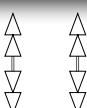
## **Art. 5(1): principle or general rule**

Equal treatment (unisex premiums and benefits): "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."



#### **Art. 5(2): derogation - contested in *Test-Achats***

- Differential treatment may be permitted by the Member States:  
"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."
  - Obligations of the Member States making use of this possibility:  
"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 this review to the Commission."



**Art. 5(3): derogation to the derogation for costs based on pregnancy and maternity**

No differential treatment; extended implementation period (2 years extra).

## Test-Achats: A Systematic Approach

The starting point of the *Test-Achats* case: national Belgian legislation

Test-Achats Chart 3

**Topic:**

The starting point of the *Test-Achats* case is the adoption of a Belgian law on discrimination on grounds of sex and, more specifically, its regime concerning insurance contracts.

**Starting point of the *Test-Achats* case: Belgian non-discrimination law**

**Implementation of Directive 2004/113 through the Belgian Law of 10 May 2007**

The Belgian Law of 10 May 2007 combating discrimination between men and women prohibits discrimination between men and women in, among others, insurance matters (Art. 10).

The Law of 10 May 2007 implements the EU-Directive 2004/113.

Notes:

- Belgium was among the few Member States that implemented the Directive in good time.
- It did not at that time make use of the possibility of Art. 5(2) of the Directive (derogation in favour of insurance and related financial services) but provided instead for unisex premiums and benefits.

**Amendment to the Law of 10 May 2007: Belgian Law of 21 December 2007**

A new version of Art. 10, on insurance

The Belgian Law of 21 December 2007 replaces Art. 10 with a new version. The new Art. 10 exempts non-marine life insurance contracts from the obligation to observe equal treatment.

Art. 10 in the new version:

By way of derogation from the rule on equal treatment/prohibition of discrimination, "a direct proportionate distinction may be drawn on the basis of gender for the purposes of calculating insurance premiums and benefits where sex is the determining factor in the assessment of risk on the basis of relevant and actuarial statistical data."

Note:

The Amending Law makes use of Art. 5(2) of the Directive, though only with respect to non-marine life insurance.

**Entry into force**

The new rule entered into force on 20 December 2007 (Art. 5 of the Law of 21 December 2007).

Notes:

- Retrospective effect!
- Probable reason: under Art. 5(2) of the Directive, Member States had to "decide before 21 December 2007" if they wanted to make use of the exemption.
- In fact, Belgium decided later, but "backdated" the effect of the amending law.

## Test-Achats: A Systematic Approach

### Two issues of validity

Test-Achats Chart 4

**Topic:**

The *Test-Achats* case raised issues in relation to the validity of both Belgian national law and EU law. These issues are linked to each other.

**Two issues of validity on two different levels:  
Validity of the Belgian Amending Law - validity of Art. 5(2) of EU Directive 2004/113**

**Comparatively narrow issue 1:  
Validity of the Belgian Amending Law concerning non-marine life insurance**

Argument of the applicants before the national court that the Belgian Law of 21 December 2007 is invalid because it breaches:

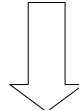
- Arts. 10, 11 and 11a of the Belgian constitution read in conjunction with Art. 13 EC (now Art. 19(1) TFEU);
- Directive 2004/113;
- Arts. 20, 21 and 23 of the Charter of Fundamental Rights;
- Art. 14 ECHR;
- Art. 26 of the International Covenant on Civil and Political Rights;
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

**Link to the validity of EU law**

The new Art. 10 of the Belgian Law is based on Art. 5(2) of Directive 2004/113. Accordingly, if Art. 5(2) of the Directive is invalid, so is Art. 10 of the Belgian Law.

Leads to a question to the ECJ that is at the same time broader and yet more narrow:

- Question focuses only on (certain) EU law (rather than also on instruments of national and international law);
- Question concerns insurance in general (rather than only non-marine life insurance).



**Much broader issue 2:  
Validity of Art. 5(2) of EU Directive 2004/113 concerning insurance in general**

Request for a preliminary ruling by the Belgian constitutional court to the European Court of Justice. Main question posed by the national court:

*"Is Article 5(2) of Directive 2004/113 [...] compatible with Article 6(2) [EU] and, more specifically, with the principle of equality and non-discrimination guaranteed by that provision?"*

**Note:**

Instruments of international law (e.g. ECHR, UN Covenants) may also be legally relevant under EU law. However, in *Test-Achats* they were not taken into account by the ECJ.

## Test-Achats: A Systematic Approach

### Legal issues raised in Test-Achats

### Test-Achats Chart 5

#### Topic:

The main question posed by the national court in *Test-Achats* raised three legal issues, namely: 1) the determination of the relevant primary law on equal treatment, 2) the comparability of situations and, in the event of a breach of the principle of equal treatment, 3) the acceptability of transitional periods or derogations.

#### The national court's questions and the legal issues flowing from it

##### The (main) question by the national court

"Is Article 5(2) of Directive 2004/113 [...] compatible with Article 6(2) [EU] and, more specifically, with the principle of equality and non-discrimination guaranteed by that provision?"

- Question of validity in the preliminary procedure, Art. 267 TFEU (indirect challenge).
- Invalidity ground relied on: incompatibility of EU secondary law with EU primary law (i.e. "unconstitutionality" of Art. 5(2) of the Directive).



#### Three legal issues (logical order)

##### What is the relevant primary law on equal treatment and what does it mandate?

- National court: Art. 6(2) TEU and, more specifically, the principle of equal treatment.
- ECJ: Art. 6(2) TEU - fundamental rights - general principles - Charter of Fundamental Rights - Art. 21 and 23 of the Charter - comparable situations must not be treated differently.

##### Is there unequal treatment? More specifically, are the situations of women and men comparable?

- Commission before the ECJ: Art. 5(2) of the Directive does not infringe the principle of equal treatment between men and women, but is in fact an expression of that principle.
- Council of Minister before the ECJ: doubts whether, in the context of certain branches of private insurance, the situations are comparable, given that, from the point of view of the *modus operandi* of insurers, in accordance with which risks are placed in categories on the basis of statistics, the levels of the insured risks may be different for men and women (implies that there is no infringement).
- ECJ: the Directive is based on the premiss of comparability, therefore the situations are comparable.

##### Are transitional periods or derogations acceptable?

- ECJ: given the legal context of the Treaty provision serving as the legal basis for the Directive (Art. 13 EC, post-Lisbon Art. 19(1) TFEU) and the fact that at the time of the adoption of the Directive the use of actuarial factors related to sex was widespread, appropriate transitional periods would have been acceptable.
- Art. 5(2) of the Directive does not provide for a transitional period.

#### Notes:

- The national court made its reference before the Lisbon revision and therefore referred to pre-Lisbon law.
- The Court in its judgment refers to post-Lisbon law (including the abbreviations "EU" and "TEU").

## Test-Achats: A Systematic Approach

### Structure of the ECJ's considerations

Test-Achats Chart 6

**Topic:**

In its preliminary ruling, the Court of Justice addresses the relevance of EU law on fundamental rights, the adoption of secondary law based on Art. 19(1) TFEU and the principle of equal treatment, including in particular the comparability of situations.

#### Structure of the ECJ's considerations

**Starting point:  
The (main) question by the national court**

"Is Article 5(2) of Directive 2004/113 [...] compatible with Article 6(2) [EU] and, more specifically, with the principle of equality and non-discrimination guaranteed by that provision?"

Test-Achats, paras. 14-15

#### The ECJ's considerations

**Description of the relevant legal framework**

- Fundamental rights as part of primary law: Art. 6(2) of the Charter and related rules and principles;
- The legal context of Art. 19(1) TFEU (legal basis of Directive 2004/113).

See **Chart 7**

Test-Achats, paras. 16-17

Test-Achats, paras. 18-21

**Assessment of the case at hand (1):  
Gradual implementation of the principle of equal treatment  
in the case of insurance?**

- Gradual implementation in the field of insurance.
- Appropriate transitional period.

See **Chart 8**

Test-Achats, paras. 22-23

Test-Achats, paras. 24-26

**Assessment of the case at hand (2):  
Is there a lack of comparability, and thereby no breach  
of the principle of equal treatment?**

- Meaning of the principle of equal treatment; how to assess comparability.
- Assessment of comparability, and thereby of equal treatment.

See **Chart 9**

Test-Achats, paras. 28-29

Test-Achats, paras. 30

**Synthesis:  
Conclusion drawn from the two assessment points**

See **Chart 10**

Test-Achats, paras. 31-34

## Test-Achats: A Systematic Approach

### Test-Achats: the relevant legal framework

Test-Achats Chart 7

**Topic:**

Before assessing the question concerning the (in)validity of Art. 5(2) of Directive 2004/113, the Court describes the legal framework in which this question has to be seen. The Court refers to two issues: 1) fundamental rights under EU law and 2) the legal context of Art. 19(1) TFEU as the legal basis of Directive 2004/113.

**Elements of the relevant legal framework as described by the Court**

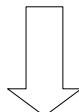
**Fundamental rights and equal treatment under EU law**

Fundamental rights as part of primary law, Art. 6(2) TEU; *Test-Achats*, para. 16-17:

- Art. 6(2) TEU: fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are part of the EU's general principles.
- Those rights are incorporated into the Charter of Fundamental Rights, which, with effect from 1 December 2009, has the same legal status as the Treaties.
- Arts. 21 and 23 of the Charter: non-discrimination and equality between men and women.

**Note:**

The fact that the *Test-Achats* case arose before 1 December 2009 does not matter in the present circumstances as the EU institutions were bound by the Charter even before that date (though not the Member States).



**Constitutional reference point for the assessment of the validity of Art. 5(2) of Directive 2004/113**

Besides Art. 6(2) TEU, the preamble of the Directive refers expressly to Arts. 21 and 23 of the Charter. Accordingly, these provisions are the benchmark against which to test the validity of Art. 5(2) of the Directive.

**The legal context of Art. 19(1) TFEU (i.e. the legal basis of Directive 2004/113)**

The EU's competence to legislate on the basis of Art. 19(1) TFEU must be seen in its context; *Test-Achats*, para. 18-21:

- Art. 19(1) TFEU is a legal basis provision, conferring a competence on the EU to take appropriate action to combat, among others, sex discrimination.
- It must be read together with Art. 3(3) TEU (objectives of the EU) and Art. 8 TFEU (mainstreaming in relation to sex equality).
- It allows for the gradual implementation of the principle of equality for men and women.
- It mandates a coherent and effective approach, with the possibility of transitional periods or derogations of limited scope.

## Test-Achats: A Systematic Approach

### Assessment 1: gradual implementation

Test-Achats Chart 8

**Topic:**

In the *Test-Achats* case, the ECJ finds that Art. 5(2) of Directive 2004/113 does not provide for the required gradual implementation of the principle of equal treatment for men and women.

#### Gradual implementation of the principle of equal treatment for men and women

##### Issue

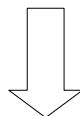
Are derogations acceptable at all?

##### Framework for the examination

- Gradual implementation of the principle of equality for men and women; *Test-Achats*, para. 20: Art. 19(1) TFEU allows for the progressive achievement of equality between men and women.
- Freedom of the EU legislature to choose the time of action; *Test-Achats*, para. 20: The EU institutions are free to determine when they will take action, having regard to the development of economic and social conditions within the EU.
- Coherent and effective action; *Test-Achats*, para. 21: When action by the EU legislature is decided upon, it must contribute, in a coherent manner, to the achievement of the intended objective.
- Possibility of transitional periods or derogations of limited scope; *Test-Achats*, para. 21: The requirement of coherent and effective action is without prejudice to the possibility of providing for appropriate transitional periods or derogations of limited scope.

##### Assessment of Art. 5(1) and (2) of Directive 2004/113

- Permissibility of gradual implementation; *Test-Achats*, paras. 23 and 23: Widespread use of actuarial factors at the time when the Directive was adopted made gradual implementation with appropriate transitional periods permissible.
- Art. 5(2) as a temporally unlimited derogation from Art. 5(1) of the Directive; *Test-Achats*, paras. 25, 26 and 31: Allows the Member States which have made use of the option under Art. 5(2) to permit insurers to apply the unequal treatment without any temporal limitation. Accordingly, there is a risk that EU law may permit the derogation to persist indefinitely.



##### Implied conclusion

Art. 5(2) of the Directive does not provide for an "appropriate transitional period" and, thereby, for gradual implementation.

## Test-Achats: A Systematic Approach

### Assessment 2: comparability

Test-Achats Chart 9

#### Topic:

In the *Test-Achats* case, the ECJ finds that the situation of men and women in insurance are comparable.

#### Comparability and the principle of equal treatment

##### Issue

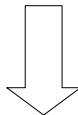
Are the situations of male and female insurance policy holders comparable, given that the level of insured risks may be different when assessed in the framework of categories and measured on basis of statistics?

##### Framework for the examination

- The meaning of equality; *Test-Achats*, para. 28:  
The principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified.
- Assessment of the comparability of situations; *Test-Achats*, para. 29:  
The comparability of situations must be assessed in the light of the subject-matter and purpose of the EU measure which makes the distinction in question.

##### Assessment of the comparability of women and men in relation to insurance

- Subject-matter of Art. 5 of the Directive; *Test-Achats*, para. 30: insurance premiums and benefits.
- Purpose of Directive 2004/113; *Test-Achats*, para. 30:  
Application of unisex rules on premiums and benefits, as confirmed by recitals 18 and 19 to the Directive.
- Premiss of Directive 2004/113 in relation to comparability; *Test-Achats*, para. 30:  
The Directive "is based on the premiss that, for the purposes of applying the principle of equal treatment for men and women, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable."



##### Implied conclusion

- The EU legislator is not consistent: in spite of the premiss of comparability, it allows for unequal treatment of comparable situations.
- In principle (i.e. with the reservation of appropriate transitional periods), this infringes the principle of equal treatment.

## Test-Achats: A Systematic Approach

### Conclusion

Test-Achats Chart 10

#### Topic:

Given the comparability of men and women, the Court finds in *Test-Achats* that to allow, without temporal limitations, a differential treatment of men and women in relation to insurance, is incompatible with Arts. 21 and 23 of the Charter of Fundamental Rights.

#### Conclusion: comparability and appropriate transition periods

##### Finding on comparability

The situations of men and women in relation to insurance are comparable.

Accordingly, unequal treatment amounts to discrimination / to a breach of the principle of equal treatment and non-discrimination.

##### Finding on transitional periods

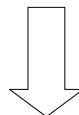
In the field of insurance, gradual implementation with an appropriate transitional period would be acceptable.

Art. 5(2) does not provide for an appropriate transitional period.

#### Conclusion

*Test-Achats*, paras. 32 and 33:

- A provision, which enables the Member States "to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment [...] and is incompatible with Articles 21 and 23 of the Charter."
- Art. 5(2) "must therefore be considered to be invalid upon the expiry of an appropriate transitional period".



#### Finding

*Test-Achats*, para. 34:

"In the light of the above, the answer to the [...] question is that **Article 5(2) of Directive 2004/113 is invalid with effect from 21 December 2012.**"

Operative part of the judgment:

"Article 5(2) of 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 is invalid with effect from 21 December 2012."

## Test-Achats: A Systematic Approach

### Outcome of Test-Achats in legal terms

Test-Achats Chart 11

#### Topic:

In the *Test-Achats* case, the ECJ held that Art. 5(2) of Directive 2004/113 is invalid with effect from 21 December 2012. Invalidity in this context is not the same as nullity.

#### Finding of invalidity in the framework of the review of legality in the preliminary ruling procedure, Art. 267 TFEU

##### Finding of invalidity in the preliminary ruling procedure, Art. 267 TFEU

Inapplicability of the relevant secondary EU measure (here: Art. 5(2) of Directive 2004/113) in the national case.

###### Note:

- Formally not general nullity of the measure! Schwarze (1965).
- But: the Court's finding of invalidity can/must also be observed in other cases and by other Member States; ICC (1981).

##### By way of comparison: Finding of nullity in the annulment procedure, Art. 264 TFEU

Nullity of the relevant secondary EU measure of EU with retrospective effect, Art. 264 TFEU (first part).

In certain (rare!) cases, the ECJ upholds the effect of the annulled measure for a certain period of time, Art. 264 TFEU (second part).

#### Temporal limitations of the Court's finding of invalidity in a preliminary ruling

##### Temporal limitations of the invalidity

###### *Test-Achats*:

- An appropriate transitional application of Art. 5(2) of Directive 2004/113 does not breach the principle of equality.
- Accordingly, until then the provision is valid. Afterwards, it is invalid.
- This finding applies to all persons affected by Art. 5(2).

The Court's choice in terms of time:  
21 December 2012 - no explanation; in fact corresponds to the moment in time when the 5 year review provided for in Art. 5(2) of Directive 2004/113 has to be undertaken by the Member States who opted for the possibility under Art. 5(2).

##### Limitation of the effect of the Court's judgment

- Art. 264 TFEU (second part) applies by analogy, i.e. it confers on the Court a discretion to decide, in each particular case, which specific effects of the act in question must be regarded as definitive.
- In such cases, the effect of the judgment is limited to periods after the date of the judgment (i.e. no actions based on the Court's finding of invalidity can be brought in relation to earlier periods).
- Exception: the applicants in the case at hand and others who already brought an action.

Société coopérative (1980), further e.g. Schecke und Eifert (2010)

#### RELEVANT in *Test-Achats*

Not relevant in *Test-Achats*  
(though it was suggested by the AG)

## Test-Achats: A Systematic Approach

### Practical effect of the Court's ruling in *Test-Achats*

Test-Achats Chart 12

**Topic:**

The Court's finding in the *Test-Achats* case means that as of 21 December 2012 insurance contracts must provide for unisex premiums and benefits. Individual premium holders may rely on the right to equal treatment.

**Practical effect of the ECJ's finding in the *Test-Achats* case**

**Starting point:  
Obligation to grant unisex premiums and benefits as of 21 December 2012**

As a result of the Court's judgment, insurance companies must provide that unisex premiums and benefits are applicable to all contracts (old and new) as of 21 December 2012.

**Note:**

The decisive date is 21 December 2012, not 1 January 2013. Strictly speaking, contracts for the year 2012 must take this into account (i.e. they must calculate the premiums and benefits in such a way that as of 21 December 2012 at the latest there is no different treatment).

**Practical consequences in the event of default ...**

