legal system postulates political agitation. But as already said, the lack of cogency in the political purposes doctrine is reason enough to reject it.

To reject the political objects doctrine is not to say that all political objects are charitable. Working out the limits will be crucial to the development of Australian law and, if England follows suit, English law too. Two potential limits present themselves. First, it may be that encouraging public debate will only be a charitable purpose if the debate concerns an established charitable purpose. Secondly, a trust with political objects will apparently not be charitable if (*i*) its formation or performance depend on, or further the doing of, an illegal act or an act contrary to public policy; or (*ii*) it is contrary to "the established system of government"; or (*iii*) its means and ends do not contribute to the public welfare.

Finally, *Aid/Watch* gives no encouragement to the thought that courts should be permitted or required to evaluate the merits of a change in the law which a supposed charity may desire. Those things would compromise a court's institutional integrity. It is significant that Aid/Watch was held to be charitable, not because it favoured a particular change in the law, but because it sought to encourage public debate about the activities of government in relation to the relief of poverty.

P.G. TURNER

INSURING THE CHARTER: WHO BEARS THE COST?

IN Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, Judgment of 9 November 2010, not yet reported, (noted at [2011] C.L.J. 306), the EU Charter of Fundamental Rights was used for the first time to review and invalidate secondary EU legislation. This marked a turning point in the case law of the Court of Justice of the EU. Until then, the Charter had played only a limited role in adjudication in the EU. While it was proclaimed as a solemn political declaration in 2000, it was only made legally binding in December 2009 with the entry into force of the Treaty of Lisbon.

Further light was shed on the status and effects of the Charter under the Lisbon arrangements by the much awaited judgment of the Court of Justice in *Test Achats* (C-236/09) (judgment of 1 March 2011, not yet reported). The case concerned the compatibility of Article 5(2) of Council Directive 2004/113 EC (OJ 2004 L373, p. 37) implementing the principle of equal treatment between men and women in the access to and supply of goods and services – the so called "Gender Directive",

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with the principle of equality and non-discrimination. That Directive is the first measure to bring gender equality outside the work place. To that effect, Article 5(1) provides for a unisex rule in the calculation of insurance premiums and benefits. However, Article 5(2) allows the Member States to maintain gender based differences in insurance contracts where sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.

In line with its previous ruling in *Volker* and *Eifert*, the Court reiterated that, at least when it is cited in the relevant EU act, the Charter is to be used as a yardstick to test its legality. The case came before the Court through a preliminary reference from the Belgian Constitutional Court which had cast its question in terms of the Directive's compatibility with the principle of gender equality guaranteed by Article 6(2) TEU. But since the Directive made specific mention of Articles 21 and 23 of the Charter, the validity of Article 5(2) of the Directive fell to be assessed in light of those provisions. Article 21 prohibits any discrimination on grounds of sex while Article 23 dictates that equality between men and women must be ensured in all areas.

The Court then recalled that 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"(at [28]). A central question was therefore whether men and women were in comparable situations with regard to the calculation of insured risk.

In her opinion, AG Kokott had expressly rejected the contention that statistical data provided a sufficiently certain basis for treating men and women differently. The Court, however, did not consider that issue, but simply pointed to a deficiency in the Gender Directive itself. It emphasized that when the Council decides to take action under Article 19 TFEU to combat discrimination, such action "must contribute, in a coherent manner, to the achievement of the intended objective [of equality] without prejudice to the possibility of providing for transitional periods or derogations of limited scope" (at [21]). The Court observed that the Directive purports to apply a rule of unisex premiums and benefits and is therefore based on the premise that women and men are in fact in comparable situations. Since Article 5(2) enables Member States to derogate from that rule indefinitely, the inevitable conclusion was that this provision frustrated the Directive's objective and that it breached Articles 21 and 23 of the Charter.

The Member States now have until 21 December 2012 to align their national laws to the ruling. This prompted strong reactions from the insurance sector. In some areas, gender indeed plays a crucial role in the calculation of risk. Women, for example, typically pay higher life

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insurance rates because, on average, they live longer than do men. It is feared moreover that the judgment might, by analogy, prevent other characteristics from being taken into account in insurance matters in the future. Notably, a similar provision to Article 5(2) is to be found in the Commission's proposal for a new Equal Treatment Directive (COM (2008) 426) regarding age and disability.

But if, to some, the result of the case appears to be dramatic, to others, the reasoning of the Court will come as a relief. The judgment appears indeed to confirm that the Charter is a codification and not an independent source of rights which is meant, henceforth, to supersede the general principles of EU law. The Court's justification for using the Charter as a ground for judicial review was that EU fundamental rights as general principles have been *incorporated* in the Charter. This is an important reiteration of the status quo. The preamble of the Charter indeed specifies that the document *reaffirms* the rights as they result from a number of sources, including the ECHR and the constitutional traditions common to the Member States. However, insofar as it suggests that all EU fundamental rights are now to be found in the Charter, the language of "incorporation" is unfortunate, although it would be rather premature to attach a definite meaning to the Court's characterisation. AG Kokott by contrast described the document as a "summary of the fundamental rights guaranteed at Union level" (at [28]), which clearly leaves scope for the Court to continue developing new rights as general principles of EU law.

The judgment is an important reminder that the EU legislator must be mindful of fundamental rights in the drafting of legislation and a further step towards the creation of a "social Europe". It also clarifies the Court's perception of the Charter as the main *formal* but not *material* source of fundamental rights protection in the EU. This fulfils the objective of visibility and simplicity that the adoption of the Charter was meant to achieve while preserving the drafters' original intention as to the nature of that document. Finally, and irrespective of its legal merits, the decision that the Directive is incompatible with the Charter is bound to have a financial cost, and a practical question arises as to who will bear it: the consumer, the insurance sector, or both?

EVA NANOPOULOS

UNCERTAIN PERPETRATORS AND SIBLINGS AT RISK

WHERE care proceedings are brought in respect of a child who is the victim of non-accidental injury inflicted by a parent, a care or

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