

Na dobre i na złe: Implementation of the “Test Achats” judgment

Gender Equality and insurance services

PIU Conference

Warsaw, 30 May 2012

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Recap

Art. 5 Gender Directive

- Art. 5. 1 - Stipulates, that:
 - 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 - Opened a “back door”:
 - **Member States may** decide [...] to **permit** proportionate **differences** in 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.**
 - All Member States currently allow gender differentiation for at least one type of insurance E.g. Belgium: “Law of 10 May 2007”
 - This law led to the European Court of Justice’s (ECJ) judgment known as “Test Achats”, declaring that Art. 5(2) is **invalid with effect from 21.12.2012**
 - All national legislations implementing an exemption based on Art 5 (2) must be amended by 21 December 2012

Top 3 questions arising from the decision

1. Does the judgment apply to in-force business?
2. Which gender-related practices (if any) remain legal?
3. Does it affect occupational pension schemes?

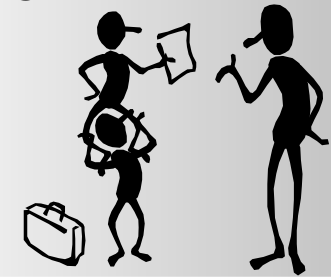


The complex system and long time-scale of making European Law excluded the possibility to pass an amendment to the Gender Directive. Instead, some answers are provided in the European Commission's guideline document that was released on 22.12.2011
It is worth noting that the guideline is not legally binding!

1. Does the judgment apply to in-force business?

Guideline:

- The unisex rule must be applied without any exception in relation to the calculation of individuals' premiums and benefits in **new contracts**.
- What is a “new contract”?
 - Not defined in EU Gender Directive
 - Usually determined by national contract / insurance contract law
 - But: The Commission’s Guideline presents a specific rule set that should be regarded, for the purposes of application of the Directive, as designating an *“autonomous concept of European Union law, to be interpreted uniformly throughout the Union.”*



- Judges in EU member states may very well disregard this opinion and decide cases on the basis of local law

New contract / no new contract

Guideline:

Basic formula : $O + A = C$ (O = offer, A = acceptance, C = contract)



- Unisex rule ***applies*** to contracts concluded on or after 21 Dec. 2012.

- When offer is made before but accepted on or after 21 December 2012, contract will need to comply with unisex rule
- Agreements between parties, concluded as from 21 December 2012, to extend contracts concluded before that date which would otherwise have expired



- Unisex rule does ***not*** apply to
 - automatic extension of existing contracts (= no cancellation notice given)
 - adjustments to elements of an existing contract (e.g. premium changes) on the basis of predefined parameters, where consent not required
 - taking out of top-up / follow-on policies (on terms pre-agreed in contract concluded before 21 Dec. 2012) by policy-holder's unilateral decision
 - mere transfers insurance portfolios from one insurer to another which do not change the status of the contracts in the portfolio.

Permitted gender-related insurance practices

Guideline:

- To **collect, store and use gender status or gender-related information** for the calculation of premiums and benefits at aggregate level, as long as it does not lead to differentiation at individual level., i.e.:



- **Reserving and internal pricing:** Insurers remain able to collect and use gender status for internal risk assessment, notably to calculate technical provisions in line with insurance solvency rules and to monitor their portfolio mix from an aggregate pricing perspective.



- **Reinsurance pricing:** Reinsurance contracts are contracts between an insurer and a reinsurer, differentiation is allowed as long as it does not lead to differentiation at individual level



- **Marketing and advertising:** It remains possible for insurers to use marketing and advertising to influence their portfolio mix e.g. by targeting advertising at either men or women

Life and health underwriting

Guideline:

- Unisex rule means that premiums and benefits cannot be different simply because of gender
- Accepted risk factors enabling insurers to differentiate taking gender status into account, in light of certain physiological differences between men and women, e.g.
 - Family history of breast cancer:
Has different impact on a man and on a woman's health risk.
 - Obesity:
Determined by waist to hip ratio (not the same for women and for men)
 - Annex 3 of the guideline provides a detailed list of examples the Commission considers acceptable
 - Also allowed: Gender-specific insurance products (or options) to cover conditions exclusively or primarily concerning one gender (e.g. prostate cancer, breast or uterus cancer).
 - Not however for pregnancy and maternity [see Article 5(3)]



Gender correlating factors / indirect discrimination

Guideline:

- Test-Achats ruling only addresses the use of gender as a risk-rating factor
- Gender Directive also forbids cases of indirect discrimination i.e. where an apparently neutral risk factor puts persons of one sex at a particular disadvantage
- Gender-correlating factors are permitted - as long as they are true risk factors in their own right!
 - e.g. differentiation on car engine size in the field of motor insurance should remain possible (even if statistically, men drive cars with more powerful engines).
 - Not allowed, however, would be differentiation based on the size or weight of a person in relation to motor insurance

Insurance and occupational pensions

What belongs where?

- In some markets there is a discussion into which category certain arrangements fall.
- General rule:
 - The EU Gender Directive only covers insurance and pensions which are *private, voluntary and separate from an employment relationship*. Employment and occupation are explicitly excluded from its scope
 - The EU Employment Directive (2006/54/EC) covers occupational pensions and **excludes** from its scope insurance **contracts concluded by workers and to which the employer is not a party**.
- The Employment Directive allows for the setting of different levels of benefits between men and women when justified by actuarial calculation factors.
 - The EC guideline considers that Test-Achats ruling has no legal implications for this provision
- Different and clearly separable context, drafted in a very different way from Article 5(2) of the Directive

For the time being..

Status quo

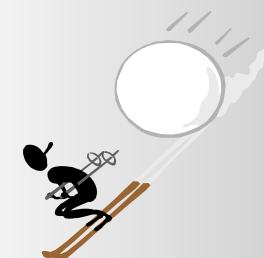
- **Where are we now?**
- In many EU member states, changes to local law, implementing the abolition of Art. 5 (2), will occur in the 2nd half or Q4 of 2012
- In some countries, it may even be after 21.12.2012
- Nevertheless, all courts in EU member states are bound by the ECJ judgment, so industry must comply in any event
- In some member states, the new local laws will have a similar level of detail as the EC Guideline
- In others it will be less detailed and therefore legal uncertainty will therefore be even higher.
- Conclusion: The paradigm shift will take some time!



What more could go wrong?

The “Test Achats” judgment could lead to

- Judicial review of Employment Directive
- Amendment of draft directive against discrimination on age, disability, deleting current exemption for insurance and banking
- “Copycat” actions outside the EU e.g.
 - Activist group “Male Solidarity” raised discrimination complaint with Financial Supervisory Service (FSS) in South Korea



Thank you for your attention



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