

Insurance: European Court rules “No Go” to differential gender pricing and benefits

On 1 March 2011, the European Court of Justice (ECJ) delivered its much anticipated Decision in the Test-Achats case. The case, brought by the Belgian consumer association, had challenged the legality of provisions in a European Directive which permit insurers to use gender as a risk factor when setting premiums and benefits under policies.

In September 2010 Advocate General Kokott delivered her Opinion in the case in which she proposed that Article 5(2) of the Gender Directive (2004/113/EC) - which permits insurers to charge different premiums and to provide different levels of benefit to men and women provided that sex is a “determining factor” in the assessment of risk – was incompatible with the principle of equal treatment under EU law and hence was unlawful.

Today the ECJ essentially came to the same conclusion as the Advocate General regarding the impermissibility of setting different premiums and benefits in the insurance sector based on gender, and confirmed that:

- Taking the gender of an insured into account as a risk factor in insurance contracts constitutes discrimination.
- The derogation within article 5 of the Gender Directive (2004/113/EC) that permitted exemptions so long as differential premiums and benefits were based on objectively reliable statistical data should not be permitted to subsist indefinitely, as it is incompatible with the principle that men and women must be treated equally, which is set out in “higher ranking European law”.
- Accordingly, from 21 December 2012, it will not be possible for UK and other European insurers to rely on the derogation to be allowed to use differential pricing of insurance policies for men and women in comparable situations. This date is the date that the derogation would be subject to review.

The Judgment therefore does allow the insurance industry a period of grace within which to consider and make necessary amendments to its business and pricing models as necessary. The Advocate General did recommend a longer period in her Opinion (3 years) and the time by which changes need to be reviewed and implemented is much shorter under the ECJ's ruling, although there was no ruling that immediate changes had to be made.

The Decision, which is binding on all Member States, will have far reaching implications for the insurance industry. Insurers will now need to consider how insurance premiums and benefits should be priced and calculated to be compliant with the Judgment from 21 December 2012.

Immediate potential business impacts going forward include:

- Increases in premiums chargeable to men or women who have been perceived to be of a lower-risk because of their gender, and whose policies have been priced accordingly.
- Specifically it seems that women drivers will have to pay more for their car insurance as it will not be permissible to charge them lower premiums than male drivers simply because overall women have a statistically better accident record than men.
- Annuity cost and benefits will change. Currently as women generally live for longer than men they receive a smaller sum than men; going forward men are likely to receive smaller annuity income.

Further reading: [Association Belge des Consommateurs Test-Achats and Others](#) (Case C-236/-9)

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