

European Commission Guidelines on Gender Directive

February 2012



The European Commission recently published Guidelines on the application of the Gender Directive in light of the ECJ ruling on the Test-Achats case.

INTRODUCTION

National regulators and legislators have been concerned about how to progress following the decision of the European Court of Justice on the Gender Directive. To support a common approach across Europe, the European Commission has recently published Guidelines on the application of the "Gender Directive" to insurance (Guidelines¹). This briefing note summarises the key points from the Guidelines and the main issues for companies to consider.

BACKGROUND

In 2004 the Gender Directive² was introduced with the aim of ensuring equal treatment of men and women in relation to the access to and supply of goods and services. For insurance and other financial services, the Directive required that where contracts are concluded (entered into) on or after 21st December 2007, gender cannot be used as a factor that results in differences in individuals' premiums and benefits ('the unisex rule').

However Article 5 of the Directive gave an option to countries to apply a derogation from the unisex rule. This would allow insurers to continue to use gender as a rating factor to set premiums or benefits provided this was based on "relevant and accurate actuarial and statistical data". The Netherlands applied this derogation only for the life insurance, annuities and disability/Income Protection insurance. Difference in tariffs between man and woman are therefore still common for these products. For other non-life business the derogation was not applied. Insurers in the Netherlands have since then stopped applying differentiation based on gender for non-life insurance products.

TEST-ACHATS RULING

In 2008, the Belgian consumer group, Test-Achats, took legal action in Belgium against the validity of the derogation for insurance. In September 2010 the EU Advocate General gave an opinion in favour

of Test-Achats. This opinion was ratified by the European Court of Justice in a judgment delivered on 1st March 2011 where they declared the derogation invalid with effect from 21st December 2012.

This ruling has raised a number of questions for insurers trying to understand the implications for their business, including:

- Is existing business affected - for example renewals, top-ups or reviewable contracts?
- What are the implications for new product pricing and marketing?
- Can information on gender still be collected and used for other purposes such as reserving and underwriting?
- Does the ruling have different implications for group and individual business?
- Given further pending European legislation, will the ruling have implications for the use of age and disability status in insurance?

EUROPEAN GUIDELINES

To help address some of these issues the European Commission issued Guidelines in December 2011 on the application of the Gender Directive in light of the Test-Achats case. The Guidelines are aimed at ensuring consistency of application in the EU, however it is important to note that they are not a legal interpretation. We have included below a summary of the key points from the Guidelines.

WHICH CONTRACTS ARE AFFECTED?

The unisex rule will apply for new contracts from 21st December 2012. A new contract is one that requires the consent of all parties and this includes amendments to existing contracts where the amendment takes place on or after 21st December

2012. The Guidelines give a number of examples to illustrate this point. The following would be considered as new contracts to which the unisex rule would apply:

- Contracts concluded for the first time on or after 21 December 2012 (including offers made before this date but accepted on or after it)
- Contract extensions concluded on or after 21 December 2012 to extend existing contracts which would otherwise have expired.

The following examples would not be considered new contracts:

- The automatic extension of an existing contract if no notice is required to be given, where the terms of the existing contract allow for this
- Adjustments made to elements of an existing contract (such as premium changes on the basis of predefined parametersⁱⁱⁱ) where the consent of the policyholder is not required
- Top-up or follow-on policies whose terms were pre-agreed in contracts concluded before 21st December 2012, where these policies are activated by a unilateral decision of the policyholder^{iv}
- A transfer of an insurance portfolio from one insurer to another which should not change the status of the contracts included in that portfolio.

ISSUES FOR LIFE INSURERS

Whilst the implications are clearer for new business, insurers will need to consider whether some features of existing business will be caught. Some examples include:

- *Do the provisions of reviewable unit-linked protection policies meet the Guidelines' definition of 'an adjustment based on pre-defined parameters'?*
- *Do traditional surrender values meet the Guidelines' definition of 'an adjustment based on pre-defined parameters'?*

Other features to consider are the treatment of top-ups, rider benefits and automatic indexation.

Whether product features can be treated as part of existing contracts is not a blanket decision – it will depend on the specific wording in policy terms and conditions.

Reinsurance: *Insurers that purchase risk reinsurance may still be exposed to risk arising from gender mix (unless reinsurers also offer unisex rates).*

CAN GENDER STILL BE USED?

The Guidelines note that, whilst gender cannot be used as a factor that results in differences in individuals' premiums and benefits, it can still be used as a risk-rating factor in general. For example gender can be used in the calculation of premiums and benefits at the aggregate level, as long as it does not lead to differentiation at individual level. It therefore remains possible to collect, store and use gender status or gender-related information for the following purposes:

- **reserving and internal pricing:** insurers can continue to collect information on gender for internal risk assessment and reserving
- **marketing and advertising:** the Gender Directive does not apply to the content of media and advertising. Therefore insurers can continue to use marketing and advertising to influence their portfolio. However, insurers may not refuse access to a specific product because of a person's sex, unless certain conditions are met.

In respect of **life and health underwriting**, the unisex rule means that premiums and benefits cannot be different between two individuals for the same insurance policy simply because their gender is different. However, in the Commission's view, the Test-Achats ruling only addresses the use of gender as a factor where the respective situations of men and women are comparable. The Commission notes that there are other risk factors, e.g. health status or family history, where differentiation is possible and for the assessment of which insurers need to take gender status into account, in light of certain physiological differences between men and women^v.

Also, in the view of the Commission, it still remains possible for insurers to offer gender-specific insurance products (or options within contracts) to

cover conditions which exclusively or primarily concern males or females e.g. prostate, breast or uterus cancer. This possibility is however excluded for pregnancy and maternity benefits.

USE OF OTHER RATING FACTORS

Rating factors other than gender can still be used however companies will need to be careful with respect to 'indirect discrimination'. The Guidelines note that, unlike direct discrimination, indirect discrimination can be justified if the aim is legitimate and the means of achieving it are appropriate and necessary. In practice this means that companies can use risk factors which might be correlated with gender as long as they are true risk factors in their own right.

For example, companies could continue to use car engine size as a rating factor for motor insurance even if men typically drive cars with more powerful engines. In contrast, the use of height or weight of a person in relation to motor insurance would not be allowed as they do not directly affect the underlying risk.

OCCUPATIONAL PENSION BUSINESS

The Guidance notes that the Gender Directive only covers private, voluntary insurance and pensions and does not cover insurance associated with an employment relationship. Therefore, in the Commission's view, provided the employer is a party to an insurance or pension contract then the ECJ ruling does not affect this business. However if the employee has to conclude an insurance contract directly with the insurer without involvement of the employer then the Gender Directive rules will apply.

MONITORING THE GUIDELINES

Member States have to amend their relevant legislation by 21st December 2012. The EC will monitor the situation to ensure that national legislation is in compliance with the Test-Achats ruling and will report on the position in 2014. The EC has also stated that it will monitor the insurance market in order to detect any unjustified price rises attributed to the ruling.

POSSIBLE MARKET IMPACTS

The impact for the insurance industry is potentially wide-ranging and includes:

- impact on profitability
- impact on surrender rates for existing business
- changes required to pricing and marketing strategies
- uncertain levels of new business sales during 2012 (will customers wait or buy now?)
- changes to policy illustrations systems for new and in-force business.

However, times of change also create opportunities for insurers to gain an advantage and monitoring the developments of competitors remains a high-priority.

AGE AND DISABILITY

The EU is working on an age and disability discrimination Directive (modelled on the Gender Directive) and had planned to use a similar derogation structure as had applied for insurance business. The Test-Achats ruling raises concerns as to whether this approach can now be used.

As a result, insurers' ability to price products allowing for age and disability status could be threatened. If this were to materialise then it could potentially lead to a community rated market, similar to the Dutch health insurance market, where each health insurer sets its own premium rate for the Mandatory Private Health Insurance (MPHI) irrespective of age, gender, health status or other risk characteristics. Whilst community rating can work for some types of insurance, more generally, this could have very serious consequences for both insurers and consumers. Increased uncertainty and the risk of adverse selection may result in higher prices for some insurance products, with other products withdrawn from sale altogether. Ultimately this could result in a step change in the level of private insurance used in society.

The Guidelines state that the Test-Achats ruling does not directly affect the use of other risk-rating factors, such as age and disability, however this is certainly a hot topic to watch!

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ⁱ <http://bit.ly/yXQEM0>

ⁱⁱ Council Directive 2004/113/EC

ⁱⁱⁱ For example a premium increase by a percentage based on the claims experience

^{iv} For example when the insured person wishes to increase the amount invested through a life insurance product

^v For example, a family history of breast cancer does not have the same impact on a man and on a woman's health risk (and the assessment of this impact requires knowledge of whether the person is a woman or a man). Obesity is a risk factor, a measurement of which is the waist to hip ratio, which is not the same for women and for men. The Guidelines provide a further list of examples that remain possible.