



Newsletter – Gender Directive

Subject: Conduct of Business

Gender Directive – Are We All Equal...?

On 1st March 2011, the European Court of Justice (ECJ) gave its final ruling on the Test-Achats case regarding the opt-out in Article 5(2) of the Gender Directive 2004.

Article 5(2) permitted Member states to opt for derogation on the Gender Directive. The derogation permitted the use of gender as a determining factor in the assessment of risk for the calculation of premiums or benefits for insurance related financial services products as long as it was based on relevant, accurate and regularly updated actuarial and statistical data and that the differences in premiums or benefits are proportionate. The UK opted for this derogation.

The ECJ has ruled that the derogation within Article 5(2) should be removed as from 21st December 2012. The ruling will have a wide ranging impact on the UK insurance industry with areas such as motor insurance, term assurance, critical illness assurance, private

medical insurance and annuity products being largely affected.

So how did we get here?

Test-Achats is the Belgian Consumer Association. Within their own national constitutional court they argued that the derogation was contrary to the principle of gender equality enshrined within Community law and in particular to Article 6(2) of the Treaty on European Union. The Belgian court referred the case to the ECJ. The Advocate General's opinion after reviewing the case was that the derogation should be removed.

The ECJ has agreed with the Advocate General's opinion. The derogation within Article 5(2) was to be initially reviewed in December 2012 regardless. The ECJ has stated that the original Directive does not give a definitive time limit for the use of such derogations and there is a risk that unequal treatment of men and women may persist indefinitely. The ECJ defined this lack of limitation as working against their objective of eliminating inequality between men and women. Therefore, it has ruled that from the first review date i.e. 21st December 2012, the derogation will be invalid.

What is the HM Treasury's (HMT) current position on the ruling?

At the time of the ruling the UK Home Secretary and Minister for Women and Equalities quoted:

“I'm very disappointed by this ruling, which goes against the grain of the common sense approach to equality being pioneered by the UK Government. Nobody should be treated unfairly because of their gender but financial services providers should be allowed to make sensible decisions based on well-defined risk factors”

Mark Hoban, Financial Secretary to the Treasury provided a written statement on 30th June 2011. The main conclusions from this statement are that:

1. The HMT is disappointed by the ruling and disagrees with the reasoning but it will have to be implemented.
2. The Equality Act will be amended next year with consultations in the autumn of this year.
3. The UK is working with European partners to ensure a common understanding.
4. The ruling will only affect new contracts entered into on or after 21st December 2012. Retrospection will not apply.

For point (4) an HMT representative has indicated that only a policy which constitutes as being a new contract on or after 21st December 2012 will be affected. This would imply that a policy commencing before this date with reviewable premiums or premiums which change with age will not be affected unless it is deemed to be a new contract. There are still some doubts surrounding implications for other types of policies i.e. deferred annuities where a policy has been taken out prior to 21st December 2012 with projections based on annuity rates which can currently differentiate based on gender. If a policyholder retires after 21st December 2012, the annuity purchased will be seen as a new contract and will be based on rates which cannot differentiate based on gender.

The latest update from the HMT states that they are still proposing to issue a consultation paper (with a full impact assessment) this Autumn.

What are the possible effects of the judgement for the UK Financial Services industry?

The most obvious impact will be on the pricing of insurance products post 21st December 2012 and the availability of products to consumers.

Firms will still be able to differentiate based on gender when calculating technical provisions. If premiums rates are the same for all policyholders then there may be a margin for uncertainty added to the technical provisions in order to allow for the additional risk being suffered for policies of one gender or the other. The increase in technical provisions could lead to an increase in overall premiums as firms try to maintain profit margins.

Firms might conceivably start to use other proxies for setting premium rates. Proxies such as occupation, lifestyle or even shoe size may give an indication as to the gender of the person applying for the product. This could lead to higher costs for firms as the application process could become more detailed.

Firms may restrict themselves to marketing to just one gender rather than take on the risk of having uniform premium rates or restrict themselves to a certain portfolio mix in order to reduce risk. These may both limit the available products to one gender. This anti-selection could push up premium rates in some circumstances and result in gender inequality of a different form.

The FSA have stated that they will be looking out for firms using indirect discrimination in terms of pricing factors or marketing. They state that such action would be illegal.

The costs of implementing the new regime in terms of pricing, changing terms and conditions, marketing material, etc. are likely to be substantial and it is very possible that these will be passed onto the consumer.

Communication with customers will need to be updated so that they are fully aware of the new legislation where necessary.

A likely consequence of all the factors above will be that premiums will not become cheaper for the gender who before was paying higher premiums and that benefits will not become higher for the gender where before they were lower. This is a view taken by many within the industry. It does however give those who are able to adapt and change their approach to product pricing, a chance to obtain a greater market share in the future.

What should we be doing now?

All firms should be assessing now how the ECJ ruling affects their products and future business strategies. If firms do have gender dependent pricing within their products then they should already be thinking about how their marketing, administration and other systems need to be changed in order to comply with the ruling and how they could develop the product pricing to remain competitive in a gender neutral market.

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