

Risk Matters



Dear Reader,

The recent Opinion of the Advocate General of the Justice of the European Union in the Test-Achats case has raised questions over the validity of the opt-out provisions under Article 5(2) of Directive 2004/113/EC (the Gender Directive)¹ that permits differential insurance premiums between men and woman, if based on relevant and accurate actuarial and statistical data.

The case was initially brought before the Belgian Constitutional Court by a consumer association and two private individuals, and was referred to the EU Court of Justice for opinion as a preliminary issue.

This Risk Matters summarises the current position and considers the implications that this opinion may have for insurers.

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Challenging the Legality of the Gender Directive

The Advocate General of the Court of Justice of the European Union, Juliane Kokott, has found that Article 5(2) of the Gender Directive, which permits insurers in certain circumstances to take the gender of a person into account as a risk factor in insurance contracts, infringes on the fundamental rights to equal treatment for men and women under other European laws. The Opinion has implications for insurers, in the setting of differential insurance premiums for men and woman, as permitted under Article 5(2).

The Opinion is focused on the preliminary issue referred by the Belgian Constitutional Court in a test case brought by a Belgian consumer organisation and two private individuals² for annulment of Belgian provisions transposing the Gender Directive. The Gender Directive enshrines the principle that gender cannot be taken into account when setting insurance premiums. Importantly, however, Article 5(2) contains a specific derogation wording that allows insurers to use gender to calculate differential premiums, provided that gender is a determining risk factor and that the difference can be substantiated by relevant and accurate actuarial and statistical data.³

The core of the Opinion is that strict standards must be imposed when dealing with fundamental rights and that differences in premium can at most be justified by clear biological differences between the sexes. Article 5(2) uses gender as a kind of substitute criterion for other factors, and differences in premium can at most be associated statistically with gender. One example given is that the life expectancy of insured persons is above all strongly influenced by the economic and social conditions of each individual, such as, the kind and extent of the professional activity carried out, the family and social environment, eating habits, consumption of stimulants and/or drugs, leisure activities and sporting activities. Gender is, by contrast, something over which the individual has no control. Accordingly Article 5(2) infringes on the fundamental right and is therefore invalid. However, given the number of insurance contracts which have been written since the Gender Directive came into force, any declaration should only have prospective effect, and there should be a three-year transition period once Member States have adjusted their laws to permit insurance businesses to adjust.

Although the Advocate General's opinion is not binding on the Court, it is likely to be influential on the Court's determination in the test case. The implication for insurers of any finding on the invalidity of Article 5.2 is that it will impact pricing, product design and underwriting. Should the Court eventually decide that the derogation provision in Article 5(2) is invalid and should be set aside, the Advocate General suggests that there should be a three-year-transition period, following which all future premiums would be gender-neutral. Accordingly, much of the work done to comply with the Gender Directive may prove to be short-lived, and that by 2014 or 2015 premiums and benefits may well have to be the same for women as for men, regardless of statistical differences in the risk proposition that each represents. Importantly this would also have to apply to in-force contracts. The case is expected to conclude in early 2011.

Endnotes

- 1 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L373, p. 37)
- 2 Test-Achats.
- 3 Article 5(2) of Directive 2004/113.



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