

## Q&A

# Prohibition of Gender Differentiation in Insurance: questions and answers on the *Test-Achats* case

On 1st March 2011, in the *Test-Achats* case, the Court of Justice of the European Union ruled that differentiation in insurance premiums and benefits based on gender would be unlawful as of 21st December 2012.

The present Q&A document aims at providing a high-level introduction to the potential impact of this case for insurers and, to some extent, reinsurers.

### 1. Why has gender differentiation in insurance become unlawful?

#### 1.1 *The Gender Directive provided for a prohibition of the different treatment between men and women...*

On 13th December 2004, the European Union adopted Directive n°2004/113/EC *Implementing the principle of equal treatment between men and women in the access to and supply of goods and services* (the “**Directive**”). Member States needed to transpose the Directive into their national legislation by 21st December 2004<sup>1</sup>.

The Directive posed as a principle the prohibition of discriminations between men and women.

Article 5(1) stated that for new insurance contracts concluded after 21st December 2007, the use of sex as an actuarial factor in the calculation of premiums and benefits may not result in differences in individuals’ premiums and benefits (the “**unisex rule**”).

#### 1.2 *...but allowed for a limited derogation for insurance premiums and benefits*

However, article 5(2) of the Directive provided for a derogation from this rule, allowing to maintain proportionate differences in individuals’ premium 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*”.

#### 1.3 *On 1st March 2011, the European Court of Justice declared such derogation to be void as of 21st December 2012*

On 1st March 2011, in the case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL* (the “**Test-Achats case**”), the Court of Justice of the European Union (“**The Court**”) ruled that the derogation found under Article 5(2) of the Directive was void with effect from 21st December 2012.

<sup>1</sup> Directives do not generally have direct effect and therefore need to be transposed into the laws of each of the European Union’s Member States

#### 1.4 The unisex rule will therefore apply to “new” individual insurance contracts as of 21st December 2012

In that context, the European Commission published guidelines on the application of the Directive following the *Test-Achats* case on 13th January 2012.

### 2. How will the unisex rule come into force?

Each of the European Union’s Member States will need to modify their national legislation in order to integrate the application of the unisex rule as of 21st December 2012.

Member States are therefore preparing laws and regulations that will modify the applicable legal framework at national level to prohibit differentiations based on gender for insurance premiums and benefits.

Such laws and regulations should make the unisex rule effective for all new insurance contracts as of 21st December 2012. As noted by the Commission in the Communication, neither the Directive nor the *Test-Achats* case define “new contract”.

The prohibition does not however apply to reinsurance, as the insureds are not a party to the reinsurance contracts.

### 3. What is the scope of the prohibition?

#### 3.1 What is included in the prohibition?

The unisex rule concerns the premiums and benefits of all individual insurance contracts<sup>2</sup> sold by an insurance company, regardless of its legal form, in particular:

- Motor insurance (both property and liability covers)
- Life, disability and critical illness insurance
- Individual health insurance
- Individual supplementary pensions (*e.g. private pension plan taken directly by an individual with an insurer with a conversion of the capital into annuities*)
- Some accident and travel insurance

#### 3.2 What is not included in the prohibition?

Generally, the Directive only covers insurance and pensions which are private, voluntary and separate from the employment relationship<sup>3</sup>. As such, the following are not concerned by the unisex rule because they are outside of the scope of the Directive:

- Collective insurance contracts (*e.g. health insurance contracts taken by an employer for the benefit of its employees*)
- Collective pension arrangements (*e.g. occupational pension schemes*)
- Reinsurance

### 4. Can insurers and reinsurers still collect information on gender?

Yes, as the unisex rule only concerns the calculation of individual premiums and benefits but does not prohibit the use of gender as a relevant risk factor for other purposes. The Commission confirms that the collection, storage and use of gender status are therefore allowed, in particular for the following purposes:

- **Reserving and internal pricing:** gender-specific information may be used to calculate provisions and to monitor the portfolio mix from an aggregate perspective
- **Reinsurance pricing:** as seen above, reinsurance is not within the scope of the Directive and is therefore not concerned by the unisex rule. Reinsurers may therefore differentiate on the basis of gender
- **Marketing and advertising:** gender-specific advertising for insurance contracts is not prohibited as such (see 5 below)
- **Life and health underwriting:** there are some risk factors on the basis of which differentiation is possible and for the assessment of which insurers need to take gender status into account, *e.g. health status or family history* – one example given by the Commission is the request for family history of breast cancer

### 5. Can marketing be gender specific?

Yes, marketing can be gender specific – *e.g. an insurer may advertise a motor insurance contract as being specifically targeted at women, as long as (i) men are also allowed to take such contract and (ii) that premiums and benefits are not affected by the gender of the policyholder / insured.*

### 6. Can insurers use other criteria that may be correlated to gender to calculate premiums and benefits?

The Directive prohibits indirect discrimination based on gender<sup>4</sup>, which occurs when an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex.

The use of risk factors which might be correlated with gender therefore remains possible, as long as, they are true risk factors in their own right.

One example given by the Commission is the price differentiation based on the size of a car engine in motor insurance. The use of such a criterion should remain possible, even if statically men drive cars with more powerful engines, because the size of the engine does have an impact on the risk itself regardless of the gender of the driver.

<sup>2</sup> It is our understanding that the “individual” insurance contracts include group insurance contracts existing in some countries, which can be taken by individuals *e.g. on the basis of memberships of associations (such as in France)*

<sup>3</sup> Recital 15 and article 4(3) of the Directive

<sup>4</sup> (Recital 12, Article 4(b), 4(4))

However, any differentiation based on the size or weight of a person in relation to motor insurance will be prohibited.

The challenge will be to determine, based in particular on transposition measures, how to draw the line between what is acceptable and what may be assimilated to indirect discrimination.

## 7. How will existing contracts be affected?

The Commission's analysis is based on the wording of article 5(1) of the Directive which provides that the unisex rule may only apply to "all new contracts", without providing a definition of "new contract".

In its Communication, the Commission provides what it perceives as the right meaning to be given to *new contracts*, stressing that it consists in an autonomous concept of European Union law which must be interpreted uniformly throughout the EU.

But one may also argue that the concept of *new insurance contract* is not much different from the concept of *new contract*, which relates to some essential concepts of contract law such as offer and acceptance. Such concepts differ across jurisdictions, thus creating a risk of uneven interpretation across the EU, which the Commission's communication may not be sufficient to address.

The Commission's view is that a new contract is defined as a) a contractual agreement requiring the expression of consent by all parties, including an amendment to an existing contract and b) the latest expression of consent by a party that is necessary for the conclusion of that agreement.

In particular, the automatic extension of a pre-existing contract if no notice, e.g. a cancellation notice, is given by a certain deadline as a result of the terms of such a pre-existing contract ("renewals"), should not be considered as a new contract.

This raises a certain number of questions and issues:

- The assumption is that the application of the unisex rule is prohibited on any contract that is not a new contract, i.e. an insurer may not decide to apply such rule to its entire portfolio, including renewals. In case of uncertainty, there may therefore be no "safe" option – e.g. a female driver may not accept an increase of her motor insurance premiums upon renewal of her policy simply because the insurer has chosen to apply the unisex rule to its whole portfolio
- In the run to the deadline of 21st December 2012, there may be competition between insurers to attract certain risks (e.g. female drivers for motor insurance), who may benefit from lower premiums and/or higher benefits for as long as they stay with the insurer
- Generally, when a policyholder has taken a contract prior to 21st December 2012 and when his/her contract benefits from lower premiums/higher benefits based on gender, there will be a strong incentive not to switch insurer as this would create a new contract subject to the unisex rule
- Offers made before 21st December 2012 which take gender into account for determining premiums and/or benefits will need to have an expiry date before such deadline, which may be an issue when the systems provide for a fixed validity period (e.g. offers are valid for six months)
- In some jurisdictions (e.g. France) current case law provides that the tacit renewal creates a new contract and it is unclear whether the transposition of the *Test-Achats* case will address this with sufficient legal certainty
- In some situations, there is uncertainty as to whether a new contract is created, e.g. the transfer of an existing contract from one insurer to another (which is not possible in all jurisdictions), the purchase of annuities at the end of the capitalisation period for pensions or even a change in the risk (change of car or address in motor insurance)

### Further information

If you would like further information on any issue raised in this update please contact:

#### Yannis Samothrakis

E: [yannis.samothrakis@clydeco.com](mailto:yannis.samothrakis@clydeco.com)

Clyde & Co LLP  
134 Boulevard Haussmann  
75008 Paris  
France

T: +33 (0)1 44 43 88 88

F: +33 (0)1 44 43 88 77

Further advice should be taken before relying on the contents of this summary.

Clyde & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary.

No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.

Clyde & Co LLP is a limited liability partnership registered in England and Wales. Authorised and regulated by the Solicitors Regulation Authority.

© Clyde & Co LLP 2012