

The Gender Directive and the ECJ decision on gender specific insurance premiums and benefits

The Decision

The ECJ has today upheld the Advocate General's (AG) opinion in the case of *Association Belge des Consommateurs Test-Achats ASBL and others* (Case C-236/09) and declared Article 5(2) of the Gender Directive (2004/1213/EC) invalid. This means that sex-specific differences in premiums and benefits based on risk assessed by actuarial and statistical data are no longer permitted as an exception to the fundamental right of equal treatment for men and women.

The effect of this decision will be that insurance policies and annuities will not be able to use gender as a determinant for risk and therefore differentiate between policies. This is likely to raise the price, and lower the availability of annuity policies and other insurance contracts.

Background

Article 6 of the Treaty on European Union (the "Treaty") enshrines the fundamental right of equal treatment between men and women into European Union law by recognising the Charter of Fundamental Rights of the European Union and giving it legal validity. The Charter of Fundamental Rights prohibits discrimination by gender and directs that "Equality between women and men must be ensured in all areas."

To implement this fundamental right of equal treatment the 2004 Gender Directive (2004/113/EC) prohibits discrimination based on sex in access to, and supply of, goods and services. The Gender Directive has been transposed into UK law by the Equality Act 2010.

Article 5 of the Gender Directive prohibits all insurance contracts concluded after 21 December 2007, the use of sex as a factor in calculating premiums and benefits where this results in differences to individuals' premiums and benefits. This prohibition is subject to Article 5(2) which allows derogation from the general principle of equal treatment from 21 December 2007, thereby permitting proportionate differences in individuals' premiums and benefits where sex is a determining factor in the assessment of risk which is based on relevant actuarial and statistical data.

Association Belge des Consommateurs Test-Achats ASBL and others

In an action against the Belgian government, Test-Achats a Belgian non-profit consumer group, and two private individuals challenged the derogation under Article 5(2) of the Gender Directive (as transposed into Belgian law) as incompatible with the fundamental right of equal treatment between men and women. The Belgian Constitutional Court referred the question of incompatibility to the ECJ posing two questions:

- (1) Is Article 5(2) of the Gender Directive compatible with Article 6(2) of the Treaty, and more specifically the principle of equality and non-discrimination guaranteed by that provision?
- (2) If the answer to the first question is negative, is Article 5(2) of the Gender Directive incompatible with Article 6(2) of the Treaty if its application is restricted to life assurance contracts?

The Opinion of the Attorney General

It was the AG's opinion that the use of actuarial factors based on sex to determine risk is incompatible with the principle of equal treatment and therefore asked the ECJ to declare Article 5(2) in isolation invalid.

While recognising that a prognosis of the individual and their recourse to insurance is "indispensable in actuarial calculations of premiums and services in order to make that risk

calculable and develop the products” the AG reflected that race and ethnic origin is not permitted to be used as a ground for differentiation in insurance. As such the AG stated “like race and ethnic origin, gender is also a characteristic which is inseparably linked to the insured person as an individual and over which he has no influence” and that EU law provided no less protection by a prohibition on race discrimination as it does on gender discrimination and it is therefore inappropriate to link risk to an individual’s sex.

The AG also criticised Article 5(2) as providing the industry with sex as a convenient “substitute criterion” for other social and economic factors that were more complicated to verify rather focusing on distinct biological differences. Gauging the reaction of the industry in advance the AG made it clear in her opinion that purely financial consideration regarding the likelihood of increased premiums for all insured persons was not a “material reason” to permit discrimination on the grounds of sex.

The ECJ Decision and Consequences

The ECJ has followed the AG’s opinion and on both questions and declared Article 5(2) invalid and incompatible with Article 6(2) of the Treaty even if its application is restricted to life assurance. Article 5(2) is declared invalid in isolation and the ECJ have confirmed the validity of the Gender Directive. The decision will not have retroactive effect and there will be a transitional period. The Court has therefore ruled that the derogation from the general rule of unisex premiums and benefits is invalid with effect from 21 December 2012.

The insurance industry is warning that this will have wide ranging ramifications to the provision of insurance products, most obviously an increase in their costs to determine the socio-economic factors to be verified instead of gender. The cost of which is likely to be passed on to the consumer. Where previously this derogation allowed for the provision of differing policies for men and women ie life and motoring products, this decision is likely to cause a ‘levelling up’ of premiums resulting in more costs for all, even those who pose the least risk.

It has also been stated that the same reasoning could apply by analogy to other factors such as age. However, it should be noted that the AG specifically noted that age was distinct from sex and race.

This decision will directly affect pensions by raising the cost of annuities. However, the danger will be that as actuarial valuations will not be exempt from anti-discrimination laws other calculations that are not unisex will be affected, for example cash commutation factors and early or late retirement factors.

Parminder Latimer

T: +44 (0)20 7634 4625

E: platimer@pitmans.com

David Hosford

T: +44 (0) 118 957 0363

E: dhosford@pitmans.com

Reading Offices:
47 Castle Street, Reading
Berkshire, RG1 7SR
T: +44 (0) 118 958 0224
F: +44 (0) 118 958 5097
DX 146420 Reading 21

The Anchorage
34 Bridge Street, Reading
Berkshire, RG1 2LU
T: +44 (0) 118 958 0224
F: +44 (0) 118 958 5097
DX 146420 Reading 21

London Office:
1 Crown Court
66 Cheapside
London, EC2V 6LR
T: +44 (0) 20 7634 4620
F: +44 (0) 20 7634 4621
DX 133108 Cheapside 2

www.pitmans.com