



Insurance and the discrimination laws

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This note outlines how the insurance industry operates within the law on discrimination, particularly with respect to age and sex discrimination. Old people frequently find it difficult or expensive to get travel insurance and a recent European Court ruling with respect to gender-pricing will end a long standing exemption for the industry from rules covering sex discrimination. This note focuses on these two issues.

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Insurance companies in the UK are private sector, profit orientated companies which operate in a competitive, global market. Insurance companies point out that premiums are set according to their own 'claims experience'. Put simply, their expected level of claims will inform their decision on price or availability of specific insurance products.

On various aspects of insurance, both age and/or gender appear to be statistically significant predictors of claims experience. This is especially true with regards to motor insurance, health insurance, life insurance and travel insurance. Typically, in the case say of motor insurance, very high premium rates for the young, give way to lower rates for the middle aged, which in turn rise for the more elderly. It is often asked whether such differential treatment is compatible with the various laws on discrimination.

1.1 Sex discrimination

The historical exemption

Because sex discrimination legislation has existed for so much longer than the age discrimination equivalent the principle versus experience argument has been mulled over far longer in that context. In the UK, insurance contracts had been specifically exempt from the general legislative presumption against sex discrimination in the *Sex Discrimination Act 1975*. This approach was reviewed and confirmed when the then Labour Government introduced the broadly based *Equality Bill*. The accompanying document with the Bill - the *Framework for a Fairer Future* (FFF)¹, published by the Government Equalities Office, explained that the *Equality Bill*, via subsequent regulations, would make it unlawful for there to be "unjustifiable" age discrimination in the provision of goods and services. It made clear however, that it will continue to allow for discrimination in certain areas where it believed that such discrimination can be justified, such as in certain healthcare provision and in relation to certain financial services. This exemption can be found in Schedule 3 (22) of the Act.

The EU court ruling

Whereas the UK policy approach had largely been pragmatic, i.e. it accepted the industry arguments; policy at the EU level has been more challenging. When the EU Commission was considering a new gender Directive, it considered introducing a new Article 13 which would have ended the exemption. It was clear that the potential impact of the proposals on insurance would be far reaching:

¹ Government Equalities Office, *Framework for a Fairer Future*, June 2008, Cm 7341

The proposal explicitly sets out to tackle the issues of premiums and benefits in the insurance sector. For example, in a majority of cases, women pay higher premiums for pensions and annuities, or their plans pay out less per year, whereas men pay high premiums for life insurance. These differences are justified by the insurance industry by citing the fact that women live longer on average than men. However, the Commission states that this justification is not necessarily valid as there are a number of factors that are not linked to sex that are equally important in establishing life expectancy, such as socio-economic or marital status, the region in which a person lives and levels of smoking. When these factors are removed from the equation, the difference in life expectancy between men and women may be between zero and two years.²

However, a sustained campaign by the European insurance industry ensured that the actuarial defence was reinstated and the directive subsequently passed. An article by the Association of British Insurers (ABI) published in *Insurance Age* at the time of the introduction of the EU's Gender Directive (which challenged the insurance exemption) highlights the arguments of the insurance industry – many of which are interchangeable with arguments over health insurance:

Daniel Schante, director-general of the Comité Européen des Assurances (CEA), the European federation for the insurance and reinsurance industry, responded: "As far as insurance is concerned, the directive, though well-intended, will not achieve its objective, and will end up harming those it is meant to help. Banning the use of objective and relevant data such as gender will adversely affect fair insurance prices and could well lead to a rise for both men and women."

Defending a 500-year old practice, the Association of British Insurers (ABI) claimed that the industry's approach was fair and the cornerstone of pooling risk. Insurers included gender as a risk factor where it was relevant; using it in that way was not discriminatory if it was based on objective, reliable and relevant data.

Banning it would result in less accurate pricing, which would expose insurers to greater risks. Inability to price risk accurately would mean that insurers have to hold more capital in reserve and extra costs would have to be passed on to consumers in higher insurance premiums or reduced benefits.³

Despite this 'victory', the 'actuarial defence' came under attack again, this time from a case brought before the European court. The history is described by an insurance law firm below (their emphasis was on annuity rates but the argument and facts remain the same):

The European Court of Justice will shortly deliver a ruling on whether insurance companies will be allowed to continue taking gender into account when calculating insurance rates. Annuity experts warn that if insurance companies are forced to equalise male and female annuity rates it will result in lower pension income for many types of annuities. The ruling from the ECJ may come as early as March 2011 and result in cuts of up to 5% in some annuity rates.

What is happening and why?

This principle of equality between men and women can be traced back to the French revolution at the end of the C18th, according to Robert Morfee an experienced litigation solicitor specialising in pensions. Equality has underpinned EU legal principles from the

² European industrial relations observatory on-line:
<http://www.eiro.eurofound.ie/2003/12/inbrief/eu0312201n.html>

³ *Insurance Age*, 1 January 2005

outset and was most recently expressed in Directive 2004/113 which directs member states to ensure that there "shall be no direct discrimination based on sex including less favourable treatment for women for reasons of pregnancy and maternity".

However there was an exception inserted into this directive at the very last minute which allowed proportionate differences in insurance premiums and benefits if based on accurate actuarial and statistical data. The UK took advantage of this exception and continued to take into consideration the different life expectancies of men and women.

[...]

Then a few years ago a Belgian consumer group took legal proceedings to outlaw what it saw as gender discrimination in the pricing of insurance policies and the matter was referred to the European Court of Justice.

In September 2010 Dr Juliane Kokott, an advocate general in the European Court of Justice (ECJ) delivered a powerful opinion in which she expressed an opinion that sex discrimination in underwriting insurance policies is incompatible with ... EU law.

It is usual for the European Court of Justice to follow an Advocate General's recommendations and we are anxiously waiting for the court's final ruling which may come as early as March 2011.⁴

The opinion referred to in the article can be found [here](#). The summary of the verdict says:

In case C 236/09 "Association Belge des Consommateurs Test-Achats", Advocate General Juliane Kokott considers that it is not compatible with EU fundamental rights to take the sex of an insured person into account as a risk factor in insurance contracts.

In her Opinion of today, Advocate General Juliane Kokott emphasises the great importance of the principle of equal treatment of men and women under EU law. Strict standards must therefore be imposed in the present case. Differences in treatment could at most be justified by clearly demonstrable biological differences between the sexes.

The Advocate General concludes that the use of risk factors based on sex in connection with insurance premiums and benefits is incompatible with the principle of equal treatment for men and women under European Union law. She therefore proposes that the Court should declare the relevant derogating provision in Directive 2004/113 to be invalid.

For reasons of legal certainty the Advocate General however takes the view that that declaration of invalidity should only have effect for the future. In addition, she proposes a transitional period of three years following the delivery of the judgment by the Court.⁵

Unsurprisingly this opinion has caused alarm within the industry. Consideration is being given to what might qualify as "demonstrable biological differences between the sexes":

The full legal opinion can be found [here](#) however the key points of the legal argument seem to be:

45. For example with regard to life assurance and pension insurance what matters is the predicted life expectancy of the insured person, in cases of third-party motor

⁴ [William Burrowes Annuities](#), February 2011

⁵ EC Court of Justice at:
<http://ec.europa.eu/avservices/services/showShotlist.do?out=PDF&lg=En&filmRef=72696>

vehicle liability insurance it is the likelihood of the insured person's causing an accident whilst driving, and with regard to private health insurance it is the likelihood of the insured person's utilising particular medical services.

46. In that regard, the making of an individual prognosis in respect of each insured person is not normally the first priority; instead recourse is had to experiential values. That is above all because exact statements with regard to the insurance risks linked to individuals are difficult, if not actually impossible to make. It is therefore in principle perfectly legitimate with regard to risk evaluation to carry out a group examination instead of – or in addition to – an individual examination.

47. However, the question of which comparison groups may be constituted for that purpose is always ultimately dependent on the respective legal framework conditions. In establishing such framework conditions, which involves political, economic and social choices and may require complex assessments and evaluations, the Council enjoys a broad 'discretion' (32) in the exercise of the powers conferred on it. Numerous parties to the proceedings have rightly pointed that out. In the context of its discretion the Council may – and must – also take into account the specific characteristics of insurance.

48. However, that discretion on the part of the Council is not boundless. In particular, the exercise of that discretion cannot have the effect of frustrating the implementation of a fundamental principle of European Union law. (33) Those fundamental principles of European Union law include not least the specific prohibitions of discrimination laid down in Article 21(1) of the Charter of Fundamental Rights.

49. The Council may not therefore, for example, permit a person's race and ethnic origin to be used as a ground for differentiation in insurance. (34) In a Union governed by the rule of law, which has declared respect for human dignity, human rights, equality and non-discrimination to be its overriding principles, (35) it would without doubt be extremely inappropriate if for instance, in the context of medical insurance, varying risks of contracting skin cancers were to be linked to the skin colour of the insured person and either a higher or lower premium were thus to be demanded of him.

50. It is equally inappropriate to link insurance risks to a person's sex. There is no material reason to assume that the prohibition of discrimination on grounds of sex under European Union law provides less protection than the prohibition of discrimination on the basis of race or ethnic origin under European Union law. 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. (36) In addition, a person's gender, unlike, for instance, his age, (37) is not subject to any natural changes.

51. It is therefore only logical that in Article 5(1) of Directive 2004/113 the Council prohibited in principle the use of sex in the calculation of insurance premiums and benefits. Even costs related to pregnancy and maternity, although they can for obvious biological reasons only arise in the case of women, (38) must, under Article 5(3) of Directive 2004/113, not result in differences in premiums and benefits for male and female insured persons.⁶

An illustration of the Courts logic was put to this author by the FSA, if you could show that Jews were worse drivers than Christians would it be acceptable to charge them more? According to the logic enunciated in the summary the answer is yes, but only if

⁶ <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-236/09>

“demonstrable biological differences” exist: behavioural differences would not be sufficient. The industry would say that proving such things is what will put up rates for everyone.

This is a really difficult issue and the consequences of a change in the law are really hard to predict. The official reaction from the industry, from its trade body the ABI was:

The decision by the European Court of Justice (ECJ) to ban the use of gender in insurance policies from December 2012 is disappointing news. The insurance industry has fought against the possibility of this for the last decade and will now do everything possible to manage negative effects for customers. Before this judgment insurers were able to take gender into account when assessing a person's risk. Today's judgment means that insurers will be legally prevented from taking a person's gender into account when pricing insurance from December 2012.

The judgment will particularly affect products which take account of the risk differences between men and women such as motor insurance and some annuity products. For example, young female drivers pay less for motor insurance because they are less likely to have accidents and therefore women make fewer claims than men. For life insurance, women on average pay less to reflect their longer life expectancy, while pension (annuity) income for males is often higher because men typically have fewer years in retirement.

Maggie Craig, ABI's Acting Director General, said: “This gender ban is disappointing news for UK consumers and something the UK insurance industry has fought against for the last decade. The judgment ignores the fact that taking a person's gender into account, where relevant to the risk, enables men and women alike to get a more accurate price for their insurance.

“Insurers will now study this judgment carefully to manage negative effects for customers. Insurers will work hard to ensure that the UK insurance market remains one of the most competitive in the world offering a strong choice of products and prices for customers.

“It will be crucial to ensure this news does not put people off having vital insurance that protects them against accident or illness, or provides an income in retirement. Insurance remains good value for people and not all customers will be equally affected as the use of gender can vary significantly between products and different companies. Each company will have to respond to the ban in the way they feel is in their customers' interests.

“Adaptation during this transition period until December 2012 will be challenging, but all insurers will be doing everything they can to ensure as smooth a change as possible for customers. Insurers will comply with the law and work proactively with the Financial Services Authority to ensure stability for the UK insurance market, its customers and investors.

”ABI-commissioned research by Oxera carried out in autumn 2010 highlighted the possible impact of removing gender from assessing risk:

For motor insurance: women under the age of 25 could see an average rise of 25 per cent to their premium.

- For annuities: men approaching retirement could see an eight per cent reduction in annuity rates while rates for women approaching retirement could rise by six per cent.

- For life insurance: women could see a rise of as much as 20 per cent in the cost of cover, while men could see a fall of 10 per cent.

Over the next 20 months insurers will have to make large scale changes including amending all affected policy documentation; contacting customers with new information; updating and changing computer systems; ensuring insurance brokers have the right pricing information; adjusting insurance renewals and updating all sales material.⁷

The trade magazine for the industry – Post Magazine – ran the following article just after the judgement was given:

The Test-Achats case will have huge consequences for the motor, life and health insurance industries. Andy Tromans and Nick Elwell-Sutton explore the ramifications.

Given the column inches and airtime devoted to last week's decision of the European Court of Justice in the Test-Achats case, it may be surprising to hear that, in reality, many insurers actually breathed a small sigh of relief when the judgment was published.

While the decision has major implications for the industry - notably motor insurers and annuity providers - it could actually have been much worse, with some commentators predicting a doomsday scenario where gender pricing was outlawed immediately or, even worse, made unlawful retroactively.

Thankfully the ECJ seems to have recognised the chaos this would have created and has provided a transitional period running until 21 December 2012, after which it will become unlawful to use gender-based data in pricing risk. The UK government could legislate earlier to remove the derogation that currently allows gender factors to be used in pricing risk, but such an unpopular move with both the insurance industry and hard-pressed public is highly unlikely.

Prospect of litigation

The good news is that the judgment effectively confirms what insurers are doing now complies with UK and European Union law for the time being, and the fact the change is set for a future date means the prospect of litigation against insurers for past and current practice should be remote.

Yet, insurers face an uncertain future coupled with a tough practical challenge of developing methods of pricing risk that do not use gender. This is a complete sea change, and does away with one of the key factors that has been relied on in modelling risk.

The pervasive nature of the EU legislation means that using other factors as a proxy may be fraught with difficulty. For example, if occupations are used to price motor risk then certain jobs have different risk profiles - sports professionals being a statistically higher risk group than, say, nurses.

The difficulty with this is that men would form a much larger proportion of the former group, and women a much larger proportion of the latter. This means that a premium calculated using statistical data based on occupations, where there is a concentration of one sex over another, could still lead to gender being used, albeit by proxy, in assessing risk.

⁷ ABI press release 1 March 2011

Life and health insurers face the same problem but in different ways. In pricing an annuity, life expectancy is the critical factor. However, while it is true to say that statistically women live longer than men, this does not mean that all men live for a shorter period of time than all women. On that basis supporters of the judgment - and there are some - say that people should be treated as individuals, and risks priced on that individual's profile, rather than at a group level.

The Advocate General's opinion, which preceded the judgment, went into greater detail on this point. It suggested that insurers should look more closely at economic and social factors in pricing risk, and obliquely set out that lifestyle factors ought to replace the broader gender-based actuarial data.

Factor verification

Habits such as diet, consumption of stimulants and drugs, plus leisure and sporting activities should be evaluated as these have an effect on a person's health and life expectancy. Being independent of sex, they can be taken into account. This is laudable, but ignores the very real difficulties insurers would face in terms of cost, as well as in verifying or monitoring these factors, which might vary over time.

While motor insurance has used telematics, driving style and the characteristics of the insured without being seen as overly intrusive, it is more doubtful that the public would welcome a level of questioning and evidence production that insurers might now find necessary as part of the underwriting process. How would individuals react, for example, if asked to produce evidence of their gym attendance, or how often they had a full English breakfast, not only at the outset of a policy but during the life of it?

So, how will insurers treat pricing going forward? Bearing in mind the guidance on lifestyle issues, it may be that insurers move towards offering two-tier pricing: one price based on a unisex rate and another based on personal factors - verification issues aside - much more closely correlated to the individual. The latter may be problematic because of continuing uncertainty around using proxy factors, and the difficulty around using personal factors. In the case of the former, this too is not simple.

If a single price is applied for a male and female who share the same risk profile, then one premium will be levelled up and another levelled down to reach the unisex premium. In motor insurance, for example, this means that women's premiums will rise and male premiums will fall to reach the unisex rate. Because the underlying risk remains the same - after all women will not suddenly cease to be safer drivers - there will be a greater profit margin on policies issued to women that will have to subsidise the reduced margin business on male policies.

Where an insurer is able to secure policies from a greater proportion of the more profitable sex, this could have a dramatic effect on profitability. So, one phenomenon might be an increasing trend for insurers to target their marketing more directly to one particular gender group. While this may seem to run contrary to the spirit of equal treatment, there should be nothing wrong with this, provided they also offer policies to the members of the other sex on the same basis.

There is only one thing we can predict for certain: the debate over Test-Achats will continue until the end of 2012.⁸

The industry is generally relieved that the ruling only applies to new insurance cases after 2012 and they are generally still considering how to respond commercially.

⁸ *Post Magazine* 10 March 2011

1.2 Travel insurance

As society gets demographically older, and as the 'old' people increasingly have both the means and the will to travel, the difficulty with which many of them have in finding travel insurance has become a more visible problem and the source of complaints from constituents. Help the Aged is reported as saying that:

91 per cent of annual travel insurance policies across the market impose an upper age limit. More than one in four of the annual policies examined by the charity - many of them from major household names - won't even cover the 9.4 million people in the UK aged 65 and over. And less than 30 per cent cover the over-75s. When it comes to single trip policies, 77 per cent impose an upper age limit, with a fifth freezing out anyone aged 65, and over half refusing cover to people over 75.

The lack of access to insurance - particularly annual policies which typically offer the best value for money - really narrows the horizons of the increasingly active over 65s," said Mark Christopher of Help the Aged Travel Insurance, whose oldest customer is 105. "We launched Help the Aged Travel Insurance in response to the many calls we were getting - and continue to receive - from older people who have found themselves unable to get cover due to insurers using age alone as their basis of assessing risk."⁹

Travel insurance currently continues to benefit from the exemption given in the Equality Act (see above) so it is not illegal for insurance companies to price according to risk or experience, or even to pull out of a particular market segment altogether. The Help the Aged venture appears to be the only company that offers comprehensive travel insurance, underwritten by UK Insurance Ltd.

One might expect, given how market demand might increase in the future as the demographic profile of the population ages and foreign travel becomes more accessible, that new companies would enter the market to provide (at a price) cover for elderly travellers. Currently this has not happened.

⁹ Reported *Manchester Evening News* 6 June 2005