

ECJ RULING
ON UNISEX
INSURANCE
PREMIUMS

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The European Court of Justice (the “**ECJ**”) has ruled¹ that Article 5(2) of Council Directive 2004/113/EC² (the “**Directive**”) is invalid with effect from 21 December, 2012. This ruling will undoubtedly have a significant effect on the level of insurance premiums throughout the EU, with insurers prohibited from taking a person’s gender into account when calculating premiums from that date.

The ECJ’s ruling results from an Article 267³ reference by the Belgian Constitutional Court which requested the ECJ to determine whether or not a domestic Belgian law implementing Article 5(2) of the Directive was valid in light of the principle of equal treatment for men and women⁴.

Equal treatment

The Directive lays down a common framework throughout the European Union for the prohibition of discrimination based on gender in the access to and supply of goods and services.

Recital 4 to the Directive makes express reference to Articles 21 and 23 of the Charter of Fundamental Rights which prohibits any discrimination based on gender and requires that equality between men and women is ensured in all areas.

Recital 18 of the Directive reflects that in order to ensure equal treatment between men and women, the use of gender as an actuarial factor should not result in differences in individuals’ premiums and benefits.

Article 5(1) the Directive gives substantive effect to Recitals 4 and 18, providing that:

“Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals’ premiums and benefits.”

¹ Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres (Case C-236/09)

² 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 (L 373/37)

³ Ex-Article 234

⁴ Article 8, Consolidated Version of the Treaty on the Functioning of the European Union (C 115/47)

The derogation

Article 5(2) of the Directive contains a derogation from the provisions of Article 5(1), allowing Member States to defer the introduction of measures necessitated under Article 5(1) until at least 21 December, 2012, so long as the use of gender as a determining factor in the assessment of risk is based on relevant and accurate actuarial and statistical data which is publicly available. At that date the Member State was, until now, permitted to reassess the situation within certain parameters.

The basis of the ECJ's ruling

In ruling that Article 5(2) of the Directive is invalid with effect from 21 December 2012, the ECJ had regard to the following considerations:

- (i) As Recital 4 to the Directive expressly refers to Articles 21 and 23 of the Charter, Article 5(2) of the Directive must be assessed in light of those provisions.
- (ii) The use of actuarial factors in determining insurance premiums was widespread when the Directive was introduced. As such, the derogation and consequential transitional period (leading up to 21 December, 2012) was justified. The wording of Article 5(2), however, is such that it may permit the derogation (and therefore the unequal treatment of men and women) to persist indefinitely. This would be contrary to the intention of the Directive and Articles 21 and 23 of the Charter.

The practical effect of the ECJ's ruling, therefore, is that Article 5(2) of the Directive must be considered valid up to the expiry of the transitional period (i.e. 21 December, 2012).

Insurance premiums are based on risk profiles. There can be significant differences in the risk profile of men and women as regards certain perils. It is arguable that the ECJ's decision will result in the equal treatment of dissimilar situations. The ECJ has long held that equal treatment requires comparable situations to be treated similarly and dissimilar situations to be treated differently - unless there is an objective justification for doing otherwise. In determining the comparability of a situation, the ECJ will have regard to the purpose of the EU measure giving rise to the comparison. In its ruling, the ECJ deemed Recital 18 of the Directive to reflect an objective justification for the comparable treatment of incomparable perils.

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