

## Insurance Europe's response to the European Commission's questionnaire on the implementation of Directive 2004/113/EC

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### European Commission's questionnaire on the implementation of Directive 2004/113/EC

Insurance Europe welcomes the opportunity to reply to the questionnaire on the implementation of Directive 2004/113/EC (the "Gender Directive") circulated by the Commission services on 21 March 2014.

As a preliminary remark, Insurance Europe would like to point out that the questionnaire is very much focused on the economic impact of the ECJ Test-Achats ruling. As explained below in more detail, it is difficult to have an accurate picture of the precise economic impact of the ruling. However, Insurance Europe would like to provide relevant information and observations on the impact of the ruling and of the Directive, which we believe will be of use to the Commission in drawing up its report.

### What is insurance and how does it work?

Insurance is the transfer of risks of unforeseeable events occurring from individuals or legal entities (such as companies) to an insurer, in return for the payment of a premium to the insurer. This risk-transfer mechanism is based on one simple principle: the losses of the few are paid for by the many, with the premiums paid based on the risk of the individual or entity.

#### ■ The use of risk-based pricing

Insurance is guided by the principle of risk-based pricing, which means that the premiums and terms of insurance products are based on the insurer's assessment of the level of the risk. To make sure that each policyholder pays a fair premium, insurers use a series of rating factors to assess the level of risk: the higher the risk, the higher the premium.

This process – called underwriting – allows insurance prices to reflect the cost of providing the insurance cover. Any restriction to the freedom of insurers to underwrite and price their policies according to the actual risks may therefore lead to higher prices and less choice for consumers, due to the process of adverse selection<sup>1</sup>.

### ■ The principle of equality

Insurers have also always been guided by the principle of equality (or principle of equal treatment), upheld by the ECJ in its case-law as a general principle of EU law<sup>2</sup>. This principle of equality precludes comparable situations from being treated differently, and different situations from being treated in the same way, unless this is objectively justified.

## Implementation of the Gender Directive before the Test-Achats ruling

### ■ Gender differentiation

The original Article 5 of the Gender Directive provided in paragraph 2 that member states may decide “to permit proportionate differences in individuals’ premiums 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.” Insurance Europe supported this member-state option.

All member states made use of this option and allowed insurers to differentiate on the basis of gender for at least life insurance. Overall, insurance companies therefore had no problems with the original implementation of the Gender Directive, and in particular Article 5.

### ■ The use of gender in risk-based pricing

In line with the Gender Directive and the national transposition provisions, most insurers differentiated on the basis of gender before 21 December 2012. Gender was only used as a risk-rating factor when it was relevant to the risks to be covered. Where gender was not a relevant indicator of risk differentials, it was not used in pricing decisions (eg home insurance).

The main benefit for consumers was that a direct link was created between the premium paid by consumers and the expected insurance benefits. For instance there are significant differences between women and men in their mortality risk (affecting, for instance, life insurance and pension annuities), the costs of providing the same level of insurance cover therefore differed between women and men, and these cost differences explained gender-differentiated prices.

## Implementation of the ECJ Test-Achats ruling

### ■ The ECJ Test-Achats ruling

On 1 March 2011, the ECJ ruled that Article 5(2) of the Gender Directive is invalid. The ECJ has focused on the structure of Article 5 of the Gender Directive, highlighting that Article 5(2) introduced an unlimited exception to the principle set in Article 5(1), pursuant to which the use of gender in insurance pricing shall not result in differences in individuals’ premiums and benefits. According to the ECJ, an exemption without any temporal limitations goes against the objective of equal treatment between men and women as described in recital 18 of the Directive.

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<sup>1</sup> See page 4 for details about the concept of adverse selection.

<sup>2</sup> See, inter alia, case 106/83 Sermide [1984] § 28; joined cases C-133/93, C-300/93 and C-362/93 Crispoltoni and Others [1994] § 50 and 51; Case C-313/04 Franz Egenberger [2006] § 33 and case C-127/07 [2008], Arcelor Atlantique and Lorraine and Others, § 23.

However, the ECJ did not explicitly rule that it considered differentiation on the basis of gender in determining insurance premiums and benefits to be contrary to the Charter of Fundamental Rights of the EU. It did not address either whether gender-based differentiation in insurance is objectively justified.

The ruling is therefore only about the structure of the Directive, ie the exemption (Article 5(2)) to the prohibition principle set in Article 5(1). The ECJ ruled that the provision enabling those member states that used the derogation to maintain this exemption without temporal limitation should be declared invalid with effect from 21 December 2012.

### ■ Implementation of the ruling in member states

It is our understanding that the ECJ Test-Achats ruling has now been implemented in all EU member states, as evidenced by the [EIOPA report](#). Insurance Europe assumes that further technical information on the transposition will be directly provided by member states to the Commission.

Insurers comply with the rules of the Gender Directive as well as with the Test-Achats ruling, as further specified in the [Commission's guidelines on Test-Achats](#), by proposing unisex premiums and benefits.

Occupational pensions fall outside the scope of the Gender Directive and of the Test-Achats ruling. As mentioned in the EC guidelines: "*the Test-Achats ruling has no legal implications for this provision [Article 9(1)(h) of Directive 2006/54/EC], which applies in the different and clearly separable context of occupational pensions and which is also drafted in a very different way from Article 5(2) of the Directive.*". Insurance Europe agrees with the Commission's view that neither the Gender Directive nor the Test-Achats ruling cover occupational pensions.

### ■ Impact of the ban on the use of gender

*Difficult to get an accurate picture of the economic impact ...*

Even though the Test-Achats ruling has been implemented across the EU, and insurers are compliant with it, it is very difficult to provide reliable, quantifiable data and information on the impact of the change.

Indeed, in most markets, insurers not only implemented the unisex premium rule, but made many other changes that affect the product. They had to implement other legal and regulatory developments, both at national and EU level – such as the adoption of new legislation. They may have added or deleted product features to improve insurance products in the regular product cycle. They might also have implemented developments in risk factors. All these changes may have had an influence on the price of products or on the cover provided. Since many different effects come into play concurrently, it is very challenging to decouple these different factors and to give a correct estimation of the sole influence of the unisex premium factor on price or product development (benefits or cover offered).

Moreover, data collection and exchange, in particular when related to companies' commercial tarification policies, are strictly framed by EU and national competition law. Insurance Europe therefore cannot engage in any such activities.

Some markets have observed an impact on consumer behaviour with, for instance, consumers wanting to buy insurance products before the application of the ban and others waiting to purchase products after the introduction of unisex tariffs.

In all countries, unisex mortality tables are now being used to calculate insurance product premiums. Unisex mortality rates are, in principle, in between the male and female reference mortality rates. In theory, this means that the premium level of a term life insurance (eg mortgage life insurance) for women has increased and the premium level for men has decreased, although this varies from provider to provider (given that the unisex mortality table is only one of the factors used when underwriting the product and that each provider has its own underwriting process).

... but comments on the qualitative impact of the ban on the use of gender can be made

Different economic and behavioural mechanisms come into play when it comes to the impact of risk-based pricing where certain relevant factors cannot be used such as:

- **“moral hazard”**, which arises when insurance results in customers changing their risk behaviour, for example if a uniform motor insurance premium for drivers makes insurance for fast cars more affordable, which in turn leads to a change in risk-taking behaviour whilst driving.
- **“adverse selection”**, which occurs if a uniform premium deters the low-risk group from buying insurance, while attracting more of the high-risk group. There is therefore redistribution of premiums from the high-risk group to the low-risk group, which may then stop buying insurance. Ultimately, the insurer’s portfolio will be mostly made up of high-risk consumers and claims costs could therefore outweigh revenues. Eventually, an insurer could thus be driven out of business.

Redistribution effects suggest that unisex pricing can result in significant increases in premiums for retiring men buying pension annuities, and for women buying life and motor insurance<sup>3</sup>.

As evidenced in the Oxera study on “The impact of a ban on the use of gender in insurance”, *“such changes in premiums are likely to result in some changes in consumer demand”*. In addition, *“adverse selection can lead to unintended wider social implications, including damaging incentives for people to save for their old age”*.

To conclude, insurers are complying both with the rules of the Gender Directive and the ECJ Test-Achats ruling. However, as explained above, it is difficult at this stage to quantify the economic impact of these changes on insurance pricing.

Insurance Europe is the European insurance and reinsurance federation. Through its 34 member bodies — the national insurance associations — Insurance Europe represents all types of insurance and reinsurance undertakings, eg pan-European companies, monoliners, mutuals and SMEs. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income. Insurance makes a major contribution to Europe’s economic growth and development. European insurers generate premium income of more than €1 100bn, employ almost one million people and invest almost €8 400bn in the economy.

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<sup>3</sup> For further information: Oxera study on “The impact of a ban on the use of gender in insurance” accessible [here](#).