

EUROPEAN COURT OF JUSTICE DECISION
01 March 2011**Association Belge des Consommateurs Test-Achats case**

The European Court of Justice has handed down its decision in the *Association Belge des Consommateurs Test-Achats* case on the 1 March 2011.

The ECJ has ruled that the use of gender as a pricing factor is contrary to the principle of equality for men and women. Insurers must apply unisex premiums and benefits from 21 December 2012 onwards. The ruling will require considerable changes to be made to premium calculations and is likely to have a significant impact on the pricing of policies. However, the industry has until 21 December 2012 to prepare for the new order.

Background

The *Association Belge des Consommateurs Test-Achats Case* (Case C-236/09) examined the legality of the opt-out in Article 5(2) of the Gender Directive (004/113/EC).

The Gender Directive prohibits discrimination on the grounds of gender in the access to and supply of goods and services. Article 5(2) permits insurers to use gender as a determining risk factor in the calculation of premiums, where this practice can be substantiated by relevant and accurate actuarial and statistical data.

In June 2008, the Association Belge des Consommateurs Test-Achats (a non-profit making Belgian consumer organization) and two private individuals brought an action before the Belgian Constitutional Court. They argued that the Belgian law in place to give effect to Article 5(2) of the Gender Directive was incompatible with the EU's fundamental principle of equal treatment for men and women, and should be annulled. Before ruling on the action before it, the Belgian Constitutional Court referred the question of the validity of Article 5(2) to the European Court of Justice (the "ECJ").

The Advocate General's Opinion

The ECJ's practice is that, before making its ruling, it will consider the formal Opinion of the Advocate General. On 30 September 2010 Advocate General Juliane Kokott handed down her Opinion on the Test-Achats case.

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The AG's view was that Article 5(2) was incompatible with the general principle of equal treatment for men and women and should be declared invalid. She said that even though the changes she was recommending might result in increased premium prices for a proportion of people, in her view, this did not constitute a material reason for making discrimination on grounds of gender permissible.

However, in a nod to the likely practical implications for the insurance sector, the AG recommended that the ECJ should declare the opt-out invalid on a prospective basis only (that is to say that the ECJ's ruling should not have retrospective effect). The AG also recommended that Member States should be given a suitable period in which to review their domestic legislation and that, contemporaneously, insurers should be given a transitional period in which to adapt their products accordingly. She recommended a transitional period of three years, commencing on the date of the ECJ's judgment.

ECJ Ruling

The ECJ has concurred with the AG's Opinion in that it has found Article 5(2) to be invalid. However, whilst the Advocate General recommended a three-year transitional period, the ECJ has allowed for a year and ten months only, ruling that Article 5(2) is invalid with effect from 21 December 2012. Insurers will be obliged to apply unisex premiums and benefits from that date onwards.

In coming to its decision, the ECJ focused on the fact that the purpose of the Gender Directive (as expressed in Article 1) is to put in place a framework for combating discrimination in the access to and supply of goods and services. The judgment refers to the wording of Article 5(1), which provides that the use of gender as a factor in the calculation of premiums and benefits for the purposes of insurance "*shall not result in differences in individuals' premiums and benefits.*"

Article 5(2) provided an opt-out and was put in place as a way of allowing for a transitional period. In its judgment the ECJ expressed concern at the fact that Member States may be allowed to make use of the opt-out for an unlimited time, which would be contrary to the purpose of the Gender Directive. Accordingly, the ECJ ruled that Article 5(2) will be invalid with effect from 21 December 2012. From this time onwards insurers will have to apply unisex premiums and benefits.

The ECJ's ruling will have wide reaching effects. All those Member States that have to date made use of the opt-out contained in Article 5(2) of the Gender Directive will have to amend their domestic laws so that all future insurance premiums, and the benefits financed out of them, must be neutral in terms of gender. The list of Member States that has to date made use of the opt-out includes Belgium, France, Germany, Ireland, Italy, the Netherlands, Spain and the UK.

There is no right of appeal against the ECJ judgment, so insurers now have until 21 December 2012 to prepare for this change.

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