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Test-Achats - what are the implications of the ruling?

by Glen James[1]

1 Introduction

Council Directive 2004/113/EC ("the Gender Directive") brought into force within the EU in 2004 a new prescription, in Article 5(1), against the use of gender differentiated insurance underwriting practices.

> "…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…shall not result in differences in individuals' premiums and benefits"

The insurance industry lobbied hard, and persuaded the European Parliament to adopt a qualification to that prescription, in Article 5(2), based on the use of relevant and accurate actuarial and statistical data.

> "…Member States may….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"

In other words, under the Gender Directive, it remained permissible to use gender differentiated pricing techniques, where this was based on relevant and accurate actuarial and statistical data.

Association Belge des Consommateurs Test-Achats ASBL ("Test-Achats") are a Belgian consumer organisation. Together with two private individuals, Test-Achats sought a declaration that the Belgian Law to transpose the Gender Directive was unconstitutional. The Belgian Constitutional Court referred to the Court of Justice of the European Communities ("ECJ") the question of whether it was compatible with the fundamental rights of the European Union for insurers to take the sex of the insured person into account as a risk factor in the formulation of private insurance contracts, even where this was justified on the basis of "relevant and accurate actuarial and statistical data".

Various Member States were represented in the proceedings before the ECJ, including the UK, which was itself instrumental in challenging the attempt by Test-Achats to have Article 5(2) of the Gender Directive struck out. It is important to appreciate this point - the case essentially concerned the validity in European law of a provision in a Directive adopted by the Parliament, the Council and (albeit reluctantly) the Commission.

The judgment was delivered on 1st March 2011 - all 13 members of the Grand Chamber of the ECJ giving (as they are required to do) a single judgment which does not reveal whether a minority of the judges may have dissented. The ECJ's judgment founded itself on the principle that the EU institutions were charged with pursuing the eventual goal of equal treatment of men and women. However, the ECJ acknowledged that this would be a gradual process, as economic and social conditions within the EU developed.

Not irrelevant to this gradualist approach was the fact that the use of gender by the insurance industry throughout Europe as a factor in assessing pricing structures was widespread when the Gender Directive was introduced. However, whilst recital 18 to the Gender Directive acknowledged this was the case, it did so in the following terms:-

> "In order to ensure equal treatment between men and women, the use of sex as an actuarial factor should not result in differences in individuals' premiums and benefits. To avoid a sudden readjustment of the market, the implementation of this rule should apply only to new contracts concluded after the date of transposition of this Directive."

Although there was agreement amongst all the EU institutions, including the ECJ, that proceeding by degrees was an option in this case, the ECJ held that recital 18 made clear that, even if the move to gender neutral insurance pricing throughout the EU was to proceed with appropriate transitional relief to avoid sudden market readjustment, the goal of gender equality, now embedded in European law making, had also to be achieved in relation to insurance pricing. So whilst there could be gradual transition, there could not be a permanent retention of gender differentiated underwriting practices, even where it was based on relevant and accurate actuarial and statistical data. Ultimately, the ECJ decided that treating men and women as different insurance risks was inconsistent with achieving the goal of equal treatment between the genders.

The decision has therefore sounded the death knell for differentiating between the risks posed by men on the one hand and women on the other, using actuarial and statistical data. The ECJ held that there could not be an indefinite postponement in relinquishing the use of actuarial and statistical data for insurance purposes. So Article 5(2), and all the national forms of legislation which Member States have introduced in reliance on its validity, will become invalid with effect from 21st December 2012. Why that date? Because it is the date by which Article 5(2) required a review to be undertaken by Member States of their reliance on the provisions it contained. It therefore seemed to the ECJ to be a suitable date from which to apply the requirement for gender neutral insurance pricing.

The European Commission, and Governmental departments in many of the Member States, are now considering what the Test-Achats judgment means in practical terms. Ultimately, however, the nature and extent of the obligations which the decision of the ECJ imposes upon insurance companies is essentially a legal question, governed by relevant EU law considerations.

This article will focus on four of the more material issues which arise, directly or indirectly, out of the judgment:-

(i) The first of these concerns the transitional period. The question has been raised as to whether an insurance contract written prior to 21st December 2012 on gender differentiated terms, but continuing in force after that date,

would have to be adjusted, following that date, onto gender neutral terms. That is a very important question - for example, vast sums are paid by consumers in the annuity market each year to secure long term income streams, which are currently calculated on the basis that women tend to live longer than men. Adjusting the basis on which that business continues to be written could be very expensive for the insurance industry throughout Europe.

(ii) The second issue concerns exactly what differences will be prescribed following 20th December 2012. The exemption in Article 5(2) was relatively clear in allowing insurers to rely on accurate actuarial and statistical data when using sex as a determining factor in the assessment of risk. Is it only the use of actuarial and statistical data in gender-related risk assessments which is to be prescribed from 21st December next year? And what will be the consequences of this in the market place, both for insurers and consumers?

(iii) The third question concerns how indirect gender discrimination should apply to insurance underwriting. How will insurers be expected first of all to be aware that seemingly non-gender related factors may have a disproportionate effect on one gender rather than the other and, secondly, how are they able to defend themselves against the consequences?

(iv) Fourthly, other areas of differentiation used by insurers - such as in relation to age or disability - may also become subject to constraints in the future as social and political views change. It is therefore possible that the precedent set by the Test-Achats judgment may turn out to have a wider relevance for insurers than just in relation to gender differentiation.

It will then briefly consider the consequences which should flow from a transgression of these rules, and offer some thoughts about how those consequences might, in practice, be addressed. Finally, the paper will conclude with the suggestion that, notwithstanding the robustness of the analysis advanced in Section 2 as to the temporal effect of the judgment in the Test-Achats case, it is in the interests of all users and providers of insurance that the conclusion reached in that analysis should be reflected in a suitable Directive adopted by the EU legislature as, it will be submitted, that legislature has the power to do.

2 Transitional relief

All that the judgment of the ECJ in the Test-Achats case contains as to the way in which the transition to gender neutral insurance pricing is to be conducted is the following:-

> "Article 5(2) must therefore be considered to be invalid upon the expiry of an appropriate transitional period. In the light of the above, Article 5(2) is invalid with effect from 21st December 2012" [2]

How should one read into that statement an answer to the question of whether contracts written before 21st December 2012, but remaining in force thereafter, will have to be "gender equalised" with effect from that date?

It is important to consider what is prohibited under Article 5(1). The prescribed action is the "use of sex in the calculation of premiums and benefits". In other words, the prohibition in the Gender Directive focuses on a particular action - the calculation of the premiums and benefits, i.e. the underwriting decision. So the conduct which is prohibited by Article 5(1) occurs immediately prior to inception of the insurance contract. And Article 5(2) - which is to remain in force until 21st December 2012 - allows "the use of sex as a determining factor in the assessment of risk, based on relevant and accurate actuarial and statistical data". On the face of it, therefore, underwriting decisions taken prior to 21st December 2012 which use sex as a determining factor in the assessment of risk in reliance on accurate actuarial and statistical data are not prohibited.

This is an important point to appreciate. In the language it uses, the Gender Directive is aimed at the underwriting decision, and not the ongoing contractual relationship. So it is possible to distinguish the two in terms of how the temporary retention of Article 5(2) under the Test-Achats judgment interacts with the prohibition in Article 5(1). This is also consistent with the principle that Article 5(1) applies, by its own terms, only to new contracts. And it is also consistent with the approach endorsed both by the Commission, and by the ECJ, for a gradual transition to gender neutral insurance pricing. This would, after all, avoid the "sudden readjustment of the market"[3] which would presumably flow if it were to be necessary to readjust the basis on which contracts remaining in force after 20th December 2012 had been written on or prior to that date.

This construction also sits well with the two EU law presumptions which ECJ precedent establish are to apply to the temporal effects of new rules when they are introduced. These are as follows:-

(v) where a new rule is introduced, the presumption which the Court makes is that the new rule will apply immediately to the future effects of existing situations (absent indications to the contrary in the new rules themselves); and

(vi) new rules will not apply retroactively unless this is clear from the terms or objectives of the new rules. New rules will also not apply retroactively unless the legitimate expectations of people who are affected by the retroactive nature of the new rules are duly respected.

So far as concerns the first presumption, what are the "future effects" of the relationship established by the insurance contract? Under the vast majority of insurance contracts, the rights and obligations of the parties are fixed at inception of the contract. What determines those rights and obligations - essentially, the premium and the cover - is

enshrined in the underwriting decision which is made at the outset. The position is to be distinguished from a pension under an employment contract, where rights accrue and build up throughout the period that service is provided.

Where this position prevails, therefore, there would be no future effects after 20th December 2012 which the removal of Article 5(2) might affect. Certain contracts - for example, where there is an option to renew or review the terms - may fall outside this principle. Any renewal or review falling after 20th December 2012 may therefore have to be carried out on a gender differentiated basis. But that does not undermine the basic principle that contractual rights and obligations coming exhaustively into existence under the terms of an insurance contract before 21st December 2012 are not impacted by the removal of Article 5(2), even though those rights and obligations continue in force after that date.

As to the second presumption, it seems clear that the Gender Directive was not intended to apply retroactively - that would be inconsistent with the concept of its applying only to "new contracts" and to the policy of introducing the change so as to avoid a sudden readjustment in the market. If the ECJ's judgment is to be read as requiring pre-21st December 2012 policies to be adjusted onto a gender neutral basis to the extent they remain in force after that date, the judgment itself contains nothing to suggest that this would be limited to policies incepting on or after 1st March 2011. Read in that way, the judgment could therefore impose a rule which would have had retroactive effect in respect of all insurance contracts written on or after 21st December 2007, to the extent that they remain in force beyond 21st December, 2012. That construction appears inconsistent with the ECJ allowing Article 5(2) to remain in force up to and including 20th December 2012 and categorising its provisions as an "exemption" from the prohibition on gender differentiated insurance pricing in Article 5(1)[4].

There is also good reason to suppose that requiring adjustment onto hypothetically gender neutral terms with effect from 21st December 2012 of contracts entered into between the end of 2007 and that date would be contrary to the "legitimate expectations" of insurers. The ECJ will have regard to the legitimate expectations of persons affected by any judgment which it is called upon to make in this area, to the extent that it might otherwise affect pre-existing rights and obligations. For this purpose, insurers need to show that they have acted "bona fide" and that the problems to which the interpretation of the new rule in question would give rise are "serious" ones.

So far as the bona fides of insurers is concerned, is it reasonable for them to continue writing business as usual, pricing on a gender differentiated basis up to 21st December 2012, if there is uncertainty as to what, if anything, will have to be done about that business on and after that date? If one looks at the options available to insurers to counter the risk of exposure to that uncertainty, those options are somewhat unappealing. A move to gender neutral pricing now by any individual company would, in theory, require it to

adopt some kind of "median" pricing policy, treating the male and female cohorts as a single one for each risk class and averaging out the risk premium appropriately. But the effect of doing so, if others continue to price on a gender differentiated basis during the transitional period, is likely to mean that the median price only attracts applicants from amongst the gender which the market treats less favourably. So for the maverick insurer, this is a recipe to lose some business and take on the rest of the business at loss making rates. In other words, the move to gender neutrality may need the market to move in step. This may be one of the concerns that legislators had in mind in the original Gender Directive, when contemplating a transitional period after which all "new" contracts would have to be written and priced on a gender neutral basis.

Another theoretical option would be to include a provision in insurance contracts which are being written now, allowing the insurer to modify the terms of the contract so that, after 20th December 2012, the premiums and/or benefits of the more favourably treated gender could be adjusted upwards onto the median level, with the result that members of that gender would pay more for their insurance or receive less by way of benefits. Without such a provision in the contract, this would of course not be legally possible and gender neutral pricing could then only be assured by reducing the premiums or increasing the benefits of the less favourably treated gender, to the extent they relate to any period after 20th December 2012, to the corresponding rates for the more favourably treated gender. This could, and presumably would, lead to significant underwriting losses. Yet the prospect is remote that consumers or the FSA would be supportive of clauses allowing the more favourable rate or benefits to be "averaged" up (in the case of premiums) or down (in the case of benefits) to the median level. For example, someone taking out an annuity for the rest of their life would, quite understandably, react negatively to a proposition that the benefits might be reduced on an as yet undetermined basis after 20th December 2012. And it seems questionable that such a clause would be likely to stand up to FSA scrutiny under the Unfair Terms in Consumer Contracts Regulations 1999.

On this basis, there is not very much that insurers can sensibly do in the present situation unless they all agree to act together, which of course itself is not permitted. So it seems to be very difficult to challenge the bona fides of insurers in deciding to continue to price business on a gender differentiated basis, if that is what the market, as a whole, is doing. And in taking that action, it is difficult to see how insurers can be said to be acting unreasonably if, in reliance on the granting of a further transitional period, they assume that the transitional relief must have been intended to operate over the life of those insurance contracts coming into existence prior to the end of that period. The consequences of the alternative construction, in the case of long term insurers, would virtually negate the benefit of the transitional relief purportedly afforded, whilst placing insurers worried about such an alternative construction in precisely the quandary identified above.

As to the question of serious problems, the figures, in terms of premium business being written, are clearly very large. And, as stated above, equalisation of those policies which

continue in force after 20th December 2012 would require the less favourable gender differentiated terms to be adjusted, not to the median level, but to the more favourable gender differentiated terms. This sort of adjustment is likely to create very significant costs, and potentially very significant underwriting losses, for the insurance industry.

So for all these reasons, the arguments against there being a general need for insurers, after 20th December 2012, to have to adjust the less favourable gender differentiated terms of insurance contracts remaining in force after that date onto the more favourable terms are strong ones. It has also to be recognised, however, that there is, in practice, a likelihood of the precise effect of the transitional period granted by the ECJ in the Test-Achats case being considered in a subsequent case brought before the ECJ. So the strength of the conclusion reached as a result of the above analysis may well be tested in a future case before the ECJ.

3 What factors are now prescribed?

It is perhaps worth noting at the outset that gender is not a cause of insurance loss in itself. It is a convenient proxy (along with many others used in insurance underwriting) to compartmentalise risk, enabling pricing decisions on a commoditised basis to be made efficiently. There is a benefit to everyone in approaching matters in this way, because it reduces the costs of trying to assess risks in every individual case. Of course, individual considerations will come into the equation. Illustrations of this are the past claims experience of, or a medical examination in relation to, an individual. But it is probably fair to say that the greater the requirement to base underwriting decisions on individual factors, the greater the ultimate cost of insurance. And it is clear that, from 21st December 2012, it will cease to be possible to use gender as a proxy for the generic segmentation of risk assessment for insurance underwriting purposes.

So what are the gender related factors which will become prescribed? It seems reasonably clear that the Gender Directive is aiming at the use of sex as an actuarial factor in the calculation of premiums and benefits. Article 5(1) is admittedly phrased in wider terms:-

> "the use of sex ***as a factor*** in the calculation of premiums and benefits …..shall not result in differences in individuals' premiums and benefits"

However, it is interesting to contrast this with the language in Recital 18 to the Gender Directive, which is in the following terms:-

> "the use of ***sex as an actuarial factor*** should not result in differences in individuals' premiums and benefits"

Moreover, Article 5 as a whole is helpfully headed up with the title "Actuarial Factors".

So this may mean that the prohibition is aimed at precluding the use of statistical and actuarial data to draw conclusions about differences in risks between male and female customers. It might follow from this that a non-actuarially based gender difference could

still be taken into account as a legitimate factor in assessing insurance pricing. For example, if medical science has established a non-statistical and non-actuarial based reason for differentiating between males and females in relation to a particular health risk, it may still be legitimate to take that into account.

These may, nevertheless, turn out to be fine distinctions. The risk to an individual suffering from a particular condition may still only be capable of assessment by having regard to the statistical evidence, so far as available, affecting all individuals of that particular gender who have suffered from that condition. The argument will then revolve around whether the statistical evidence is itself being used to drive differences in premiums and benefits as between the genders. It might be contended that the medical evidence, not the statistics, establishes that there is a recognisable difference in risk as between each of the gender cohorts suffering from the condition. The statistics are used, not to differentiate between the genders, but to assess the likelihood of the acknowledged greater risk within one of those gender cohorts materialising in an individual case. Nevertheless, the subtlety of this distinction may be lost when confronted with the blunt generality of the phraseology used in Article 5(1).

The insurance market is sufficiently competitive for it to be absurd to say there is, at present, any systematic bias against one or other gender in a truly discriminatory sense. Pricing is based upon statistical and actuarial evidence as to the risk differentials which insurers fail to take into account in pricing their products at their peril. So what is the market response likely to be in relation to the requirement that insurers abandon the use of statistical and actuarial data in assessing the different underwriting risks which that data evidences to be posed by male and female cohorts respectively? It seems likely that insurers will have to move one way or another along the risk assessment spectrum. Either insurers will be forced to adopt a more focussed approach concerning the risk posed by the individual, as the gender proxy is dropped, which will lead to higher costs but more sensitive pricing, with the consequence that lower risk customers are likely to be more certain that they are not being overcharged to subsidise the price of insuring higher risk customers. Or insurers will have to adopt a less focused approach as to the risk posed by the individual as a result of losing the gender proxy, with the benefits of lower costs but less sensitive pricing. In this instance, higher risk customers are less likely to be discouraged and the greater therefore becomes the possibility that lower risk customers will end up subsidising the higher risk customers.

It is then informative to consider what this is likely to mean in the insurance market. Under the first alternative, one would expect prices to increase for higher risk consumers, possibly to the point where, in some cases, the cost of insurance may become prohibitive for them. The overall costs could increase, because the business of more refined risk assessment brings an additional layer of expense to the market. Under the second alternative, lower risk consumers may find prices increasing unacceptably. Examples of this

have been given - such as the young woman driver putting off the time when she buys a motorcar because the cost of insurance is so much greater as a result of the requirement to price on a gender neutral basis as between (more statistically risky) young males and (less statistically risky) young females. The impact of the lower risk consumer exiting the market is that insurance pricing is then pushed up for those who remain in it.

What conclusions can be drawn from all this? The decision in the Test-Achats case will clearly impact upon the adage of "letting the market decide". Using gender as a proxy for risk assessment had produced a market disciplined basis of differentiation, using historic data, and a period of readjusting expectations will inevitably now follow. Moreover, it may be economically unsustainable for significant differences in approach to materialise within the market in this context. Niche operators may seek to attract relatively lower risk, or relatively higher risk, customers on a gender neutral basis. That may, in turn, influence the approach which more broad based insurers choose to take in order that they can remain competitive with the niche operators, as well as with one another.

4 Indirect discrimination

It is possible to fall foul of the new rules, even in circumstances where the insurer does not intend that a particular underwriting practice should have a discriminatory or differentiating effect as between the genders. Article 4.1(b) of the Gender Directive provides that there shall be no indirect discrimination based on sex. For this purpose, indirect discrimination is defined as follows:-

> "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."[5]

In the insurance context, the main area of exposure is likely to concern situations where a particular non-gender related factor is taken into account in the assessment of risk, which nevertheless affects one gender disproportionately compared with the other.

The distinction between direct and indirect discrimination is likely to owe much to the insurer's motivation. It would, for example, be naïve to think that the deliberate use of factors such as height, weight etc. as a means of introducing gender differentiation indirectly will avoid such conduct being categorised as direct discrimination. The distinction between conduct which amounts to indirect discrimination, as distinct from direct discrimination, may also turn out to be of some consequence. Whereas (as the language quoted above makes clear) indirect discrimination is permissible if objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary, no such exception applies in the case of direct discrimination.

In essence, indirect discrimination is a more "innocent" activity than direct discrimination, and therefore in some ways a less easily identifiable one for insurers to avoid. It can arise where seemingly legitimate factors used to assess risk nevertheless, because of the incidence with which they occur, result in their affecting one gender disproportionately compared with another. A key element in determining whether there has been any indirect discrimination will be to identify the correct comparator with the circumstances of the person alleging discrimination.

Let us suppose that life insurance premiums for smokers in a particular age group are higher than for non smokers in that age group. Then let us suppose that the smoking premium affects many more males in that group than females. It might be argued that, in taking the risk posed by an individual's smoking habit into account, the pricing structure disproportionately affects the males, and that in consequence the underwriting practice falls foul of the indirect discrimination rule.

The first line of defence to any discrimination claim in this context would be to show that the correct comparator in this situation is a smoker of the opposite sex in the relevant age group, not a non smoker of the opposite sex in that age group. It is hopefully unlikely that, in this sort of situation, the smoking and non smoking cohorts would be regarded as comparable. But if this were to happen, the insurer is then thrown back on its last line of defence, that of objective justification, as set out in the definition of "indirect discrimination" quoted above. The problem in this context is that, once a prima facie case of indirect discrimination is established against the insurer, it is for the insurer to establish two requirements.

First, it is necessary for the insurer to show that it is seeking to fulfil a legitimate aim - that should be relatively easy in the case of establishing that the risk posed by smokers to insurers is greater than the risk posed by non smokers. However, it is then necessary to show that the differential applied to smokers compared with non smokers is "proportionate". The differential being applied has to be justified for reasons which have nothing to do with gender, and which could expose the pricing structures in relation to wholly discrete areas of risk - in this case, the smoking risk - to forensic scrutiny. Hence, this line of defence, which (as explained earlier) is only available in the case of indirect gender discrimination, may not always be a reliable foundation upon which to base underwriting practices because the insurer cannot be certain of its ability to defend the proportionality of the practice against ex post facto challenge.

5 Future developments

So far as concerns insurance, the substantive provisions of UK law implementing the Gender Directive are to be found in section 29 Equality Act 2010. This prohibits a person providing a service to the public, or to a section of the public, from discriminating against another, either by refusing to provide the service at all, or in relation to the terms on which the service is provided. The section was enacted to cover discrimination in relation

to a range of protected characteristics. These obviously include sex, but also extend to a number of other characteristics, such as age and disability. The ban on age discrimination under section 29 has not yet been brought into force, although the UK Government intends that it should come into effect in April next year.

In its recent consultation on the introduction of these rules, the UK Government has indicated that there will be a defence to both direct and indirect age discrimination in the field of insurance if the insurer can show that it is differentiating "proportionately" between customers of different age groups. It will be clear from the above discussion about indirect discrimination in relation to gender in the previous section of this note that there are some problems in relying on this defence to provide a satisfactory basis for future underwriting practices. Essentially, the insurer risks having those practices successfully challenged on the basis of an ex post facto assessment of the proportionality of the pricing structures that have been applied. The UK Government is therefore currently consulting upon the introduction of a further exception to allow financial service providers, including insurers, to use age as a criterion in designing financial service products. Broadly, the exception will allow underwriters to make risk assessments by reference to information which is both relevant to the risk assessment itself, and from a source on which it is reasonable to rely.

This is, in principle, a much more satisfactory basis upon which to rest underwriting decisions, because the proportionality of the decision can at least be justified by evidence which is identified, in the specific exception, as being a proper basis upon which to do so. In other words, the risk of an ex post facto re-assessment of the proportionality of the decision is diminished, if not eliminated.

The exception which the UK Government is proposing for age discrimination in the context of insurance does, however, bear an uncanny resemblance to Article 5(2). And age and disability discrimination are both to be targeted in the draft Equal Treatment Directive, which is at a preparatory stage in Brussels. This may leave the insurance sector exposed to the uncomfortable prospect, eventually, of further challenges before the ECJ to the validity of using, in risk assessments and underwriting decisions, factors which distinguish cohorts of insureds on the basis of characteristics which, in addition to gender, are increasingly seen to be discriminatory in nature.

6 The consequence of breach

The consequence that flows from breach of section 29 Equality Act 2010 is that any term of a contract constituting, promoting or providing for discriminatory treatment is unenforceable (see section 142 Equality Act 2010). So, for example, premiums priced on a gender differentiated basis in breach of the requirements of Article 5(1) may not be recoverable, possibly leaving the insurer to seek a quantum meruit payment for the risk it has assumed under the contract. There is also provision (see section 143 Equality Act 2010) for any person who has an interest in the contract to apply to the County Court

for an order for the relevant term to be removed or modified. These mechanisms were, of course, enacted before the ECJ's decision in the Test-Achats case. In light of that decision, it seems entirely possible that the UK authorities may wish to review the remedial mechanisms insofar as they are applicable to insurance business found to contraverse the gender neutral requirement.

The Gender Directive itself provides:-

> "Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered."[6]

It is possible that more surgical and adaptable remediation mechanisms may be required than those currently contained in the Equality Act to achieve the above objectives in the case of any direct or indirect discrimination which is successfully established against an insurer in relation to its underwriting practices.

The UK regulatory framework is well acquainted with policing self-administered remediation exercises undertaken by insurers themselves when there has been a transgression with potential consequences for a substantial number of customers. It may be sensible to contemplate extending that framework to proven cases of gender discrimination under the auspices of the Financial Services Authority, or its successor, the Financial Conduct Authority. It is, however, possible that this may still need to be undertaken in combination with a judicially based process. Such a process may be considered appropriate in order to determine whether the particular underwriting practice which is the subject of challenge is, indeed, discriminatory in relation to one or other of the sexes.

7 Conclusion

In the immediate term, it is probably the temporal effect of the Test-Achats judgement which is the focus of most attention. This article has sought to show why insurers should not be under any obligation to adjust onto a gender neutral basis, with effect from 21st December 2012, policies priced prior to that date on a gender differentiated basis which remain in force after that date. Yet however robust the analysis, it seems relatively likely that the ECJ may be asked to rule on the precise temporal effect of the Test-Achats judgment in one or more subsequent cases, if this has not otherwise been put beyond any doubt.

In paragraphs 23 and 24 of its judgment in the Test-Achats case, the ECJ acknowledged the right of the EU legislature to introduce gender neutral insurance pricing, but only in relation to new contracts entered into after a defined future date. This principle is not dependent on the legislation having been enacted with the particular date of 21st

December 2007. It suffices that the relevant transitional period is "appropriate"[7], and the ECJ has itself adopted 21st December 2012 as a suitable date for this purpose from which to bring the requirement for gender neutral pricing into effect. The analysis in Section 2 above concludes that Article 5(1) of the Gender Directive is to be read and construed, in relation to all insurance contracts written in conformity with Article 5(2) on or after 21st December 2007 and prior to 21st December 2012, as though the reference to 21st December 2007 in Article 5(1) were a reference to 21st December 2012.

The judgment in the Test-Achats case appears, at least implicitly, to recognise that the EU legislature has the power to adopt a Directive making that position clear. In consequence, it seems eminently desirable that the EU legislature should adopt such a Directive so that the relevant rules are clearly promulgated for all concerned. All users and providers of insurance will benefit from the clarity that will bring to their insurance dealings.

Endnotes

1 Glen James is a partner at Slaughter and May. His practice covers all work in the fields of company/corporate finance, including mergers and acquisitions, issues and flotations and corporate restructurings. He has acted for a number of insurance companies. He is indebted to his colleagues, Philippe Chappatte, Victoria MacDuff and Annalisa Tosdevin for their thoughts and ideas, on which this article is based.

2 Paragraphs 33 and 34 of the Test-Achats ruling.

3 The Gender Directive, Recital 18.

4 See paragraph 30 of the Test-Achats ruling.

5 The Gender Directive, Article 2(b).

6 The Gender Directive, Article 8 paragraph 2.

7 See paragraph 24 of the Test-Achats ruling.