Insurance & Reinsurance November 2010

Dear Madam,
Dear Sir,

Will it remain possible in Europe, to make distinctions between women and men in insurance contracts? That is the question that arises after the recent decision of Advocate General Juliane Kokott in the case Association Belge des Consommateurs Test-Achats ASBL before the European Court of Justice (ECJ). In answer to a question for a preliminary ruling raised by the Belgian Constitutional Court, the Advocate General concluded in general terms that the use of actuarial factors based on sex is incompatible with the principle of equal treatment for men and women.

If the ECJ would, as happens in many cases, take the Advocate General's lead, this will have important implications for the insurance industry. Whereas Belgian law (for the time being) accepts a difference in premiums and benefits in life insurance contracts, an affirmative judgment of the Court will mark the end of the use of separate (actuarial) mortality tables for women and men in the calculation of premiums and benefits, not only in Belgium but in the entire European Union.

Many Member States also allow differences in premiums and benefits for women and men in motor insurance, private health insurance, insurance against work incapacity, etc. Where it concerns these kinds of insurance contracts, the Advocate General's opinion can lead to compulsory unisex tariffs in all European Member States.

However, we are not yet that far. The Court's decision is only expected at the outset of 2011. In this E-Zine, we seek to run ahead of things and scrutinize the possible effects if the Court of Justice will share the Advocate General's view. Prior to undertaking this exercise, the proceedings that were instituted by Test-Achats before the Belgian Constitutional Court, as well as the exact line of reasoning of the Advocate General, will be examined.

We hope you will enjoy the read!

Sandra Lodewijckx Hugo Keulers

Coordination and final editing:
Yves Thiery
Tel.: +32 2 787 90 12
yves.thiery@lydian.be

Are you interested in this subject?

On 18 November 2010 between 12am and 3pm, we organise a **free lunch-seminar** in our offices on the following theme "Life insurance: overview of case-law 2003-2010".
This subject will be handled among with others.

Do you wish to subscribe or to receive more information?

Send an e-mail to register@lydian.be.

IN THIS ISSUE

PROCEDURE

Action for annulment of the Act of 21 December 2007

On 26 June 2008, the Belgian consumer association Test-Achats (together with two private parties) brought an action for annulment of the Belgian Act of 21 December 2007 amending the Act of 10 May 2007 combating discrimination between men and women with respect to gender in insurance matters. Specifically for the purpose of calculating insurance premiums and benefits, this Act allows direct distinctions to be drawn on the basis of gender. As a condition, it is stipulated that the distinction must be proportionate and sex must be a determining factor in the assessment of risk on the basis of relevant and accurate actuarial and statistical data.

By enacting this rule, the Belgian legislator made use of the so-called "opt-out possibility" that was granted pursuant to article 5 (2) of the so-called Gender Directive (2004/113/EC). Under this provision, European Member States could decide, before 21 December 2007, to permit derogations from the general prohibition on gender discrimination in access to and supply of goods and services. All Member States made use of this possibility, although at least 11 of them, like Belgium, the Netherlands, France, Ireland, Cyprus and the Baltic states, only permitted derogations for a particular class of insurance contracts, mostly life insurance.
According to Test-Achats, the Belgian statutory regulation that permits gender-based setting of tariffs in life insurance contracts is incompatible with the principle of equal treatment and non-discrimination between men and women as a basic principle of European Union law.

Question for a preliminary ruling of the Belgian Constitutional Court to the European Court of Justice

Since the Belgian Constitutional Court has no jurisdiction to decide on the issue of compatibility of a European Directive with a basic principle of European Union law, the Constitutional Court decided to refer the following question to the ECJ:

> *"Is article 5 (2) of 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 compatible with article 6(2) of the Treaty on European Union, and more specifically with the principle of equality and non-discrimination guaranteed by that provision?"*

Further, the Constitutional Court wants to know whether article 5(2) is also incompatible with the principle of equality and non-discrimination, if its application is restricted to life insurance contracts. In Test-Achat's view, gender is indeed a determining factor for the eminence of claims and the intensity of risk in both life insurance and non-life insurance contracts. Gender should not play a part in any insurance contract.

LINE OF REASONING

Opinion Advocate General Kokott in Case C-236/09, Association Belge des consommateurs Test-Achats ASBL

In her opinion of 30 September 2010, Advocate General Juliane Kokott answers the two questions that the Belgian Constitutional Court referred to the ECJ.

With regard to the first question, referring to the compatibility of article 5(2) of the Gender Directive with the principle of equal treatment and non-discrimination, the Advocate General decides that this principle is infringed by article 5(2). In her view, the use of actuarial factors based on sex is incompatible with the principle of equal treatment for women and men. Therefore, article 5(2) should be declared invalid.

It's interesting to note that, according to the Advocate General, differences in treatment between the sexes may be justified in particular circumstances. In case of direct discrimination, justification is however conceivable only in limited circumstances and should also be carefully reasoned. The Union legislator is by no means at liberty to allow arbitrary exceptions to the principle of equal treatment and thereby to undermine the prohibition against discrimination.

The Advocate General continues that direct discrimination on grounds of sex is only permissible if it can be established with certainty that there are relevant differences between men and women which necessitate such discrimination. Within the framework of the calculation of insurance premiums and benefits, no relevant differences can be deduced from mere statistical differences between men and women. If different life expectancies of male and female insured, just like a possible difference in their propensity to take risks when driving or a difference in their inclination to use medical services, merely come to light statistically, this will not suffice, according to the Advocate General, to justify gender-related premiums and benefits. After all, many other factors play an important role in the evaluation of the insurance risks mentioned. The life expectancy of the insured is, for instance, strongly influenced by economic and social circumstances as well as by the habits of each individual. The Advocate General admits that economic and social circumstances, just like individual habits, are much more difficult to verify than wholesale differences between male and female insured persons

that are merely statistically verifiable. In her view, practical difficulties alone do not on their own, however, justify the use, to an extent for reasons of convenience, of the insured person's sex as a distinguishing criterion. The Advocate General suggests, however, that clearly demonstrable biological differences between the sexes could on the contrary be considered as a justification ground for unequal treatment.

The Advocate General further submits that purely financial considerations such as the danger of an increase in premiums for the insured, do not in any event constitute a material reason which would make discrimination on grounds of sex permissible. At most, a serious danger to the financial equilibrium of private insurance systems would be accepted as a justification.

To conclude, the Advocate General finds no reasons for accepting a more flexible arrangement for life insurance contracts, where in contrast with other types of insurance contracts, sex could be applied as a risk-factor. Both in non-life insurance as in life insurance contracts she finds it should be prohibited to take into account merely statistically verifiable differences between men and women.

EFFECTS

Possible reaction of the European Court of Justice

In spite of the fact the Advocate General is suggesting herself that in some cases the use of different insurance tariffs for women and men can be considered legitimate (biological differences between women and men, serious danger to the financial equilibrium of private insurance systems), she recommends the Court to declare article 5(2) invalid.

Whether the Court will follow this position, remains unclear at present. The Court could be guided by the fact that the European Commission originally declared itself firmly against allowing differences based on sex in respect of insurance premiums and benefits but was eventually persuaded by the insurance industry that the application of gender in risk pricing was necessary. Acting on the Court's recent ruling in the case of Lindorfer (C-227/04 P), a strict position has already been revealed against the use of gender as an actuarial calculation factor. In this case, the Court decided that the use of gender-based actuarial values (yet within the framework of EU official's pension rights) was not compatible with the need for sound financial management of the pension scheme as it was put forth by the organizer of the scheme. A similar equilibrium could have been attained with unisex actuarial values, so that a case of discrimination could in casu be established. It remains to be seen whether there would be a desire for the Court to extend this reasoning to private insurance relations.

There is a possibility that the Court of Justice, instead of declaring the concerned article 5(2) invalid, would provide the Belgian Constitutional Court with a binding reading, based on the gaps the Advocate General apparently seems to leave with reference to the application of the prohibition of discrimination in insurance relations. One possible direction is that article 5(2) would be declared valid to the extent that it is interpreted in the sense that direct distinctions on grounds of gender are only allowed when these distinctions are justified by biological differences between men and women and on the condition that a serious danger is demonstrated to the financial equilibrium of the insurance company concerned.

Possible effect on insurance rates

In insurance circles it is already expected that banning the use of gender in the calculation of premiums and benefits will boil down to the addition of a so-called "uncertainty premium" to the tariffs charged. This will presumably result in higher premiums for both men and women. The additional cost burden of more sophisticated and hence more expensive risk management tools that should be applied, could for some insurers even become too great and would eventually lead them to exit the market. For the time being, it cannot be sure whether the Court of Justice would be inclined to also consider these particular aspects.

Temporal application ?

If the Court of Justice would eventually declare article 5(2) to be invalid, such decision would in principle have retroactive effect. The Belgian Constitutional Court would also have to recognize the invalidity of the article and be obliged to annul the applicable Belgian rules, the result being that all insurance contracts that have been concluded after the coming into force of the Gender Directive would essentially be invalid too. According to Advocate General Kokott this would, however, result in too much legal uncertainty for those parties who relied on the validity of the respective provisions of national law adopted on the basis of article 5(2) of the Gender Directive. A declaration of invalidity, according to the Advocate General, should therefore only have effect for the future. At the same time, she proposes a transitional period in which insurance companies could adjust to the new legal framework and adapt their products accordingly. After that transitional period has ex-

pired, all future insurance premiums, in the calculation of which sex-specific differences are still being made, and also the benefits financed out of the new premiums would, however, have to be neutral in terms of sex. That would also have to apply to existing insurance contracts. This would boil down to a situation where premiums and benefits which can be attributed to periods prior to termination of the period concerned, can still be dependent on the insured's gender. Premiums and benefits relating to periods after this date should, in that case, be gender neutral.

Consequences for classification on the basis of age and disability?

The Advocate General's advice to declare article 5 (2) of the Gender Directive invalid and which would therewith impose unisex tariffs in insurance contracts, would possibly have an additional effect on insurance classification that takes into account the factors of age and disability. At this very moment negotiations are underway in the Council of the European Union on the text of a new Directive that will contain a prohibition on discrimination on grounds of (among other factors) age and disability in the access to and the supply of goods and services. (At present, such a prohibition already exists in Belgian law, but distinctions on grounds of these factors can still be justified). In the proposed Directive, presented by the Commission, it is provided that (by analogy with article 5(2) of the Gender Directive), Member States may permit proportionate differences in treatment in the provision of financial services (including insurance) where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data. It almost goes without saying that in the event the ECJ would declare article 5 (2) invalid, the opt-out rule contained in this proposal would, if not abolished, at least have to be reconsidered.

CONCLUSION

The Advocate General's opinion, in which she deems the use of gender-based risk factors incompatible with the principle of equal treatment and non-discrimination, will potentially have a great influence on insurance tariffs. An affirmative judgment of the Court of Justice will result in unisex tariffs in all European Member States. In spite of a potential transitional period of three years, as proposed by the Advocate General, such affirmation will have an extraordinary impact on all existing and future insurance contracts. One of the possible effects will be a significant increase in prices for policyholders.

The Court of Justice is not bound by the Advocate General's opinion but will nevertheless be able to take her lines of reasoning into consideration. Despite of the fact that the Advocate General is suggesting a complete prohibition of the use of gender in the calculation of insurance premiums, she does not refrain from outlining the circumstances in which the use of gender as a rating factor could be legitimate. In this manner, it is indicated that possible biological differences between women and men could still be used as a justification ground for unequal treatment. Further, also a serious danger to the financial equilibrium of the insurance company could be considered as a basis for justification.

To obtain clarity on the final destiny of gender-based insurance tariffs, a final judgment of the Court of Justice now has to be awaited. We'll keep you informed!