

Test-Achats and the use of gender in pension schemes

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Introduction

The recent judgment from the European Court of Justice (ECJ) in the Test-Achats case has received significant press attention. Women woke up on 1st March to the news that their car insurance might be getting more expensive, but that the annuity they buy when they retire could now pay a bigger pension. For men, it was the other way round.

The UK pensions industry is still assessing the new Test-Achats judgment and whether it might impact on occupational pension schemes. This client alert provides some commentary on the judgment and a discussion of its possible application to occupational pension schemes.

Background

A European Directive passed in 2004 required member states to put in place, by 21st December 2007, laws to combat sex discrimination "in access to and supply of goods and services". This included an obligation for member states to ensure that in "all new contracts concluded after 21st 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".

However, the Directive contained an exception to this principle which allowed member states "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".

What does the Test-Achats judgment say?

The ECJ, in the Test-Achats judgment, decided that the exception set out above works against the objective of the equal treatment between men and women. It therefore declared that the exception would be invalid for contracts entered into after 21st December 2012.

This means that any national law relying on the exception set out in the Directive will not be allowed from 21st December 2012.

It should be noted that this is a long stop date. Member states will have to ensure that any required change is made to their national law by 21st December 2012 *at the latest*.

As mentioned above, the most obvious impact in the UK is on car insurance premiums and on the benefits to be paid from annuities.

In terms of annuities, removal of the exception means that insurance companies may not be able to base the payment of different levels of benefits from an annuity on the sex of the annuitant. The intention is that this will apply for annuities entered into after 21st December 2012 (at the latest). Clearly, as women normally live longer than men, insurance companies will no longer be able to pay comparable men higher benefits based purely on their sex.

Does the judgment apply to occupational pension schemes?

On the one hand, a simple answer to this question could be 'no'. This is based on the fact that the ECJ was dealing in the Test-Achats case with legislation that is not related to occupational pension schemes. The question actually raised before the ECJ relates to laws that deal with 'goods and services' rather than occupational pension schemes. This is why immediate comment in the press has focused on car insurance and annuities.

Indeed, the law which the ECJ examined in this case specifically excludes 'matters of employment and occupation' and only deals with 'insurance and pensions which are private, voluntary and separate from the employment relationship'. Although this decision may change annuity rates (and therefore have an indirect impact on a member's pension if their occupational pension 'pot' will ultimately be used to buy an annuity), it seems unlikely at this stage that this judgment alone will prevent occupational pension schemes from using sex-specific factors.

However, this simple answer ignores the fact that the position taken by the ECJ in this case could suggest that, if a similar case were brought in respect of occupational pension schemes and sex-specific factors (used, for example, for commutation and transfer values), the ECJ would make the same decision. This may prevent the use of sex-specific factors in occupational pension schemes. Indeed, although the judges in Test-Achats chose not to cover, or make any comment upon, occupational pension schemes therefore leaving this question unanswered, the

equalisation laws relating to equal treatment under occupational pension schemes were referred to in the course of argument in this case.

Even if no case is brought dealing with occupational pension schemes, the relevant overriding European legislation could still now be altered at European level so that the same principle filters down and applies as in the Test-Achats case. This could prevent sex-specific factors from being used in the future.

Having said that and arguing this from the other side, it could be decided, once this issue is formally raised, that there is a sensible and justifiable reason for allowing the use of sex-specific factors in occupational pension schemes. If that conclusion were to be reached, occupational pension schemes could then be explicitly excluded from this principle, with confirmation that they are allowed to continue to use sex-specific factors.

What action should occupational pension schemes take now?

As outlined above, it seems unlikely that the judgment requires occupational pension schemes to introduce sex-neutral factors. On that basis, it cannot be said that there is currently any legal requirement to change to sex-neutral factors on the basis of Test-Achats. Any change as a result of this case could therefore be difficult to explain to members.

Having said that, this is a debate that employers, trustees and members are going to have to monitor as there is not yet a conclusive answer as to whether this principle applies to occupational pension schemes. It is therefore anticipated that action will be taken at some point soon (either by the Government, by another member state or by the ECJ) to come to a conclusion on this.

What should we be saying to members?

Given the uncertainties here, it is difficult for occupational pension schemes to come to a definitive conclusion. It is therefore also difficult to make any definitive statements to members.

In the interim, what can be said is that, although it does seem that annuity providers will no longer be able to differentiate between those buying annuities on the basis of sex, this does not yet apply directly to occupational pension schemes.

Save for where a member of an occupational pension scheme looks to use his or her pension savings to buy an annuity, this judgment alone should therefore have little impact. However, the position is not yet clear, and the implications of the judgment could extend in the future to occupational pension schemes.

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