



## The Gender Equality Directive: New Challenges for Insurers

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### Introduction

This article examines the Gender Equality Directive, which European Union (EU) Member States had to implement into national law by 21 December 2007, and its consequences for the European insurance sector.

Equal treatment between men and women has been at the heart of the EU since the entry into force of the Treaty of Rome 50 years ago. Legislation has been passed to ensure



equal treatment between men and women in a number of fields such as:

- Conditions of employment and occupation
- Pregnancy and parental leave
- Statutory social security rights
- Conditions for self employed status

Most recently, the Gender Equality Directive was adopted in December 2004 and came into effect from 21 December 2007.

### The Gender Equality Directive and the insurance sector

Unlike previous legislation, the Directive is not restricted to the workplace. It is more extensive since its purpose is to “... lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women”. The Directive sets out minimum requirements to achieve this purpose. In other words, Member States “... may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment between men and women than those laid down in this Directive” — but stricter minimum requirements would still have to comply

with general Community law principles of non-discrimination (on grounds of nationality) and proportionality.

The Directive prohibits two types of sex discrimination:

- Direct discrimination: where one person is treated less favourably on grounds of sex, than another, has been or would be treated in a comparable situation.
- Indirect discrimination: 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.

As a result, the principle of equal treatment between men and women means that direct and indirect discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity, is prohibited. The Directive provides limited examples of such prohibitions (for example, sexual harassment). This prohibition is, however, also tempered by the “legitimate aim” exception, for example protection of victims of sex-related violence or the promotion of gender equality, etc.

For the insurance sector, the key provision of the Directive — which was only inserted after intensive lobbying by the sector in 2004 — is Article 5 (“Actuarial Factors”). It is worth citing in full:

1. Member States shall ensure that 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 and related financial services shall not result in differences in individuals' premiums and benefits.
2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences to 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. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.
3. In any event, costs related to pregnancy and maternity leave shall not result in differences in individuals' premiums and benefits.

Member States may defer implementation of the measure required to comply with this paragraph until two years after 21 December 2007 at the latest. In that case, Member States concerned shall immediately inform the Commission.

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### Dealing With Article 5 (“Actuarial factors”)

As noted above, with effect from 21 December 2007, insurers may no longer use sex as a factor in the calculation of premiums or benefits or, if they do use it, it must not result in differences in individuals’ premiums and benefits. Rates must be “unisex”.

At first sight, this means, for example, that: (i) because women are more careful drivers, they will lose the benefit of lower premiums than those applied to the more dangerous male sex and; (ii) because men do not live as long as women, they will lose the benefit of higher annuities, since their premiums will have to be used to fund annuities for female annuitants.

When the Directive was drawn up, it was, however, recognised that an immediate prohibition would provoke a “sudden readjustment of the market”, hence the restriction of the rule to contracts concluded after 21 December 2007.

Furthermore, Article 5 provides for a five-year “opt out”. Specifically, Member States may allow insurers to continue to apply “. . . proportional differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risks”. If a Member State so allows, the “proportionate differences” must be based on “relevant and accurate actuarial and statistical data”. In addition, accurate data must be compiled, published and regularly updated. This opt-out is limited to five years because, by the end of that period, i.e. by 21 December 2012, the Member State must review its decision and report to the Commission on it.

Insurers therefore enjoy a reprieve, but at a price: first, the insurer must be established (i.e., incorporated and authorised) in a State which has decided to allow continuation of proportionate differences where use of sex is a determining factor (most States have. . .); second, the insurer will need to be able to advance accurate actuarial and statistical data to justify the differences (for example, in the event of a challenge before the Courts); third, the insurer will have to participate in a scheme ensuring compilation, publication and regular updating of data; and, last, the insurer will have to lobby hard over the next five years to ensure continuation of proportionate differences after 2012.

Many Member States may conclude that this opt-out is simply not justifiable and that unisex must prevail from day one (Belgium did initially, but has since changed tack); many insurers might reach the same conclusion or already be subject to unisex rules in any event (e.g., in France).

Lastly, paragraph 3 of Article 5 prohibits different premiums and benefits due to costs related to pregnancy and maternity.

This means that, where pregnancy and maternity are factors in pricing, premiums for males will have to subsidise premiums for females (in, for example, travel or medical insurance).



### Implications for Insurance Companies

First, where Member States have opted out for five years, they must implement the provisions on data compilation and publication. Member States are currently addressing these requirements (e.g., recent regulations adopted in France refer to national statistical office data).

Second, the Directive raises a number of technical questions, such as its application to policies which are tacitly renewed, how to apply unisex rates taking into account longevity or morbidity experience, identifying all classes of insurance affected by the Directive in the light of Member State implementation, etc.

Third, the minimalist approach of the Directive could give rise to regulatory and product “arbitrage”: by way of example, an insurer based in a (home) State which allows proportionate differences and, consequently, different (lower) tariffs might try to market its products in a (host) State which has opted for an immediate, uniform regime. Could the insurer market lawfully? The better view is that, subject to review of the exact terms for the policy, the host State could, in the name of “general good”, validly enforce its prohibition against the foreign insurer (and this is reflected in a declaration at the time of adoption of the Directive).

Last, insurers and their trading partners should consider the effects of the Directive on their reinsurance contracts. Insurers need, for example, to ensure that their reinsurance programmes reflect any new (probably, higher) pricing structures and that their distribution networks — including persons holding delegated underwriting authority — are aware of the new provisions.

### Conclusion

The Directive is the result of a trend in Europe stretching back many decades. Its adoption was difficult and the reprieve for the insurance sector described above is limited, temporary, and conditional.



# European Marketplace

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Now that the implementation deadline has expired, insurers ignore the Directive at their peril — not just before the Courts in the event of legal challenge; but also, crucially, for their reputation. Insurers can, instead, burnish their reputation by openly and fully complying with the Directive.

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