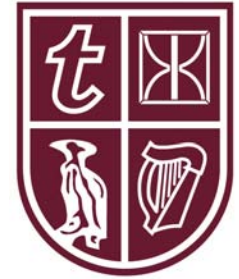


Impact of ECJ Judgement

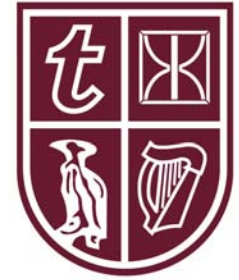
Ger Bradley
Dermot Corry
Keith Burns



Impact of ECJ Judgement Background

Ger Bradley

**What has
Jennifer
Aniston to
do with the
EU Gender
Directive?**



**Prize: Irish Cricket Jersey and Cap
(Not for members of the GI Committee!!!)**

Here's the hint . . .





How did that thing grow legs?

- Jennifer Aniston wasn't a fan of her iconic "Rachel" haircut, created by her hairstylist and close friend Chris McMillan.
- She told Allure

"I love Chris but he's the bane of my existence because he started that damn Rachel, which was not my best look. How do I say this? I think it was the ugliest haircut I've ever seen. How did that thing grow legs?" !!

Kevin O'Brien – Enough Said . . .





So what has this to do with
the EU Gender Directive?

Let's take a step back shall
we?

The Gender Directive



- Article 5 of the Gender Directive (Dir. 2004/113/EC), which is directly effective in all European Union member states, provides that the use of sex as a factor in calculating premiums and other benefits in respect of insurance should not result in differences in premiums or benefits to an individual.
- However, Article 5(2) contains an exemption to this prohibition which permits proportional differences in such premiums or benefits where the sex of an individual is a determining factor in the assessment of risk (based on relevant and accurate actuarial and statistical data) for the purposes of determining the level of premium.

Test-Achats



- The Belgian consumer group Association Belge des Consommateurs Test-Achats challenged Article 5(2) on the basis that it conflicts with the overarching principle of equal treatment of men and women under EU law.
- The subject matter of the case was a Belgian law enacting, amongst other things, the provisions of Article 5(2) in Belgium.
- In September 2010, Advocate-General Juliane Kokott produced an opinion in support of the consumer group's case.

Test-Achats - the court's decision



- On 1 March 2011 the ECJ delivered its ruling in the Test-Achats case: the derogation in EU law (i.e. Article 5(2) of the Gender Directive) which allows for sex-specific differences in insurance premiums and benefits where sex is a determining risk factor will be invalid from 21 December 2012.
- In delivering this ruling the ECJ agreed with the Advocate-General's opinion that different insurance premiums for men and women constitute sex discrimination and this is not compatible with the Charter of Fundamental Rights of the European Union (the Charter).

The Equal Status Acts 2000–2008



- The first act was the Equal Status Act 2000.
- This was amended by the Equality Act 2004, the Disability Act 2005 and the Civil Law (Miscellaneous Provisions) Act 2008.
- They are known collectively as the Equal Status Acts 2000–2008.

1 - Council Directive 2000/43/EC of 29th June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

2 - Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services.

Source: The Equality Authority

The Equal Status Acts 2000–2008



- The Equal Status Act 2000 and the Equality Act 2004 seek to implement the EU Race Directive 1
- The Equal Status Act 2000, the Equality Act 2004 and the Civil Law (Miscellaneous Provisions) Act 2008 seek to implement the Gender Goods and Services Directive 2
- These Directives prohibit discrimination on the grounds of racial or ethnic origin or gender and take precedence over Irish law.

1 - Council Directive 2000/43/EC of 29th June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

2 - Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services.

Source: The Equality Authority

Purpose



The Equal Status Acts 2000–2008:

- promote equality;
- prohibit certain kinds of discrimination (with some exemptions) across nine grounds;
- prohibit sexual harassment and harassment;
- prohibit victimisation;
- require reasonable accommodation of people with disabilities;
- allow a broad range of positive action measures.



Who does it apply to

The Acts apply to people who:

- buy and sell a wide variety of goods;
- use or provide a wide range of services;
- obtain or dispose of accommodation;
- attend at, or are in charge of, educational establishments.

There are separate provisions on discriminatory clubs.

The nine grounds . .



The Equal Status Acts 2000–2008 prohibit discrimination on the following nine grounds:

The gender ground: A man, a woman or a transsexual person;

The marital status ground: Single, married, separated, divorced or widowed;

The family status ground: Pregnant, a parent of a person under 18 years or the resident primary carer or parent of a person with a disability;

The sexual orientation ground: Gay, lesbian, bisexual or heterosexual;

The religion ground: Different religious belief, background, outlook or none;

The nine grounds . .



-
- The age ground:** This only applies to people over 18 except for the provision of car insurance to licensed drivers under that age;
 - The race ground:** A particular race, skin colour, nationality or ethnic origin;
 - The Traveller community ground:** People who are commonly called Travellers, who are identified both by Travellers and others as people with a shared history, culture and traditions, identified historically as a nomadic way of life on the island of Ireland;
 - The disability ground:** This is broadly defined including people with physical, intellectual, learning, cognitive or emotional disabilities and a range of medical conditions.



Goods and Services Exemptions

The Acts allow for people to be treated differently in certain circumstances.

(i) Exemptions on the ground of gender

The Acts allow people to be treated differently on the gender ground in relation to:

(a) Cosmetic services - Covering cosmetic, aesthetic or similar services which involve physical contact

(e.g. hairdressing).

(b) Privacy/embarrassment - Where embarrassment or breach of privacy could reasonably be expected to happen on account of the presence of a person of another gender.

(II) Exemptions on the ground of religion

(III) Exemptions on the ground of age (with respect to Adoption)

(IV) Exemptions on the ground of gender / age/ disability and/or race or nationality

(Sport and Drama)

(v) Exemptions on all grounds

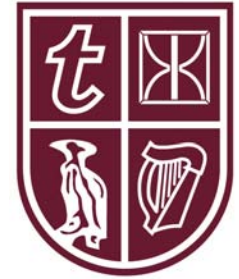
(a) **Insurance**

(b)



Indirect Discrimination

- Indirect discrimination happens where there is less favourable treatment by impact or effect. It occurs where people are, for example, refused a service not explicitly on account of a discriminatory reason, but because of a provision, practice or requirement which they find hard to satisfy.
- If the provision, practice or requirement puts people who belong to one of the grounds covered by the Acts, at a particular disadvantage, then the service provider will have indirectly discriminated. If the service provider proves the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, then it may not be indirectly discriminatory.



Impact of ECJ Judgement on General Insurance

Ger Bradley

Issues Specific to GI



- Policies in force on the date 21 Dec 2012
 - Must they have gender neutral rates in place
 - Must any endorsements after this date be gender neutral
 - Will there be selective mid-term cancellations after this date
- Will there be any retrospection – past contracts?
- Anti-selection
- What is the possibility of challenges in the interim to policies priced using gender specific rating?

Issues Specific to GI



- Where does the fine line between proxy and indirect discrimination get crossed
 - Occupation – e.g. Housewife
 - Scheme e.g. Nurses motor insurance
 - ITs4women.ie – Cheaper Car insurance for Women
 - Questions that should not be asked
 - How many shoes do you own?
 - Do you like the movie “When Harry met Sally?”
 - If so – was it the restaurant scene??
- Will reinsurance costs rise for portfolios with very few young male drivers at the moment – and conversely

Issues Specific to GI



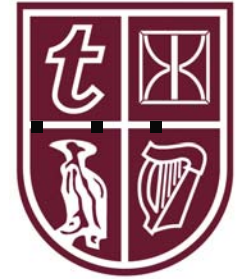
- What will the Industry do to protect itself from the downside risk
 - Curfew
 - Telematics
 - Advanced Driver tests
 - Are there new relevant questions that can be asked that are not indirect discrimination, to get a better handle on likely driving behaviour
- Will age be next – why not – policyholders pass through all ages?
- What would the social consequences be of motor insurance at prices that do not vary by age or gender
- Could number of years driving experience be deemed indirect discrimination

Does the following line of thinking in particular apply to motor insurance??



- There is a possibility that the Commission could accompany its report with proposals to modify the Directive.
- Thus it would be open for the amending directive to do more than simply delete Article 5(2).
- For example, there may be cases where gender neutral premiums would themselves be discriminatory because there are clear differences in the risks covered due to gender and the effect of neutral premiums is that one sex subsidises the other which subsidy could be considered a form of indirect discrimination as it disadvantages one sex.
- Such a situation might justify a specific derogation.

Every Cloud has its silver lining

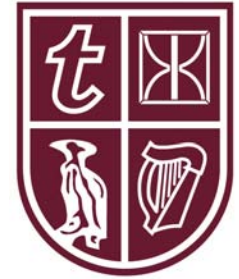


**Now we can talk about
something other than
Solvency II**

Jennifer's hair was not that bad . .



(Gender Directive does not apply to poodles)



Impact of ECJ Judgement on Life Assurance

Dermot Corry

Agenda



- High Level impact
- New Business
- Existing Policies

High Level Impact



- Rates currently vary by gender as follows
 - Term Assurance/Mortgage Protection (male more expensive)
 - Critical Illness (female generally more expensive)
 - Disability (female more expensive)
 - Annuity (female more expensive)
- Many policies for Term Assurance and Annuities are joint life – there will be very little difference here

New Business (1)



- From December 2012 will have to charge on a gender specific basis
- Relatively simple for new policies
- Implications for projections of pension business – will need to project using unisex annuity
- Society may introduce changes to ASP-LA8 which apply before December 2012
- Underwriting will be interesting
 - Can we ask for gender?
 - What medical information can we ask that will not be seen as indirect discrimination?
 - Be careful when rating a policy that it is seen as gender neutral
 - Can we develop smarter rating factors which distinguish other medical factors which influence mortality/morbidity?

New Business (2)



- **Still some lack of clarity about corporate business**
 - Can take account of gender for corporate business
 - But not where this will lead to the corporate discriminating on the basis of gender
 - So would appear than an insurer can charge an employer with a largely female workforce a lower premium than an equivalent with mainly male workforce
 - But the employer cannot distinguish the charges for employees
 - Could be implications for voluntary group schemes
- **Fire Sale shortly before end 2012?**
- **Rush of new business in 2013 where cheaper?**
- **Will there be selection against the insurer**
 - E.g. more males than females purchase ARFs



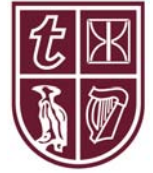
Existing Business (1)

- May be different considerations for
 - Policies issued before 2007 when the Gender Directive was introduced
 - Policies issued between 2007 and December 2012
- Issues that may arise
 - Would appear that policies sold before 2007 excluded from most aspects
 - For policies sold between Dec 2007 and Dec 2012, can the premium/benefits post 2012 continue to be gender specific
 - Major issues if the answer is no?
 - Can the monthly charge for unit linked benefits be gender specific
 - Can it be increased for females?
 - If not will males have to be reduced to the female rate?
 - Generally no ability to change premium before next review date



Issues for Existing Business (2)

- Indexations to existing term/UL contracts
 - Do the premiums/benefits have to be unisex?
 - Difficult to increase female charge if rates set in advance
 - Will contract language allow a change?
- Surrender value formulae – benefits cannot vary by gender
 - How should these be calculated on a gender neutral basis?
- Projections of pension benefits sent to pension customers
 - Annuities will increase for females and decrease for males. Difficult communication exercise
- Lapse and re-entry shortly after 2012
- Reserving
 - Presumably will continue to take account of gender where available



But remember:

- Gender is only one of a number of factors that should not be taken into account
 - We would not dream of using race as a rating factor
 - Gender joins this list
- Many countries already have gender neutral pricing
 - In a few years we many wonder what the fuss was about
- The implementation of the ECJ ruling in individual countries will be a key consideration
- The EU is working on an age discrimination directive and had planned to use the same methodology for insurance
 - This would really be a major issue



Impact of ECJ Judgement on Pensions

Keith Burns



Impact on Pension Schemes

- The immediate impact on pension schemes is confined to their role as the consumer of insurance products.
- No requirement at this point to change factors ‘internal’ to a pension scheme:
 - e.g. commutation, early retirement, transfer values
 - However ECJ ruling may prompt Trustees to consider unisex rates
- Directive only applies to insurance that is "private, voluntary and separate from the employment relationship"
- When the exemption is terminated, on or before 21 December 2012, insurance companies will not be permitted to quote gender-based premiums for annuities, disability policies or life assurance.
- General legal view seems to be that existing policies would not be upset in any way.



Impact on Pension Schemes

- Where the scheme is the potential consumer of a bulk annuity the likelihood is that these products can continue to be priced on a gender specific basis
- **Legal comment:** In contrast to annuity contracts sold to individuals, our view is that bulk annuity contracts issued to pension trustees as part of a buy-in or buyout process should not be affected by the decision, and such contracts may continue to be priced on the basis of gender-specific factors. This is on the basis that the directive only applies to insurance that is "private, voluntary and separate from the employment relationship" which would not normally be the case with a bulk pension contract.
- Presumably similar comments could apply to other Group contracts (i.e. Group Life or PHI).
- Position is less clear in respect of individual annuity purchase. General view is that gender neutral rates will need to apply:
 - Group DB Scheme
 - Group DC Scheme
 - PRSA

Impact on Pension Schemes



- Greater uncertainty and selection risks are likely to mean higher costs
 - Insurance premiums
 - Individual annuity costs
 - Funding Standard – unaffected unless bulk annuities move to gender neutral rates
- Given the move to unisex annuity rates, should Standard Transfer Value basis be reviewed?
 - No immediate requirement to change
 - Public policy issue for discussion with Department
- DC Statement of Reasonable Projections – ASP PEN-12
 - Again no immediate requirement to change
 - Will look to review, working in tandem with Life Committee (ASP LA-8)

Recital 15 and 16 of Directive 2006/54



- (15) The Court of Justice has confirmed that whilst the contributions of male and female workers to a defined benefit pension scheme are covered by Article 141 of the Treaty, any inequality in employers' contributions paid under funded defined-benefit schemes which is due to the use of actuarial factors differing according to sex is not to be assessed in the light of that same provision.
- (16) By way of example, in the case of funded defined-benefit schemes, certain elements, such as conversion into a capital sum of part of a periodic pension, transfer of pension rights, a reversionary pension payable to a dependant in return for the surrender of part of a pension or a reduced pension where the worker opts to take earlier retirement, may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented.

Domino effect



- In the light of the Test-Achats case it must be seen as likely that if a challenge were made to the exceptions described in Recital 16 of the 2006 Directive, that challenge could succeed.
- Is age discrimination next? Kucukdevici v Swedex (2010) Mangold v Helm – suggest that the ECJ views age discrimination in much the same way as it views sex discrimination.
- The first subparagraph of Article 6(1) of Directive 2000/78 states that a difference of treatment on grounds of age does not constitute discrimination if, within the context of national law, it is objectively and reasonably justified.....
 - Age or service related DC contribution rates?
 - Age related maximum contributions for tax relief purpose
 - Normal Retirement Age