

# Testing Times: The Test Achats Decision

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## To Cover

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2. Practical Consequences of Test Achats decision.
3. Indirect Discrimination.
4. Consequences of Breach.
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6. European Commission guidance and Existing Contracts.
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## Gender Directive (Directive 2004/113/EC)

- Equal treatment for men and women in access to goods and services
- Article 5(1): Use of gender as a factor in calculation of premiums and benefits must not result in differences in individuals' premiums or benefits for new contracts post 21 December 2007



## Exemption:

- Article 5 (2): Option to allow proportionate differences in individuals premiums and benefits based on relevant and accurate actuarial and statistical data.
- Ireland took this option: Section 5(2) Equal Status Act 2000 (as amended). Note also Commercial, Underwriting factors.

## Test Achats:

- CJEU Judgment 1 March 2011: Article 5(2) – Gender Directive invalid from 21 December 2012.
- Gender Discrimination contrary to charter of fundamental rights (equal to EU Treaties) and TFEU.



## Practical Consequences:

From 21 December 2012:

- No gender related factors in calculating premiums/benefits for new contracts?
- Indirect discrimination also prohibited:

*Apparently neutral provision, criterion or practice that would put one sex at a particular disadvantage unless objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*



## Indirect Discrimination

- e.g. height/weight/shoe size: Potential proxies for gender.
- but: Allowed if justified e.g. weight as a risk factor in life assurance.



## Indirect Discrimination

- Policyholder must show: One gender disproportionately affected by a provision, criterion or practice.
- If so, can this be justified by legitimate aim?
- Onus on insurer to show justification.







## Defending Indirect Discrimination

1. Does treatment affect one gender disproportionately?  
Policyholder must establish this.
2. Has policyholder chosen correct “comparator” e.g. higher premiums for high performance cars: reflect higher risk or discrimination against the gender more likely to drive those cars?
3. Correct comparator for man claiming discriminatory treatment: woman with high performance car not woman with lower performance car.

## Indirect Discrimination

### Comparator a defence in all cases?

- e.g. Equal treatment for men with size 5 shoes.



### Show:

- Legitimate aim: to price higher risk.
- Proportionate: statistical evidence to justify.
- High performance engine example vs case where differentiator less obvious (e.g. occupation: nursing – does occupation justify lower premiums or is it proxy for gender?)

## Who does not benefit:

Discrimination prohibited against “insured individuals” not:

- Corporations
- Direct insurers (reinsurers may use gender for reinsurance premiums/benefits).
- Occupational pension scheme members (for now) but N.B. no exclusion for pensioners with insurance products



## Consequences of Breach

Equal Status Act 2000:

- Maximum compensation: €6,348.69
- Circuit Court (gender only) unlimited.



## Advertising:

### Equal Status Act 2000:

- Offence to publish advertisement indicating intention to engage in prohibited conduct e.g. “cheap insurance for ladies”.
- More subtle techniques?



## Existing Contracts

- Logically Test Achats applies to new contracts from 21 December 2012.
- Confirmed by European Commission Guidance on 22 December 2011.
- New contract includes amendment of existing contract requiring “expression of consent” by all parties.
- Narrow examples of amendments that don’t create new contracts:
  - Adjustments based on “predefined parameters” (e.g. automatic price increase);
  - Top up/follow on policies on “pre-agreed” terms.

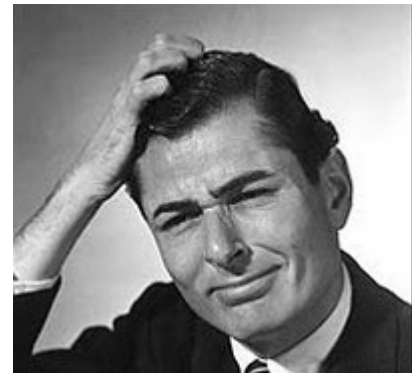


## Grey Areas

General Insurance: MTAs

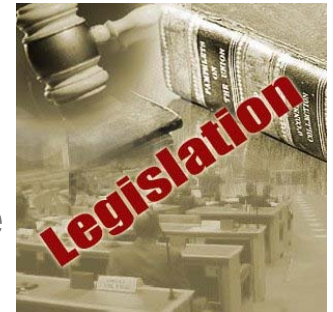
Life:

- Premium/benefit reviews
- Indexation
- Reinstatements
- Guaranteed annuity options
- Benefit increases at policyholder option



## Legislative Fix?

Irish legislation implementing Test Achats must be compatible with gender directive (as amended by Test Achats decision).



**Past:** State responsible for incorrect implementation **Now:** Küçükdeveci case creates danger of direct effect.

National Courts must disapply national legislation if contrary to principle of equal treatment.

Case concerned age discrimination. Court held prohibition on age discrimination is general principle of EU law, given expression by Directive. German law not properly reflecting Directive must be disregarded and directive applied directly to employment relationship.

Result: Private employer (not just State) liable for damages.