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## **COMMUNICATION FROM THE COMMISSION**

**Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats)**

(Text with EEA relevance)

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#### **1. INTRODUCTION**

1. Article 5 of Council 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<sup>1</sup> (hereinafter ‘the Directive’) regulates the use of actuarial factors related to sex in the provision of insurance and other related financial services. Article 5(1) provides that, for new contracts concluded after 21 December 2007, the use of sex as an actuarial factor in the calculation of premiums and benefits must not result in differences in individuals’ premiums and benefits (hereinafter ‘the unisex rule’). Article 5(2) provides for derogation from this rule by allowing Member States to maintain 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.
2. In a judgment delivered on 1 March 2011<sup>2</sup> (hereinafter ‘the Test-Achats ruling’), the Court of Justice of the European Union (hereinafter ‘the Court of Justice’) declared Article 5(2) invalid with effect from 21 December 2012. The Court of Justice considers that by enabling Member States to maintain without temporal limitation an exemption from the unisex rule laid down in Article 5(1), Article 5(2) runs counter to achievement of the objective of equal treatment between men and women in relation to the calculation of insurance premiums and benefits, which is the purpose of the Directive as defined by the legislature in the insurance field, and is therefore incompatible with Articles 21 and 23 of the Charter of Fundamental Rights of the European Union.
3. All Member States currently allow gender differentiation for at least one type of insurance. In particular, in all Member States, insurers are allowed to use sex as a risk-rating factor in life insurance<sup>3</sup>. The Test-Achats ruling will therefore have implications in all Member States.
4. The present guidelines aim to facilitate compliance with the Test-Achats ruling at national level. However, the Commission’s position is without prejudice to any interpretation the Court of Justice may give to Article 5 in the future.

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<sup>1</sup> OJ L 373 of 21.12.2004, p. 37.

<sup>2</sup> Judgment of 1 March 2011 in Case C-236/09, OJ C 130 of 30.4.2011, p. 4.

<sup>3</sup> For more information on national legislation and insurers’ practices, see Annexes 1 and 2.

## 2. GUIDELINES

5. As from 21 December 2012, the unisex rule contained in Article 5(1) must be applied without any possible exception in relation to the calculation of individuals' premiums and benefits in new contracts.

### 2.1. Impact of the Test-Achats ruling – the contracts concerned

#### 2.1.1. Article 5(1) to be applied without derogation from 21 December 2012

6. In the Test-Achats ruling, the Court of Justice concludes that Article 5(2) of the Directive '*must therefore be considered to be invalid upon the expiry of an appropriate transitional period*' ending on 21 December 2012<sup>4</sup>. This means that from that date the requirements of Article 5(1) must be applied without derogation.

#### 2.1.2. Article 5(1) applies only to new contracts

7. The transitional period needs to be interpreted in line with the objective of the Directive as expressed in Article 5(1), which provides that the unisex rule shall only apply to new contracts concluded after the deadline for transposition of the Directive on 21 December 2007. As explained in Recital 18 of the Directive, the objective of this rule is to avoid a sudden readjustment of the market. The Test-Achats ruling does not change this objective, nor does it have an impact on the applicability of the unisex rule only to new contracts as laid down in Article 5(1). The Test-Achats ruling means that for new contracts concluded as from 21 December 2012 this rule has to be applied without any exception, owing to the invalidity of Article 5(2) from that date.
8. It is settled case-law that the need for uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union<sup>5</sup>.
9. The Directive does not define the concept of a 'new contract', nor does it contain any reference to national laws as regards the meaning to be applied to such terms. This concept should therefore be regarded, for the purposes of application of the Directive, as designating an autonomous concept of European Union law which must be interpreted uniformly throughout the Union. This uniform interpretation corresponds to the aim of the Directive in the insurance field, which is to implement the unisex rule, after the expiry of a transitional period. The concept of a 'new contract' referred to in Article 5(1) is essential for the practical implementation of this provision. Diverging interpretations of this concept based on national contract laws would create a risk of different transitional periods delaying the comprehensive application of the unisex rule and also of an uneven playing field for insurance companies. This would undermine the objective pursued by the Directive of comprehensively guaranteeing the equal treatment of women and men across Member States in relation to

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<sup>4</sup> Paragraph 33 of the ruling.

<sup>5</sup> Most recently confirmed in the judgment of the Court of Justice of 18 October 2011 in case C-34/10, *Oliver Brüstle v. Greenpeace e.V.*, paragraph 25. See also Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 27; and Case C-467/08 *Padawan* [2010] ECR I-0000, paragraph 32.

individuals' insurance premiums and benefits from the same date as expressed in its Article 5(1)<sup>6</sup>.

10. The implementation of Article 5(1) requires a clear distinction between existing and new contractual agreements. The distinction must meet the need for legal certainty and be based on criteria that avoid undue interference with existing rights and preserve the legitimate expectations of all parties. This approach is in line with the Directive's objective of preventing a sudden readjustment of the market by restricting the application of the unisex rule only to new contracts.
11. Accordingly, the unisex rule pursuant to Article 5(1) shall apply whenever a) a contractual agreement requiring the expression of consent by all parties is made, including an amendment to an existing contract and b) the latest expression of consent by a party that is necessary for the conclusion of that agreement occurs as from 21 December 2012.
12. Consequently, the following<sup>7</sup> should be considered as new contractual agreements, having therefore to comply with the unisex rule:
  - (a) contracts concluded for the first time as from 21 December 2012<sup>8</sup>. Therefore, offers made before 21 December 2012 but accepted as from that date will need to comply with the unisex rule;
  - (b) agreements between parties, concluded as from 21 December 2012, to extend contracts concluded before that date which would otherwise have expired.
13. On the contrary, the following situations<sup>9</sup> should not be considered as constituting a new contractual agreement:
  - (a) the automatic extension of a pre-existing contract if no notice, e.g. a cancellation notice, is given by a certain deadline as a result of the terms of that pre-existing contract;
  - (b) the adjustments made to individual elements of an existing contract, such as premium changes, on the basis of predefined parameters, where the consent of the policy-holder is not required<sup>10</sup>;
  - (c) the taking out, by the policy-holder, of top-up or follow-on policies whose terms were pre-agreed in contracts concluded before 21 December 2012, where these policies are activated by a unilateral decision of the policy-holder<sup>11</sup>;

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<sup>6</sup> A very narrow definition of the concept of a new contract extending the possibility to use gender as a risk-assessment factor with impact on individuals' premiums and benefits would jeopardise the objective laid down in Article 5(1) to exclude such use from the expiration of the transitional period '*at the latest*'. Differences in interpretation between Member States would further be impossible to reconcile with the requirement of an independent and uniform interpretation of these terms which are essential for the scope and meaning of the Directive.

<sup>7</sup> These situations are non-exhaustive examples identified on the basis of their practical relevance.

<sup>8</sup> For example, if an insured person decides to switch provider to benefit from the unisex rule.

<sup>9</sup> These situations are non-exhaustive examples identified on the basis of their practical relevance.

<sup>10</sup> For example a premium increase by a percentage based on the claims experience.

<sup>11</sup> For example when the insured person wishes to increase the amount invested through a life insurance product.

- (d) the mere transfer of an insurance portfolio from one insurer to another which should not change the status of the contracts included in that portfolio.

## 2.2. Gender-related insurance practices which remain possible

14. Article 5(1) prohibits any result whereby differences arise in individuals' premiums and benefits due to the use of gender as a factor in the calculation of premiums and benefits. It does not prohibit the use of gender as a risk-rating factor in general. Such use is allowed in the calculation of premiums and benefits at the aggregate level, as long as it does not lead to differentiation at individual level. After the Test-Achats ruling, it therefore remains possible **to collect, store and use gender status** or gender-related information within those limits, i.e.:
- **reserving and internal pricing:** insurers remain able to collect and use gender status for internal risk assessment, notably to calculate technical provisions in line with insurance solvency rules and to monitor their portfolio mix from an aggregate pricing perspective.
  - **reinsurance pricing:** reinsurance contracts are contracts between an insurer and a reinsurer. It remains possible to use gender in the pricing of these products, as long as they do not lead to gender differentiation at individual level.
  - **marketing and advertising:** pursuant to Article 3(3), the Directive does not apply to the content of media and advertising, and Article 5(1) only addresses the calculation of individuals' premiums and benefits. It therefore remains possible for insurers to use marketing and advertising to influence their portfolio mix e.g. by targeting advertising at either men or women. However, insurers may not refuse access to a specific product because of a person's sex, unless the conditions of Article 4(5) are met<sup>12</sup>.
  - **life and health underwriting:** the unisex rule means that premiums and benefits cannot be different between two individuals for the same insurance policy simply because their gender is not the same. There are however other risk factors, e.g. health status or family history, on the basis of which differentiation is possible and for the assessment of which insurers need to take gender status into account, in light of certain physiological differences between men and women<sup>13</sup>.
15. The Commission also considers that, under the conditions of Article 4(5) of the Directive, it remains possible for insurers to offer gender-specific insurance products (or options within contracts) to cover conditions which exclusively or primarily concern males or females<sup>14</sup>. This possibility is however excluded for pregnancy and maternity, in light of the specific solidarity mechanism created by Article 5(3).

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<sup>12</sup> Under this provision, differences in treatment are allowed if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

<sup>13</sup> For example, a family history of breast cancer does not have the same impact on a man and on a woman's health risk (and the assessment of this impact requires knowledge of whether the person is a woman or a man). Obesity is a risk factor, a measurement of which is the waist to hip ratio, which is not the same for women and for men. A more developed list of examples is provided under Annex 3.

<sup>14</sup> For example prostate cancer, breast or uterus cancer.

## 2.3. Use of other risk-rating factors

### 2.3.1. Factors correlated with gender – the issue of indirect discrimination

16. The Test-Achats ruling only addresses the use of gender as a risk-rating factor and not the admissibility of other factors used by insurers. However, pursuant to Article 2 (b) of the Directive, indirect discrimination occurs where an apparently neutral risk factor puts persons of one sex at a particular disadvantage. In contrast to direct discrimination, indirect discrimination can be justified if the aim is legitimate and the means of achieving it are appropriate and necessary.
17. The use of risk factors which might be correlated with gender therefore remains possible, as long as they are true risk factors in their own right<sup>15</sup>.

### 2.3.2. Factors not correlated with gender

18. The Test-Achats ruling only addresses the use of the gender factor in a context where the respective situations of men and women were found comparable by the legislature. It does not affect the use of other risk-rating factors, such as age and disability, which is currently not regulated at EU level.
19. In the Test-Achats ruling, the Court of Justice points out that *‘(...) the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified’* and that *‘the comparability of situations must be assessed in the light of the subject-matter and purpose of the EU measure which makes the distinction in question (...)’*<sup>16</sup>.
20. The use of age and disability would continue to be allowed under the proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation<sup>17</sup>, as it would not be considered discriminatory. Where the legislator provides that, under certain conditions, a specific practice is not discriminatory, it does not create a derogation from the principle of equal treatment of comparable situations (which could only be admissible for a transitional period). It rather complies with the principle of equal treatment by recognising that the situations at issue are not comparable and should be treated differently (or that, in spite of comparability, there is an objective justification for treating them differently).

## 2.4. Insurance and occupational pensions

21. Some insurance products, such as annuities, contribute to retirement income. The Directive however only covers insurance and pensions which are private, voluntary and separate from the employment relationship, employment and occupation being explicitly excluded from its

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<sup>15</sup> For example, price differentiation based on the size of a car engine in the field of motor insurance should remain possible, even if statistically men drive cars with more powerful engines. This would not be the case for differentiation based on the size or weight of a person in relation to motor insurance.

<sup>16</sup> See paragraphs 28 and 29 of the Test-Achats ruling.

<sup>17</sup> COM(2008) 426 final. In contrast to the Directive, the proposal does not contain a general principle such as the unisex rule, according to which the use of age and disability should not result in different premiums or benefits. The objective of the relevant provision is rather to recognise that, for instance, two persons of a different age are not in a comparable situation with regard to life insurance and that proportionate differences of treatment based on a sound risk assessment therefore do not constitute discrimination.

scope<sup>18</sup>. Equal treatment of women and men in relation to occupational pensions is covered by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)<sup>19</sup>.

22. Some occupational pension schemes provide for the payment of a benefit under a specific form, such as annuities. Where that is the case, the scheme in question will fall under Directive 2006/54/EC even if it relies on an insurer to pay out the benefit. On the contrary, if the individual employee has to conclude an insurance contract directly with the insurer without involvement of the employer, for example to convert a lump sum into an annuity, the situation will fall within the scope of the Directive. Article 8(1) (c) of Directive 2006/54/EC specifically excludes from its scope insurance contracts concluded by workers and to which the employer is not a party.
23. Article 9(1) (h) of Directive 2006/54/EC allows for the setting of different levels of benefits between men and women when justified by actuarial calculation factors. The Commission considers that the Test-Achats ruling has no legal implications for this provision, which applies in the different and clearly separable context of occupational pensions and which is also drafted in a very different way from Article 5(2) of the Directive. Indeed, under Article 9(1) (h) of Directive 2006/54/EC, the setting of different benefits for men and women is not considered discriminatory when justified by actuarial data.

### 3. MONITORING OF THE GUIDELINES

24. Member States have to draw the consequences from the Test-Achats ruling and adapt their legislation before 21 December 2012 in order to guarantee the application of the unisex rule by insurers as required by the judgment. The Commission will monitor the situation, ensuring that, after that date, national legislation in the field of insurance is fully in compliance with the ruling on the basis of the criteria set out in the present guidelines.
25. The Commission would like to encourage a competitive and innovative industry such as the insurance sector to make the necessary adjustments and offer attractive unisex products to consumers without an unjustified impact on the overall price levels. The Commission will remain vigilant in following the evolution of the insurance market in order to detect any unjustified rise in prices attributed to the Test-Achats ruling, including in light of the tools that are available under competition law<sup>20</sup> in the event of alleged anti-competitive conduct.

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<sup>18</sup> Recital 15 and Article 3(4) of the Directive. Group health and accident contracts are therefore also excluded from the scope of the Directive.

<sup>19</sup> OJ L 204, 26.7.2006, p.23.

<sup>20</sup> The current Block Exemption Regulation (Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 83 of 30.3.2010, p.1), contains an exemption allowing insurers to share certain types of data through joint compilations, tables and studies under certain conditions. It does not, in particular, exempt agreements on commercial premiums. **The Block Exemption Regulation will expire on 31 March 2017 and the Commission will review it in advance to assess whether a further extension is still justified.**

26. The Commission will report on the implementation of the Test-Achats ruling in national law and in insurance practice in 2014, in the context of a more general report on the implementation of the Directive.

## **ANNEXES**

### **Annex 1: Use of gender as a rating factor according to national law**

### **Annex 2: Reported use of factors for risk assessment by product**

*(Source: Study on the use of age, disability, sex, religion or belief, racial or ethnic origin and sexual orientation in financial services, in particular in the insurance and banking sector, Civic Consulting, 16.07.2010)*

### **Annex 3: Examples of gender-related practices which remain possible after the Test-Achats ruling – medical underwriting**

### Annex 1: Use of gender as a rating factor according to national law <sup>(a)</sup>

| Country        | Life insur.        | Private health insur. | Mortgage loans    | Motor insur.       | Travel insur.     | Disability/ Income insur. | Consumer credit   | Annuity products      | Accident insur.    | Credit cards      | Deposit accounts  | Loan insur.       | Home insur.       | Private liability insur. | Long term care insur. | Critical illness insur. |
|----------------|--------------------|-----------------------|-------------------|--------------------|-------------------|---------------------------|-------------------|-----------------------|--------------------|-------------------|-------------------|-------------------|-------------------|--------------------------|-----------------------|-------------------------|
| Austria        | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |
| Belgium        | Yes                | No <sup>(2)</sup>     | No <sup>(2)</sup> | No                 | No <sup>(2)</sup> | No                        | No <sup>(2)</sup> | Yes                   | No <sup>(2)</sup>  | No <sup>(2)</sup> | No <sup>(2)</sup> | No <sup>(2)</sup> | No <sup>(2)</sup> | No <sup>(2)</sup>        | No <sup>(2)</sup>     | No                      |
| Bulgaria       | Yes                | Yes                   | n.a.              | No                 | n.a.              | n.a.                      | n.a.              | Yes                   | No                 | n.a.              | n.a.              | n.a.              | n.a.              | n.a.                     | n.a.                  | Yes                     |
| Cyprus         | Yes                | No                    | No <sup>(2)</sup> | No                 | No <sup>(2)</sup> | No                        | No <sup>(2)</sup> | Yes                   | Yes                | No <sup>(2)</sup> | No <sup>(2)</sup> | n.a.              | No <sup>(2)</sup> | No <sup>(2)</sup>        | No                    | No                      |
| Czech Republic | n.a.               | n.a.                  | n.a.              | n.a.               | n.a.              | n.a.                      | n.a.              | n.a.                  | n.a.               | n.a.              | n.a.              | n.a.              | n.a.              | n.a.                     | n.a.                  | n.a.                    |
| Denmark        | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |
| Estonia        | Yes <sup>(1)</sup> | Yes <sup>(1)</sup>    | n.a.              | No                 | n.a.              | n.a.                      | n.a.              | Yes <sup>(1)(b)</sup> | Yes <sup>(1)</sup> | n.a.              | n.a.              | n.a.              | n.a.              | n.a.                     | No                    | n.a.                    |
| Finland        | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |
| France         | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |
| Germany        | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |
| Greece         | Yes <sup>(1)</sup> | n.a.                  | n.a.              | Yes <sup>(1)</sup> | n.a.              | n.a.                      | n.a.              | n.a.                  | Yes <sup>(1)</sup> | n.a.              | n.a.              | n.a.              | n.a.              | n.a.                     | n.a.                  | Yes <sup>(1)</sup>      |
| Hungary        | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |
| Ireland        | Yes                | Yes                   | n.a.              | Yes                | n.a.              | Yes                       | n.a.              | Yes                   | No                 | n.a.              | n.a.              | n.a.              | n.a.              | n.a.                     | Yes                   | Yes                     |
| Italy          | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |
| Latvia         | Yes                | Yes                   | n.a.              | No                 | n.a.              | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | n.a.              | n.a.              | n.a.                     | Yes                   | Yes                     |
| Lithuania      | Yes                | Yes                   | n.a.              | No                 | n.a.              | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | n.a.              | n.a.              | n.a.                     | n.a.                  | Yes                     |
| Luxembourg     | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |
| Malta          | n.a.               | n.a.                  | n.a.              | n.a.               | n.a.              | n.a.                      | n.a.              | n.a.                  | n.a.               | n.a.              | n.a.              | n.a.              | n.a.              | n.a.                     | n.a.                  | n.a.                    |
| Netherlands    | Yes <sup>(2)</sup> | No                    | No <sup>(c)</sup> | No                 | No <sup>(c)</sup> | No <sup>(2)(c)</sup>      | No <sup>(c)</sup> | No <sup>(2)(c)</sup>  | No                 | No <sup>(c)</sup> | No <sup>(c)</sup> | No <sup>(c)</sup> | No <sup>(c)</sup> | No <sup>(c)</sup>        | No <sup>(c)</sup>     | No <sup>(c)</sup>       |
| Poland         | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |
| Portugal       | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |
| Romania        | n.a.               | n.a.                  | n.a.              | n.a.               | n.a.              | n.a.                      | n.a.              | n.a.                  | n.a.               | n.a.              | n.a.              | n.a.              | n.a.              | n.a.                     | n.a.                  | n.a.                    |
| Slovakia       | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |
| Slovenia       | Yes                | Yes                   | n.a.              | No                 | n.a.              | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | n.a.              | n.a.              | n.a.                     | Yes                   | Yes                     |
| Spain          | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |
| Sweden         | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |
| United Kingdom | Yes                | Yes                   | n.a.              | Yes                | Yes               | Yes                       | n.a.              | Yes                   | Yes                | n.a.              | n.a.              | Yes               | Yes               | Yes                      | Yes                   | Yes                     |

Sources: Implementation of the Insurance Gender Directive, Group Consultatif 2009, unless otherwise specified: (1) Civic Consulting survey of competent authorities (2) Civic Consulting interviews with competent authorities, equality bodies and industry associations. Notes: (a) The table illustrates for which financial products national legislation in each Member State allows the use of gender as a rating factor in line with Art. 5(2) of the Gender Directive. (b) Unisex mortality tables in the case of compulsory funded pension annuities. (c) Sex can be considered by insurers in the calculations but it may not lead to a difference in premiums for men and women.

n.a: not available

**Annex 2: Reported use of factors for risk assessment by product (based on frequency of reported use by stakeholders)**

| Product category                            | Definition of product category                                                                                                                                                                                     | Factors |     |            |
|---------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|-----|------------|
|                                             |                                                                                                                                                                                                                    | Sex     | Age | Disability |
| Insurance products                          |                                                                                                                                                                                                                    |         |     |            |
| Private health insurance                    | Private health insurance - insurance that covers health risks in addition to (or for those not covered by) the national health care system                                                                         | ++      | ++  | ++         |
| Critical illness insurance                  | Critical illness insurance - insurance policy that pays a benefit if the insured is diagnosed with a specified critical illness during the policy term                                                             | ++      | ++  | ++         |
| Disability/income protection insurance      | Disability/income protection insurance - insurance that provides payments to replace lost income when the insured is unable to work because he/she becomes disabled                                                | ++      | ++  | ++         |
| Life insurance                              | Life insurance - insurance which provides, in particular, payment on survival to a stipulated age or payment on the death of the insured to their beneficiaries                                                    | ++      | ++  | ++         |
| Annuity products                            | Annuity products (including private pensions) - insurance that provides regular payments in the future in exchange for the payment of a lump sum or a series of regular payments prior to the onset of the annuity | ++      | ++  | +          |
| Motor insurance                             | Motor insurance - insurance for private cars covering at least third party liability                                                                                                                               | ++      | ++  | +          |
| Travel insurance                            | Travel insurance - temporary insurance that covers, for the duration of the trip only, at least medical expenses and potentially financial and other losses incurred while travelling                              | +       | ++  | +          |
| Accident insurance                          | Accident insurance - insurance that covers losses caused by a bodily accident or expenses of medical treatment necessitated after a bodily accident                                                                | +       | +   | +          |
| Long term care insurance                    | Long-term care insurance - insurance policy that covers costs of long-term care beyond a predetermined period not covered by health insurance                                                                      | +       | +   | +          |
| Loan insurance/Payment protection insurance | Loan insurance/Payment protection insurance - insurance that protects monthly loan payments if holders become unemployed or suffer an accident or sickness                                                         | +       | +   | +          |
| Home insurance                              | Home insurance - property insurance policy that covers losses occurring to private buildings and to their contents                                                                                                 | o       | +   | o          |

| Product category            | Definition of product category                                                                                                                                                   | Factors |     |            |
|-----------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|-----|------------|
|                             |                                                                                                                                                                                  | Sex     | Age | Disability |
| Private liability insurance | Private liability insurance - insurance that provides protection against third party claims, i.e., payment is typically to someone suffering loss caused by the insured          | o       | +   | o          |
| Banking/Loan products*      |                                                                                                                                                                                  |         |     |            |
| Mortgage loans              | Mortgage loans - loan secured against a property                                                                                                                                 | o       | +   | o          |
| Consumer credit**           | Consumer credit - short-term loan to consumers for the purchase of goods, including credit accounts at retail outlets, personal loans, hire purchase, but excluding credit cards | o       | +   | o          |
| Credit cards                | Credit cards - card entitling holders to buy goods and services based on the holders' promise to pay for these goods and services at a later stage                               | o       | +   | o          |
| Deposit account             | Deposit account - current or savings account, or other type of bank account, at a banking institution that allows money to be deposited and withdrawn by the account holder      | o       | o   | o          |

Notes: ++ = Frequently reported to be used (by 50 % or more of all responding industry associations, actuarial associations and competent authorities and equality bodies).  
+ = Occasionally reported to be used (by 10 % to 50 % of all responding industry associations, actuarial associations and competent authorities and equality bodies).  
o = Rarely reported to be used (by less than 10 % of all responding industry associations, actuarial associations and competent authorities and equality bodies).

In the event that frequency of reported use has led to deviations between the three groups on which the assessment is based (industry associations/actuarial associations/competent authorities and equality bodies), the assessment in the table represents the results of the two groups falling into the same category.

Product categories may include a variety of different types of products offered on the market. Bundled products are not covered (e.g. the combination of a current account with an insurance product).

\* Age and sex are sometimes used in credit scoring and this may affect the provision of banking/loan products.

\*\* Consumer credit includes motor finance and personal loans

### **Annex 3: Examples of gender-related practices which remain possible after the Test-Achats ruling – life and health underwriting**

The underwriting process is the assessment by the insurer of the risk presented by an applicant before it can enter a pool of insured risks. It is separate from the base price of an insurance product and designed to take account of each individual's risk profile. If a particular applicant presents a higher risk to the pre-determined pool of standard risks he or she should be allocated to, the insurer will generally request an additional risk premium ('ratings'). Insurers use application forms to collect information about risk factors, which range from a list of simple questions (simplified underwriting) to a fully detailed health questionnaire. The level of detail which is requested depends on several factors, including the product at issue and the amount insured. This process can also include a medical examination.

The present list contains examples of gender-related insurance practices which are allowed under Article 5(1) of the Directive, therefore not affected by the Test-Achats ruling. Generally speaking, it remains possible to reflect physiological differences between men and women in questions and tests and in interpretations of medical results. The examples below are without prejudice to national legislation which would regulate certain aspects not covered by the Directive.

|                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|-------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Application forms</b>                  | <p>Insurers are allowed to collect information on gender status and ask questions about gender-specific diseases. Application forms can include different relevant questions for each gender (excluding questions about pregnancy).</p> <p>For example, family history is a risk factor particularly relevant to certain products, such as critical illness insurance.</p> <p>A woman with a family history of breast cancer will generally pay an additional risk premium compared to a woman who has no such family history, because it is a key risk factor for a woman's risk of developing this disease. There is however no reason to apply such additional premium to a man with the same family history because the probability that he will suffer from breast cancer is very low.</p> |
| <b>Medical tests</b>                      | <p>Required medical tests are not necessarily the same for men and women, and it remains possible to use different tests by gender for insurance screening when necessary (mammograms, prostate screening, etc.).</p> <p>Insurers are also allowed to continue to use differentiated testing limits by gender to reflect different pre-test probabilities of disease. For example, ischemic heart disease (IHD) is primarily a male disease during the main insurance purchasing years and the incidence is very low in pre-menopausal women. Testing for IHD is therefore far more effective in men than in women. Taking this factor into account can avoid unnecessary testing.</p>                                                                                                          |
| <b>Interpreting medical test results:</b> | <p>Medical reference values/prognoses might differ between men and women, and gender therefore needs to be taken into account when interpreting medical results, e.g.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| <b>Different reference values</b>         | <p>– haemoglobin is a common test used to detect anaemia. The normal ranges are not the same for men and women, which means that a man and a woman presenting the same absolute result are not in the same situation from a medical point of view. It is therefore normal that results are assessed on the basis of the different ranges for men and women.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                 |

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|-------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Different prognoses for the same disease</b> | <ul style="list-style-type: none"> <li>– elevated creatinine levels are an indication for kidney disease. The reference values are not the same between men and women, men having higher levels of creatinine because they have more skeletal muscle mass.</li> <li>– the prognostic value of hematuria (presence of blood cells in the urine) differs between men and women, because women might have false positive results from menstrual discharge.</li> <li>– screening for coronary heart disease (CHD) is mostly done by exercise tests. As young women have a much lower pre-test likelihood than men to have CHD, positive results have to be interpreted taking gender into account, because such tests done on young women would generate more false positive results than results indicative of a genuine disease.</li> <li>– the same disease can have a different outcome by gender. This is for example the case for Alport Syndrome, a hereditary form of kidney inflammation. Women with this disorder tend to have a normal life expectancy with their only symptom being hematuria while men are likely to experience deafness, visual disorders and kidney failure by the age of 50.</li> </ul> <p>Insurers are therefore allowed to differentiate their underwriting decision according to the gender-differentiated normal ranges advocated by the medical profession. Conditions or risk factors with impact on both sexes but which are associated with different severity or outcome may also continue to be differentiated during the underwriting process.</p> |
| <b>Physical differences</b>                     | <p>There are physical differences between men and women (for example in terms of skeletal muscle mass) which explain why the reference values, and therefore the cut-offs which are used to establish what is normal or abnormal, are not the same (see previous category). For example, men and women generally process alcohol differently and the safe alcohol consumption guidance is generally set by government on medical advice at different levels for the two genders. A particular level of consumption that is within the safe limit for one gender may be outside the safe limit and have a clinical risk for the other gender.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>Benefits</b>                                 | <p>Two persons diagnosed with the same illness will not necessarily receive the same treatment, because their gender might influence the treatment which is medically deemed the best for them. For example, some cancers (e.g. kidney cancer) can rely on hormones to grow and hormone treatment to inhibit cancer growth might be dependent on gender-specific hormones. They will therefore make different claims on their insurance policy to cover the medical treatment.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |