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Insurance Committee response to HM Treasury consultation on ECJ Judgment in Case 236/09 Test Achats

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of this topic has been prepared by the CLLS Insurance Committee.

RESPONSES TO QUESTIONS

1. We do not have any data which will assist with either of the two key areas identified. That said, the data set out in the impact statement appear credible and their sources are authoritative.

2. We agree that the scope of the regulations should be restricted to repealing paragraph 22 of Schedule 3 to the Equality Act 2010. That is all that is necessary to comply with Article 13(a) of the Directive (as defined below).

3. As the "Regulations" are restricted to a single repealing provision, it is inherently difficult to have any comments "in relation to" them. If we are to make one comment, we suggest that the mandatory effect of Article 5(1) of Directive 2004/113/EC ("the Directive"), that insurance premiums and benefits are to be identical regardless of sex, does not appear to admit of indirect discrimination, provided that the terms and conditions of a policy are regarded as an inextricable component of its benefits, and that they are applied without discrimination.

   If the premiums and benefits (including the conditions and their application) are the same, then the Directive holds that to be equal treatment and the Equality Act cannot do otherwise. If they are not equal, then there is direct discrimination. What can be foreseen is that particular conditions may impact differentially on the sexes, but so do identical

premiums and benefits. Article 13(b) of the directive requires Member States to ensure that contractual provisions contrary to the principle of equal treatment are declared null and void. But if identical treatment constitutes equal treatment, then differential impacts must be disregarded. There will also need to be identical application of the conditions, and insurers' underwriting processes will need to ensure that exclusions are applied identically and based on criteria which do not discriminate between the sexes.

4. We agree that no provision is needed in the Regulations, since it is, as identified in paragraph 1.14 of the consultation paper, not the use per se of gender as an actuarial factor that is prohibited but any resulting differentials in premiums and benefits.

5. It is perhaps unfortunate that the consultation was not timed to take account of the European Commission's guidelines published on 22 December 2011 ("the Guidelines"), in that there are overlapping issues that have emerged with conflicting positions or emphases, and the precise legal status of the Guidelines is unclear. Thankfully though, there is at least consensus that it is only "new contracts" on or after 21 December 2012 which must meet the requirement of Article 5(1) of the Directive, and retrospective application on that date has been discarded.

   The main area of divergence is over whether there should be a single EU-wide approach to what constitutes a new contract. Given that the Directive was not a harmonising one and that insurance contracts are still a matter of national laws, current disparities in such laws mean that, unless a single European insurance contract law is to be introduced "by the back door" by the Guidelines, there are bound to be differences of approach and result. Moreover, the parties' existing rights and obligations under contracts of insurance cannot simply be changed by the Guidelines. Indeed, it is questionable whether national law can itself modify those existing rights and obligations.

   In our view, the key criterion is this: is there an existing legally enforceable right to insurance and a corresponding obligation to insure, on terms which on their face are inconsistent with the Test Achats judgment? It does not matter how this is expressed, e.g. whether as an extension of the existing contract or as a right to a new one. If there is such a right, that right exists prior to 21 December 2012, then in principle it remains in force and unaffected by the judgment in Test Achats for so long as it remains exercisable. The insurer remains obliged to honour the right on the terms on which it was originally granted, even if those terms differentiated between the sexes, because the right was part of a contract coming into existence before 21 December 2012.

   The only caveat to the above is that insurers should not be encouraged to adopt artificial structures in contracts ahead of 21 December 2012, for example to grant enforceable

options to their policyholders to extend policies differentiating between the sexes when they would not have done so but for the Test Achats judgment.

In summary, we agree with the approach of applying paragraph 22 of Schedule 3 to the Equality Act 2010 to contracts concluded before 21 December 2012 and, by implication, rights granted under them. Were it sought to deal more comprehensively with the points outlined above, then paragraph 3 of the regulation could be expanded along the following lines:

"3. (1) Despite its omission by regulation 2, but subject to regulation 3(2), paragraph 22 of Schedule 3 to the Equality Act 2010 continues to apply to all legally enforceable rights and obligations contained in a contract concluded before 21 December 2012 whenever such rights and obligations arise and whenever such rights are exercised.

(2) The provisions of regulation 3(1) shall not apply to any rights and obligations contained in a contract concluded after [ ] 2012 but before 21 December 2012 to the extent that such rights and obligations have been included in such contract primarily to extend the application of paragraph 22 of Schedule 3 to the Equality Act 2010 to anything done under that contract beyond the last date to which that paragraph might otherwise reasonably have been expected to apply in relation to that contract."

6. We agree that no amendment is needed to paragraph 20 of Schedule 3 to the Equality Act 2010. The pricing of a group insurance scheme as a whole based on the aggregate of different prices for men and women does not offend the Directive provided that any price charged (directly or indirectly) to each man and woman in the group having the same qualities other than sex is identical.

THE CITY OF LONDON LAW SOCIETY
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