



OFMDFM Consultation on European Court of Justice ruling that insurance benefits and premiums should be gender –neutral

December 2012

Introduction

1. The Equality Commission for Northern Ireland has set out below its response to OFMDFM's consultation on the European Court of Justice ruling that insurance benefits and premiums should be gender –neutral.
2. Further details on the scope of the Equality Commission's remit, duties and expertise is contained in Annex 1.

Executive Summary

3. In summary, the Equality Commission:-
 - welcomes the steps proposed by the NI Executive in order to give effect to the European Court of Justice's (ECJ) decision in March 2011 in the *Test Achat* case;
 - considers that it is important, through discussions with the industry and key stakeholders, that robust data on the quantitative impacts of the judgement is collected and collated;
 - recommends that the scope of the draft regulations should be restricted to repealing Article 46 of the SDO 1976 in order to implement ECJ judgement;
 - considers that neither the ECJ judgement nor the Gender Directive require changes to be made to the definition of indirect discrimination within the SDO 1976. We recommend, as part of wider legislative

reform of the SDO 1976, that the range of inconsistencies within the legislation as regards the definition of indirect discrimination are addressed.

- considers that the EC guidance is helpful in clarifying the definition of a “new contract”;
- agrees that neither the collection of data on sex nor the use of sex for the purposes of assessing overall risk are prohibited by the Gender Directive or the SDO 1976. We therefore consider that no provision is needed in the regulations.
- regrets that there is a lack of clarity in relation to what comes under the remit of the Equal Treatment Directive (which relates to employment and vocational training) and the Gender Directive (which relates to goods and services outside the workplace). However, we recognise that not infrequently clarification by the courts is needed in order to establish boundaries between Directives.
- recommend that data on the use of equality factors (such as gender, sex, disability) in financial services is collected and collated by insurance providers in a more transparent, robust and easily understood manner.

Comments

4. In general, we welcome the steps proposed by the NI Executive in order to give effect to the decision of the European Court of Justice (ECJ) in March 2011 in the *Test Achat* case¹, and in particular, the proposal to repeal Article 46 of the Sex Discrimination (NI) Order 1976 (SDO 1976) with the effect that the exemption will not apply to contracts concluded after 21 December 2012.

¹Case236/09, 1 March 2011, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=80019&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=297026>

5. The Equality Commission has consistently taken the view that it opposed the inclusion of an exception in the sex equality legislation which allowed insurers to treat people differently on grounds of sex. It has also called for greater transparency and accountability within the insurance sector.²

Question 1

6. The consultation document seeks views on whether the assumed impacts set out in the impact assessment and the underlying assumptions are reasonable.
7. We note, as regards the impact of implementing the judgment, as set out in OFMDFM's Draft Regulatory Impact Assessment (RIA), that "although consumer impacts are considered to be adverse, quantitative calculations are based on very limited sources of data".
8. The Commission is of the view that it is important, through discussions with the industry and key stakeholders that robust data on the quantitative impacts of the judgement is collected and collated. This will also help inform the findings in the final equality impact assessment.
9. In terms of the impact of the exception, a report commissioned by the European Commission in 2010 on the use of age, disability, sex, religion or belief, race or ethnic origin and sexual orientation in financial services, has highlighted the significant degree to which gender is a risk factor used by insurers in the UK in a range of areas.³ For example, it is used in term life insurance and motor insurance.

² See *ECNI response to OFMDFM's Consultation on implementation of the Gender Directive*, September 2007, www.equalityni.org

³ *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 sectors 2009/10-UK* report, commissioned by the EC, . http://www.civic-consulting.de/project_42.html

10. The report also highlights that concerns had been raised about transparency within the financial services sector and notes that in the UK, 'currently it is almost impossible for a civil society organisation to challenge the practices of an insurer on the grounds of underlying data as the level of expertise required to debate the actuarial principles is too high (and therefore expensive).' In addition, cases in Great Britain have illustrated the impact of this exception under the sex equality legislation on individuals.

Question 2

11. OFMDFM has sought views on whether the scope of the draft regulations should be restricted to repealing Article 46 of the Sex Discrimination Order 1976.
12. The Commission is of the view that the scope of the draft regulations should be restricted to repealing Article 46 of the SDO 1976 in order to implement ECJ judgement.

Question 3

13. OFMDFM has sought comments in relation to the scope of indirect discrimination in the draft regulations in insurance and related financial services.
14. The European Commission (EC) Guidance has made it clear that the use of risk factors which correlate with gender remain possible as long as they are true risk factors in their own right. It is therefore, for example, likely to be lawful for insurance providers to take into account claims records (which may correlate with gender).
15. The Commission is of the view that neither the ECJ judgement nor the Gender Directive require changes to be made to the definition of indirect discrimination within the SDO 1976.
16. However, the Commission recommends, as part of wider legislative reform of the SDO 1976, that the range of inconsistencies within the legislation as regards the definition of indirect discrimination are addressed. These include areas outside the scope of the Gender Directive, such as marketing and advertising, which apply to financial

services. These inconsistencies have been already addressed in Great Britain through the Equality Act 2010.

Question 4

17. OFMDFM has sought comments on the definition of a “new contract” in the context of implementation of the ECJ judgement.
18. Whilst there is no definition of what constitutes a “new contract” within the Gender Directive, the Commission considers that the EC guidance is helpful in clarifying the definition of a “new contract”.⁴
19. We are of the view that this will help ensure a consistent approach to the implementation of the judgement across Member States. We note that domestic law relating to contracts in the United Kingdom is broadly in line with the EC interpretation.

Question 5

20. The Commission agrees that neither the collection of data on sex nor the use of sex for the purposes of assessing overall risk are prohibited by the Gender Directive or the SDO 1976. We therefore consider that no provision is needed in the regulations.
21. Clearly, insurance providers can still use sex as an actuarial factor as long as it does not result in individual differences in premiums and benefits between men and women. Insurance providers can, therefore, take relative proportions in terms of male and females into account in order to assess the overall risk of the pool.

Question 6

22. OFMDFM has sought views on the impact of the ECJ judgement on pensions and annuities.
23. It is clear that there is a lack of clarity in relation to what comes under the remit of the Equal Treatment Directive (which relates to

⁴ In line with the EC guidance, the consultation document states that “a renewal will almost certainly create a new contract, but a review of a contract on its terms is less likely to do so”.

employment and vocational training) and the Gender Directive (which relates to goods and services outside the workplace).

24. The Gender Directive only covers insurance and pensions which are private, voluntary and separate from employment or vocational training. In contrast, the Equal Treatment Directive covers occupational pensions; which are not therefore affected by the ECJ decision.
25. An issue in relation to which clarity is needed is the question as to whether some occupational pension schemes which provide for benefits/annuities are covered by the Gender Directive. The EC Guidelines has indicated that the Gender Directive applies to annuities purchased using funds in a work based pension scheme **where the employer is not involved.**
26. We note that the UK Government has indicated that it is not in a position to provide further clarity on the exact interaction between the two Directives in this area and states that this can only be clarified by the Courts.
27. It is regrettable that there is a lack of clarity in this area but we recognise that not infrequently, clarification by the courts is needed in order to establish boundaries between Directives.
28. Clearly, one consequence of the ECJ decision is that insurance benefits and premiums must be gender neutral if they relate to insurance and pensions which are private, and voluntary. Insurance benefits and premiums from work based pension schemes are not subject to the ECJ decision and therefore need not be gender neutral.
29. We welcome the fact that the UK Government has indicated that it will consider the impact of operating two different types of pension schemes and intends to monitor this impact before deciding whether further action is appropriate. It is important that this impact is also monitored effectively in Northern Ireland.

Question 7

30. As regards the draft EQIA, we note that OFMDFM has indicated that 'data regarding the effect on different insurance product lines is scarce' and that 'many of the factors are either incalculable or based on market-sensitive information'.
31. In the Commission's view, this emphasises the need for greater transparency as regards data collection within the insurance industry. Data currently published as regards the use of a number of equality factors in financial services (for example, age, gender and disability) is at too high a level and too complex; thus preventing individuals from understanding or challenging decisions relating to the premiums they are charged. The availability of this data would, if collected, have enabled the impact of OFMDFM's proposals on Section 75 grounds, not only on the ground of gender, but on other equality grounds, to have been more thoroughly assessed.
32. We recommend that data on the use of equality factors (such as gender, sex, disability) in financial services is collected and collated by insurance providers in a more transparent, robust and easily understood manner.
33. As highlighted above, we recommend, through further discussions with the industry and key stakeholders, that robust data on the quantitative impacts of the legislative change arising from the judgement is collected and collated.

**Equality Commission
5 December 2012**

Annex 1: The Equality Commission for Northern Ireland – Remit

1. The Equality Commission for Northern Ireland (the Commission) is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the legislation on fair employment, sex discrimination and equal pay, race relations, sexual orientation, disability and age.
2. The Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998 (Section 75) and to promote positive attitudes towards disabled people and encourage participation by disabled people in public life under the Disability Discrimination Act 1995.
3. The Commission's general duties include:
 - working towards the elimination of discrimination;
 - promoting equality of opportunity and encouraging good practice;
 - promoting positive / affirmative action
 - promoting good relations between people of different racial groups;
 - overseeing the implementation and effectiveness of the statutory duty on relevant public authorities;
 - keeping the legislation under review;
 - promoting good relations between people of different religious belief and / or political opinion.
4. The Commission, with the Northern Ireland Human Rights Commission, has been designated under the United Nations Convention on the rights of Persons with Disabilities (UNCRPD) as the independent mechanism tasked with promoting, protecting and monitoring implementation of UNCRPD in Northern Ireland.