

Update

European Commission's Test-Achats guidance muddies the waters

With insurers across Europe considering how they will change their pricing models following the ruling in Test-Achats last year, the European Commission's guidelines on the application of the ruling were eagerly anticipated.

Unfortunately, while the guidelines provide some helpful clarity, they also create significant confusion for UK insurers in one vital area.

The Test-Achats ruling means gender-neutral pricing must be adopted for all new insurance contracts from December 21, 2012. While what constitutes a "new contract" appears at first sight to be a straightforward concept, the position is not always clear: midterm changes and tacit renewals, for example, create particular difficulties. In this key area, understanding of which is essential for the practical application of the ruling, the commission position contradicts that taken by HM Treasury in its consultation paper.

The Treasury is of the view that what constitutes a new contract is a matter of national contract law. However, the commission considers it should be regarded as an "autonomous concept of European law". Does it matter which way the coin falls on this issue? The answer is unequivocally yes: national law and European law

may produce different answers to the same question. The commission's approach is designed to avoid differing interpretations based on national law by imposing an overriding set of rules.

Where a contract is concluded for the first time or renewed by agreement there is no conflict between the Treasury and the commission. However, tacit renewals are not considered by the commission to give rise to a new contract, where as English law would regard them as creating one. There is also a difference in how mid-term adjustments would be treated.

The commission believes amendments to existing contracts creates new contracts, except where the contract has set out predefined parameters for amendments. Under English law, some mid-term adjustments will constitute a new contract and others will not, depending on the contract wording and then the nature of the amendment.

The commission's guidance is helpful in clarifying insurers can continue to offer gender specific products, or options within products where conditions affect only or predominantly one gender (eg, breast cancer).

This is consistent with the position under the Equality Act 2010. It also acknowledges circumstances where an insurer will need to take account of gender in assessing risk factors because of physiological differences – for example, in the context of life and health underwriting, safe alcohol consumption is set at different levels for men and women because they process alcohol differently.

It is expected the Test-Achats ruling will result in higher premiums. However, the commission expects the industry to be innovative and offer attractive unisex products without unjustified price increases.

It is not yet clear whether the contradictory approaches of the commission and the Treasury will result in a tug of war between them; given the limited time before insurers have to apply gender neutral pricing, it is hoped the Treasury will provide clarification in its follow-up to its consultation to enable the industry to prepare for December 21 with some certainty as to the legal position.

However, if the contradiction remains, the question can only be definitively resolved by a further European Court of Justice ruling.

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Further information

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