

The Gender Equality Directive: adapting to the new rules

Philip Woolfson examines the Gender Equality Directive, adopted by the European Union in 2004, and its consequences for the European travel insurance sector

Background

The Gender Equality Directive, which the 27 member states of the EU must implement into their national laws by the end of this year, will be a major development in the equal treatment between men and women, an area which has been at the heart of the European Union (EU) since the Treaty of Rome was signed on 25 March 1957. Article 119 of the Treaty stated: "Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied".

In practice, this principle was not seriously applied until the famous Defrenne case in 1975, in which Gabrielle Defrenne sued the Belgian national airline, SABENA, for equal pay for her work as an air stewardess. The Brussels Labour Court referred two questions to the European Court of Justice for that court to provide an interpretative ruling. The two questions were whether, notwithstanding the absence of a national provision, Gabrielle Defrenne could institute proceedings before a national court by relying directly on Article 119 and, if so, to what date could her claim for equal pay be backdated?

The European Court confirmed that Gabrielle Defrenne could indeed rely directly on Article 119 to enforce her claim to equal pay. On the question of back pay however, the Court was sensitive to the risk of a flood of claims and accordingly held that the direct effect of Article 119 could only be relied on to support claims concerning future pay periods.

Equal Treatment

The Defrenne case was a watershed and, since 1975, the EU has enacted a raft of measures to apply the principle of equal treatment of men and women. Firstly, the Treaty of Rome has evolved into the treaty establishing the European Union (known as the Maastricht Treaty), Article 6 of which declares that the Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedom and the rule of law.

Central to these principles is a right to equality before the law and protection against discrimination. Furthermore, equality between men and women is a fundamental principle of the European Union – Articles 21 and 23 of the Charter of Fundamental Rights prohibit any discrimination on grounds of sex and require equality between men and women to be ensured in all areas.

In order to give effect to this principle, the European institutions 'may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation' (Article 13 of the Treaty establishing the European Community, this article is the legal basis for the Gender Equality Directive).

In the light of these principles common to all member states, the EU has enacted legislation in a number of fields:

- equal treatment in employment and occupation, including equal pay and occupational social security
- pregnant workers and parental leave, including

of the Directive. For example, Recital (15) states that 'the Directive should apply only to insurance and pensions which are private, voluntary and separate from the employment relationship'. This raises the intriguing question of whether travel insurance which is part of a contract of employment, for example a corporate group policy (of which membership may be voluntary or mandatory), comes within the scope of the Directive.

The Directive sets out minimum requirements to achieve its purpose. In other words, as stated in Article 7, member states 'may introduce or maintain provisions which are more favourable to

including less favourable treatment of women for reasons of pregnancy and maternity, is prohibited. The Directive provides limited examples of such prohibitions (for example, sexual harassment). This prohibition is, however, also tempered by the 'legitimate aim' exception noted above. For the insurance sector, the key provision of the Directive – which was only inserted after intensive lobbying by the sector in 2004 – is Article 5 ('Actuarial factors'):

"1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of

premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.

2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences to 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. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.

3. In any event, costs related to pregnancy and maternity leave

shall not result in differences in individuals' premiums and benefits.

Member States may defer implementation of the measure required to comply with this paragraph until two years after 21 December 2007 at the latest. In that case, Member States concerned shall immediately inform the Commission."

The remaining provisions of the Directive address:

- remedies and enforcement, for example ensuring judicial or administrative procedures (or both) are available to enforce obligations under the Directive
- putting the burden of proof in civil proceedings on the respondent (for example, an insurer) to prove that there has been no breach of the principle of equal treatment
- bodies for the promotion of equal treatment
- final provisions, covering amendment of existing laws, introduction of penalties, etc. These final provisions also require the Commission to draw up a report on Article 5 and for Member States to implement the Directive into national law by 21 December 2007.



health and safety of pregnant workers, maternity leave, parental leave of men and women workers and protection of employment rights

- equal treatment in statutory social security, including state sickness insurance schemes for workers and state old-age pensions for workers
- equal treatment of self-employed persons and assisting spouses, including protection of self-employed workers and spouses participating in their activities
- the Gender Equality Directive itself.

Gender Equality Directive & travel insurance

Whilst Gabrielle Defrenne and numerous litigants since the 1970s have relied on the principle of equal pay in the workplace, the Gender Equality Directive is not restricted to the workplace. It is more extensive since its purpose is to 'lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the member states the principle of equal treatment between men and women'.

Though no definition of goods or services is provided, insurance is undoubtedly a service within the meaning

of the protection of the principle of equal treatment between men and women than those laid down in this Directive' – but stricter minimum requirements would still have to comply with general Community law principles of non-discrimination (on grounds of nationality) and proportionality.

There are two types of sex discrimination prohibited by the Directive:

- direct discrimination, where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation
- indirect discrimination, where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim (such as protection of victims of sex related violence, or organisation of sporting activities – not, however, insurance related aims), and the means of achieving that aim are appropriate and necessary. As a result, the Directive provides that the principle of equal treatment between men and women means that direct and indirect discrimination based on sex,

Dealing with Article 5 ('Actuarial factors')

As noted above, Article 5 is the key provision: with effect from 21 December 2007, insurers will no longer be able to use sex as a factor in the calculation of premiums or benefits or, if they do use it, it must not result in differences in individuals' premiums and benefits. Contracts must be 'unisex'.

At first sight, this means, for example, that: (i) because women are more careful drivers, they will lose the benefit of lower premiums than those applied to the more dangerous male sex; (ii) because men do not live as long as women, they will lose the benefit of higher annuities, since their premiums will have to be used to fund annuities for female annuitants.

When the Directive was drawn up, it was, however, recognised that an immediate prohibition would provoke a 'sudden readjustment of the market', hence the restriction of the rule to contracts concluded after 21 December 2007.

Furthermore, Article 5 does provide for a five-year 'opt out'. Specifically, member states may allow insurers to continue to apply 'proportional differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risks'. If a member state allows this, the 'proportionate differences' must be based on 'relevant and accurate actuarial and statistical data'. In addition, accurate data must be compiled, published and regularly updated.

This opt-out is limited to five years because, by the end of that period, i.e. by 21 December 2012, the member state must review its decision and report to the Commission on it. Insurers therefore enjoy a reprieve, but at a price: firstly, the insurer must be established (i.e. incorporated and authorised) in a state which has decided to allow continuation of proportionate differences where use of sex is a determining factor; secondly, the insurer will need to be able to provide accurate actuarial and statistical data to justify the differences (for example, in



Lastly, paragraph 3 of Article 5 prohibits different premiums and benefits due to costs related to pregnancy and maternity. Recital (20) of the Directive explains the extent of this: "Costs related to risks of pregnancy and maternity should ... not be attributed to the members of one sex only." This means that insurers will have to 'mutualise' these costs (in, for example, travel or medical insurance) without differentiating between the sexes.

Reprieve

The reprieve granted by Article 5 is somewhat confusing, but can be represented in linear form, as seen below in the Timeline (Articles 5 (Actuarial factors), 16 (Reports) and 17 (Transposition))

The timeline is not the sole issue arising out of implementation into national law. Firstly, where member states have opted out for five years, they must implement the provisions on data compilation and publication. This could be costly and, in the event of inadequate implementation, could trigger legal challenge. A pragmatic solution is to authorise the insurance sector to compile the data and to ensure its publication in accordance with regulatory guidelines, thereby promoting its 'legibility' by a layman and also ensuring that competing insurers from other jurisdictions can obtain easy access to it (this solution is under discussion in the UK, for example).

Collective collation of data must, however, also comply with competition rules: there is a fine line between sharing of data to secure a social objective (lawful) and price-fixing (unlawful).

Secondly, it is a characteristic of the travel insurance sector (at least in some member states) that cover

is excluded for travellers who are pregnant beyond, generally, 28 weeks. Exclusion of cover means exclusion of benefits and is on first impression, therefore, a breach of the prohibition of 'direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity' (Article 4.1a). However, as noted above, a breach can be justified by a 'legitimate aim' and, in this case, it is at least arguable that the exclusion of cover reflects a legitimate aim of ensuring the safety of the mother and the baby. The exclusion might still be open to challenge if it were absolute, so insurers could consider waiving it on production of a doctor's certificate (or two certificates to avoid 'certificates of convenience'). Insurers should also ensure that their practices reflect the approach taken in other parts of the travel industry, for example airlines and that, more generally, they monitor closely case law developments in 'health tourism' – see, for example, the recent Watts case before the European Court (Case C-372/04, 16 May 2006). Thirdly, the minimalist approach of the Directive could give rise to regulatory and product 'arbitrage': by way of example, an insurer based in one state (the 'home' state) which allows proportionate differences and, consequently, different (lower) tariffs might try to market its products in another state (the 'host' state) which has opted for an immediate, uniform regime. Could the insurer market lawfully? The better view is that, subject to review of the exact terms for the policy, the host state could, in the name of 'general good', validly enforce its prohibition against the foreign insurer. At

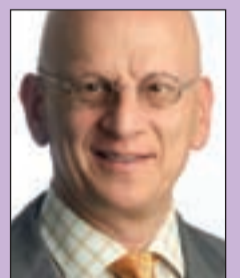
the time of adoption of the Directive, the French government filed a declaration that 'the legislation applicable in relation to parity in premiums and

benefits for men and women must be the same for all insurance companies operating in a given Member State, regardless of their country of origin'. Lastly, insurers and their trading partners should consider the effects of the Directive on their reinsurance contracts, in particular in the absence of any 'opt-out', and, consequently, the 'sudden readjustment' noted above. Insurers need, for example, to ensure that their reinsurance programmes reflect any new (probably, higher) pricing structures and that their distribution networks – including persons holding delegated underwriting authority – are aware of the new provisions.

Conclusion

The Directive is the result of a trend in Europe stretching back many decades. Its adoption was difficult and the reprieve for the insurance sector described above is limited, temporary and conditional. Now that the implementation deadline is approaching, insurers ignore the Directive at their peril – not just before the courts in the event of legal challenge, but also, crucially, for their reputation. Insurers can, instead, burnish their reputation by openly and fully complying with the Directive.

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the event of a challenge before the courts); thirdly, the insurer will have to participate in a scheme ensuring compilation, publication and regular updating of data; and, lastly, the insurer will have to lobby hard over the next five years to ensure continuation of proportionate differences after 2012.

Many member states, including Belgium and Germany, may conclude that this opt-out is simply not justifiable and that unisex must prevail from day one; many insurers might reach the same conclusion or already be subject to unisex rules in any event, as is the case in France.

Timeline (Articles 5 (Actuarial factors), 16 (Reports) and 17 (Transposition)):

