

## FRENCH INSURANCE LAW BRIEFING



April 2008

## Implementation of the Gender Equality Directive into French insurance law

### Background

The Gender Equality Directive, adopted in 2004, includes provisions of vital importance to the insurance sector.

The deadline for implementation into the national laws of the Member States was 21 December 2007. France has implemented through Law N° 2007-1774 of 17 December 2007 and various ministerial orders, which set out how the prohibition of discrimination is dis-applied for specified classes of insurance.

This briefing describes the principal provisions of the implementing texts as they affect the insurance sector.

### The Gender Equality Directive and actuarial factors

For the insurance sector, the key provision of the Gender Equality Directive<sup>1</sup> 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

<sup>1</sup> 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, OJEC L 373 of 21 December 2004, page 37 (the “Directive”).

*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 measures 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.*

.....”

For present purposes, the key provision is the option to permit “proportionate differences” in premiums and benefits for up to five years after 21 December 2007.

### **Implementation into French law – legislative amendment**

Law N° 2007-1774 of 17 December 2007 regarding various provisions to be adopted to conform to Community law in the economic and financial sectors (the “Law”) implements the insurance-specific provisions of Article 5 of the Directive as set out above.

The Law introduces a new Article into the Insurance Code, Article L 111-7, prohibiting any direct and indirect discrimination based on gender in the calculation of premiums and benefits. The Article also provides that costs related to pregnancy and maternity shall not result in differences in premiums and benefits.

Notwithstanding this general prohibition, Article L 111-7 further provides that ministerial orders (*arrêtés*) may allow differences in premiums and benefits where the use of sex is a determining factor in the assessment of risks based on relevant and accurate actuarial and statistical data. Ministerial orders may also set out how specified authorities must compile or catalogue the data as submitted to them. The data must be regularly updated and published as prescribed by these ministerial orders at the latest on the date of their entry into force.

With regard to actuarial and statistical data for risks related to the length of human life, these may be set out in approved tables. Subsequent orders will regularly update the tables.

Article L 111-7 does not, however, apply to certain group contracts, as statutorily defined<sup>2</sup> and to related transactions<sup>3</sup>.

Subject to the above exceptions, Article L 111-7 applies to contracts, on an individual or group basis, entered into from 21 December 2007.

### **Implementation into French law – ministerial orders**

In addition to setting out requirements for compilation and publication of data, these orders also authorise proportionate differences in premiums and benefits in the following classes:

- Accidents (including industrial injury and occupational diseases);
- Sickness;
- Land vehicles (other than railway rolling stock) and motor vehicle liability; and
- Certain insurances of the person (life-death, unit-linked, etc.).

These orders entered into force on 21 December 2007. The annex to this briefing provides a translation of the operative parts of these orders.

### **Commentary on the implementing texts**

The implementing texts form part of a general effort to address various forms of discrimination and so reflect broader social policies within the European Union and, in particular, France. The provisions for the insurance sector are therefore an exception whose permanent status cannot be assumed. Although the implementing texts

<sup>2</sup> Article L 911-1, Social Security Code, i.e. occupational schemes set up through collective bargaining, referendum or unilateral decision by the employer.

<sup>3</sup> Article L 322-2-2, Insurance Code, i.e. ancillary activities of “restricted importance” having regard to all the activities of the undertaking.

make no mention of this, insurers need to remember that the Directive requires review of its provisions within five years. Insurers could face a repeat performance of the arguments they had to put forward in 2004 in order to secure the differences in treatment permitted under Article 5 of the Directive.

Meantime, however, the French texts grant broad authorisations covering key classes, both in non-life and life: by doing so, they recognise that women enjoy longer life expectancy and a reduced risk of sickness and that younger women drivers are less prone to serious motor accidents. That said, note also that the implementing texts do not apply to the mutual sector<sup>4</sup>, to certain categories of group contract<sup>5</sup> or to providential institutions<sup>6</sup>.

In addition, these authorisations should not induce complacency. The wording of each is precise, i.e. differences are authorised, “*provided the data so justifies*”. This is a strict application of the “determining factor” test set out in the legislative provision, Article L 111-7. “Determining factor” is not defined, but can be interpreted as a factor without which the insurer would not be willing to cover the risk. If an insurer relies on sex as a determining factor, it will need objective and comprehensive data to hand to demonstrate that it would not have granted coverage at all if it had to apply a unisex rate. Individual consumers – or, more probably, consumer associations – will be vigilant to ensure that insurers are able to justify such proportionate differences. Insurers in turn need to note that, even if “class actions” are not (yet) possible in France, consumer associations enjoy access to the courts and are formidable guardians of the consumer interest<sup>7</sup>.

<sup>4</sup> Article L 112-1, Mutuality Code.

<sup>5</sup> See footnote 2 above.

<sup>6</sup> A bill is currently under discussion to extend the Article 5 prohibition of the Directive to the mutual and providential sectors.

<sup>7</sup> Articles L 421-1 ff, Consumer Code.

Lastly, the orders set out a precise list of French and European sources for actuarial and statistical data. Including European as well as French sources shows some awareness of the *communautaire* aspects of the exercise; the orders do not, however, explicitly recognise any Community law right of a foreign (EU) insurer operating on the French market on a cross-border basis to use equivalent data drawn from sources in its home State<sup>8</sup>.

### Conclusion

French implementation of Directives often addresses legislative aspects adequately, but then delays issuing ministerial orders. In fact, for implementation of Article 5 of the Directive, the French legislator has adopted timely and accessible rules – at least for non-mutual insurers. This is explained not by an enthusiasm for matters European, but by the rule in the Directive that exceptions had to be implemented by 21 December 2007 (i.e. “use it or lose it”).

Furthermore, despite experience already with unisex rates, the legislator has implemented in a favourable manner for the insurance sector, in that both non-life and life classes have been authorised to apply proportionate differences based on sex. As the Parliamentary reports underline, the implementing texts maintain the pre-Directive *status quo* and consolidate existing differences rather than introduce any new ones.

Lastly, the five-year review in the Directive emphasises that the sector has secured a reprieve, not an entrenched opt-out.

<sup>8</sup> E.g. the relevant order for life insurance only refers to French mortality tables.

Annex: Ministerial order regarding actuarial and statistical data

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“Article 1 – *[inserts the following text in the Insurance Code]*:

‘Art. A. 111-1 – The professional organisations referred to in Article L. 111-7<sup>9</sup> compile relevant and accurate actuarial and statistical data covering the insurance risks in question. These organisations may also catalogue data published by other organisations, in particular the *Institut de recherche et de documentation en économie de la santé* or the *direction de la recherche, des études, de l’évaluation et des statistiques* or the *organismes d’assurance maladie obligatoire* or the *Institut des données de santé* or the *Institut national de la statistique et des études économiques* or the *Institut de veille sanitaire* or the Statistical Office of the European Communities or the Organisation for Economic Cooperation and Development.

These actuarial statistical data are provided by the professional organisations by recorded delivery letter with acknowledgement of receipt slip requested addressed to the Minister for the Economy and the Minister for Social Security.

If the data have already been published, the ministerial orders authorising differences in premiums and benefits based on sex may refer to such publication, failing which the data are annexed to these authorisation orders or published on the internet site of the Minister for the Economy.’

Art. 2 – The professional organisations review the data referred to in Article 1 one year following entry into force of this order and every two years thereafter and provide updated data by recorded delivery letter with acknowledgement of receipt slip requested to the Minister for the Economy and the Minister for Social Security.

...”

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<sup>9</sup> Article L 111-7 refers to a further Article in the Insurance Code which specifies the organisations in question: the *Fédération Française des Sociétés d’Assurances*; the *Groupement des Entreprises Mutuelles d’Assurances*; and the *Centre Technique des Institutions de Prévoyance*.

Annex: Ministerial order authorising differences in premiums and benefits based on sex for class 1 business.

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“Article 1 – *[inserts the following text in the Insurance Code]*:

‘Art. A 111-2 – Provided the data referred to in Article L 111-7 so justifies, the use of sex may result in proportionate differences in premiums and benefits for the risks under insurance classed by reference to Article R 321-1, in class 1 “accidents (including industrial injury and occupational diseases)”’.

For class 1, the data referred to in Article L 111-7 are public data from the *Institut de recherché et de documentation en économie de la santé*, the *direction de la recherche, des études, de l’évaluation et des statistiques*, the *Institut national de la statistique et des études économiques* and the *Institut national d’études démographiques*, and also data compiled by the professional organisations referred to in Article L 132-9-2<sup>10</sup> of the Insurance Code on the basis of insured populations and published on the internet site of the Minister for the Economy.’

...”

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<sup>10</sup> i.e. the *Fédération Française des Sociétés d’Assurances*, the *Groupement des Entreprises Mutuelles d’Assurances* and the *Centre Technique des Institutions de Prévoyance*.

Annex: Ministerial order authorising differences in premiums and benefits based on sex for class 2 business.

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“Article 1 – *[inserts the following text in the Insurance Code]*:

‘Art. A 111-3 – Provided the data referred to in Article L 111-7 so justifies, the use of sex may result in proportionate differences in premiums and benefits for the risks under insurance classed by reference to Article R 321-1, in class 2 “sickness”.

For class 2, the data referred to in Article L 111-7 are public data from the *Institut de recherché et de documentation en économie de la santé*, the *direction de la recherche, des études, de l’évaluation et des statistiques*, the *Institut national de la statistique et des études économiques* and the *Institut national d’études démographiques*, and also data compiled by the professional organisations referred to in Article L 132-9-2<sup>11</sup> of the Insurance Code on the basis of insured populations and published on the internet site of the Minister for the Economy.’

...”

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<sup>11</sup> i.e. the *Fédération Française des Sociétés d’Assurances*, the *Groupement des Entreprises Mutuelles d’Assurances* and the *Centre Technique des Institutions de Prévoyance*.

Annex: Ministerial order authorising differences in premiums and benefits based on sex for classes 3 and 10 business.

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“Article 1 – *[inserts the following text in the Insurance Code]*:

‘Art. A 111-4 – Provided the data referred to in Article L 111-7 so justifies, the use of sex may result in proportionate differences in premiums and benefits for the risks under insurance classed by reference to Article R 321-1, in the following classes:

- 3 Land vehicles (other than railway rolling stock);
- 10 Motor vehicle liability.

For classes 3 and 10, the data referred to in Article L 111-7 are public data from the professional organisations referred to in Article L 132-9-2<sup>12</sup> of the Insurance Code on the basis of insured populations and published on the internet site of the Minister for the Economy.’

...”

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<sup>12</sup> i.e. the *Fédération Française des Sociétés d’Assurances*, the *Groupement des Entreprises Mutuelles d’Assurances* and the *Centre Technique des Institutions de Prévoyance*.

Annex: Ministerial order authorising differences in premiums and benefits based on sex for classes 20, 22, 23 and 26 business.

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“Article 1 – *[inserts the following text in the Insurance Code]*:

‘Art. A 111-5 - Provided the data referred to in Article L 111-7 so justifies, the use of sex may result in proportionate differences in premiums and benefits for the risks under insurance classed by reference to Article R 321-1, in the following classes:

- 20 Life-death;
- 22 Insurances linked to investment funds;
- 23 Tontines;
- 26 Any group operation as defined in Book IV, Title IV, Chapter I, Section I [of the Insurance Code, i.e. certain retirement operations].

For classes 20, 22, 23 and 26, the data referred to in Article L 111-7 are approved mortality tables annexed to Article A 335-1 of the Insurance Code.’

...”

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