

**UK RESPONSE TO THE 1 MARCH EUROPEAN COURT OF JUSTICE RULING
THAT INSURANCE BENEFITS AND PREMIUMS AFTER 21 DECEMBER 2012
SHOULD BE GENDER NEUTRAL**

COMMENTS OF SACKER & PARTNERS LLP

A Introduction

The purpose of this document is to set out our comments on HM Treasury's [consultation](#)¹ on the UK response to the 1 March European Court of Justice (ECJ) ruling that insurance benefits and premiums after 21 December 2012 should be gender neutral.

Sackers is a firm of solicitors specialising in pensions law. We act for in excess of 800 pension schemes, including household names and a number of FTSE-100 clients. The views expressed in Sackers' response to this consultation have been collated following discussions with a sub-group of the firm's solicitors.

B Background

On 1 March 2011, in the *Test-Achats*² case, the ECJ ruled that, with effect from 21 December 2012, an exemption in a European Directive³ (the "Gender Directive") which permits insurers to use sex as a determining factor in their assessment of risk where it is based on "relevant and accurate actuarial and statistical data", will no longer be valid. The Treasury's consultation seeks views on the Government's legal interpretation of the judgment and the accompanying draft regulations that will amend the Equality Act 2010.

As we act for trustees and employers of occupational pension schemes, we have focused on the issues relevant to our practice and have not sought to answer every question in the consultation.

C General Comment

The Treasury's consultation proposes a narrow interpretation of the *Test-Achats* decision in the UK, in that it should only apply to new contracts for insurance and related financial services entered into on or after 21 December 2012. We agree with this approach.

¹ Published on 8 December 2011

² [Association belge des Consommateurs Test-Achats ASBL](#) (Case C-236/09)

³ Council Directive 2004/113/EC which implements the principle of equal treatment between men and women in the access to and supply of goods and services

D Consultation questions

Question 1:

As part of this consultation process, the Government would welcome views on whether the impacts set out in the impact assessment, and the underlying assumptions, are reasonable. The Government would welcome any data that would help us get a better understanding of whether our assumed market impact is correct. We are, in particular, seeking data on two key areas:

- a) the number of term life policyholders and annuitants, and the gender mix, to allow extrapolation to estimated aggregate impact; and**
- b) industry implementation costs.**

(i) Effect on annuity purchase

Due to legislative requirements in the UK, the majority of pension savers will ultimately purchase an annuity. This situation is unlikely to change as a result of the *Test-Achats* ruling or the current consultation. In practice, we expect annuity purchase to become more common, as the occupational pensions market continues to shift from defined benefit (DB) to defined contribution.

The consultation acknowledges that any impact as a result of adverse selection⁴ is likely to fall on the consumer. Any rise in annuity premiums resulting from adverse selection may lead to lower pensions and, ultimately, more individuals needing to rely on the state for financial support during their retirement.

(ii) Use of the open market option may decline

Contrary to the current efforts of the Government and the pensions industry to encourage use of the open market option, individuals may be discouraged from doing so if the application of fewer variables in annuity pricing leads to more standardised pricing between insurers, with less incentive for competition in the market.

There is a risk that more people with small pots will find themselves unable to purchase an annuity on the open market. If the effect of this is that employers find themselves called upon more frequently to provide annuities via a workplace pension scheme, this could result in the greater use of contract-based schemes rather than trust-based arrangements, ultimately leading to loss of control and flexibility for employers and their workforces.

⁴ In the consultation, this concept is expressed in the following way: "whereby the overall risk profile of an insurer's book becomes more risky as higher-risk individuals are incentivised to buy cover and lower-risk individuals depart the market or reduce their level of cover"

(iii) *Effect on DB pension arrangements*

For occupational DB pension schemes, the ban on the use of gender as a risk factor in the pricing of individual insurance policies may, in our view, lead to an increase in the cost of buying out members' benefits with insurance policies. As a result, employers looking to de-risk by means of a buy-out or buy-in, or those seeking to wind-up, may find themselves unable to do so, while others may be discouraged by the higher costs. Employers may also be adversely affected in circumstances where contributions by reference to buy-out costs are compulsory (for example, on winding-up or where debts under section 75 of the Pensions Act 1995 need to be met).

Question 2:

Do you agree that the scope of the regulations should be restricted to repealing paragraph 22 of Schedule 3 to the Equality Act?

We consider the Government's proposed approach to be in line with both the *Test-Achats* decision and the European Commission's [guidelines](#).⁵

Our reading of the *Test-Achats* judgment is that it only applies to contracts for insurance or related financial services which are subject to the Gender Directive and not the Equal Treatment Directive.⁶ This view is supported by the Commission's guidelines, which draw a clear distinction between the equality provisions applicable to insurance and related contracts and those which govern sex equality in pension schemes (linked to employment and occupation) which are subject to the Equal Treatment Directive.

In the UK, under the Equality Act 2010 (and the Equality Act 2010 (Sex Equality Rule) (Exceptions) Regulations 2010) occupational pension schemes are permitted to use sex-based actuarial factors to determine, for example, funding requirements, transfer values and commutation.

Question 5:

Do you have any comments on the definition of a new contract in the context of implementation of the Test Achats judgement?

Draft regulation 3 makes reference to "a contact concluded before 21st December 2012" (our emphasis). We understand that the intention is to refer to insurance contracts which have been entered into before this date, rather than contracts which have come to an end by that

⁵ Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (*Test-Achats*)

⁶ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

time. However, the phraseology is ambiguous and we suggest that draft regulation 3 is amended to make the intention clear.

Question 6:

Do you agree that no amendment is needed to paragraph 20 of Schedule 3 to the Equality Act 2010 as a result of the Test Achats judgment?

We refer to our comments in relation to Question 2, above.

**Sacker & Partners LLP
29 February 2012**