



## Forum on the implementation of Article 5 of Directive 2004/113/EC

### JOINT ANSWER TO THE QUESTIONNAIRE PREPARED BY AGE – THE EUROPEAN OLDER PEOPLE'S PLATFORM, TEST-ACHATS AND THE EUROPEAN WOMEN'S LOBBY

*Directive 2004/113 lays down a framework for combating discrimination based on sex in the access to and supply of goods and services. Broadly speaking, the groups protected by the principle of non-discrimination on grounds of sex in this Directive are men, women, pregnant women, women in their maternity and transsexual people. Article 5 of the Directive, however, provides a limited exception in respect of the use of sex as a factor in the calculation of premiums and benefits in insurance and related financial services.*

### Contact details of Forum members

#### **AGE – the European Older People's Platform**

Title: Ms

SURNAME/First name: PARENT, Anne-Sophie

Position: Director

Representing: AGE

Address: Rue Froissart 111

Email: [annesophie.parent@age-platform.org](mailto:annesophie.parent@age-platform.org); [rachel.buchanan@age-platform.org](mailto:rachel.buchanan@age-platform.org)

Telephone (including country code): 00 32 2 280 1470

Fax (including country code): 00 32 2 280 15 22

#### **Test-Achats/ Test-Aankoop**

Title: Monsieur

SURNAME/First name: Jean-Paul Coteur

Position: coordinator for insurance matters

Representing: Test-Achats, consumer organization

Address: 13, rue de Hollande 1060 Bruxelles

Email: [jpcoteur@test-achats.be](mailto:jpcoteur@test-achats.be)

Telephone (including country code): + 32 2.542.32.47

Fax (including country code): idem

## **European Women's Lobby**

Title: Ms

SURNAME/First name: Myria Vassiliadou

Position: Secretary General

Representing: European Women's Lobby (EWL)

Address: 18, rue Hydraulique, B-1210 Brussels

Email: [ewl@womenlobby.org](mailto:ewl@womenlobby.org)

Telephone (including country code): +32 2 217 90 20

Fax (including country code): +32 2 219 84 51

## **Questionnaire**

### **Introduction**

AGE – the European Older People's Platform, Test-Achats/Test-Aankoop and the European Women's Lobby (EWL) are submitting a common answer to the questionnaire on the implementation of Article 5 of Directive 2004/113. AGE, Test-Achats/Test-Aankoop and the EWL have prepared this follow up to their common actions taken when the goods and services directive was adopted. At that time, we repeatedly argued in favour of a strong text that prohibits, without exception, discrimination between women and men for services that are sometimes compulsory and that are vital to achieve gender equality and help to achieve the full integration of all women into society on an equal footing i.e. insurance and financial services and products.

AGE, Test-Achats/Test-Aankoop and the EWL would like to stress that the review of Article 5 is a timely and unique opportunity to put an end to the exception to the right to equal treatment between women and men that was introduced in paragraph 3 of this Article.

From a legal point of view, a number of arguments stated in our contribution explain why the exception to the principle of equality provided for in Article 5(2) should be abandoned in the future. In the same way, the very recent referral to the European Court of Justice by the Belgian Constitutional Court<sup>1</sup> about Article 5(3) questioning the compliance of this Article with Article 6(2) of the EU Treaty shows that this Article raises serious questions as to its

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<sup>1</sup> Case n° 103/2009, 18.06.2009 Test Achats v Belgian State

compatibility with the principles of equality and non discrimination between women and men in the European legal framework.

From a practical and political point of view, we stress that affordable insurance products are equally important for both women and men. Firstly because some of them are mandatory for large segments of the population (i.e. car insurance or mortgage insurance) but more importantly because there is general trend to re-individualise some risks which used to be covered by the social security schemes or the welfare state and citizens need complementary healthcare insurance and private pensions schemes to be protected against these life risks. Insurance companies should therefore not be allowed to violate women's fundamental rights to equality when offering such basic products and to use technical argumentation about actuarial issues to dismiss their legal obligations with regard to human rights.

## 1. *Priorities*

**a) In your view, which 3 aspects of Article 5 of Directive 2004/113 should the Forum focus on? Please tick the relevant boxes.**

- |  |  |
|--|--|
| <input checked="" type="checkbox"/> Definitions                    | <input checked="" type="checkbox"/> Publication duties         |
| <input type="checkbox"/> Costs relating to pregnancy and maternity | <input checked="" type="checkbox"/> The need for the exception |
| <input type="checkbox"/> Best practice sharing                     | <input type="checkbox"/> Other – please specify                |

## 2. *Products*

**a) Please add to the list below any insurance and related financial products for which sex is used as a determining factor in the assessment of risk, and so potentially covered by the Directive:**

- |                         |   |
|-------------------------|---|
| b) i) Motor insurance   | iv) 2 <sup>nd</sup> and 3 <sup>rd</sup> pillar pensions in some countries                     |
| c) ii) Health insurance | v) Travel insurance in some countries   |
| iii) Life insurance     | vi) Complementary health insurance and medical insurance (critical illness) in some countries |

We also would like to stress that in most countries, insurance is unavailable for people with a disability and that this very much affects women with a disability who usually have a lower income than men (including men with disability).

**d) i) Are you aware of situations where the products mentioned in question 2a) are offered on an equal basis to both men and women (in terms of premiums, coverage or both)?**

Yes, here are a few examples:

- Motor and complementary health insurance and travel insurance in few countries,
- Motor insurance, property insurance, tax-financed health and dentist insurance in several countries

- Group insurance in France – the average price is based on the ratio of women / men but everyone pays the same averaged premium

However, the majority of respondents among our members indicated that women – and especially older women - are charged higher premiums in complementary health insurance, pension insurance and travel insurance which include a healthcare component.

**ii) What has been the impact of providing these products on a unisex basis on the industry and on consumers? (For example, it is sometimes argued that unisex products result in a noticeable increase in premiums for all consumers, irrespective of their sex. Has this been your experience?)**

No, it doesn't seem to affect the premiums. We would welcome a clear demonstration by the insurance industry, with verifiable data, that this would increase the cost for all consumers.

In Belgium, for example, the introduction of unisex tariffs through the implementation of the Directive was accompanied by a rise in premiums for health insurance. This was because some insurance companies which faced significant losses used this opportunity to raise premiums. For car insurance (third party liability) where there are also unisex premiums the tariffs are now more-or-less half way from before the Belgian law of 21.12.2007.

### **Article 5(2) exception**

**a) In your view, what key issues should be considered when assessing:**

- **Whether sex is a determining factor in risk assessment?**

At the time of the adoption of the Directive in 2004, AGE, Test-Achats/Test-Aankoop and the European Women's Lobby repeatedly took a common position against discrimination based on sex for insurance and financial products which reinforces the already weaker economic position of women especially when they reach old age. AGE, Test-Achats/Test-Aankoop and the EWL believe that Article 5(2) is in contradiction with the principle of equal treatment between women and men as defined by European legislation.

We feel in particular, that the use of sex as a basis for the calculation of premiums should be forbidden - just like the use of race - since these factors are beyond the control of the individual concerned. Research has shown that there are significant differences in life expectancy between race groups (for example, up to 7 years between white males and black males)<sup>2</sup>. Would policy makers find it acceptable to allow insurance companies to apply differences of treatment to people of different races in occupational pension plans? Why then should they allow such differences on the ground of gender?

A feature observed for a group of people because of their sex, race or skin colour cannot justify differences in treatment between these individuals based solely on belonging to such a group. As was rightly observed by the Advocate General Jacobs in his Opinion of 27 October 2005 preceding the *Lindorfer* case of 11 September 2007: *"In order to see such discrimination in perspective, it may be helpful to imagine a situation in which (as is perfectly plausible) statistics might show that members of one ethnic group lived on average longer than those of another. To take those differences into account when determining the*

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[http://books.google.be/books?id=RdeZTn99zbgC&pg=PA18&lpg=PA18&dq=differences+life+expectancy+black+minorities&source=bl&ots=\\_hKYe59P8z&sig=JmPgEJsxnPDTFIZ1Ad-PWYYIBww&hl=fr&ei=VBZKSruJIYyNjAe8hbmQCQ&sa=X&oi=book\\_result&ct=result&resnum=4](http://books.google.be/books?id=RdeZTn99zbgC&pg=PA18&lpg=PA18&dq=differences+life+expectancy+black+minorities&source=bl&ots=_hKYe59P8z&sig=JmPgEJsxnPDTFIZ1Ad-PWYYIBww&hl=fr&ei=VBZKSruJIYyNjAe8hbmQCQ&sa=X&oi=book_result&ct=result&resnum=4)  
Or [http://www.publichealthreports.org/userfiles/116\\_5/116474.pdf](http://www.publichealthreports.org/userfiles/116_5/116474.pdf)

*correlation between contributions and entitlements under the Community pension scheme would be wholly unacceptable, and I cannot see that use of the criterion of sex rather than ethnic origin can be any more acceptable.*<sup>3</sup> "

Individuals belonging to a group do not have the power to "change group" or to demonstrate that the characteristics observed in connection with "their group" are not relevant to them. Therefore differences in treatment between individuals on the basis of general characteristics, which are in fact merely averages for groups of people, cannot be justified. As Advocate General Jacobs rightly said: "(...) *In relation to the individual, I do not think that such average characteristics can in any way be described as 'objective'. What is objectionable (and thus prohibited) in such discrimination is the reliance on characteristics extrapolated from the class to the individual, as opposed to the use of characteristics which genuinely distinguish the individual from others and which may justify a difference in treatment.*"<sup>4</sup> It is therefore not possible, on the basis of randomly observed statistics about a group, to create discrimination between individuals.

The fundamental right to equal treatment irrespective of sex is an individual right enjoyed by men and women as individuals and not as members of a given group. As highlighted by legal expert Eugenia Caraccciolo Di Torrella "The traditional approach used by the insurance industry appears to be based on statistical stereotypes and assumptions about different groups. This is inconsistent with the interpretation of the concept of equality promoted by EU law. Firstly, the principle of gender equality requires that individuals are treated according to their individual circumstances and not according to stereotypes linked to their gender. (...) Secondly, insurance premiums are calculated on the basis of group characteristics, whilst the principle of gender equality requires that individuals are to be assessed in their capacity as persons, not as members of groups."<sup>5</sup>

Promoting equality between women and men is a mission of the EU according to Article 2 TEC and Article 23 of the Charter of Fundamental Rights of the European Union states that "Equality between men and women must be ensured in all areas, including employment, work and pay." The right to equal treatment between women and men is a fundamental right and has precedence over the right to contractual freedom. In its Defrenne case, the European Court of Justice pointed out that "*respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure.*"<sup>6</sup> and that "*There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.*"<sup>7</sup> The European Court of Justice recalled in its case P. v. S. and Cornwall County Council that "*the right not be discriminated against on grounds of sex is one of the fundamental rights of the human person, which the Court is required to ensure compliance.*"<sup>8</sup>

Article 14 of the European Convention on Human Rights also prohibits discrimination based on sex in the enjoyment of rights and freedoms it enshrines. In its case *Zarb Adami v. Malta* from 20 June 2006, the European Court of Human Rights pointed out that "*very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of sex as compatible with the Convention.*"<sup>9</sup>

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<sup>3</sup> Conclusion of Advocate General Jacobs §60

<sup>4</sup> Conclusion of Advocate General Jacobs §59

<sup>5</sup> Eugenia Caraccciolo Di Torrella, The principle of gender equality, the goods and services directive and insurance: A conceptual analysis, Maastricht Journal 13, 2006:3 p.345

<sup>6</sup> C.J.C.E., 15 June 1978, Defrenne, n° 149/77, §26.

<sup>7</sup> Ibidem, § 27.

<sup>8</sup> C.J.C.E., 30 April 1996, P.c.S. and Cornwall County Council, n°13/94, §19.

<sup>9</sup> Ruling §80.

- **Whether differential premiums are based on relevant and accurate underlying actuarial and statistical data?**

Insurers should be obliged to publish the statistical data they use to justify the differences of treatment they impose on the ground of gender and age and explain why these are relevant. Besides, the sex factor is neither the only one nor the most relevant one as other factors linked to lifestyle play a more important role (e.g. smoking, alcohol consumption, stress factors, health awareness...). Apart from all the medical and biological determinants, we should focus on socio-economic aspects that place women at greater risk of poverty on the one hand and a decrease in their life expectancy in the long term (stress, dual responsibilities lives, job insecurity...) on the other hand.

All figures from the public institutions of different countries (France, Canada, United States, and Belgium, for example) point to the narrowing gap in life expectancy between women and men<sup>10</sup>. The 2004 study by INED (Institut National d'Etudes Démographiques, France) explains very well the reasons for this development<sup>11</sup>.

It follows that, in addition to legal and social obligations, the sex factor is no longer a determining criterion. Socio-economic inequalities are, unfortunately, a much more determining factor for shortened life expectancy. As noted very well by the actuarial science professor Mr Denuit: *"While it is undeniable that mortality differs between women and men, actuarial technique still doesn't oblige to acknowledge this difference in the rate applied to the insured. There is as much difference between the mortality of top level executives and those of manual workers without these differences to be systematically included in commercial rates."*<sup>12</sup> This obviously shows that when insurers justify gender differences of treatment on the potential impact that unisex premiums would have on the cost for all clients, they are not objective. If differences in mortality between different groups were so important in calculating risks to obtain the cheapest option for all, then insurers would use other determining factors such as race, social status and working conditions which are much more relevant with regard to mortality risk.

- **the reliability of the data**

Insurers should be requested by law to use data certified by relevant public institutions.

With regard to pension schemes, as very clearly explained by Christa Prets MEP: *"The calculation of contributions is based on mortality tables which admittedly reflect current mortality rates. However, they exclude future developments, which may affect the probability of current contributors dying, from being taken into account. This means, for instance, that the future approximation of life expectancy for men and women is not taken into account so that the calculation of contributions is based on a false and therefore unfair premise."*<sup>13</sup>

Life expectancy tables used to justify higher premiums for women are based on cohorts with lifestyles which are very different from the lifestyles and working conditions of women today. The impact of today's living and working conditions on young and middle aged women's life expectancy are not know. However they are offered much less favourable conditions in occupational pension schemes compared to men. We therefore question the reliability of the

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<sup>10</sup> In industrialized countries, Japan expected.

<sup>11</sup> France Meslé : espérance de vie – un avantage féminin menacé ? in Populations et sociétés n° 462, Paris, juin 2004.

<sup>12</sup> Michel Denuit – Quand la différenciation tarifaire est-elle techniquement justifiée ? Le Monde de l'Assurance n°xy du 16 mai 2005.

<sup>13</sup> Christa Prets, Member of the European Parliament, Discussion Paper 14.01.2004 DV/521429EN.doc

data used by insurers and call for more research to be done by an independent source on the life expectancy of women today, taking on board their increased exposure to pollution, the burden they face given the unequal sharing of paid and unpaid work between women and men and therefore the increasing pressure on women to reconcile work and family commitments, etc.

- **whether the differences in premiums etc are proportionate**

We fear that the notion of “proportionate” can be interpreted in very different ways in different Member States and could lead to large differences in treatment. There is therefore a need for the EC to develop a clearer definition and guidelines as to which differences are proportionate.

Here, we would like to recall the April 2009 Glor ruling of European Court of Human Rights stating that: *"for a measure to be considered as proportionate and necessary in a democratic society, the existence of a measure which undermines less severely the fundamental right at stake and serving the same aim should be excluded"*<sup>14</sup>.

Following this judgment we recommend that the EC takes action to help achieve harmonised interpretation as to what ‘proportionate’ differences mean within the next 5 years.

- **how frequently the data should be updated**

The data should be updated regularly and at least once a year. As stated above, data should also take fully into account the changes in lifestyle and working conditions of different segments of the population as well as official demographic data.

- **How the data should be compiled and published?**

All data used by the insurers should be made available on the internet page of the public institution responsible for the supervision of insurance companies and it should be explained how it has been gathered, used and interpreted. Companies willing to use additional data should request permission to do so from the public institution responsible for the supervision of insurance companies and this new source of data should be added to the data published. This would help a lot to implement the publication requirement included in Article 5.

**b) Under the current Article 5 publication requirement, what has been done to enable consumers to understand the relevance of sex to assessments of their premiums, compared with the situation before the Directive came into force?**

First we would like to stress, on the basis of the above explanations, that sex is mostly not a relevant factor to assess premiums.

Having said that, obviously not enough efforts have been devoted to explain how and why insurers need to apply gender specific premiums. This explains why most of our experts and members are not satisfied with the way in which insurers are interpreting the Article 5 publication requirement. After 5 years, with a few exceptions, they still see no or little difference in the conditions applied today to female insurance product consumers compared to what was happening before the Directive came into force.

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<sup>14</sup> Glor against Switzerland, 30 April 2009

The EC should publish an impact assessment of Article 5 to check what improvements - if any - the Directive has delivered for women and what limitations Article 5 brings to the EU gender equality objective. The EC could also play a very useful role in collecting and disseminating examples of good practice, in particular on unisex premiums.

- c) What are the advantages and disadvantages to consumers of the publication requirement? For example, does the Article 5 publication requirement result in greater transparency and awareness among consumers of how sex is relevant to the assessment of premiums?**

We consider that the publication requirement is essential in terms of allowing for more transparency and raising awareness about the situation among consumers, especially given that some types of insurance are mandatory or increasingly unavoidable (e.g. private pensions). This allows individuals the opportunity to make a critical and informed choice and possibly to challenge unfair or discriminatory situations. However, there should be a better use and implementation of the publication requirement, which has not as yet resulted in any substantial progress.

- d) What are the biggest concerns about the publication requirement for the insurance and financial industry? Do you consider these concerns to be well-founded? How can these concerns be addressed?**

Although this question is mainly addressed to the insurance industry, we would like to stress that we strongly support the principle of publication but feel that this should be the responsibility of the regulator, and not the insurance industry. Some of our members have expressed serious concerns about the way in which the publication requirement has been implemented. For example the UK has published very high-level aggregate data that does not meet the aim of encouraging transparency for consumers. Similar remarks were made about the way the publication requirement is implemented in other countries. Even experts find it hard to find the relevant data, not to mention ordinary consumers.

- e) Bearing in mind the need to balance the right of consumers not to be discriminated against on grounds of sex against the objective of not imposing disproportionate burdens on business, what is the best way to publish the data - and in what format? Can you give examples of best practice on the publication requirement?**

The AGE Lithuanian member reported that the Insurance Supervisory Commission of Lithuania publishes reports when sex should be considered as determining and relevant factor when assessing risk and that these reports are published on its internet site. In our view, this shows that if insurers are allowed only to use data authorised and published by the supervisory body, this will ensure adequate information of consumers and will avoid imposing disproportionate burdens on the industry. It will also ensure fairer competition between insurance companies.

- f) In light of the European Court of Justice's ruling that sex discrimination includes discrimination arising from the gender reassignment of a person, which issues need to be taken into account when assessing how Article 5 applies to the assessment of transsexual people's claims? (See *P v S and Cornwall County Council Case C-13/94*, [1996] ECR I-2143).**

Article 5 needs to be implemented in line with the most recent legislative and case law developments (see Case C-423/04 *Richards v Secretary of State for Work and Pensions*).

### **3. Article 5(3) - costs relating to pregnancy and maternity**



**a) In your view, what has been or what are expected to be the practical impacts of Article 5(3) concerning costs relating to pregnancy and maternity?**

AGE, Test-Achats/Test-Aankoop and the EWL welcome Article 5(3) of the Directive. The exclusion of costs relating to pregnancy and childbirth from insurance coverage constitutes discrimination based on sex. The costs relating to childbirth and pregnancy should not be borne exclusively by women and pregnancy/maternity “risks” should be borne by society as a whole.

The principle of insurance is to mutualise risks but, for pregnancy, mutualising between women only is not acceptable as it is in the interests of our entire society to ensure procreation and the cost thereof should not be borne solely by women.

The prohibition of discrimination based on sex in relation to pregnancy and maternity in Article 5(3) of the Directive is a good example of gender equality provision that should be applied to all insurance products. We consider that Member States and the European Commission should be consistent and show a political will to implement measures that fully respect the right of women to equality and non discrimination in all aspects of insurance-related legislation, not only with regard to pregnancy and childbirth.

**b) How are you preparing for 21 December 2009 (when Article 5(3) comes into force)?**

**4. Current issues**

**Are you aware of any recent court cases, investigations, other forms of dispute resolution concerning Article 5, which would interest the Forum? Please give brief details.**

June 18 2009: referral to the European Court of Justice by the Belgian Constitutional Court<sup>15</sup> about the compliance of Article 5(3) Article with Article 6(2) of the EU Treaty.

**5. Impact of Article 5**

**a) Do you think Article 5 sufficiently protects consumers from unjustified sex discrimination? Please explain your answer.**

Article 5(1) and (3) are steps in the right direction. However, the implementation of Article 5(2) has caused problems and consumers are still not adequately protected against sex-based discrimination in many Member States as Article 5(2) introduces “dangerous justification<sup>16</sup>” allowing for discrimination based on sex.

All insurance companies should agree to regularly re-assess the way they use sex and age when calculating risks with the aim of phasing them out. Otherwise the implementation of Article 5 will continue to be problematic.

**b) In your view, what are the main advantages and disadvantages of the exception in Article 5?**

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<sup>15</sup> Ruling n°103/2009 of 18 June 2009

<sup>16</sup> Eugenia Caracciolo Di Torrella, The principle of gender equality, the goods and services directive and insurance: A conceptual analysis, Maastricht Journal 13, 2006:3 p.349

From a conceptual point of view, the main disadvantage of Article 5.2 is that it undermines the general gender equality principle. Indeed, whilst the first paragraph states that “sex ... shall not result in differences in individual’s premiums and benefits” (i.e. discrimination on the ground of gender is prohibited as it is a form of *direct* discrimination) the second paragraph introduces exceptions (i.e. discrimination on the ground of sex can be justified as it can be *indirect* discrimination).

AGE, Test-Achats/Test-Aankoop and the EWL see no advantage in allowing any form of discrimination based on sex to continue, including in access to insurance and financial products that are essential in everyday life and that have an impact on women’s economic independence. As written by Christa Prets MEP: “*The shift in old-age provision from the first to the second and third pillars is forcing individuals to join company and private schemes. If the state no longer guarantees 100 percent provision through the (gender-neutral) statutory pension, thus pushing private old age pension schemes, then it must ensure that there is no gender-based discrimination in private schemes either. In private pension schemes, women are discriminated against to an even greater extent since they are already at a disadvantage as a result of their already reduced pension entitlements owing to career breaks to look after children, part-time work etc. (...) Morally, it is not clear why practices which are evidently discriminatory against women should be maintained only to ensure that the product in question does not become less attractive to men. What is far more likely is that insurance companies do not want to lose a lucrative target group, i.e. men*<sup>17</sup>”.

**c) Do you consider it important to retain the exception in Article 5? Why?**

No, the need to retain the exception in Article 5 should be reassessed based on the impact assessment that the EC should do after 5 years (see our response to question b and 2 a).

**d) Do you have evidence of problems in the provision of or access to insurance and related financial products on a cross-border basis? Please supply details.**

If a country adopts the basic principle of the Directive (i.e. the prohibition to differentiate premiums between women and men), this principle also should also apply to foreign operators who must take into account the national legislation relating to contracts and, in particular, to insurance contracts of the country concerned.

The law related to the principle of equality between women and men can be considered as a *loi de police*, which is binding in contractual relations between individuals from different countries. It is clearly stated in a note by Yves Thiery, published in the “Bulletin des Assurances” in 2007<sup>18</sup>, that such legislation may be considered as a law of general interest, therefore justifying restrictions to the freedom to provide services: “With this Directive, the European legislator itself has set limits to the content of freedom of establishment and provision of services<sup>19</sup>”.

The rule prohibiting discrimination arising from the transposition into national law of a harmonised European rule is in principle binding for a foreign insurer willing to market insurance products differentiated according to sex on the territory of a Member State.

In practice, insurance markets are, in any case as regards the insurance of individuals, national markets. On the one hand, the insurance of so-called mass risks is a national or local market. An extract from the final report of the European Commission’s DG Competition dated 27.09.2007 and related to a sector survey on business insurance summed up the

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<sup>17</sup> Ibidem

<sup>18</sup> Yves Thiery in dossier discrimination, différenciation hommes/femmes et assurances Kluwer 2007, n°69-89.

<sup>19</sup> Free translation from Dutch

issue perfectly: *“Frontline insurance markets tend to have a national dimension, even when they are served primarily by a group of international insurance companies. The reasons for this are diverse. The main reasons are that insurance contracts are subject to national law governing contracts in general as well as to the specific national insurance legislation. Besides, issues of liability are also subject to national legislation and its application may moreover vary significantly from one jurisdiction to another. In addition, an on-site presence is often needed in order to sell the contracts but also and always to settle claims and language problems may arise. We can therefore conclude that the market has a multinational dimension and often excludes the possibility of any pressure from cross borders providers having no real entry point into the markets. To date, to enter new markets, insurers often have purchased local companies which then become subsidiaries (or in some cases branches) of the purchaser. This is why as national markets they tend to be fairly concentrated, especially concerning the major categories of risk. ”*

In addition, insurance is a secondary element in the consideration of a general request (e.g. assurance of outstanding balance coupled with the purchase of a mortgage).

Finally, the law applicable to the contract (in relation to the reporting of risk or medical secrecy...) is always the one of the country where the consumer is resident and it is the consumer protection legislation of the country of residence which applies. When the Belgian consumers' association Test-Achats recommended British temporary death insurance contracts, which were significantly cheaper than the contracts offered by Belgian companies, neither consumers nor foreign companies have shown the slightest inclination to enter into cross border service provision.

On another point, for the moment in some countries, the pension age for women is still different from that of men (cf infringement procedure launched by the EC against Italy on 26 June 2009). Often banks link conditions to access loans to the pension age because the insurance which guarantees the loan is linked to occupational income and insurers apply the pensionable age as a limit. We would like more research to be done to assess whether this has an impact on the access women have to bank loans and insurance products based on occupational income as this may constitute a barrier to female workers' cross border mobility.

**e) If Article 5 were modified in future, what would be the top 3 issues in your "wish-list"? Please explain.**

The exception in Article 5 should be abandoned in the future.

As stated above, attention should be paid to the impact of Article 5 on supplementary pensions and gender equality in terms of old age income. When there is a growing trend to move away from first pillar to supplementary pensions systems, women face greater discrimination in old age income as these pensions systems are allowed to apply less favourable treatment to women.

The interconnection between Article 5 of Directive 2004/113 and the recast Directive 2006/54/EC should also be considered. The EC should check whether the differences in premiums allowed in employment related insurance products (complementary health insurance offered by employers, travel insurance when on mission, etc.) are not an indirect form of discrimination on the ground of sex in access to employment as they result, despite equal skills and experience, in making women more expensive for employers.

The same issue arises from the use of age in employment related insurance products as this also results in making older workers more expensive for employers and constitutes an indirect form of discrimination (see enclosed examples of quotes for complementary hospitalisation insurance in Belgium).

More generally, it is necessary to look at the causes of the “clear differences between women and men”, which are used as justification for more expensive insurance premiums for one sex (often women). In order to enhance the principle of equality we need to work on these “clear differences”: are they valid? Or can they be challenged? We also need to work on the reasons why women work less and therefore have lower pension contributions or less money to invest in insurance/investment products.

## **6. Sharing of experiences and best practice**

- a) Would you like to make a brief presentation at the next meeting of the Forum on any particular issues, such as (for Member States) how Article 5 has been implemented in your Member State, examples of best practice, particular problems encountered etc?**

AGE and the EWL would each like to make a presentation during the next meeting of the Forum and will cover different points.

- b) Are you able to share details of any useful publicly-available documents or other sources of information relevant to Article 5 with the Forum? If so, please provide a brief summary of the document and where it can be found, such as a website link. (Please note, this information may eventually be placed on the Commission's website.)**

AGE is developing an information sheet on the impact of Article 5 on older women's equal opportunities. We hope to have it ready in September and will be happy to share it with the Forum participants.

- c) Do you have suggestions for raising awareness of the rights and obligations under Directive 2004/113/EC – in particular Article 5?**

Our members across the EU have indicated that information and awareness-raising campaigns about the Directive and, in particular, about Article 5 and its impact would be absolutely necessary.

The EC should also issue guidelines on how Article 5 should be interpreted and make compliance with it mandatory. The EC should also collect examples of good practice, in particular on unisex products and run awareness raising campaigns about the advantages of such products.

## **7. Other**

### **The danger of using other criteria (instead of sex) and the threat this would pose to the right to privacy**

We would like to highlight the potential threat to privacy if other criteria are substituted for sex to assess risk in medical questionnaires. Health-related data belong to the heart of the principle of privacy of which the European Court of Human Rights has emphasised the importance: "*Respect for the confidentiality of health information is of fundamental importance to the right to privacy*<sup>20</sup>". On the one hand, the provisions of the ECHR prevail over national laws; on the other hand, they are binding in the relationship between individuals<sup>21</sup>. When a law is contrary to the Convention for the Protection of Human Rights

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<sup>20</sup> MS against Sweden, 27 August 1987.

<sup>21</sup> Sébastien Van Droogenbroeck, *l'horizontalisation des droits de l'homme en la responsabilité face cachée des droits de l'homme*, Bruxelles, Bruylant p. 355-356 (in casu dans les rapports entre un consommateur et une compagnie d'assurances).

and Fundamental Freedoms, the application of this law shall be dismissed by the judge to the benefit of the Convention.

This right may be subject to limitations. However, these limitations must satisfy simultaneously three conditions to be considered compatible with Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, namely:

- Be provided by law;
- Pursue one of the legitimate aims listed in Article 8 § 2 of the Convention, namely national security, public safety or the economic well-being of the country; for the prevention of disorder or crime; for the protection of health or morals; or for the protection of the rights and freedoms of others; and
- Be "necessary in a democratic society" in the sense that the restrictions must be proportionate to the legitimate aim pursued.

Thus, limiting the right to privacy must meet three requirements: legality, legitimacy and proportionality. The European Court of Human Rights has recently stated that: *"for a measure to be considered as proportionate and necessary in a democratic society, the existence of a measure which undermines less severely the fundamental right at stake and serving the same aim should be excluded"*<sup>22</sup>.

The European Parliament in its resolution of 2 April 2009 on the proposal for a Council Directive<sup>23</sup> implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation has very adequately inserted a new Article 2.8, stating *"This Directive recognises that the right to privacy is a means of combating the discrimination referred to in this Article."*

## Conclusions

AGE, Test-Achats/Test-Aankoop and the EWL represent thousands of member organisations and millions of individuals across the EU. Our members indicated a mixed response to the way in which their governments have transposed the Directive. There is a projected massive rise in the number of workers who will retire with a fund to be annuitized and the perceived injustice of women's lower annuities (on top of their shorter employment histories and lower pay) will become increasingly acute. The compromise reached earlier (that gender-unequal annuities are permissible in EU law as long as they can be objectively justified) does nothing to help; it merely permits the previous inequality to be maintained.

For these reasons, AGE, Test-Achats/Test-Aankoop and the EWL would like to call on the EC to assess the impact of Article 5 on women's rights and, in particular, women's right to enjoy equal pay (and therefore equal purchasing power) since Article 5(2) allows insurance companies to charge women more for similar insurance products and occupational pensions schemes compared to men. In our view, this aggravates the gender inequalities and, in particular, the gender pay gap that the European Union in general and the European Commission in particular are committed to eliminating.

Again, we would like to call for a review of the need to have an exception article related to insurance products in Directive 2004/113/EC and for the European institutions to commit to a consistent implementation of the right to equality and non discrimination provided by the EU Treaty in all areas.

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<sup>22</sup> Ruling Glor against Switzerland, 30 April 2009

<sup>23</sup> COM (2008) 0426-c6-0291/2008-2008/0140 (CNS)