

# Discriminate without prejudice?

**Ben Lynch** and **Andrew Burns** assess the impact on insurers of the latest draft EU directive on discrimination

- the desirability of gender-specific data in actuarial calculations
- the impact of abolishing s 45 of the Sex Discrimination Act 1975

On the far horizon are proposals from the European Commission to require insurance companies to apply gender neutrality to the way they calculate their insurance premiums. This is only a part of the Commission's proposal to outlaw sex discrimination in access to goods and services, which would come into force in six years if the European Council approves the draft Equal Treatment Directive. The Commission says that a similar approach to discrimination by service providers works well in the US, but insurers may be among the first to notice the difference between the existing UK discrimination regime and the new proposal. It may be that scepticism among the member states on the newly enlarged

Council will sink the proposals or bring them into force in a much-diluted state, despite a recent vote of approval by the European Parliament.

#### When discrimination is allowed

The Sex Discrimination Act 1975 (SDA 1975) presently applies to all service providers, including insurance companies, but there are some limited circumstances in which discrimination is allowed. There is a general exception relating to insurance in s 45 of SDA 1975, which states that it is not unlawful to treat a person in a discriminatory way in relation to an annuity, life assurance policy, accident insurance policy, or similar matter involving the assessment of risk, where the treatment:

- was effected by reference to actuarial or other data from a source on which it was reasonable to rely; and
- was reasonable, having regard to the data and any other relevant factors.

This exception does not apply to credit arrangements or occupational pensions. It ensures men and women are treated equally; but where reliable data shows a real difference in the risk relating to men or women, the insurance is offered taking into account those differences. The current rules have worked well in the UK for a number of years, and the insurance industry is approaching the new proposals with caution and some mistrust.

#### Paying the premium

Men and women often pay different premiums for their insurance. Women may pay higher premiums for pensions, or are offered pension plans on the same premium as men that pay out less each year than a man would receive. Men generally tend to pay higher premiums for life insurance, as women live about three years longer than men on average. The popular press regularly publicises the various studies of insurance risks that reveal that women are safer drivers than men, and thus their motor premiums are often lower. The Association of British Insurers' reaction to the proposals was to warn that applying equal treatment without taking account of the fact that statistically women are safer drivers could put up their motor premiums. Insurers who specialise in insuring women due to their different risk pattern are particularly alarmed at the proposals.

#### The draft Equal Treatment Directive

The European Commission challenges these easy gender assumptions in its proposals. It states that there are a number of factors not linked to sex that are equally important in establishing life expectancy, such as socio-economic or marital status, the region a person lives in, or levels of smoking. It points out that when these factors are removed from the equation, differences in life expectancy on purely gender grounds are much less than stated. It is the view of the Commission (as endorsed by a majority of the European Parliament) that calculating risk based on the grounds of sex is discrimination.



Illustration: Jennifer Lubbock

**Blunt tool?**

However, this seems to be a blunt tool to approach a sophisticated problem. Insurers are well aware of the other factors that commonly affect life expectancy, and they assess the premium and the cover on the basis of these as well as the sex of the insured. The Commission wants insurers to take a relevant factor out of the equation.

The Commission's proposed directive, based on Art 13 of the Treaty on European Union, would not only deal explicitly with insurance sector premiums and benefits, but would apply, with some exceptions, to all goods and services. The exceptions would allow discrimination to continue in cases where goods or services are intended exclusively for members of one sex, such as single sex private members' clubs, or in hairdressing, where "the skills required are different for each sex", according to the Commission. It is difficult to see the justification for these exceptions and not for actuarial differentiation between the sexes.

**Justifiable discrimination?**

But what is this reform intended to achieve? Anti-discrimination law is generally intended to prevent discrimination based on prejudice or where there is no objectively justifiable difference between men and women. Discrimination should be prevented where it is unfair and prejudices the treatment of one sex illegitimately.

It is difficult to see how it is unfair to allow insurance companies to discriminate between men and women on the basis of legitimate, actuarial data that substantiates different treatment of men and women on non-prejudicial, justifiable grounds. In fact, it is arguably unfair and prejudicial to require insurers to turn a blind eye to a real difference between the sexes that affects the likelihood of the insured risk coming to pass. Good actuarial data that helps predict risk more accurately will save the insurance industry costs and thereby benefit consumers. It is submitted that this is a fair basis on which to assess premiums, which is beneficial to both sexes.

**Assessing the impact**

What would happen if s 45 of SDA 1975 exemption were to be abolished? The Equal Opportunities Commission (EOC) carried out an investigation into a very similar question. Looking at the issue of annuities, the EOC commissioned the Pensions Policy Institute (PPI) to look at annuities, determine what proportion of people's retirement income is

likely to come from annuities in the future, and whether the introduction of compulsory unisex rates would lead to rates going up (to male rates) or down (to female rates) or somewhere in between. The final report of the PPI study (published June 2004) concludes that removing gender rating as a factor for annuities would not have a large adverse impact for men or the insurance industry, but nor would it result in significant gains for women. The key findings of the PPI study include: "the introduction of unisex annuities is therefore unlikely to be of widespread or significant benefit" and "none of the arguments commonly put for or against the introduction of compulsory unisex annuities have been quantified, and none has been made conclusively" (see also box, right).

**Amending s 45**

The EOC has suggested, therefore, that s 45 of SDA 1975 is kept, with some amendments. The EOC stated it believed "the current exception under s 45 of SDA 1975 is not sufficiently rigorous, and would like to see it strengthened so that insurance companies would only be able to depart from the principle of equal treatment in some limited circumstances". These would be:

- where there are very clear differences in risks that are directly related to gender (ie excluding those where gender is a proxy for something else);
- where up to date, relevant actuarial data indicates such differences exist; and
- where there is an independent regulatory regime that can offer consumers assurance that sex-based factors are only used in these circumstances.

**Follow the UK's lead**

Danish MEP Lone Dybkjaer favours a root-and-branch reform that sweeps away all reliance on sex-based risk factors: "We should insure people as individuals, not on the basis of gender stereotypes." However, this fails to address the fact that an important aspect of an individual's insurance risk may be their sex. Discrimination in insurance is not an example of one sex being treated worse or unfairly on the grounds of their sex. In fact, both men and women benefit from the strengths of their respective sexes in this area. The UK approach appears to be the most sensible: rendering unlawful any prejudicial or stereotypical grounds for different treatment, while retaining an exception for justifiable statistical or actuarial evidence. It is to be hoped that the proposal is amended in line with present UK discrimi-

nation law, or in line with the proposals for reform of the EOC, and that the directive in its present form does not find favour in the European Council.

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**How unisex rates would affect the annuities market**

*An Analysis of Unisex Annuity Rates*, an independent piece of research carried out by the Pensions Policy Institute (PPI), was commissioned by the EOC to assess how the introduction of unisex rates would affect the annuities market. Its key findings include the following:

- The introduction of unisex annuities is unlikely to be of widespread and significant benefit.
- Annuity income makes up only a very small proportion of total retirement income for most pensioners. Gains and losses to annuity rates will only have a small impact on incomes in most cases.
- Fewer than one-quarter of pensioners have annuities. Although the use of annuities will become more widespread in the future, the pattern of gains and losses is likely to remain similar to today.
- In a compulsory unisex pricing market, the best rates are likely to be between the current male and female rates. This could mean 10% better rates for women, but 3% worse rates for men.
- Three-quarters of pensioners with annuities are likely to see a drop in retirement income. This would include some wives and widows who were dependent on their husband's annuity.
- The introduction of unisex annuities is therefore unlikely to be of widespread or significant benefit.
- Better advice and guidance to help annuity purchasers to choose the best options may be of more practical use than compulsory unisex annuity rates.

The EOC has called for the draft directive to be amended so that insurers could still set different rates for women and men, but with strict limits on how data based on gender could be used. It has also called for a professional regulatory body to monitor how companies are assessing risks for women and men.

Source: *An Analysis of Unisex Annuity Rates*, available from [www.eoc.org.uk](http://www.eoc.org.uk).