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Discrimination
Belgian report[1]

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DISCRIMINATION

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QUESTIONNAIRE

1) Give a short description of the evolution of insurance practice in your country, as regards differenciations made in policy conditions and tariff setting on grounds that might be discriminatory in a general sense

Please,
- identify the insurance branches (insurance of persons, motorcar insurance, etc.)
- identify the grounds : gender, age, etc..
- identify the techniques used : exclusions, premium tarrifs, deductible, selection, etc.

Overview

The main insurance branches in Belgium that seem to make use of differentiation grounds that might be discriminatory in a general sense, are motor insurance, travel insurance, term life insurance (including loan insurance) and private health insurance. Some insurance companies also use such differentiation grounds in income protection insurance, accident insurance private liability insurance and home insurance.

The main differentiation grounds used in such sense are gender (including transsexuality and gender identity), age and disability/health status.

We will further elaborate on the specific ways gender, age and disability are being used as a differentiation ground in the Belgian insurance industry. Our answers are based on a survey that the authors conducted under the supervision of a consultancy firm, Civic Consulting in 2010, in behalf of the European Commission. The outcome of this survey is still relevant. Where no longer relevant, our answers are based on experience in practice or assumptions based on the relevant legal requirements.

Use of gender

Before 21 December 2012, insurance companies were still allowed to use different tariffs for women and men in **life insurance**. Gender therefore had a direct influence on pricing in term life insurance, annuity products and loan insurance. In order to ensure that differences in treatment related to sex (and age) were proportionate to differences in risk, the industry made

[1] Finalized on 19 December 2013.

use of mortality tables. Those tables were based on statistics provided by the Belgian National Institute for Statistices, supplemented with the companies' own experience figures. Before 2011, the Belgian Institute for the Equality of Women and men ("Institute for gender equality") reported cases where also *gender reassignment* sometimes lead to higher premiums in life insurance. It is not clear to what extent such differentiation is still used.

In line with the European Commission's guidelines on the application of Council Directive 2004/113/EC (the "Goods and services directive") to insurance in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 ("Commission's guidelines"), the Belgian legislator decided that unisex premiums may only be applied in "new" life-insurance contracts (see *infra*), concluded as of 21 December 2012, and not to existing life-insurance contracts concluded before this date. Insurance companies are generally acting in compliance with this rule.

The Belgian Institute for the Equality of Women and men ("Institute for gender equality") reports cases where contractual conditions in **private health insurance** are sometimes influenced by pregnancy and maternity. Some private sickness funds offer contracts where benefits relating to pregnancy and maternity are being capped to a certain level. Cases are reported where waiting periods of one year are used for pregnant women. Both the Institute for gender equality and the Insurance Ombudsman report cases where insurance companies exclude the costs of gender reassignment in private health insurance. This is mainly done by referring to the impossibility to insure a pre-existing condition (assuming the disorder already existed before the signing of the contract), but sometimes also as a clear contractual exclusion under the policy.

Gender is not used as a differentiation ground in motor insurance and travel insurance, nor in any other non-life insurance contracts.

Use of age

Due to the legal obligation to use unisex tariffs in non-life insurance policies as of 21 December 2007, age appears to be one of the most important risk-assessment factors in **motor insurance** offered in Belgium. The Belgian consumer organisation Test-Achats mentions that besides age, three of the other most important criteria are place of residence, the driver's position on the bonus-malus scale and the insured vehicle. The use of age as a differentiation factor has an impact on tariffs. This impact can be direct (higher premiums for younger drivers) or indirect (use of bonus-malus scale). The industry refers to the correlation between age and frequency/average cost of accidents. Higher premiums for younger drivers are also explained by the fact that companies cannot dispose of experience figures for young drivers.

Age sometimes influences contractual conditions in motor insurance, such as the use of higher deductibles for the segment of 'young drivers'. Policies that, in addition to private liability, also cover bodily harm of the insured (a form of accident insurance, called *assurance conducteur*) sometimes reduce the sum insured in case of death if the insured has reached a certain age, for instance the age of 75. There are examples where so-called 'gross negligence' is excluded after a certain age. Age also influences the need for additional (medical) check-ups.

The Insurance Ombudsman received complaints of both younger and older people who were denied access to motor insurance. Such complaints could be resolved by providing adapted

insurance policies, imposing certain conditions, such as a prohibition of driving during weekend nights (for younger people) or driving ability check-ups (for people older than 75).

Age certainly has an impact on price setting in **life insurance contracts**, including loan insurance. From a certain age, a more detailed medical procedure is followed in term life insurance. As age increases, medical requirements in loan insurance are also likely to be more stringent. Several companies are applying maximum age limits ranging between 65 to 70 years in term life insurance. Other companies make no use of upper-age limits in offering term life insurance, but keep applying premiums corresponding to higher risk.

Age also forms one of the most important risk-assessment factors in **non-work related private health insurance**, having impact on prices, contractual conditions and medical check-ups. This in contrast to group contracts (work-related) that typically do not take account of age (nor sex, nor disability) of the individual employee. This seems to be explained by the fact that work-related contracts are the result of negotiations between the employer and the insurance company. The use of age in non-work related private health insurance contracts is explained by reference to statistical data showing a lower mortality and morbidity rate for younger people.

Certain companies only take account of age at the moment of subscription of private health insurance, so that the premium is considered to remain stable throughout the years. Other companies let premiums increase when the insured, in the course of the contract, proceeds to another age band. Most companies make use of upper-age limits (ranging between 65 and 75) above which no (new) insurance contracts are concluded.

Age is also reported to be a risk-assessment factor in **travel insurance**.

The insurance industry further reports that age is sometimes used as a pricing factor in critical illness insurance, income protection insurance, accident insurance, private liability insurance and home insurance.

Use of disability / Health status

The insurance industry contends that disability (in the sense of health status) will be of influence on tariffs, contractual conditions (including exclusions) or the need for medical check-ups in **motor insurance** (to the extent that an individual's health status affects insured risk). Consumer organisations refer to *assurance conducteur* policies (as mentioned above) that refuse coverage when the driver has a 'physical or pshychological problem' that may or may not constitute the cause of the accident.

Also **life insurers** take account of underlying health status in price setting, contractual conditions and the need for additional medical check-ups, at least to the extent that it is influencing life expectancy/mortality of the insured. In loan insurance, companies reject (do not insure) a lot of consumers for health reasons. Especially (ex-)cancer and diabetes patients encounter difficulties.

Health status/disability is also a significant risk-assessment factor in **private health insurance**, having an important influence on premiums, contractual conditions (exclusions) and the need for additional medical check-ups. Medical questionnaires help insurance companies decide whether supplementary medical examinations are necessary before

conclusion of the contract. Cases are however reported where insurance companies are willing to reduce additional premiums when the insured's health status stabilised or improved. Health insurance policies mostly exclude health disorders that already existed at the time the contract was concluded (at least as far as details and circumstances with regard to such disorders were known to the policyholder at the time of the conclusion of the contract). Some health insurance contracts exclude costs of a stay in a psychiatric facility. The extent of coverage of ambulant care in case of critical illness such as Alzheimer's, Parkinson's, sclerosis, etc. differs from contract to contract.

In **travel insurance**, pre-existing health disorders will mostly lead to exclusions from coverage. Sometimes all pre-existing pathologies are excluded, except when these have 'stabilized' at least two months before booking.

2) Legislation specifically focusing on discrimination

- fundamental or constitutional rights
- other legislation :
    - general
    - specific to insurance (or financial services or other services)
- specific regulations (from official or non-official entities, bodies or institutions : insurance supervision authorities, specific authorities with competence for discrimination matters)
- insurance industry codes of conduct
- other

The **Gender equality act** of 10 May 2007 prohibits discrimination in the fields of goods and services, including financial services such as insurance, banking and credit products on the basis of gender, pregnancy and maternity and gender reassignment.

A prohibition of discrimination in goods and services is also provided by the **General anti-discrimination act** of 10 May 2007 for the grounds of, in particular, disability, current or future health status, physical or genetic characteristics, sexual orientation and belief.

The **Act of 30 July 1981** prohibits discrimination on the basis of nationality, alleged race, skin colour, ancestry or national or ethnic origin in the field of the provision of goods and services.

All three acts prohibit direct and indirect discrimination in the fields of goods and services, including insurance. The acts apply the same definitions of direct and indirect discrimination as the ones that are formulated under the European directives based on Article 19 TFEU (2000/43/EC – "Race Directive"; 2000/78/EC – "Framework Directive"; 2004/113/EC – "Goods and services directive").

Compared to the prohibition on discrimination as provided in those directives, direct discrimination can be justified on the basis of the same open-ended justification formula as the one applicable to indirect discrimination, *in all those situations falling outside the scope of existing EU Directives.*

This means that for all **non-life insurance contracts**, differentiation based on non-gender and non-race related criteria can be justified by a *legitimate aim* whereby the means of achieving

that aim are *appropriate* and *necessary*. Private health insurance contracts or motor insurance contracts can for instance make use of age or health status as a differentiation factor if a) the insurance company can refer to statistical data showing a correlation between age/health status and the insured risk and if b) there are no less restrictive alternatives in order to maintain a financial equilibrium of the insurance portfolio or to satisfy the need of accurate risk assessment. With regard to gender or race related differentiation, insurance companies will on the other hand not be allowed to justify the use of these differentiation criteria. The unisex rule as it was already installed by the earliest version of the Belgian gender discrimination act of 10 May 2007, will continue to apply to all non-life insurance contracts.

As mentioned above, the rule of unisex premiums and benefits in **life insurance contracts** (at least the contracts falling under the scope of the Gender Directive) will only apply to *new contracts*, concluded as of 21 December 2012 and not to *existing* life-insurance contracts concluded before this date. The concept of "new contracts" is directly inspired, both conceptually and verbally, to the (aforementioned) Commission's guidelines (see *infra* answer to question 5). With regard to contracts that *already existed* per 21 December 2012, the guarantees of article 5(2) of the Goods and services directive (proportionate differences, use of sex determining factor in the assessment of risk, relevant and accurate actuarial and statistical data as collected by the Belgian national bank) will remain in force (for the concept of "existing contracts", see again *infra*, answer to question 5). With regard to contractual conditions, other than the determination of premiums and benefits (exclusions, waiting periods, etc…), the use of gender was already prohibited by the Belgian gender discrimination act as of 10 May 2007.

The absolute ban on differences in individuals' premiums and benefits based on costs related to **pregnancy and maternity** (as dealt with under article 5(3) of the Goods and services directive), will continue to persist for both life insurance and non-life insurance contracts.

Insurance companies can further rely on the rule under article 4(5) of the Goods and services directive determining that differences in treatment in the provision of goods and services are ***exclusively or primarily*** **provided to members of one sex**, can be justified (by a *legitimate aim*, whereby the means of achieving that aim are *appropriate* and *necessary*). Although there is no relevant Belgian case-law available, it is not unimaginable that for instance private heath insurers offering an improved reimbursement of mammograms or contraceptive pills (which are both related to the physiological characteristics of women), would be exclusively offered to women.

As for the use of **gender in private pensions**, specific rules can be found under article 12 of the Gender Discrimination act.

With regard to occupational social security schemes falling under the Goods and services directive (individual contracts for self-employed persons, single-member schemes for self-employed persons, insurance contracts to which the employer is not a part, optional provisions of occupational social security schemes offered to participants to guarantee the additional benefits), the unisex rule will apply to these schemes, but only to new contracts, concluded as of 21 December 2012. Existing agreements (concluded before 21 December 2012) will again not be hit by the unisex rule. They will be subject tot the aforementioned guarantees of article 5(2) of the Goods and services directive.

Occupational social security schemes that are subject to the material scope of Chapter 2 of the 2006/54/EC Directive ("Recast Directive") will retain the possibility to use gender-specific premiums and benefits, subject to the limits set forth under article 12 of the Gender Discrimination Act. These limits are largely based on the exceptions as formulated under article 9, h), i) and j) of the Recast Directive as they are in turn inspired by the *Neath* (C-152/91) and *Coloroll*(C-200/91) case-law of the European Court of Justice.

The anti-discrimination rules as described above are perceived as an expression of the **fundamental principle of equal treatment as a constitutional right**. This does not imply that an appeal to the principle of equal treatment would not be possible or in some cases not be necessary. As is already demonstrated by the recent Test-Achats judgment of the European Court of justice, an appeal to the fundamental principle of equal treatment is able to successfully challenge the validity of European union legislation dealing with the applicability of equal treatment rules in insurance relations. An appeal to the fundamental principle of equal treatment could also be used to compel a national judge to set aside any provision of national law which may conflict with this principle.

It can be mentioned that the Belgian insurance industry has developed initiatives of **self-regulation** providing guidelines for an increased accessibility to motor insurance for younger and older drivers (so-called 29/29 gentleman's agreement) and for more affordable private health insurance. With regard to private health insurance, insurance companies committed themselves to offer an adapted private health insurance contract (no coverage for the cost of a private room in an hospital) when the premium became too expensive for an individual insured. No medical formalities and no waiting periods are imposed in. The same alternative was temporarily (from 1 July to 30 September 2009) offered to people older than 65 who had already terminated their contract between 1 January 2008 and 1 July 2009 due to high premiums. It was promised that a new medical check-up would not be imposed on the latter group.

3) Implementation of anti-discrimination rules

Are there any institutions or official bodies that regulate, control or decide on discrimination issues in your country ? Specifically, are there any courts or institutions having specific jurisdiction as regards complaints of discrimination ?

Belgium has two government agencies having as one of their principal tasks, the fighting of discrimination by assisting discrimination victims. This assistance might be given in the form of legal advice or support, mediation (also with insurance companies) or going to court. It concerns the Centre for Equal Opportunities and Oppostion to Racism and the Institute for the Equality of Women and Men. These agencies are able to represent discrimination victims in court, but have no jurisdiction to decide on discrimination issues. The only official bodies with jurisdiction with regard to complaints of discrimination are the regular courts and tribunals.

4) Please describe very succinctly major cases or decisions that were taken by

- courts
- instances with specific jurisdiction
- institutions or bodies within the insurance industry

1. An important case concerning an alleged form of insurance-related discrimination which was brought before a Belgian Court is the affair of the Belgian consumer organisation *Test-*

Achats against a private health insurance company. The company had unilaterally imposed a premium increase that was much higher for older insured persons than for younger insured persons. Because substantial premium increases were imposed on older insured persons without applying the same conditions to younger members, *Test-Achats* asked the president of the Brussels Commercial Court to recognise that the implemented premium increase was discriminatory within the meaning of Belgian anti-discrimination legislation of 2003 (Act of 25 February 2003 which was later superseded by the General anti-discrimination act of 2007). The insurance company referred to difficulties associated with the increase in costs related to the development of medical science and asserted that the growth rate of the costs increases sensitively with age. The President did not specifically mention that this justification as such was illegitimate. The President did however rule that the differential way in which the insurance premiums had been increased, was not *pertinent* to the objective pursued. Statistics had been presented by the insurance company, showing, according to the President, the relation between the number of claims and age, but not the way age was related to increases in the cost of hospitalisation. Under the necessity criterion, the President argued that the insurance company could also have chosen measures less intrusive to the principle of equality and non-discrimination.

The judgment by the president of the Brussels Commercial court was later overruled by the Brussels Court of appeal in a judgment of 14 September 2010. The court decided that a linear price increase would actually penalize the younger insured. An increase which is higher for older insured persons than for younger insured persons is in the eyes of the Court, a "first step in the right direction towards an increase according to the risk of each insured", whereby a certain level of solidarity between age bands is still preserved. Hence, the court labels the increase as applied by the insurance company as a reasonable alternative to an increase which would have depended on the risk of each individual insured. For those reasons the challenged price increase was not considered to be discriminatory.

2. A second major anti-discrimination case in the field of insurance which was ruled before the Belgian courts was the famous case of *Test-Achats* v. the Belgian council of ministers. The case concerned an application to annul a Belgian federal law that adapted an article of the Gender equality act of 10 May 2007. The case was submitted to the Belgian Constitutional Court by *Test-Achats*. Since the Gender Equality Act came into effect, the use of gender when setting premiums and benefits had temporarily (until 21 December 2007) been allowed in *all* private insurance contracts. By means of the act of 21 December 2007, the Belgian legislator eventually foresaw that this allowance could only persist for life insurance contracts (from the date of 20 December 2007). With this change in the law, Belgium called on the opting-out clause of Article 5, Paragraph 2 of the Goods and services directive (2004/113/EC). Test-Achats, however, reported that, by making use of this option, there was a violation of the equality clauses in the Belgian Constitution. According to Test-Achats, the Belgian legislature should not have formulated an exception for *any* insurance contract.

One of the grounds that was submitted to prove the violation of the constitutional provisions concerned the assertion that Article 5, Paragraph 2 of the Goods and services directive would itself be contrary to the principle of equality between women and men as it is enshrined in EU law. The Constitutional Court therefore considered that in order to reach a decision on the action for annulment, the validity of Article 5, Paragraph 2 would first have to be examined by the European Court of Justice. The result is well-known. Article 5(2) of the Goods and services directive has been declared invalid with effect from 21 December 2012, not only for life insurance contracts in Belgium, but for all insurance contracts (falling under the scope of

application of the Goods and services directive) across the EU. Throughout the EU, the use of different insurance premiums and benefits for women and men will no longer be allowed as of 21 December 2012. Subsequently, the Belgian Constitutional Court had no choice but to decide on the incompatibility of the Belgian Act of 21 December 2007 with the Belgian constitution and to annul this act. In line with the ECJ's decision, the Constitutional Court however preserved the effects of the act to 21 December 2012, meaning that as of this date the exception for life insurance contracts would no longer be valid.

5) For EU Member States

Does the Court of justice decision of 1 March 2011 in the *Test Achat* case have an impact on legislation and/or practice in your country? Briefly explain the actual problems that are created by the judgment.

The Test-achats ruling by the ECJ has led to the annulment of the aforementioned Act of 21 December 2007 which, in short, had led to the allowance of differences in premiums and benefits in life insurance contracts. Without further reaction of the Belgian legislator, there would however have been no legal certainty as to the *effects* of the annulment by the Belgian Constitutional court of the Belgian Act of 21 December 2007, *with regard to life insurance contracts that already existed on 21 December 2012*.

The Belgian legislator has therefore decided to completely redraft article 10 of the Gender discrimination act in accordance with the Test-Achats judgment as it was followed by the Belgian Constitutional Court and taking account of the aforementioned Commission's guidelines. This occurred by the act of 19 December 2012. Since the Belgian legislator was of the opinion that certain occupational social security schemes are necessarily included in the scope of the Goods and services directive, an amendment was also made to article 12 of the Gender discrimination act, which generally applies to such occupational social security schemes (see *supra* – answer to question 2).

The orientations of the Act of 19 December 2012 can be summarized as follows:

<u>Life insurance contracts</u>

- As already mentioned above, the rule of unisex premiums and benefits in life insurance contracts falling under the scope of the Goods and services directive (2004/113/EC) will only apply to *new* contracts, concluded as of 21 December 2012 and not to existing life-insurance contracts concluded before this date.

  The concept of "new" contracts is directly inspired, both conceptually and verbally, by para. 12, (a) and (b) of the Commission's guidelines. This means that contracts to which the latest consent in order to conclude or alter such contract has been given after 20 December 2012, will be regarded as "new". It is specified that the extension of contracts concluded before 21 December 2012, which would otherwise have expired, will also classify as new.

- Premiums and benefits in contracts which the Commission's guidelines explicitly classify as "existing" contractual agreements (concluded before 21 December 2012), will *not* be hit by the unisex rule. The Belgian legislator seems to follow the rationale as expressed by the European Commission and inspired by one the Goods and services

directive's objectives, namely *to prevent a sudden readjustment of the market*. As to the circumscription of "existing" contractual agreements, the Belgian legislator again follows the wording as used under the Commission's guidelines. Are, among others, perceived as an "existing" agreement:

a) the automatic extension of a pre-existing contract in accordance with the statutory provisions and the terms of the contract if no cancellation notice is given by one of the parties;
b) the adjustment made to an existing contract on the basis of predefined parameters where the consent of the policy-holder is not required;
c) the increase of insurance coverage or the purchase of additional insurance whose terms have been subject to a preliminary agreement before 21 December 2012 whereby this adjustment is enabled by the unilateral will of the policy-holder;
d) the mere transfer of an insurance portfolio from one insurer to another which should not change the status of the contracts included in this portfolio.

With regard to existing agreements, the guarantees of article 5(2) of the Goods and services directive (proportionate differences, use of sex determining factor in the assessment of risk, relevant and accurate actuarial and statistical data as collected by the Belgian national bank) will remain in force.

Non-life insurance contracts

The unisex rule as it had already been installed by the earliest version of the Belgian Gender discrimination act of 10 May 2007, will continue to apply to non-life insurance contracts. They will remain subject to the regime of article 8 of the Gender discrimination act, providing that direct discrimination on the basis of gender is prohibited and cannot be justified by referring to a legitimate aim.

Pregnancy and maternity

As already mentioned above (*supra* answer to question 2), the absolute ban on differences in individuals' premiums and benefits based on costs related to pregnancy and maternity (as dealt with under article 5(3) of the Goods and services directive) will continue to persist for both life insurance and non-life insurance contracts. The prohibition will also apply to occupational social security schemes falling under the scope of the Goods and services directive (see next point).

Occupational social security schemes under the Goods and Services Directive

As already mentioned above (*supra* answer to question 2), the rule of unisex premiums and benefits will also apply to certain occupational social security schemes concluded *after* 21 December 2012 (*new* schemes). It concerns pension products that are either related to self-employed persons or whereby the employer is not a party or has made no financial commitment or whereby the employee makes voluntary contributions. The Belgian legislator considers these products to fall outside the material scope of chapter 2 of Directive 2006/54/EC on the implementation of the principal of equal opportunities and equal treatment of men and women in matters of

employment and occupation ("Recast directive"), so that these schemes are deemed to fall under the scope of the Goods and serviced directive.

Existing agreements (concluded before 21 December 2012) will again not be hit by the unisex rule. They will again be subject to the guarantees of article 5(2) of the Goods and services directive. With regard to products offered by institutions for occupational retirement provisions, actuarial and statistical data will however not be collected by the Belgian national bank, but by the Financial Services and Market Authorities (FSMA), which is the prudential authority for these institutions.

Occupational social security schemes under the Recast Directive

As already mentioned above (*supra* answer to question 2), occupational social security schemes that are not excluded from the material scope of Chapter 2 of the Recast Directive, will retain the possibility to use gender-specific premiums and benefits, subject to the limits as provided under article 12, §2 of the Gender discrimination act. These limits are largely based on the exceptions as formulated under article 9, h), i) and j) of the Recast Directive as they are in turn inspired by the *Neath* and *Coloroll* case-law of the ECJ.

Belgian insurance practice seems to have accepted the newly adapted rules resulting from the *Test-Achats* case. Premiums and benefits in life insurance contracts concluded as from 21 December 2012 do not longer differ according to sex, although insurance companies still use mortality tables that take account of the different life expectancy of women and men *for purposes of calculation of technical provisions*.

There is however an unmistakable administrative burden (adaptation of policy terms, premium calculations,…) which in the end, results in general price increases.

Premiums and benefits do also not move to arithmetic average of the former premiums/benefits for women and men, but will fluctuate between this average and the premiums (and corresponding benefits) which had formerly to be paid by/to the highest "risk-group" (eg *group of men* in case of term life insurance/loan insurance – *group of women* in case of annuity-benefit systems/endowment insurance).