

**EXPLANATORY MEMORANDUM TO  
THE EQUALITY ACT 2010 (AMENDMENT) REGULATIONS 2012**

**2012 No. 2992**

1. This explanatory memorandum has been prepared by the Treasury and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 These Regulations amend the Equality Act 2010 (“the Equality Act”) to reflect a change to European Union law brought about by a ruling by the European Court of Justice (“ECJ”) on 1 March 2011. The Court ruled that, from 21 December 2012, the use of sex as a risk factor should not result in differences in individuals’ insurance premiums and benefits<sup>1</sup>. The exemption that is contained in the EU Gender Directive (Directive 2004/113/EC) of 13 December 2004 (the “Gender Directive”) to allow such practices will cease to be valid from that date. These Regulations will reflect this change to EU law by omitting the exemption included in the Equality Act (paragraph 22 to Schedule 3) which gives effect to the exemption in the Gender Directive.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

**4. Legislative Context**

4.1 The Gender Directive prohibits discrimination on the basis of sex in the provision of goods and services. It includes a requirement that Member States shall ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals’ premiums and benefits.

4.2 However, the Gender Directive also includes an exemption to this rule, allowing Member States to permit proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. All EU Member States took advantage of this exemption to some extent. The UK applied it to all forms of insurance. This was achieved by including an exemption in the Equality Act reflecting the Gender Directive exemption.

4.3 In March 2011, in ruling on a case brought by a Belgian consumer group *Test Achats*, the ECJ stated that the insurance exemption in the Gender Directive was contrary to the objective of equal treatment between men and women. The court therefore ruled that the exemption would cease to be valid from 21 December 2012, giving industry time to adjust their systems and practices before this date.

4.4 In June 2011 the then Financial Secretary to the Treasury, Mark Hoban, made a Written Ministerial Statement to the House of Commons in relation to the ECJ ruling. This statement set

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<sup>1</sup> The ruling does not prevent insurers collecting data on sex and using it for the purposes of assessing the overall risk presented by a particular pool of people. For example, if a motor insurer insures a pool of people comprising 70% men and 30% women, the insurer may take the relative proportions of men and women into account for the purposes of assessing the overall risk of the pool, and use that risk for the purposes of calculating the unisex premium applicable to men and women in that pool.

out the Government's view that the ruling only applies to new contracts entered into on or after 21 December 2012 and that any contracts with gender-sensitive pricing of premiums or benefits concluded ahead of 21 December 2012 can continue unchanged after that date.

4.5 The statement also set out Government's intention to proceed with amendments to Schedule 3 to the Equality Act in order to remove the exemption in paragraph 22 that gave effect to the Gender Directive exemption, noting that these amendments would be effected by Statutory Instrument under Section 2(2) of the European Communities Act 1972. The Minister also committed to issuing a consultation on a draft set of regulations, including a full impact assessment, before introducing legislative changes.

4.6 Following consultation between December 2011 and March 2012, the Government issued a response document in July 2012 confirming its intention to proceed with amendments to the Equality Act to reflect in UK law the changes to EU law brought about by the ECJ ruling. These Regulations omit the exemption in the Equality Act that had previously allowed gender-sensitive pricing of premiums and benefits, with effect from 21 December 2012.

## **5. Territorial Extent and Application**

5.1 This instrument applies to England, Wales and Scotland. Separate provisions will be put in place by the Northern Ireland Executive.

## **6. European Convention on Human Rights**

6.1 In the view of Sajid Javid, the Economic Secretary to the Treasury, the provisions of these Regulations are compatible with the Convention rights.

## **7. Policy background**

- *What is being done and why*

7.1 The Government believes that nobody should be treated unfairly because of their sex, but that financial services providers should be allowed to make sensible decisions based on sound analysis of relevant risk factors. However, the ruling makes a change to EU law which the Government is legally required to reflect in UK law. As the ECJ is the highest court of the EU, responsible for interpreting EU law and ensuring its consistent application, there is no avenue for appeal against its decisions. It has made a binding ruling on the validity of a provision of EU law and the UK is bound to reflect that ruling in its implementation of EU law. Only if another ruling is made by the Court, which has the effect of reversing the Test Achats ruling, would the UK be able to revisit this matter in its own legislation.

- *Consolidation*

7.2 There are no plans to consolidate the relevant legislation.

## **8. Consultation outcome**

8.1 The Government issued a consultation document on 8 December 2011<sup>[1]</sup>. The consultation closed on 1 March 2012 and 38 written responses were received. Treasury officials also met a range of stakeholders during the consultation period to seek views on the issues being consulted

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[1] UK response to the 1 March European Court of Justice ruling that insurance benefits and premiums after 21 December 2012 should be gender-neutral. [http://www.hm-treasury.gov.uk/d/condoc\\_insurance\\_benefits\\_and\\_premiums.pdf](http://www.hm-treasury.gov.uk/d/condoc_insurance_benefits_and_premiums.pdf)

on. The consultation reiterated the Government's view that the ruling applies only to new contracts entered into after 21 December 2012, meaning existing contracts are not affected. It sought views on this interpretation and the draft Regulations amending the Equality Act. The consultation also sought comments on the Government's impact assessment and requested additional data that would help Government better understand the impact on consumers and insurers. Finally it asked for views on some of the key issues arising from the ruling.

8.2 The majority of the respondents agreed that the repealing of paragraph 22 of Schedule 3 to the Equality Act was all that was necessary to comply with the ECJ ruling. A few felt, however, that repealing paragraph 22 alone was insufficient or inappropriate (one considering that the exemption should continue to apply to life insurance and annuities). Other respondents thought the legislation could be more specific on what practices are still permissible in the field of insurance or on what constitutes a "new" contract.

8.3 The summary of responses, available on the Treasury website<sup>[2]</sup>, sets out the key points raised by respondents and the Government's response to these. In summary, the Government did not consider there to be sufficient rationale to do anything further beyond removing from the Equality Act the exemption in paragraph 22 of Schedule 3. The proposal to allow the exemption to continue to life insurance and annuities would be contrary to the ECJ ruling and the other suggested amendments are, in the Government's view, either not necessary because they have been addressed in guidance from the European Commission, or not appropriate in that they represent specific interpretations of what constitutes a new contract, on which there is already a large body of contract law.

## 9. Guidance

9.1 The European Commission has already published guidelines<sup>[3]</sup>, on the scope of the ruling, which we believe may be useful in helping to align interpretations of insurers across Member States. While the guidelines are not law, they do represent the Commission's interpretation of the intended application of the Gender Directive and courts may therefore find them to be persuasive and influential. Other bodies such as the Financial Services Authority and the Association of British Insurers have also produced advice for consumers on how the ruling may affect them.

9.2 The Treasury is not intending to produce further guidance on the ECJ ruling as we do not think this would be helpful or appropriate. Only the courts can provide an authoritative interpretation of the ruling and additional guidance from the Government would not help to minimise the risk of legal challenge to insurance providers. Therefore the Treasury's response to the consultation responses constitutes the most clarity Government can provide. We have urged insurers to seek their own legal advice when considering how to amend their practices to comply with the ECJ ruling.

## 10. Impact

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[2] UK response to the 1 March European Court of Justice ruling that insurance benefits and premiums after 21 December 2012 should be gender-neutral: Government Response. [http://www.hm-treasury.gov.uk/d/condoc\\_responses\\_insurance\\_benefits\\_and\\_premiums.pdf](http://www.hm-treasury.gov.uk/d/condoc_responses_insurance_benefits_and_premiums.pdf)

[3] European Commission: 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) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:011:0001:0011:EN:PDF>

10.1 The impacts of the ECJ ruling on the insurance industry are likely to be felt in the transitional period to unisex pricing. These are likely to include, amongst others: underwriting changes; marketing changes; sales changes; and losses as a result of consumer premium changes.

10.2 There is no anticipated impact on the public sector.

10.3 The Government published an Impact Assessment on the impact of the ECJ ruling as part of its consultation on the draft Regulations. This will be published alongside the Explanatory Memorandum on [www.legislation.gov.uk](http://www.legislation.gov.uk).

## **11. Regulating small business**

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on small firms employing up to 20 people, the Treasury has worked with the financial sector on the requirements for complying with the Equality Act. The European Commission has provided guidance on the ECJ ruling and the Treasury does not think it would be helpful or appropriate to provide any further guidance.

11.3 The basis for the final decision on what action to take to assist small business is that the ECJ ruling affects EU and UK law in the same way for businesses of all sizes.

## **12. Monitoring and review**

12.1 The Regulations provide that the Treasury must from time to time carry out a review of the regulatory system established by the Equality Act insofar as it implements the Gender Directive and publish a report. The Government will monitor any developments in the law in this area and will consider any changes that may be necessary in light of such developments.

## **13. Contact**

13.1 Sandra Holben at the Treasury ([Sandra.holben@hmtreasury.gsi.gov.uk](mailto:Sandra.holben@hmtreasury.gsi.gov.uk)) can answer questions regarding the instrument.