

# **EQUALITY IN INSURANCE FOR MEN AND WOMEN**

## **PRELIMINARIES**

In 1992 already, we supported the initiative of a "green" deputy who had deposited an amendment relating to the bill on insurance contracts. This amendment was accepted as well by the committee of the Chamber than in plenary session and prohibits that insurance company can put questions relatives with genetic data. Those which had forecast that this provision was going to bring all the people likely to be affected by genetic diseases to come and conclude a health insurance contract in Belgium were totally wrong.

Nothing ever justified their catastrophic predictions but consumers who have genetic diseases are now protected for the health and death insurance.

## **The position taken by our consumer associations**

It is to mark the boundaries of an outrageous segmentation (refusal to contract or asking very high premiums to the policyholder) that our (consumers) associations have developed in 1996 the position called : solidarity and insurance. Our associations have been willing that solidarity has to be one of the basic ethical principles; we didn't accept that the premium can vary depending on factors over which the consumer has no control, such as gender, disability, genetic diseases .... An author, Catherine Paris, explained that in a book called "Les dérives de la segmentation en assurance " : a trend of opinion argues for distinguishing the alterable variables which result from a choice of the insured, and those who are not. Determine the amount of the premium according to the first ones is fair. The method makes the consumers aware of their responsibilities, it encouraged him to change his behaviour; it is him who can make that he benefits from a favourable tariff. On the contrary, taking into account the immanent characteristics on which the insured has no control, leads to unfair situations without having any impact on risk prevention. It should therefore be prohibited that the insurer can establish risk categories on the basis of these characteristics. In this context, the ethical choice is to determine the parameters controllable by the insured and those who are not. « And it is in highlighting the primacy of fundamental rights, that our association has found the weapons giving a little bit tangible reality to our position.

## **Equal treatment**

The rule also applies to insurance companies and comes in Belgium at least, from the anti-discrimination law voted in February 2003 and updated in May 2007. At European level the base is provided by Article 21 of the Charter of Fundamental Rights of the European Union. Article 14 of the Convention of Human rights also prohibits discriminations based on sex in the enjoyment of the rights and freedoms it consecrates.

Any different treatment (or refusal to insure or asking a higher premium - very - high) is allowed only if it is reasonable and objective, the burden of proof falls on the insurance company. This implies that, to take the real example of a person aged 80 who caused 2 minor accidents (with only material damage), whose contract was terminated after these claims; one has to seek a solution as much more acceptable (without. through our bureau de tarification) that the elderly consumers compensate

for their "defects" (seeing less and having less sharpened reflexes) by other positive features: they drive a reduced number of miles, slower, they better respect the safety distances.... This is called "the least intrusive way to the right in question", here that he can conclude a compulsory insurance (third party liability car insurance) at an affordable price.

But if the insurer can deny a candidate policyholder or asking him a high premium, provided he proves that his decision was objective and reasonable, in terms of equality between male / female, the rule is very simple. Both the Charter of Fundamental Rights of the European Union (Article 20 and specifically Article 23 )and the Convention on Human Rights prohibits any a priori difference in treatment based on gender. The Court of Human Rights has emphasized that "only very strong 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". Then in a second ruling it said that "the level of protection afforded to individuals against differential treatment (i.e. a lower pension) based on this criterion (here it reside in a country other than the one where he/she made his/her career) need not be as high as they benefit when the distinction is based on a characteristic of their own, such as sex, race or ethnicity ...

Belgium transposed the directive 2004/113 in the law of 21 of December 2007 but accepting the exception, allowed by article 5.2 of the directive, to the rule of equal treatment between men and women, only for life and death insurances.

We decided to respond by introducing an appeal for annulment to the Constitutional Court, referring to the fact that Belgium had broken with the principle of gender equality laid down by our Constitution.

We believe that the law allowing exceptions for life( an death) insurance was contrary to the principle of equal treatment provided by the Belgian Constitution in Articles 10 and 11. We also believed, in the alternative, that the EU directive which allows exceptions is contrary to the principle of equal treatment provided by the Charter of fundamental rights and the Convention of human rights. Then we ask – to the Constitutional Court - to put a preliminary question to the European Court of Justice to tell if this directive is not contrary to the principle of equality at european level.

Our arguments towards the European Court of Justice were as well legal as factual

1) The Charter of Fundamental rights intends to give special importance to gender equality; article 23 is specially devoted to him. In addition, article 23 expressly states an obligation to guarantee this equality: "Equality between men and women must be ensured in all areas. " The Charter does not provide an exception to this rule of equality.

The Court recalled in its ruling PC S. and Cornwall County Council that "the right not to be discriminated against on grounds of sex constitutes one of the fundamental rights of the human person, which the Court is required to ensure compliance"

The decisions of the European Court of the human rights are constant today.

2) For the European Court of human rights, the prohibition of the treatment differences founded on the gender constitutes a quasi-absolute standard which is likely of exemption only in exceptional circumstances, in the presence of "very strong considerations". Actually, the European Court of Human Rights grant the highest

level of protection against the treatment differences founded on the three following criteria: the sex, the race and the ethnic origin. The reason is that these criteria relate to characteristics specific to the individual, on which this one does not have any influence

The European Court of Human Rights explicitly underlined in its Carson arrest of November 4, 2008 that the criteria of distinction resting on a choice of the individual should not receive a protection as high as that reserved for the criteria of distinction on which the individual does not have any influence: "In any event, to even suppose that the situation of the applicants is similar to that of the pensioners lying in countries where revalorization applies by virtue of an agreement of reciprocity, the Court considers that the litigious treatment difference is objectively and reasonably justified. If it is appropriate to grant a certain weight to the thesis of interested taken up by Old Concern, according to which various factors govern the choice of an elderly person to choose to go abroad, in particular the desire to come closer to the members of his family, the fact remains that the choice result of a personal convenience. Consequently, the Court estimates, like the Government and the internal jurisdictions, that the level of protection granted to the individuals against treatment differences founded on this criterion does not have to be as high as that of which they profit when the distinction rests on a characteristic of their own such as the sex, the race or the ethnic origin

In addition, it is advisable to recall that in the beginning, the proposal for a directive 2004/113/CE did not envisage any exception to the principle of the equality of the gender: prohibition to use actuarial factors related to the sex was stated there in an absolute way, without it being question of exemption. It is only later on, and whereas the European Parliament and the European economic and social Committee had, each one on their side, approval the text of the Commission, that was finally inserted, to the favour of an intense pressure of the professionals of the insurance, a clause of "opting out" allowing the Member States to authorize the recourse to the criterion of the sex in the fixing of the premiums and the services of insurance. This derogatory option was introduced at the Council of ministers, on October 4, 2004.

Already at that time the industry had claimed that the use of unisex rates would result in a generalized increase in premiums. It is interesting to quote the study of a professor in actuarial science at the UCL, Michel Denuit. He stressed that most tariff choices made by insurance companies are resulting from commercial or competitive considerations, and are not imposed by the actuarial science. Thus one can read from his pen what follows:

*« La directive européenne visant à abolir toute différence entre hommes et femmes a fait couler beaucoup d'encre en ce qui concerne le secteur des assurances. De nombreuses voix se sont élevées contre cette « hérésie technique ». Notre position est beaucoup plus nuancée. S'il est indéniable que la mortalité est différente pour les hommes et les femmes, ces dernières jouissant à tout âge d'une longévité moyenne supérieure à celles des hommes, la technique actuarielle n'impose pas pour autant de reconnaître cette différence dans le tarif appliqué aux assurés. On constate autant*

*de différence entre la mortalité des cadres supérieurs et celles des ouvriers manuels, sans pour autant reconnaître systématiquement ces variations dans les tarifs commerciaux (voyez à cet égard Delwarde & Denuit 2005).*

*Les produits commercialisés par les compagnies sont pour la plupart rendus contractuellement obligatoires (comme l'assurance du solde restant dû d'un emprunt hypothécaire, par exemple) ou jouissent d'incitants fiscaux considérables. L'anti-sélection résultant d'un tarif commercial identique pour les hommes et pour les femmes devrait donc être négligeable. Par conséquent, on ne peut pas invoquer d'arguments techniques ou une quelconque « logique assurantielle » pour légitimer une différenciation des primes commerciales entre les hommes et les femmes en assurance sur la vie. Des tables unisexes sont d'ailleurs en usage dans plusieurs pays, sans que cela ne pose de problème particulier. (in France till the end of 2006) »*

**The factual arguments:**

To take the example of the life and death insurances only the behavioural factors related to the lifestyle (smoking tobacco, stress, practical of a sport, the way of driving, etc) are likely to explain the lifespan of the individuals. It is not the sex as such which explains the lifespan of the individuals. The criterion of the sex is actually a criterion of substitution to which the insurers resort by simple convenience. if we take only one but very important cause of death, we can observe that in France, but without any doubt also in Belgium, the first cause of mortality of the men is related to the tobacco (lung cancer and of the respiratory tracts and a risk factor in the cardiovascular diseases). Currently, the incidence and mortality among women are six times less low. But if one examines the phenomenon of prospective manner, one notes that the increase in mortality due to the tobacco is of 0.6% per annum for the men; among women, it is of 2.9% per annum! In other words, about 2015 - 2020, mortality due to the tobacco among women will quadruple.

France Meslé <sup>1</sup> has very well indeed also showed that in all the industrialized countries the gap of life expectancy between men and women is coming slowly but surely closer in particular for the reason mentioned above.

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<sup>1</sup> France Meslé : espérance de vie un avantage féminin menacé ? in Populations et sociétés n°462, Paris, juin 2004



