

European Commission
DG Employment, Social Affairs and Equal Opportunities

Study on the use of age, disability, sex, religion or belief,
racial or ethnic origin and sexual orientation in financial
services, in particular in the insurance and banking sectors

Final Report

Part II: Country Reports

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Final Report
Part II: Country Reports

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Country report Belgium

1 Current practices of financial service providers

1.1 The use of sex, age, and disability as a factor in design, supply, or pricing of products

1.1.1 *Use of sex, age, or disability as a factor in risk assessment*

Credit and banking products

Sex

According to the survey results, sex is used neither as a factor influencing pricing or contractual conditions nor the need to perform additional check-ups in credit and banking products.

Age

According to the responses of banks and of the credit industry to the survey, age is not used as a factor influencing pricing in credit and banking products. Survey results, however, indicate that age can be a risk-assessment/marketing factor in mortgage loans, consumer credit, credit cards, and deposit accounts.¹ Certain banks indeed declare that age can influence contractual conditions² or the need for further (financial) assessment.³

Disability

According to the banking industry and the Centre for Equal Opportunities and Opposition to Racism (CEOOR), disability is not used as a factor influencing pricing in credit and banking products.⁴ *Test-Achats*, however, indicates that disability can be a risk-assessment/marketing factor in mortgage loans, consumer credit, credit cards, and deposit accounts.⁵

¹ This can be explained by the further phenomenon that age is sometimes taken into consideration to decide whether or not a loan shall be granted. No specific cases are reported by stakeholders concerning the influence of age on price setting.

² It happens that mortgage loans are only offered to customers when age and duration of the loan don't exceed 75 years. A bank said not to offer mortgages with a maturity over 10 years to customers older than 60. Another bank mentioned that the maximum age for bullet loans is 70 at the end of the contract. Hence, age can influence the duration of the contract.

³ For instance, on the availability of financial collaterals. For example one Belgian bank stated that most banks are executing additional financial check-ups by a credit analyst if the age of the person together with the duration of the credit exceeds 75 years. Banks are also obliged to collect information from the so-called *Centrale des crédits aux particuliers*. See indeed Article 15 of the Law of 12 June 1991 *relative au crédit à la consommation*, *Moniteur Belge* 9 July 1991. This central individual credit register is an instrument used to curb excessive indebtedness. It records information on all loans contracted by natural persons for private purposes as well as any overdue debts relating to these loans. See http://www.nbb.be/pub/04_00_00_00_00/04_02_00_00_00/04_02_01_00_00.htm?l=en.

⁴ Survey of Civic Consulting.

⁵ The response of the Belgian financial supervisor (Banking, Finance and Insurance Commission; CBFA) to the survey

Motor insurance

Sex

Sex is not reported by the industry to influence contractual conditions or the need for additional (medical) check-ups.⁶

Age

Due to the legal obligation to use unisex tariffs in non-life insurance policies, age now appears to be one of the most important risk-assessment factors in motor insurance offered in Belgium.⁷ This certainly has an impact on tariffs. The impact can be direct (higher premiums for young drivers)⁸ or indirect (use of bonus-malus scale).⁹ The industry explains the use of age as a risk-assessment factor by showing a statistical correlation between age, on the one hand, and frequency and average costs of accidents, on the other. Higher premiums for young drivers are further explained by the fact that insurance companies cannot dispose of experience figures for young drivers. Elderly drivers, in comparison to younger ones, would also reduce their exposure to risk significantly.¹⁰

Some companies acknowledge that age influences contractual conditions, such as the use of higher deductibles for the segment of 'young drivers'.¹¹ *Test-Achats* further

confirms that this is the case for consumer credit.

⁶ This is confirmed by the answers of the CBFA, the Insurance Ombudsman, the Belgian Institute for Gender Equality, the CEOOR, and of Test-Achats to the survey, who indicate that sex is not a risk-assessment factor in motor insurance.

⁷ This is indicated by the responses of the industry (one insurance company, however, reported to offer fleet insurance and for that reason not to take account of age), the CBFA, the CEOOR, Test-Achats and the Insurance Ombudsman. In Test-Achats 2010, Test-Achats mentions that, besides age, three of the other most important criteria are place of residence (tariffs in city areas are higher than in rural areas), the driver's position on the bonus-malus scale and the insured vehicle (type, horsepower, brand).

⁸ Test-Achats gives the example of motor insurance for a person of 22 years, 26 years, and 46 years. In so-called 'omnium' insurance contracts, a 26-year-old pays a premium 1.5 times higher than a 46-year-old. A 22-year-old pays two times more than a 46-year-old (see Test-Achats 2010). Omnium insurance is motor insurance that in addition to private liability, also covers own loss, theft, glass damage, the risk of fire, and natural disasters. See for instance, <http://www.touring-assurances.be/Auto/omnium-complete.htm>.

⁹ Beside age, part of the difference in premium level in motor insurance can be explained by the level that has been reached on the so-called bonus-malus scale. Under this system, policyholders have the amount of their premium reduced after several years of accident-free driving (whereas it is increased following an accident). See <http://www.auto55.be/dossiers/1342-wegwijs-in-de-autoverzekering/4>.

¹⁰ Assuralia indicates that elderly people generally drive under less stress than young people: they drive fewer kilometres per year than other people and a number of elderly people also avoid complicated places, in which case they prefer to make use of public transportation. This explains why an older person (more than 70 years old) applying for insurance for the first time can still pay a lower premium than a young person in spite of the fact that a claims history does not exist.

¹¹ A higher deductible means that in case of payment of loss by the insurance company, younger drivers pay a

refers to policies that, in addition to private liability, also cover bodily harm of the insured (a form of accident insurance, called *assurance conducteur*) but where the sum insured in case of death is reduced if the insured has reached a certain age, for instance the age of 75.¹² A Belgian consumer guide for motor insurance finds examples where so-called ‘gross negligence’¹³ is excluded after a certain age.¹⁴ One company states that age influences the need for additional (medical) check-ups.¹⁵

One company states that age is used as a marketing factor influencing prices in motor insurance.

Disability

Some insurance companies contend that disability can have an influence on contractual conditions or the need for medical check-ups. Other stakeholders contend disability is used as a risk-assessment/marketing factor directly influencing prices or contractual conditions.¹⁶ Industry, however, explains that it is not disability as such, but rather health status that will be of influence and only to the extent that an individual's health status affects insured risk. One company asserts it provides important discounts for disabled persons in motor insurance. *Test-Achats* refers to the above-mentioned *assurance conducteur* policies that refuse coverage when the driver has a ‘physical or psychological problem’ that may or may not constitute the cause of the accident.¹⁷

Travel insurance

Sex

None of the stakeholders from the industry reported that sex as such influences contractual conditions or the need for additional (medical) check-ups.

Age

It is not clear to what extent age is used as a risk-assessment factor in Belgian travel insurance. Of the two travel insurers who responded, one reports to taking account of

relatively higher part of the loss themselves.

¹² See J.-P. Coteur, P. Louyet and A. Moriau 2007. See also, for instance, <http://www.aginsurance.be/nl/canal/ag/particuliers/00792000500n.pdf>, where the sum is reduced by 50%.

¹³ Gross negligence (*faute grave*) is, for instance, driving under influence of alcohol, drugs, or narcotics not prescribed by a physician. See <http://assurance-voiture.guides-123.be/fr/etape-1--bon-a-savoir/exclusions>.

¹⁴ The age limit will vary from one insurer to another. See <http://assurance-voiture.guides-123.be/fr/etape-1--bon-a-savoir/exclusions>.

¹⁵ This company makes insurance candidates older than 70 prove their driving skills.

¹⁶ The use of disability as a risk-assessment/marketing factor in motor insurance is reported by the CBFA, Test-Achats, and the CEOOR.

¹⁷ This happens, according to Test-Achats, in policies that cover personal bodily injury of the insured. See the above-mentioned *assurance conducteur*. See J.-P. Coteur, P. Louyet and A. Moriau 2007.

age in contractual conditions. The financial supervisor (the Banking, Finance and Insurance Commission, CBFA) and *Test-Achats* respond that age indeed is a risk-assessment/marketing factor in travel insurance. Assuralia states it is not.

Disability

Insurance industry mentions that disability is not used as a risk-assessment factor in travel insurance.¹⁸ Other stakeholders believe it does.¹⁹ *Test-Achats* acknowledges that so-called ‘pre-existing conditions’ (health disorders that already existed before the signing of the insurance contract) mostly lead to exclusions from coverage.²⁰ One company indeed reports that all pre-existing pathologies are excluded, except when these have ‘stabilized’ at least two months before booking. This company also states that exclusions are being removed in top policies.

Term life insurance, including loan insurance

Sex

Since the Belgian legislator did not impose a duty to use unisex tariffs in life insurance, responses of stakeholders to the survey suggest that sex still has a direct influence on pricing in term life insurance, annuity products, and loan insurance. One gender either has to pay a higher premium or receive less benefits than the other gender on the basis that statistics show a higher average life expectancy and lower mortality for women than for men.²¹ In order to ensure that differences in treatment related to sex and age

¹⁸ Due to the narrow definition of disability that appears to be used by the industry, the answers do not lead to an unequivocal conclusion.

¹⁹ This is revealed by the responses of the CBFA, the Insurance Ombudsman, *Test-Achats*, and the CEOOR to the survey.

²⁰ Sometimes these exclusions are excluded unconditionally. Sometimes they are only excluded when they generate medical treatment. See J.-P. Coteur, P. Louyet, and A. Moriau 2008.

²¹ Assuralia explains that the mortality risk for women is lower than the mortality risk for men. In term life insurance, for instance, insurance companies will be interested in the risk that the insured will die within the insured period. Differences in life expectancy and mortality explain higher premiums for men in term life insurance since they cover the risk of (early death). Annuity systems and endowment insurance cover the risk of surviving a certain age and are thus more expensive to women. The difference in life expectancy between men and women leads insurance companies to pay out less to female annuitants than to males of the same age. This seems logical. In an annuity–benefit system the insurer–annuity debtor is required to pay annuities on a periodic basis from the time a certain initial capital is paid. The annuity-debtor fulfils its obligation immediately, which ends at the death of the annuitant. The death of the annuitant frees the annuity-debtor. Because women on average live longer than men, women receive less benefits per period than men do, the idea being that eventually they should receive the same total sum. With endowment insurance, the insurer carries out its obligation at a stipulated date on the condition that the policyholder is still alive at that time. For instance, the capital is paid out at the moment the insurance-taker has reached the age of 65. If the insurance-taker dies before he or she has reached this age, the insurer is no longer liable. Because women have a higher life expectancy and thus a higher chance of reaching 65, they become a higher-risk group in the eyes of the insurer and thus are charged higher premiums. See C. Van Schoubroeck and Y. Thiery 2003.

are proportionate to differences in risk in (term) life insurance, the industry makes use of mortality tables.²²

The Belgian Institute for Gender Equality reports cases where gender reassignment sometimes leads to higher premiums in life insurance.

None of the stakeholders from the industry reported to use sex as a factor influencing contractual conditions or the need for additional medical check-ups in term life insurance.

Age

Age has an impact on price setting in life insurance contracts.²³ Assuralia indicates that younger people have a lower mortality risk than older people and consequently pay less for term life insurance.²⁴ Age is also used as a pricing factor in the provision of loan insurance (*assurance solde restant dû*).²⁵

It is indicated by the insurance industry that, from a certain age, a more detailed medical procedure is followed in term life insurance.²⁶ *Test-Achats* points at medical requirements in loan insurance that are more likely to be stringent as age increases.²⁷

Disability

Insurance industry generally reports that disability as such is not used as a risk-assessment factor in term life insurance.²⁸ Responses of other stakeholders to the survey however suggest the position of disability as a risk-assessment factor in life

²² Those tables are based on statistics provided by the National Institute for Statistics, supplemented with the companies' own experience figures. The Royal Decree of 17 December 1992 introduced different mortality tables for men and women (Royal Decree of 17 December 1992 *relatif à l'activité d'assurance sur la vie*, *Moniteur Belge* 31 December 1992, abolished by the Royal Decree of 14 November 2003). The possibility to use different tables, which must in any case take account of statutory minimum survival or mortality rates, was later confirmed by the Royal Decree of 14 November 2003. See Article 24, §§5-6 of the Royal Decree of 14 November 2003 *relatif à l'activité d'assurance sur la vie*, *Moniteur Belge* 23 July 2004. The tables are formed according to the formula so stated in Annex 1 of the Royal Decree of 14 November 2003, as adapted by the Royal Decree of 25 January 2007.

²³ According to survey results, all respondents offering term life insurance make use of age. Most of them use age in annuity products.

²⁴ The fact that the risk of mortality increases with age seems to be ascertained by the Royal Decree of 14 November 2003 that legitimises the use of different mortality tables for men and women. See Annex 1 of the Royal Decree of November 14, 2003, which explicitly incorporates age in the formula that determines the different mortality tables.

²⁵ Out of a total of five insurance companies that responded to the survey, four answered that they make use of age as a pricing factor in loan insurance. *Test-Achats* notes that a 40-year-old can sometimes pay up twice as large a premium in loan insurance than a 30-year-old. See Y. Evenepoel, K. Van Neck and R. Vanparys (2009).

²⁶ Assuralia gives the age of 55 as an example.

²⁷ Y. Evenepoel, K. Van Neck And R. Vanparys 2009.

²⁸ Three companies (of a total of 18 respondents) however indicated that they use disability for price-setting.

insurance.²⁹ The industry explains that life insurers do take account of the underlying health status in price setting, contractual conditions, and the need for additional medical check-ups, which means that disability as such will only be taken into account to the extent that it is influencing life expectancy/mortality of the insured. Proportionality between disability-based differences and differences in risk of an individual insured is stated to be ensured by medical evidence, 'relevant actuarial principles', and 'accurate statistical data'.

Private health insurance

Sex

None of the stakeholders from the industry reported that sex as such influences contractual conditions or the need for additional (medical) check-ups.³⁰ It is nevertheless reported by the Belgian Institute for Gender Equality that contractual conditions in private health insurance are sometimes influenced by pregnancy and maternity. Some private sickness funds (so-called 'mutualities')³¹ offer contracts where benefits relating to pregnancy and maternity are being capped to a certain level.³² Cases are reported by the Belgian Institute for the Equality of Men and Women where waiting periods of one year are used for pregnant women.³³ The Institute for the Equality of Men and Women reports further cases where insurance companies exclude the costs of gender reassignment.

²⁹ The CBFA, Test-Achats, and the Insurance Ombudsman responded that disability is used as a risk-assessment factor in life insurance.

³⁰ See section 3.1. on the implementation of Directive 2004/113/EC in Belgium.

³¹ These private sickness funds indeed offer supplementary private health insurance (to their members), in addition to state-funded private health insurance. The European Commission has decided to refer Belgium to the European Court of Justice to ensure that these private sickness funds comply with EU insurance directives in offering supplementary private health insurance outside the scope of obligatory social security. See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1756&format=HTML&aged=0&language=EN&guiLanguage=en>. On 25 March 2010, an act has been adopted that changes the Act of 6 August 1990 *relative aux mutualités et aux unions nationales de mutualités*, *Moniteur Belge* 28 September 1990. This change to the law obliges mutualities to offer insurance contracts such as private health insurance exclusively through a separate legal person, a so-called *société mutualiste* which would fall under the same conditions (insurance contract law, supervision rules) as any other insurance company. See new Article 43bis, 1° of the Act of 6 August 1990 as to be adapted by Article 13 of the Bill voted by the *Chambre des Représentants de Belgique* on 25 March 2010, <http://www.dekamer.be/FLWB/pdf/52/2292/52K2292006.pdf>, evoked by the Senate, without further amendments (decision of 1 April 2010, see <http://www.senate.be/www/?MIval=dossier&LEG=4&NR=1729&LANG=fr>) and still to be ratified by the Chamber and to be published in the *Moniteur Belge*.

³² J.-P. Coteur, A. Moriau and I. Nauwelaers 2009.

³³ Insurance companies abolish the waiting time of nine months, but do not grant benefits when the insured person was already pregnant at the time of subscription. See Insurance Ombudsman 2009.

Age

Age forms one of the most important risk-assessment factors in non-work-related³⁴ private health insurance, having impact on prices, contractual conditions and medical check-ups.³⁵ Both Assuralia and private health insurers explain age-differentiated price setting by referring to statistical data³⁶ showing a lower mortality and morbidity rate for younger people.³⁷ Young subscribers also have more time to contribute to a (collective) reserve that is then used to pay health claims at an older age. Certain companies only take account of age at the moment of subscription, 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.³⁸ Only in 'work-related' private health insurance contracts³⁹ will age not have an (important) influence on pricing.⁴⁰ Nonetheless, it is pointed out there can still be considerable increases in premium when people who retire switch to individual (non-work-related) health insurance contracts. The industry is not specific on the impact of age on contractual conditions or the need for additional check-ups. *Test-Achats*, however, points at medical questionnaires in private health insurance that, as age increases, are more likely to lead to exclusions from coverage.⁴¹

Disability

The insurance industry indicates that disability is a risk-assessment factor in private health insurance, having an important influence on premiums, contractual conditions,

³⁴ This is in contrast to group contracts (work-related) that typically do not take account of age (nor sex nor disability) of the individual employee. The phenomenon can be explained by the fact that work-related contracts are the result of negotiations between the employer and the insurance company. On group contracts, see also J.-P. Coteur, A. Moriau and I. Nauwelaers 2009.

³⁵ All insurance companies that answered the question (seven companies) responded that age directly influences price. Most of them responded that age also influences contractual conditions (5 companies) and the need for additional medical check-ups (4 companies). This is confirmed by the responses of the Flemish Advisory Council of Older People, *Test-Achats*, the CBFA, and the Insurance Ombudsman, which all answered that age is used as a factor in risk assessment or marketing of health insurance directly influencing prices or contractual conditions.

³⁶ Companies make use of their own figures but use market figures as well. One private health insurer reports that it makes use of its own (internal) evidence-based figures to determine premiums, benefit, and contractual conditions.

³⁷ Assuralia stresses that, in voluntary health insurance, age-differentiated pricing is necessary (1) in order to avoid the consequences of adverse selection; (2) in order to encourage people to join early so that they start contributing to solidarity and help keeping insurance premiums lower; and (3) in order to take into account the average costs for health care that increases with age.

³⁸ See J.-P. Coteur, A. Moriau and I. Nauwelaers 2009.

³⁹ Private health insurance offered through the employer.

⁴⁰ One respondent insurance company contends that only private health insurance offered to retail clients takes account of age and typically is not used in group contracts. See also J.-P. COTEUR, A. MORIAU and I. NAUWELAERS 2009. These authors further indicate that premium levels in these contracts are generally also lower.

⁴¹ See J.-P. Coteur, A. Moriau and I. Nauwelaers 2009.

and the need for additional medical check-ups.⁴² It is indicated by the industry, however, that disability will only play a role when it influences mortality or the general health status of the insured. This influence can be proven by (internal or market)⁴³ figures, medical knowledge, or guidelines of reinsurers.⁴⁴ The Insurance Ombudsman refers to cases where insurance companies were also willing to reduce additional premiums when the insured's health status stabilised or improved.⁴⁵

Test-Achats refers to the use of medical questionnaires that help insurance companies decide whether supplementary medical examinations are necessary before conclusion of the contract.⁴⁶

The Insurance Ombudsman also refers to contractual clauses that exclude health disorders that already existed (pre-existing conditions) at the time the contract was concluded.⁴⁷ The insurance industry explains that the law on insurance contracts would allow for such exclusions.⁴⁸ The industry further refers to a legally constituted conciliation board⁴⁹ that must judge the proportionality and technical soundness of the exclusion of costs referring to pre-existing conditions of insured with a chronic illness or disability.

⁴² The CBFA, the Insurance Ombudsman, the CEOOR, and Test-Achats confirmed that disability is used as a factor in risk assessment or marketing of health insurance directly influencing prices or contractual conditions.

⁴³ One respondent insurance company refers to the so-called INAMI-statistics provided by the Belgian *Institut National d'assurance maladie-invalidité*, also known as RIZIV (*Rijksinstituut voor ziekte- en invaliditeitsverzekering*). See www.inami.fgov.be.

⁴⁴ Insurers sometimes use information available from reinsurers when pricing a policy. One private health insurer reports that, even in the field of rare diseases, no use is made of reinsurers' figures, since they make use of their own 'in-house specialists' who base their decision on 'experience'.

⁴⁵ See Insurance Ombudsman 2009.

⁴⁶ See J.-P. Coteur, A. Moriau and I. Nauwelaers 2009.

⁴⁷ See Insurance Ombudsman 2008 http://www.ombudsman.as/fr/documents/Rapport_Ombudsman_2007.pdf. See also Insurance Ombudsman 2004. Insurance companies denied intervention when the insured had no knowledge about the disorder. This practice came to an end after the law changed on 20 July 2007, *Moniteur Belge* 10 August 2007. See Article 138bis-5 of the Insurance Contract Act of 25 June 1992 *sur le contrat d'assurance terrestre*, *Moniteur Belge* 20 August 1992.

⁴⁸ This is only true, however, for details and circumstances that were known to the policyholder at the time of conclusion of the contract. See the interpretation *ex analogia* of Article 5 and Article 138bis-5, 2° of the Insurance Contract Act of 25 June 1992 *sur le contrat d'assurance terrestre*, *Moniteur Belge* 20 August 1992. See for instance H. Cousy 1997; J.-P. Coteur, A. Moriau and I. Nauwelaers 2009. These kinds of exception clauses must also be limited in time (Case-law of the Brussels Commercial Court of 16 June 2003, *Revue du Droit Commercial Belge* 2003, 897). See also article 138bis-5, 1° and 138bis-6 of the Insurance Contract Act of 25 June 1992 and Article 9, §1quinquies, 2° of the Law of 6 August 1990 on private sickness funds.

⁴⁹ I.e. *La Commission de Conciliation Assurance Soins de Santé*. See Article 138bis-6 of the Insurance Contract Act of 25 June 1992. See also Royal Decree of 20 December 2007 *instituant l'organe de conciliation visé à l'article 138bis -6, troisième alinéa de la loi du 25 juin 1992 sur le contrat d'assurance terrestre*, *Moniteur Belge* 14 May 2008.

Test-Achats refers to private health insurance contracts of some Belgian mutualities that exclude the costs of a stay in a psychiatric facility.⁵⁰ It also points at differences in the extent of coverage of ambulant care in case of critical illness.⁵¹

Other insurance products

The responses of the insurance industry to the survey indicates that age is used as a pricing factor in critical illness insurance, disability (income protection) insurance, accident insurance, long-term care insurance, and private liability insurance, and home insurance.⁵² As non-life insurance contracts, these products make no use of sex.

1.1.2 Existence of financial products that are offered exclusively to specific groups

Banking and credit products

As for banking and credit products, mortgage may not be offered above a certain age (65-75 years). One company reports that so-called 'bullet loans'⁵³ are not offered to people above 70. The CEOOR reports cases where a customer was denied access to a department's store customer credit card.⁵⁴ One company explains that most banks in Belgium base their decision to grant a loan on the results of 'credit scoring' of the client.⁵⁵

Motor insurance

Cases are reported where older and younger drivers were refused coverage because of their age.⁵⁶

Travel insurance

In travel insurance, one company refers to a maximum age of 75 for so-called warranty capital accident travel insurance.⁵⁷

⁵⁰ J.-P. Coteur, A. Moriau and I. Nauwelaers 2009.

⁵¹ *Ibidem*. What is meant are diseases such as Alzheimer's, Parkinson's, sclerosis, etc.

⁵² I.e. at least one respondent insurance company or Assuralia answered that the factor age is used for these products. The Insurance Ombudsman answered that age is not used as a pricing factor in accident insurance and home insurance. The CEOOR responded that age is not used as a pricing factor in critical illness insurance, disability income protection insurance, and long-term care insurance. Test-Achats answered that age is not used as a pricing factor in private liability insurance and home insurance.

⁵³ A bullet loan is a loan where a payment of the entire principal of the loan (and sometimes the principal and interest) is due at the end of the loan term. See for this definition, http://en.wikipedia.org/wiki/Bullet_loan.

⁵⁴ CEOOR, complaint BE-1.

⁵⁵ This means that, for existing clients, the credit and account history of the particular client at the issuing bank is examined. For new clients, socio-demographic factors come into play, such as the place of residence in Belgium and the job or position of the potential client.

⁵⁶ See Insurance Ombudsman 2008; see also CEOOR, complaint BE-2 (maximum age of 75).

Term life insurance, including loan insurance

Several Belgian insurance companies are applying maximum age limits ranging between 65 to 70 years in term life insurance. These age limits are explained by the fact that premium amounts after a certain age are so high that they are no longer commercially attractive. Assuralia further explains that if insurance companies would offer term life insurance above these age limits, they would be exposed to a high degree of adverse selection, since a person could 'anticipate' a premature death. Nevertheless, some of the respondents still make no use of upper-age limits in offering term life insurance and so they keep applying premiums corresponding to higher risk. Due to a legal ban in Belgian insurance contract law, life insurance cannot be concluded for children under the age of 5.⁵⁸

The Insurance Ombudsman notes that, in loan insurance, insurance companies reject (do not insure) a lot of consumers for health reasons.⁵⁹ For this reason, especially (ex-) cancer and diabetes patients encounter difficulties in finding loan insurance. The insurance industry reports that from a technical angle it may be extremely difficult or in some cases even impossible to offer (term) life insurance to people with severe health problems, such as terminally ill patients.

Private health insurance

According to survey results, also in private health insurance (and disability insurance), companies may make use of upper-age limits (ranging between 65 and 75),⁶⁰ above which no (new) insurance contracts are concluded.⁶¹

1.2 The use of racial/ethnic origin, religion/belief, and sexual orientation as a factor in design, supply, or pricing of products

On the basis of the survey results, it cannot be concluded that racial/ethnic origin, religion/belief, or sexual orientation is used as a factor in the design, supply, or pricing of financial products in Belgium. One bank reports, however, that it takes account of

⁵⁷ This type of insurance pays a sum in case of death or invalidity following an accident abroad.

⁵⁸ See Article 96 of the Insurance Contract Act of 25 June 1992. Apart from cases relating to this prohibition, no specific industry reports revealing whether insurance companies offer products exclusively to consumers above a specific age could be found.

⁵⁹ See Insurance Ombudsman, 2008 and Insurance Ombudsman 2009.

⁶⁰ It must be noted that Belgian insurance contract law provides for an obligation towards insurance companies to offer private health insurance to people under 65 who have a disability or a chronic illness. See Article 138bis-6 of the Insurance Contract Act of 25 June 1992. As already mentioned above, this article also allows for exclusions of pre-existing conditions related to the chronic illness or the disability involved.

⁶¹ A respondent insurance company reports that, above these ages, relevant statistical information to be able to price a risk correctly is not available.

whether the potential client is a ‘resident’ or not when deciding whether to grant a loan.⁶²

1.3 Conclusions

1.3.1 Use of sex

Survey results indicate that sex is not used as a factor influencing pricing or contractual conditions in credit and banking products in Belgium. Sex is also not used as a price-setting factor in non-life insurance contracts. Due to differences in mortality and life expectancy, sex is still used as a pricing factor in life insurance. Sex as such will not normally influence contractual conditions or the need for additional medical checks, but cases are reported where pregnancy and maternity influence exclusion from coverage and the use of longer waiting periods for women in private health insurance. Gender reassignment can also lead to exclusions in private health insurance. No cases were reported showing the existence of financial products offered exclusively to women or to men.

1.3.2 Use of age

Age appears to be an important risk-assessment factor in credit and banking products. The most important use of age is the setting of age limits above which certain products, such as credit cards and mortgage loans, are not available. Age is sometimes used as a factor influencing contractual conditions in mortgage loans. Mortgage loans and so-called bullet loans are mostly not offered to people above 70 years of age.

Age also appears to be one of the most important risk-assessment factors influencing prices in motor insurance and private health insurance. Due to a higher risk of mortality for older people, age is still considered to impact pricing in life insurance. Age is also a pricing factor in critical illness insurance, disability (income protection) insurance, accident insurance, long-term care insurance, private liability insurance, and home insurance.

Age has a much more important impact on contractual conditions and the need for additional medical check-ups in life insurance and private health insurance than in motor insurance and travel insurance, for instance. Most insurance products make use of age limits (ranging between 65 and 75), beyond which no cover is available. Life insurance products cannot be offered under the age of 5.

1.3.3 Use of disability

Disability appears to be a risk-assessment factor in most of the investigated credit and banking products.

Disability is used as a risk-assessment factor in insurance when it has an effect on the insured risk. As this is the case in most insurance contracts, disability (including chronic

⁶² For residents, the banks make use of scoring and the information of the *Central des crédits aux particuliers* to decide on the reimbursement capacity of the particular client, while non-residents are automatically referred to a credit analyst who will check the availability of collaterals to secure the loan, for instance.

illness) is a commonly used price-setting factor. When disability forms a pre-existing condition at the time of the conclusion of the insurance contract, it has an effect on contractual conditions (in the capacity of exclusions or loss of coverage) when this pre-existing condition can be related to the disability. In (motor) accident insurance, exclusions of coverage occur when a physical or psychological problem may constitute the cause of an accident. In term life insurance, adapted contractual conditions occur when disability influences mortality or the general health status of the insured. Supplementary medical examinations can be requested. The same is true for private health insurance. Some private health insurers also exclude costs relating to psychiatric care.

Loan insurance is often not offered to people with chronic illness. This is especially the case for (ex-) cancer patients and people with diabetes.

1.3.4 Use of racial/ethnic origin, religion/belief, and sexual orientation

These factors do not appear to be used as a factor in the design, supply, or pricing of financial products in Belgium. It is, however, reported that additional check-ups are performed for 'non-residents'.

2 Actual and potential problems of discrimination

2.1 Complaints concerning discriminatory treatment of consumers

2.1.1 *Problem areas to which reported/documentated complaints relate*

Test-Achats and the Centre for Equal Opportunities and Opposition to Racism report that they have received complaints concerning discrimination in a vast field of problem areas. Problems refer to the refusal to provide requested services and expensive premiums.⁶³ These complaints relate to private health insurance, motor insurance, and consumer credit. In addition, the Centre received complaints for practically all other forms of insurance.⁶⁴ Some of these complaints may be sent to the Insurance Ombudsman. The Centre further received complaints concerning all investigated banking and credit products.⁶⁵

Complaints that were received by the Insurance Ombudsman merely related to denials of access to insurance, general difficulties in finding an insurance company, and exclusions and restrictions in insurance policies.⁶⁶ Most of the complaints received by the Insurance Ombudsman are related to motor insurance; private health insurance, long-term care insurance and critical illness insurance; and life insurance, loan insurance and annuity products.⁶⁷ Some complaints concern travel insurance, disability (income protection) insurance, and accident insurance.⁶⁸ Discrimination-related complaints have increased between 2006 and 2009.⁶⁹ The Insurance Ombudsman

⁶³ See table of complaints. See also Insurance Ombudsman 2005.

⁶⁴ Apart from private health insurance (22 complaints in 2007, 16 in 2008, 4 in 2009), motor insurance (7 complaints in 2007, 6 in 2008, 1 in 2009), and loan insurance (12 complaints in 2007, 12 in 2008, 18 in 2009), complaints related also to travel insurance (1 complaint in 2007, 0 in 2008, 1 in 2009), other forms of life insurance (1 in 2007), annuity products (1 in 2007), disability (income protection) insurance (5 complaints in 2007, 4 in 2008, 1 in 2009), and private liability insurance (1 in 2008).

⁶⁵ Complaints were received for mortgage loans (1 in 2007, 1 in 2008, 2 in 2009), consumer credit (5 in 2007, 3 in 2008), credit cards (3 in 2007, 2 in 2008), and deposit accounts (3 in 2007, 2 in 2009).

⁶⁶ See also Insurance Ombudsman 2005; Insurance Ombudsman 2007; Insurance Ombudsman 2008.

⁶⁷ Complaints for motor insurance: 4 in 2007, 2 in 2008, 3 in 2009; complaints for private health insurance, critical illness insurance and long term care insurance: 8 in 2007, 7 in 2008, 5 in 2009; complaints for life insurance, annuities and loan insurance: 22 in 2007, 17 in 2008, 20 in 2009. See also Insurance Ombudsman 2008.

⁶⁸ Complaints for travel insurance: 1 in 2007; complaints for disability (income protection) insurance: 3 in 2008, 1 in 2009; complaints for accident insurance: 2 in 2007, 1 in 2008. In 2009, the Insurance Ombudsman also received some complaints outside the field of insurance, including 2 complaints concerning mortgage loans.

⁶⁹ 24 complaints in 2006, 37 complaints in 2007 (peak explained by new legislation and higher press coverage), 31 complaints in 2008, 31 complaints in 2009. See Insurance Ombudsman 2008. The Insurance Ombudsman notes however that the number of complaints relating to discrimination in total is only a fraction of the total number of complaints received.

attributes this effect to a better knowledge of Belgian anti-discrimination legislation among consumers.⁷⁰

The Belgian Institute for the Equality of Men and Women also received (gender-related) complaints concerning denial of access, expensive premiums, loss of coverage, and exclusion clauses, most frequently in private health insurance and life insurance policies. The Flemish Advisory Council of Older People reports complaints concerning denial of access, high premiums, loss of coverage, and the general difficulty of finding a provider for elderly people for private health insurance.

2.1.2 *Discrimination grounds to which reported/documentated complaints relate*

Sex in general

With regard to sex in general, *Test-Achats* refers to premium differences for men and women in loan insurance.⁷¹ The Insurance Ombudsman, however, reports not to have received complaints concerning sex-related premium differences in life insurance. The Insurance Ombudsman did, however, report to have received some premium-related complaints in the field of non-life insurance, where premiums, as a result of the obligation to use unisex tariffs, had increased for one of the two gender categories.⁷²

Pregnancy and maternity

Denial of access to insurance

The Institute for the Equality of Men and Women handled a case involving a pregnant woman who was denied access to travel insurance. More specifically, the insurer refused to guarantee the repayment (in the context of a cancellation insurance) of the plane ticket. Without further information or evidence, the pregnant woman was told to be regarded as an almost 'certain risk'.⁷³

Exclusions and delays in obtaining coverage

The Institute for the Equality of Men and Women reports some cases where the costs of pregnancy were either excluded from coverage or the right of coverage was postponed. One of the complaints involved an income protection insurance contract where a pregnant woman could not get coverage during the period of her pregnancy.⁷⁴ Another complaint involved a private health insurance policy that used a waiting period

⁷⁰ See Insurance Ombudsman 2008.

⁷¹ Y. Evenepoel, K. Van Neck and R. Vanparys 2009.

⁷² In private health insurance, for instance, women used to pay a higher premium because of risks associated with pregnancy. After the Gender Equality Act came into effect, men paid higher premiums, while premiums for women remained the same.

⁷³ Institute for the Equality of Men and Women, complaint BE-7. No inquiry has taken place yet. The complaint is still being processed by the Institute.

⁷⁴ Institute for the Equality of Men and Women, complaint BE-8. No inquiry has taken place yet. The complaint is still being processed by the Institute.

of three months starting from the conclusion of the contract, which was increased to 12 months in case of pregnancy. Costs relating to pregnancy or maternity that would be generated within this period would be excluded. According to the insurance company, this waiting period was again justified since it is impossible to insure a risk that was already certain at the time of conclusion of the contract.⁷⁵ The Insurance Ombudsman received a similar complaint from a woman who had concluded a private health insurance contract. After seven months, she gave birth to a child and asked to be reimbursed the costs of hospitalisation. Due to the Belgian Gender Equality Act coming into effect in 2007, the company had abolished formerly used pregnancy-related waiting periods of nine months. Nevertheless, coverage was still refused. This refusal was again motivated by the fact that there had been a 'known condition' at the time of subscription. According to the Insurance Ombudsman, the insurer was right in refusing coverage, having respected the general principle that an insurance contract can only cover future and, at the time of conclusion of the contract, uncertain events.⁷⁶

Gender reassignment

The Belgian Institute for the Equality of Men and Women reported a case where a transsexual who wanted to conclude a life insurance contract was asked to pay a surcharge.⁷⁷ The insurance company defended the surcharge on the basis of a supposed increase in health risk for transsexuals. Further information on or evidence for the increased health risk was not provided.

Age

Denial of access to insurance

The Centre for Equal Opportunities and Opposition to Racism recalled a case concerning a person whose application for motor insurance was turned down by the agency of an insurance company because he was older than 75. In its initial answer, the agency referred to the guidelines from the insurance company's management that new clients over 75 could not receive motor insurance. The management, however, denied that it had given such directives. Instructions were sent out to all agencies that driving skills, not age, should be taken into account when assessing new persons to be insured. The company's management even mentioned that older people would be able to receive reductions in premiums since they are believed to drive less than the average Belgian driver.⁷⁸ The Insurance Ombudsman however reports to have received

⁷⁵ Institute for the Equality of Men and Women, complaint BE-9; no inquiry has taken place yet. The case is still being processed by the Institute.

⁷⁶ See Article 1 of the Insurance Contract Act of 25 June 1992 that describes an insurance contract as a contract whereby the insurer agrees to provide a benefit stipulated in the contract in case an uncertain event should arise. It was accepted that only loss-triggering events, occurring after the conclusion of the contract, could be subject of the insurance policy. See Insurance Ombudsman 2009.

⁷⁷ Institute for the Equality of Men and Women, complaint BE-6.

⁷⁸ Centre for Equal Opportunities and Opposition to Racism, complaint BE-2. The Centre referred the case to the

other complaints of older or younger people who were still denied access to motor insurance.⁷⁹ These complaints were resolved by providing adapted and (more) affordable motor 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).⁸⁰

Denial of access to credit products

The Centre for Equal Opportunities and Opposition to Racism received a case concerning credit products. A department store offers 'customer cards' with a credit function that is issued by a bank. The Centre received two identical complaints from single customers whose application for this card was turned down because of their age (70+). Due to the denial of access, the customer could also not enjoy the 'best prices and promotions' and 'extra benefits' offered to promote the use of this card. After being contacted by the Centre, the bank referred to the Belgian Consumer Credit Act stating that the creditor can only enter into a credit agreement if, given the information he has (or should have),⁸¹ it can reasonably be assumed that the consumer will be able to meet the obligations under the contract.⁸² The financial institution further referred to the average life expectancy in Belgium and stated that there exist 'more appropriate' credit arrangements (with limited duration) for elderly people. The Centre argued that age as such does not determine the customer's financial standing and creditworthiness. The Centre considered the use of a standard age limit arbitrary and therefore not objectively justified. According to the Centre, the company did not reveal the relative weight of the age factor, nor did it present any actuarial or statistical data. The financial institution did, however, add that 25% of their customers over the age of 70 are behind on their payments (as opposed to a general average of 1%). The National Bank of Belgium provided the Centre with general statistics stating that there are no difficulties of repayment by older consumers.⁸³

High premiums

The Insurance Ombudsman received complaints from older people who switched from a work-related (collective) private health insurance contract to a non-work-related (individual) private health policy and were confronted with significant premium

Insurance Ombudsman, which informed the insurance company that such discriminating policies were not allowed.

⁷⁹ See Insurance Ombudsman 2008.

⁸⁰ See Insurance Ombudsman 2004 referring to the 29/29 agreement between Assuralia and the Ministry for Economic Affairs.

⁸¹ For instance, from the above mentioned *Centrale des crédits aux particuliers*.

⁸² See Article 15 of the Act of 12 June 1991 *relative au crédit à la consommation*, *Moniteur Belge* 9 July 1991. Article 10 of this Act states that the creditor or credit intermediary must request accurate and complete information that the creditor or credit intermediary deems necessary to assess the financial situation, the ability to repay, and the outstanding financial commitments from the consumer seeking a credit agreement.

⁸³ Centre for Equal Opportunities and Opposition to Racism, complaint BE-1.

increases.⁸⁴ The Insurance Ombudsman has pleaded for the use of a fixed maximum age of 65 to 70 years as a basis for premium calculation.⁸⁵ *Test-Achats* further reports cases with high price increases for (mainly)⁸⁶ older people in private health insurance.⁸⁷ These premium increases will in many cases lead to a termination of the contract by the insured.⁸⁸ Insurance companies justify increases on the basis that, since 2007, private health insurance must in principle be concluded for life,⁸⁹ that there exists a duty to use unisex tariffs in non-life insurance, and that there have been increases in the cost of health care.⁹⁰

Disability

Denial of access to insurance

Patient organisations specifically point at difficulties in finding affordable loan insurance (hindering them from concluding mortgage loans) for disabled people and people with chronic illness.⁹¹ The Insurance Ombudsman reported a case involving a woman ex-suffering from hepatitis C who encountered difficulties in finding loan insurance. According to the Insurance Ombudsman, the refusal of coverage or specific conditions of acceptance should be based on so-called 'objective and reasonable criteria'.⁹² After being contacted by the Insurance Ombudsman, the insurer proposed to cover this woman under the condition of a surcharge based on and justified by statistics. During negotiations, the Insurance Ombudsman learned that the surcharge was fixed by the oral recommendation of the advisory physician of the insurance company. Documentary proof was not, however, available. Unable to accept this justification, the

⁸⁴ Premiums rose from 276 Euro to 1691 Euro for a 65-year-old. For an 80-year-old, premiums rose to 3000 Euro.

⁸⁵ Insurance Ombudsman 2008.

⁸⁶ Reference can be made to insurance companies that start with very low premium levels for young subscribers and augment premium levels considerably at ages where it is much more difficult to switch to another insurance company. See J.-P. Coteur, A. Moriau and I. Nauwelaers 2009. See also Centre for Equal Opportunities and Opposition to Racism, complaint BE-3.

⁸⁷ See J.-P. Coteur, A. Moriau and I. Nauwelaers 2009 and Test-Achats, "Assurance hospitalisation : scandaleusement chère", available at: <http://www.test-achats.be/assurances/assurance-hospitalisation-scandaleusement-cher-s618703.htm>.

⁸⁸ See Insurance Ombudsman 2008. Termination is usually detrimental to older policyholders, since the new insurer will take account of the older age of subscription and possible new developed pre-existing measures. See Insurance Ombudsman 2006.

⁸⁹ See Article 138bis-3, of the Insurance Contract Act of 25 June 1992.

⁹⁰ Insurance Ombudsman 2009.

⁹¹ See Commission des Assurances 2009b.

⁹² Under the former General Anti-Discrimination Law of 2003, (Act of 25 February 2003 *tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des [chances] et la lutte contre le racisme*, *Moniteur Belge* 17 March 2003), distinctions on the basis of *inter alia* sex, age, and disability could continue provided that there was a so-called '*justification objective et raisonnable*'.

Insurance Ombudsman asked to review the case. After new analysis, the company agreed to cancel the surcharge.⁹³ The Insurance Ombudsman further reported cases where (ex-) cancer patients and diabetes patients were denied access to loan insurance.⁹⁴ In most cases, sometimes after lengthy negotiations, the insurer proposed a contract with a surcharge.⁹⁵ The Insurance Ombudsman was also contacted regarding refusing coverage to a blind person in a work-related private health insurance policy.⁹⁶

High premiums

The Insurance Ombudsman reports that most complaints concern cases where people are faced with a high premium because of current or former health conditions. Problems occur with higher premiums in life insurance because of the presence of a chronic (or mortal) illness. Complaints are also reported regarding ex-cancer patients who, after being cured, do not consider themselves to be an aggravated risk and protest high surcharges. The Insurance Ombudsman has intervened by asking companies whether they could prove a higher risk of mortality of the client. Most companies could provide a clarification, leaving the Insurance Ombudsman with little room to negotiate. One case was reported where the Insurance Ombudsman obtained medical proof that an individual who suffered from heart arrhythmias would only have an increased mortality risk after the age of 60. Based on the principle that reasonable solutions are required 'in relation to risk',⁹⁷ the Insurance Ombudsman could obtain a lower surcharge in concluding the loan insurance contract.⁹⁸

Exclusions and loss of coverage

As already mentioned above, both the Insurance Ombudsman and *Test-Achats* received complaints of persons with pre-existing health-conditions being excluded from coverage in travel insurance and private health insurance contracts. One of the responding private health insurers to the survey also reports to have received

⁹³ See Insurance Ombudsman, complaint BE-4. See also Insurance Ombudsman 2006.

⁹⁴ See Insurance Ombudsman 2009. See also Commission des Assurances 2009a.

⁹⁵ According to the Insurance Ombudsman, this can be a solution, provided that the premium is reasonable and payable. See Insurance Ombudsman 2009.

⁹⁶ See Insurance Ombudsman 2008. Another case concerning private health insurance is reported by the Centre for Equal Opportunities and Opposition to Racism (it is not clear whether this case was an actual complaint or rather a hypothetical example). A father asked for hospital insurance for his family. The company decided to cover the entire family except for one child with Down's syndrome. According to the Centre, this refusal is unjustified and disproportionate: a child with Down's syndrome does not really represent a higher risk of hospitalisation than any other (See Insurance Ombudsman 2005).

⁹⁷ "The degree of unequal treatment", Velaers writes, "should be proportionate to the degree of risk aggravation." Velaers relies on the proportionality test that is developed in the case-law of the Belgian Constitutional Court. See J. Velaers 2007.

⁹⁸ See Case BE-5. See also Insurance Ombudsman 2009.

complaints concerning exclusions relating to pre-existing health conditions.⁹⁹ This company offers its clients an alternative solution which consists of a surcharge to cover the risk. Its clients often consider these surcharges too high, but would not discuss the existence of the pre-existing condition.

Racial/ethnic origin

One bank reports to receiving complaints concerning the refusal to provide loans on the basis of racial or ethnic origin. The bank, however, reports that, in reality, the reasons to refuse are mostly linked to a high ratio of debt to income and/or to a problem at the *Centrale des crédits aux particuliers*. These reasons would not be racially related but are, rather, according to the bank, a client's misperception. Decisions are reported to be made on the basis of creditworthiness (behavioural scoring)¹⁰⁰ and the capacity of reimbursement of a person. In case of complaints, the bank will explain the risk elements taken into account (and point out that they are not related to racial origin).

2.2 Court cases concerning discriminatory treatment in the provision of financial services on basis of sex, age, disability, racial/ethnic origin, religion/belief, and sexual orientation

Until now, there is only one case concerning an alleged form of insurance-related discrimination reported to be brought before a Belgian court (Case of *Test-Achats vs. DKV*).¹⁰¹ Another case involves a request from *Test-Achats* before the Belgian Constitutional Court for annulment of the Belgian legislative decision to make continued use of unisex tariffs in life insurance contracts (Case of *Test-Achats vs. Belgium*).¹⁰²

2.2.1 The case of *Test-Achats vs. DKV*

A private health insurance company had unilaterally imposed a premium increase that was much higher for older insured persons than for younger insured persons.¹⁰³ Because substantial premium increases were imposed on older insured persons without applying the same conditions to younger members,¹⁰⁴ *Test-Achats* asked the president of the Brussels Commercial Court to recognise that the implemented

⁹⁹ Complaints did not relate to the exclusion itself, but rather to the alternative surcharge that is offered instead.

¹⁰⁰ The bank reports that the normally used behavioural scoring techniques for new clients also involve socio-economic factors such as the place of residence in Belgium.

¹⁰¹ See Centre for Equal Opportunities and Opposition to Racism, complaint BE-3.

¹⁰² See *Test-Achats*, complaint BE-10.

¹⁰³ There was no increase in premiums for the segment of insured persons between 0 and 19 years. For older insured persons, the percentage in premium increase rose as the insured person reached higher age bands. Insured persons between the age of 20 and 39 years paid an 8%-higher premium. Insured persons between 40 and 59 years paid 16% more and insured persons older than 60 paid 24% more.

¹⁰⁴ According to *Test-Achats*, the purpose of this premium increase was to favour new and younger insured and impose heavy financial conditions on older groups, obliging them to cancel their contract or accept substantially reduced coverage. See *Test-Achats* 2005.

premium increase was discriminatory within the meaning of Belgian anti-discrimination legislation of 2003.¹⁰⁵

In assessing the discriminatory nature of the premium increases, the President of the Commercial Court made a fairly rigorous application of the criteria used by the Belgian Constitutional Court¹⁰⁶ and the European Court of Human Rights¹⁰⁷ to assess potential forms of discrimination in state legislation.¹⁰⁸ The ruling of the President particularly focused on the so-called:

- Legitimacy criterion (i.e. whether the distinction in question has a legitimate aim);
- The pertinence criterion (i.e. whether the distinction is pertinent or relevant with regard to the objective pursued);
- The criterion of comparative effectiveness (i.e. whether the distinction is necessary, meaning that it should be determined whether any action with similar effectiveness that would be less harmful to the principle of equal treatment was unavailable), and;
- The strict proportionality criterion (i.e. whether the distinction keeps a balance between the advantages and prejudice it generates).

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.¹⁰⁹ The President did, however, rule that the differential way in which the insurance premiums had been increased was not pertinent to the objective pursued.¹¹⁰ Statistics had been presented by the insurance company

¹⁰⁵ See Act of 25 February 2003 *tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des [chances] et la lutte contre le racisme*, *Moniteur Belge* 17 March 2003. This Act was later superseded by the General Anti-Discrimination Law of 2007.

¹⁰⁶ See *Cour d'Arbitrage* nr. 21/89, 13 July 1989, recital B.4.5.b, available at: <http://www.arbitrage.be/public/f/1989/1989-021f.pdf>; *Cour d'Arbitrage* nr. 1/94, 13 January 1994, recital B.2.3, available at: <http://www.arbitrage.be/public/f/1994/1994-001f.pdf>; *Cour d'Arbitrage* 86/2002, 8 May 2002, recital B.5.1–B.6.1, available at: <http://www.arbitrage.be/public/f/2002/2002-086f.pdf>.

¹⁰⁷ See ECHR, *affaire relative à certains aspects du régime linguistique de l'enseignement en Belgique* of 23 July 1968, Publ. Cour eur. D. H., Serie A, vol. 6, ; ECHR, *McMichael / United Kingdom* of 24 February 1995, Publ. Cour eur. D. H., Serie A, nr. 307-B, §97; ECHR, *Inze/Austria*, 28 October 1987, Publ. Cour eur. D. H., Serie A, nr.126, §41.

¹⁰⁸ The President therefore finds support in the parliamentary debates that were conducted in the drafting process of Belgian anti-discrimination legislation. See *Documents Parlementaires Sénat* 2001-2002, 2-12/15, 4, available at: <http://www.senaat.be/www/webdriver?MltabObj=pdf&MlcolObj=pdf&MlnamObj=pdfid&MltypeObj=application/pdf&MlvalObj=33577348>.

¹⁰⁹ Thiery 2005.

¹¹⁰ According to the president, the insurance company was deemed to know that the risk of hospitalisation at the time of the conclusion of the contract increases with age and that older population increases in size. Moreover, it was argued that the increase in health costs is experienced the same way for all patients, regardless of their age.

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.¹¹¹

2.2.2 The case of *Test-Achats vs. Belgium*

This case concerned an application to annul a Belgian federal law that adapted an article of the Gender Equality Act.¹¹² 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.¹¹³ By means of the changed law 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).¹¹⁴ With this change in the law, Belgium calls on the opting-out clause of Article 5, Paragraph 2 of Directive 2004/113/EC.¹¹⁵ *Test-Achats*, however, reports that, by making use of this option, there was a violation of the equality clauses in the Belgian Constitution.¹¹⁶ 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 concerns the assertion that Article 5, Paragraph 2 of Directive 2004/113/EC would itself be contrary to the principle of equality between women and men as it is enshrined in EU law.¹¹⁷ 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.¹¹⁸

¹¹¹ In particular, a linear increase could have been applied, which does not distinguish according to the age of the insured, as this distinction should already have been taken into account at the time of the assessment of risk and the original calculation of premiums.

¹¹² It concerns the Act of 21 December 2007 (*modifiant la loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes, pour ce qui est de l'appartenance sexuelle en matière d'assurance*, *Moniteur Belge* 31 December 2007) that adapted Article 10 of the Gender Equality Act of 10 May 2007 (*tendant à lutter contre la discrimination entre les femmes et les hommes*, *Moniteur Belge* 30 May 2007).

¹¹³ See former Article 10, §3 of the Gender Equality Act of 10 May 2007.

¹¹⁴ See Article 5 of the Law of 21 December 2007.

¹¹⁵ According to Article 5, Paragraph 2 of Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Member States may decide before 21 December 2007 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.

¹¹⁶ See Articles 10, 11, and 11 bis of the Belgian Constitution protecting the constitutional principle of equality and non-discrimination.

¹¹⁷ See recital A.5 of the case (see *Cour Constitutionnelle* nr. 103/2009, 18 June 2009, available at: <http://www.arbitrage.be/public/f/2009/2009-103f.pdf>.)

¹¹⁸ See recital B.5.1 of the case.

Since the Court considers itself not competent to judge whether this provision is incompatible with the prohibition of discrimination on grounds of sex as a general principle of EU law,¹¹⁹ a request was made for a preliminary ruling by the European Court of Justice.¹²⁰

2.3 Conclusions

2.3.1 Factors and problem areas

With regard to sex, several reported complaints relate to denials of access to insurance and exclusions and delays (waiting periods) for reasons of pregnancy and maternity. Complaints have been received for private health insurance, income protection insurance, and travel insurance.

With regard to age, complaints concerned the denial of access to motor insurance for younger or older people. Other complaints concerned the refusal of a department store credit card issued by a financial institution, inhibiting the use of the credit function or the extra benefits related to the use of this card. Further complaints were received concerning high premiums for older people who switched from a work-related (collective) private health policy to a non-work-related (individual) private health policy. Older people also complained of high premium increases in private health insurance, forcing them to terminate the contract or to accept reduced coverage.

With regard to disability, most complaints were received from people with chronic illness such as cancer or diabetes (also people who had been cured of such chronic illness), who were denied access to loan insurance. Disabled persons were also denied access to private health insurance. A person suffering from heart arrhythmias was further confronted with a high surcharge in loan insurance.¹²¹

2.3.2 Evidence

Differences in treatment on the basis of sex, age, and disability are generally reported to be justified on certain (statistical) evidence or at least by some form of justification.

Denial of access, exclusions of coverage, and waiting periods for pregnant women are, in general, based on the assertion that a so-called 'certain risk' cannot be insured.

¹¹⁹ As it is guaranteed by Article 6, Paragraph 2 of the EU Treaty (new Article 6, Paragraph 3 of the consolidated version of the Treaty on European Union (Lisbon)).

¹²⁰ See recital B.5.2 and B.6 of the case. See also European Court of Justice, *Association Belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier/Conseil des Ministres*, Reference for a preliminary ruling from the *Cour constitutionnelle* (Belgium) lodged on 29 June 2009, *Official Journal of the European Union* C 205, 29 August, 28. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:205:0028:0028:EN:PDF>. Prior to a ruling on the request for annulment of the provisions considering the use of sex in the setting of premiums and benefits, the Constitutional Court will have to await the reply of the Court of Justice on these questions.

¹²¹ Another complaint concerned the denial of access to a blind person and another complaint concerned the denial of access to a child with Down's syndrome. However, it is not clear whether this case was an actual complaint or rather a hypothetical example (see footnote 96).

Denial of access for older and younger people in motor insurance are most likely based on accident statistics or the lack of experience statistics (for younger people), but this cannot be confirmed by the reported complaints. Denial of access for older people to credit cards would be based on average life expectancy and statistics showing that a certain percentage of the customers over the age of 70 would be behind on their payments, as opposed to a lower general average. According to the Centre of Equal Opportunities and Opposition to Racism, these data are not in line with official statistics on consumer credit. More specific data concerning the relative weight of age were not revealed.

Denial of access and surcharges for people with a chronic illness in loan insurance are said to be backed by statistics and studies. However, one case reported by the Insurance Ombudsman indicated that surcharges were also based on oral recommendations by the advisory physician of the insurance company.¹²² The same could be true for exclusions and loss of coverage.

2.3.3 Proportionality

According to the Insurance Ombudsman, an insurance company could rightly refuse coverage of facts that are already known at the time of subscription, since an insurance contract can only cover future and uncertain events. The Insurance Ombudsman did not accept, however, the oral recommendation of an advisory physician as an 'objective and reasonable justification' for a surcharge on the basis of an increased health risk. Based on the principle that reasonable solutions are required 'in relation to risk', the Insurance Ombudsman insisted on a modification of the conditions because a more individualised assessment revealed a lower risk profile.¹²³

The Centre for Equal Opportunities and Opposition to Racism considers the use of standard age limits in the provision of credit cards 'arbitrary, and therefore not objectively justified'.¹²⁴

The President of the Brussels Commercial Court found an unequal age-based premium increase not 'objectively and reasonably justified', since it was neither 'pertinent' (statistics only showed a link between age and the number of claims but not between age and increased cost of hospitalisation) nor 'necessary' (a linear increase would have been possible).

¹²² See Insurance Ombudsman, complaint BE-4.

¹²³ See Insurance Ombudsman, complaint BE-4.

¹²⁴ The Centre for Equal Opportunities and Opposition to Racism also considers a case where a private health insurer would cover an entire family, except for a child with Down's syndrome, 'unjustified and disproportionate', since this child would not really represent a higher risk of hospitalisation than any other.

3 Existing measures to prevent discriminatory practices

3.1 Implementation of Directive 2004/113/EC

3.1.1 Interpretation of key terms of Article 5(2) of the Directive

Article 5(2) of the 2004/113/3C Directive has been implemented in Belgian legislation by the Gender Equality Act of 10 May 2007.¹²⁵ Article 10 of this act provides that, in the setting of insurance premiums and benefits, proportionate direct differences can be made on the basis of sex (not including pregnancy and maternity),¹²⁶ when sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. This provision closely follows the wording of Article 5(2) of the Gender Directive (2004/113/EC) and is an explicit exception to the rule of Article 8 of the Gender Equality Act, which determines that direct differences on the grounds of sex constitute a prohibited form of discrimination.¹²⁷ The Belgian legislator made an explicit decision to limit the Article 5(2)-derogation to life insurance contracts only.¹²⁸ This means that for non-life insurance contracts, such as private health insurance, motor insurance, and travel insurance, there is a duty to use unisex tariffs.¹²⁹

As already mentioned above, *Test-Achats* has contested the constitutionality of the exception for life insurance contracts. This consumer organisation believes that the exception is contrary to the general principle of equality between women and men as it is embedded in the Belgian Constitution and in European Union law. It must be noted

¹²⁵ The Act of 10 May 2007 *tendant à lutter contre la discrimination entre les femmes et les hommes*, *Moniteur Belge* 30 May 2007 (Gender Equality Act).

¹²⁶ Article 10, §2 of the Gender Equality Act provides that costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits as of 21 December 2007. This article also closely follows the wording of the 200/113/EC Directive (Article 5.3).

¹²⁷ The Gender Equality Act was one of the acts that superseded the General Anti-Discrimination Act of 2003 that still allowed an objective and reasonable justification for direct (and indirect) discrimination on the basis of gender. See Act of 25 February 2003, *tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des [chances] et la lutte contre le racisme*, *Moniteur Belge* 17 March 2003.

¹²⁸ Under Article 10, §1.2, it is provided that the exception of Article 10 is only applicable to life insurance contracts. This article is the result of the law change of 21 December 2007 (*Loi modifiant la loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes*: "Art. 10. § 1er. Par dérogation à l'article 8, une distinction directe proportionnelle peut être établie sur la base de l'appartenance sexuelle pour la fixation des primes et des prestations d'assurance, lorsque le sexe est un facteur déterminant dans l'évaluation des risques sur la base de données actuarielles et statistiques pertinentes et précises. Cette dérogation ne s'applique qu'aux contrats d'assurances sur la vie au sens de l'article 97 de la loi du 25 juin 1992 sur le contrat d'assurance terrestre").

¹²⁹ This duty is given shape by the impossibility of objectively justifying direct gender-based differences by showing a legitimate aim where the means of achieving that aim are appropriate and necessary. See Article 8 of the Gender Equality Act. This 'open justification formula' is reserved for cases of indirect discrimination (Article 15 of the Gender Equality Act) and also for cases of the provision of goods and services exclusively or primarily to members of one sex. (Article 9 of the Gender Equality Act).

that the Constitutional Court has also been presented the question whether the decision of the Belgian legislator to allow unisex tariffs in life insurance contracts¹³⁰ did respect the predetermined date of 21 December 2007 imposed by the 2004/113/EC Directive to make use of the option provided in Article 5(2).¹³¹

So far, there is no general and uniform understanding as to the meaning and content of the separate terms 'proportionate differences', 'relevant' and 'accurate actuarial and statistical data', and 'determining factor'. The Belgian Financial Supervisor states that the proportionality of differences in premiums is interpreted as a requirement imposing that 'differences in premium levels reflect the difference in the assumed risk'.¹³² Consumer organisations state that the notion of 'proportionate' is open to diverging interpretations and could still lead to vast differences in treatment.¹³³ Insurance companies rather consider the exception as a general and explicit permission to make continued use of different survival and mortality tables for men and women in life insurance. Assuralia explains that under Belgian legislation, insurance companies are, within certain limits, allowed to set up mortality tables on the basis of their own experiences within their own insurance portfolio. Insurance companies only have to take into account certain minimum survival and mortality rates based on the figures of the Belgian National Institute for Statistics (NIS), imposed by the Royal Decree of 14 November 2003.¹³⁴

¹³⁰ Act of 21 December 2007 *modifiant la loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes, pour ce qui est de l'appartenance sexuelle en matière d'assurance*, *Moniteur Belge* 31 December 2007.

¹³¹ *Cour Constitutionnelle* nr. 103/2009, 18 June 2009, <http://www.arbitrage.be/public/fi/2009/2009-103f.pdf>, A.22. The actual act that explicitly provided for an exception for life insurance contracts has been promulgated on 21 December 2007 while the decision should have been taken *before* 21 December 2007. The Belgian Council of Ministers however clarified that the use of gender in the setting of premiums and benefits was temporarily allowed for all private insurance contracts up to the date of 21 December 2007. See A. 24.1 and A. 24.2. By means of the changed law of 21 December 2007 (*Loi modifiant la loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes*, *Moniteur Belge* 31 December 2007), the Belgian legislator eventually foresaw that the exception would only count for life insurance contracts.

¹³² Answer of the CBFA in the CEIOPS Members and Observers Replies to the EC-forum questionnaire on the implementation of Article 5 of Directive 2004/113/EC, 23 September 2009, CEIOPS-CCP-16/09, 15/45.

¹³³ See Age, European Women's Lobby and Test-Achats.

¹³⁴ Reference can be made to Article 24, §§5-6 of the Royal Decree of 14 November 2003 (*relatif à l'activité d'assurance sur la vie*, *Moniteur Belge* 23 July 2004), which states that, in life insurance covering the risk of survival (like endowment insurance), survival rates cannot be lower than those from the so-called reference tables MR (minimum survival rate for men) or FR (minimum survival rate for women), as the sex of the insured is male or female. In life insurance covering the risk of death (like term life insurance or loan insurance), mortality rates cannot be lower than those from the so-called reference tables MK (minimum mortality rate for men) or FK (minimum mortality rate for women), as the insured is male or female. The tables are formed according to the formula stated in Annex 1 of the Royal Decree. For this annex, see Article 16 of the Royal Decree of 25 January 2007, *Moniteur Belge* 8 February 2007. This formula is based on figures of the NIS.

3.1.2 **Implementation of the publication requirement of Article 5(2)**

The Belgian Financial Supervisor (CBFA) has a legal obligation to publish the data relevant for risk calculation in life insurance contracts.¹³⁵ The CBFA has indeed published this data on its website.¹³⁶ The available data represent the aggregate results of the figures resulting from the periodic reporting by the insurance companies supervised by the CBFA. The figures show the amount of male and female insured in the year 2006¹³⁷ per age and the number of these males and females that died in that year. On the basis of these results, a different mortality can be deduced for men and women.

The Centre for Equal Opportunities finds the information published by the CBFA fairly intelligible to consumers. *Test-Achats* and the Belgian Institute for the Equality of Men and Women contest this statement.¹³⁸ According to the Centre for Equal Opportunities and Opposition to Racism transparency towards consumers could improve if insurance companies and banks would give evidence, e.g. through providing statistical and other scientific data, that their decision is objectively and reasonably justified in individual cases.

3.2 **Implementation of the UN Convention on the Rights of Persons with Disabilities**

Belgium has ratified the UN Convention on the Rights for Persons with Disabilities (including the optional protocol) in July 2009.¹³⁹ According to the Centre for Equal Opportunities, Articles 12.5 and 25(e) have not yet been fully implemented in the Belgian legal framework.

Implementation measures can be found in the so-called 'General Anti-Discrimination Act' of 10 May 2007¹⁴⁰ prohibiting discrimination on the basis of *inter alia* health status and disability in the provision of goods and services, including banking and insurance services.¹⁴¹ The concept of disability¹⁴² provided in the UN Convention would appeal to

¹³⁵ See Article 10, §3 of the Gender Equality Act. According to this provision, these data had to be published before 20 June 2008 and should be updated every two years.

¹³⁶ See CBFA, "Statistiques hommes-femmes – Article 10 de la loi anti-discrimination", <http://www.cbfa.be/fr/vo/stat/pdf/mannen-vrouwen.xls> (see also <http://www.cbfa.be/fr/vo/stat/sta.asp>). According to C. Devoet 2009, the figures were published on 23 April 2008.

¹³⁷ According to Article 10, §3 of the Belgian Gender Equality Act, figures should be updated every two years.

¹³⁸ Note that the CBFA points out that the lack of transparency is also caused by the fact that information on the duties that are imposed by reinsurers towards insurance companies remains undisclosed.

¹³⁹ See Act of 13 May 2009 *portant assentiment aux Actes internationaux suivants : Convention relative aux droits des personnes handicapées, Protocole facultatif se rapportant à la Convention relative aux droits des personnes handicapées, adoptés à New York le 13 décembre 2006, Moniteur Belge* 22 July 2009. The UN acknowledged Belgium's ratification on 2 July 2009. See <http://www.un.org/disabilities/default.asp?navid=19&pid=257>.

¹⁴⁰ See Act of 10 May 2007 *tendant à lutter contre certaines formes de discrimination, Moniteur Belge* 30 May 2007.

¹⁴¹ Article 14 *juncto* Article 5, §1, 5° of the General Anti-Discrimination Act prohibits all forms of discrimination in (among others) the access to goods and services and the provision of goods and services available to the public.

a so-called ‘social’¹⁴³ definition and would also broaden the scope of protection towards discrimination on the basis of chronic illness.¹⁴⁴ Since the General Anti-Discrimination Act also includes a prohibition against discrimination on the basis of current or future health status or physical or genetic characteristic,¹⁴⁵ it can be assumed that chronic illness is unconditionally protected as a discrimination ground.¹⁴⁶ Hence, it can be concluded that Article 25 of the UN Convention (prohibition of discrimination in health insurance and life insurance) has already reached a fair level of implementation in Belgian anti-discrimination law. The Belgian General Anti-Discrimination Act further imposes a duty to provide reasonable accommodation for people with disabilities in *inter alia* the provision of goods and services.¹⁴⁷ Reasonable accommodation includes all kinds of measures enabling disabled persons to have access to the provision of goods and services or to participate or proceed in it, unless these measures impose a disproportionate burden on the provider.¹⁴⁸ This provision, together with the prohibition of discrimination on the basis of disability and health status, can already meet, to a certain extent, the duties as described under 12.5 of the UN Convention (equal access to bank loans and other forms of financial credit).

Outside the field of anti-discrimination law, other legislation in force seeks to guarantee improved access to private health insurance for disabled persons and people with a chronic illness, as imposed by Article 25 of the UN Convention. Reference should be made to the provisions of the Belgian Insurance Contract Act, inserted by the Act of 20 July 2007 (so-called ‘Act Verwilghen’)¹⁴⁹ that is applicable to ‘private health insurance contracts’, including non-compulsory long-term care insurance, disability insurance, and

¹⁴² See Article 1 of the Convention that describes persons with disabilities as including those who have long-term physical, mental, intellectual, or sensory impairments, which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

¹⁴³ G. Quinn 2007, L. Waddington and M. Gijzen 2006.

¹⁴⁴ See also, M. Leonardi, J. Bickenbach *et al.* 2006.

¹⁴⁵ See Article 3 of the General Anti-Discrimination Act.

¹⁴⁶ In that sense one could say that the Belgian General Anti-Discrimination Act offers a broader protection against discrimination compared to the case law of the European Court of Justice in the decision of Chacón-Navas, where it was ruled that sickness as a condition cannot always be equated with disability. See European Court of Justice, 11 July 2006, *Sonia Chacón Navas/Eurest Colectividades*, C-13/05, *European Court Reports* 2006, I-6467, recital 46. The level of protection against discrimination in the Belgian General Anti-Discrimination Act is also broader than the interpretation of Advocate-General Geelhoed. He stated that sickness can be equated with a disability if “during the course of the sickness permanent functional limitations emerge which must be regarded as disabilities despite the continuing sickness”. See Advocate-Generaal Geelhoed, conclusion of 16 March 2006, in the case of European Court of Justice, 11 July 2006, *Sonia Chacón Navas/Eurest Colectividades*, C-13/05, *European Court Reports* 2006, I-6467, recital 79.

¹⁴⁷ See Article 14 of the General Anti-Discrimination Act, *juncto* Article 5, §1, 1°.

¹⁴⁸ See Articles 4, 12 of the General Anti-Discrimination Act.

¹⁴⁹ See Act of 20 July 2007 *modifiant, en ce qui concerne les contrats privés d'assurance maladie, la loi du 25 juin 1992 sur le contrat d'assurance terrestre*, *Moniteur Belge* 10 August 2007.

critical illness insurance.¹⁵⁰ Article 138bis-6 of this Insurance Contract Act grants a right to private health insurance to persons with a chronic illness or a disability, up to the age of 65. They pay a normal premium without taking into account the disability or chronic illness of the insurance candidate.¹⁵¹ However, all costs related to the specific disability or chronic illness could be excluded from coverage when specifically provided in the insurance conditions. A so-called ‘conciliation board’ (*Commission de conciliation d’assurance Soins de Santé*) has been constituted, which in case of dispute has to conciliate on the proportionality and technical soundness of the exclusion of costs related to the pre-existing conditions of the insurance candidate.¹⁵² The Act of 11 May 2007, changing the Act of 6 August 1990 on private sickness funds, also inserts a prohibition for these funds to refuse (supplementary) hospitalisation insurance for any person under 65.¹⁵³ According to this Act, pre-existing health conditions may not lead to higher premiums and (under certain conditions)¹⁵⁴ also not to exclusions.¹⁵⁵

Moreover, Article 138bis-3 of the Belgian Insurance Contract Act provides that private health insurance contracts are concluded for life. This means that an insurance company cannot terminate the private health insurance contract for reasons of sickness or accident, even though, from an underwriting point of view, he/she may have become an uninsurable risk. In addition, Article 26 of this Act provides that the insurer is not allowed to modify or terminate private health insurance contracts nor life insurance contracts in case of an aggravation of the (health) risk.¹⁵⁶ Insurance companies are also

¹⁵⁰ Article 138bis-1 of the Insurance Contract Act of 25 June 1992 provides that the provisions concerning private health insurance contracts, include health care insurance (*assurance soins de santé*), work-related and non-work-related disability insurance (*assurance incapacité de travail*, *assurance invalidité*), and non-compulsory long-term care insurance (*assurance soins non obligatoire*). Travel insurance and accident insurance (for instance *l’assurance conducteur*) are not included in the scope of application.

¹⁵¹ See Article 138bis-6 of the Insurance Contract Act of 25 June 1992. Remember that, according to this provision, possible costs relating to the existing disability or chronic illness can be excluded.

¹⁵² Royal Decree of 20 December 2007 *instituant l’organe de conciliation visé à l’article 138bis -6, troisième alinéa de la loi du 25 juin 1992 sur le contrat d’assurance terrestre*, *Moniteur Belge* 14 May 2008.

¹⁵³ See new Article 9, §1bis of the Act of 6 August 1990 on private sickness funds, inserted by Article 2 of the Act of 11 May 2007 *modifiant la loi du 6 août 1990 relative aux mutualités et aux unions nationales de mutualités*, *Moniteur Belge* 31 May 2007.

¹⁵⁴ Pre-existing conditions may only lead to exclusions when lump sums exceed a certain amount or in case of repayment of costs of a private room. See Article 9, §1quinquies, 2°.

¹⁵⁵ See Article 9, §1quinquies, 1° and 2° of the Act of 6 August 1990 on private sickness funds, inserted by Article 2 of the Act of 11 May 2007.

¹⁵⁶ This is an interpretation *a contrario* of article 26, §1, 1°, 2° and 3° of the Insurance Contract Act. “Sauf s’il s’agit d’un contrat d’assurance sur la vie, d’assurance maladie ou d’assurance-crédit, le preneur d’assurance a l’obligation de déclarer, en cours de contrat, dans les conditions de l’article 5, les circonstances nouvelles ou les modifications de circonstance qui sont de nature à entraîner une aggravation sensible et durable du risque de survenance de l’événement assuré.” This means that in case of life insurance and private health insurance contracts, the insured is not obliged to give details on the aggravation of risk during the contract. “Lorsque, au cours de l’exécution d’un contrat d’assurance autre qu’un contrat d’assurance sur la vie, d’assurance maladie ou d’assurance-crédit, le risque de

restricted in modifying the conditions of coverage and premiums during the term of the contract. Insurance contract law provides that from 1 July 2009 on, it is prohibited to modify the technical bases of the tariff or the conditions of coverage in existing contracts.¹⁵⁷ After that date, premium increases can only take place commensurate with the regular economic price index,¹⁵⁸ after authorisation by the CBFA,¹⁵⁹ or commensurate with a medical index per age group and for different kinds of guarantees (to be calculated by the public authorities competent for economic matters on the bases of criteria set out by Royal Decree).¹⁶⁰ This medical index should ensure that premium increases be commensurate with the costs of hospitalisation in Belgium (and consequently avoid sudden premium increases). This index has been published on the website of the Federal Public Service Economy, on the basis of the Royal Decree of 1 February 2010.¹⁶¹

Article 138bis-8 of the Insurance Contract Act states that an insured person who loses the advantage of work-related private health insurance has the right to an individual continuation of the insurance coverage without additional medical examinations or questionnaires.¹⁶² The premium to be paid is based on his/her age at the time of continuation of the coverage. In addition, the Act provides a special system guaranteeing a lower premium in case the insured has already paid additional

survenance de l'événement assuré s'est aggravé de telle sorte que, si l'aggravation avait existé au moment de la souscription, l'assureur n'aurait consenti l'assurance qu'à d'autres conditions, il doit, dans le délai d'un mois à compter du jour où il a eu connaissance de l'aggravation, proposer la modification du contrat avec effet rétroactif au jour de l'aggravation. Si l'assureur apporte la preuve qu'il n'aurait en aucun cas assuré le risque aggravé, il peut résilier le contrat dans le même délai." This means that the insurer in case of a life insurance contract or a private sickness contract, can not use any information on the aggravation of risk to modify or end the contract.

¹⁵⁷ Up to that date, premiums could still be modified in existing private health insurance contracts, since the medical index was not yet in force. See Article 138bis-4 of the Insurance Contract Act *juncto* Article 13 of the Act of 17 June 2009, modifying the original Article 3 of the so-called Act Verwilghen.

¹⁵⁸ See Article 138bis-4, §2 of the Insurance Contract Act of 25 June 1992.

¹⁵⁹ See Article 138bis-4, §4 of the Insurance Contract Act of 25 June 1992 *juncto* Article 21octies of the Act of 9 July 1975 *relative au contrôle des entreprises d'assurances*, *Moniteur Belge* 29 July 1975.

¹⁶⁰ See Article 138bis-4, §3 of the Insurance Contract Act of 25 June 1992 .

¹⁶¹ The legal basis for the medical index has been published in the Royal Decree of 1 February 2010, *déterminant les indices spécifiques visés à l'article 138bis-4, § 3, de la loi du 25 juin 1992 sur le contrat d'assurance terrestre*, *Moniteur Belge* 8 February 2010. See Articles 2, 4, and 6, providing that the *Service Public Fédéral Economie* has to publish a global table on the basis of aggregated results of the damages in health insurance for several kinds of several insured guarantees ('*garantie chambre particulière*' and '*garantie chambre double et commune*'), divided over five different age classes. See for the indices that were subsequently constituted by the SPF Economie, http://economie.fgov.be/fr/statistiques/chiffres/economie/secteur_sante/indice_medical/index.jsp. For more information on the development of this index, see P. Devolder *et al.* 2008.

¹⁶² Article 138bis-7 of the Insurance Contract Act offers a comparable right for people wishing to continue a non-work-related private health insurance contract when they leave their domicile and thus also the family private health insurance policy. The insurance company will not be able to claim that the risk has already been realised.

premiums during the term of the work-related private health insurance contract in order to build up a so-called premium reserve.¹⁶³

Since Belgian insurance contract law bans any communication of genetic data by the insured, it is accepted that medical questionnaires can neither include questions concerning genetic traits nor inquire about information on health history of family members.¹⁶⁴ Equally, medical examinations cannot be based on genetic techniques.¹⁶⁵ The Act on Complementary Pensions for Workers of 28 April 2003 also provides that one cannot be denied access to these pensions on the basis of the results of a medical examination.¹⁶⁶

Reference must finally be made to the recently enacted Act of 21 January 2010 aiming at the improvement of access to certain loan insurance contracts for people with increased health risk in view of the renovation or acquisition of the proper and only residence of the insured.¹⁶⁷ Insurers are obliged to inform the insurance candidate on the precise amount of the health-related surcharge, denial of contract, or health-related exclusions, and expressly have to provide the underlying reasons.¹⁶⁸ The Act introduces a so-called 'Bureau of Tariff Follow-up' (*Bureau de suivi de tarification*) that has the legal authority to inquire whether the surcharges are objectively and reasonably justifiable from a medical and insurance-technical point of view.¹⁶⁹ If an insured person does not agree with the insurer's offer or refusal, the insurance company is obliged to obtain the advice of its reinsurer and must follow its decision to grant a better offer to the insurance candidate.¹⁷⁰ Insured persons obtaining an offer to pay a surcharge of more than 200% have a right to a standardized form of loan insurance.¹⁷¹ A

¹⁶³ See Article 138bis-9, §1, 1° and 2° of the Insurance Contract Act of 25 June 1992. For comments see J.-P. Coteur, A. Moriau And I. Nauwelaers 2009.

¹⁶⁴ See Article 5 of the Insurance Contract Act of 25 June 1992. See also K. Troch 2001, with reference to N. Jeger and P. Cauwenbergh 1997.

¹⁶⁵ Article 95, 3° of the Insurance Contract Act of 25 June 1992 provides that the medical examination can only be based on the history determining the current health status and not on techniques of genetic analysis to determine the insured's future health.

¹⁶⁶ See Article 13, 4 of the Act of 28 April 2003 *relative aux pensions complémentaires et au régime fiscal de celles-ci et de certains avantages complémentaires en matière de sécurité sociale*, *Moniteur Belge* 15 May 2003.

¹⁶⁷ See Act of 21 January 2010 *modifiant la loi du 25 juin 1992 sur le contrat d'assurance terrestre en ce qui concerne les assurances du solde restant dû pour les personnes présentant un risque de santé accru*, *Moniteur Belge* 3 February 2010. This Act will enter into force upon publication of a Royal Decree. The Act is based on a proposal that has been debated in the above-mentioned *Commission des Assurances*. See Commission des Assurances 2009a, Commission des Assurances 2009b, Commission des Assurances 2009c.

¹⁶⁸ See Article 4 of the Act, inserting a new Article 138ter-2 in the Insurance Contract Act of 25 June 1992.

¹⁶⁹ See Article 8 of the Act, inserting a new Article 138ter-6 in the Insurance Contract Act of 25 June 1992.

¹⁷⁰ See Articles 5 and 6 of the Act, inserting a new Article 138ter-3 and 4 in the Insurance Contract Act of 25 June 1992.

¹⁷¹ See Articles 13 and 15 of the Act, inserting a new Article 138ter-11 and 13 in the Insurance Contract Act of 25 June

compensation mechanism (*Caisse de compensation*) funded by insurance companies will pay the amount of the surcharge that exceeds the surcharge of 200%.¹⁷² The above-mentioned *Commission des Assurances* received the task of drafting a code of good conduct regarding the accessibility of loan insurance within six months after publication of the Act. In case no agreement can be obtained in due time, a code will be enacted by Royal Decree.¹⁷³

3.3 Other national legislation or regulation in force that prevents or restricts the use of sex, age, disability, racial/ethnic origin, religion/belief, and sexual orientation in the design, supply, or pricing of financial products

The Gender Equality Act of 10 May 2007 prohibits discrimination in the field of goods and services,¹⁷⁴ including financial services such as insurance, banking, and credit products, on the basis of gender, pregnancy and maternity,¹⁷⁵ and gender reassignment.¹⁷⁶ 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, religion, and belief.¹⁷⁷ The Act of 30 July 1981¹⁷⁸ 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.¹⁷⁹

All three Acts (General Anti-Discrimination Act, Gender Equality Act, and the Anti-Racism Act) prohibit direct and indirect discrimination in the provision of goods and services.¹⁸⁰ These acts apply the same definitions of direct and indirect discrimination as the ones that are formulated under the 2000/43/EC, 2000/78/EC, and 2004/113/EC European Directives. Compared to the prohibition on discrimination as provided in the EU Equality Directives, direct discrimination can be justified on the basis of the same

1992. This guaranteed standard loan insurance will have a maximum loan coverage of €200,000.

¹⁷² See Article 14 of the Act, inserting a new Article 138ter-12 in the Insurance Contract Act of 25 June 1992.

¹⁷³ See Article 3 of the Act inserting a new Article 138ter-1 in the Insurance Contract Act of 25 June 1992.

¹⁷⁴ See Article 5, §1, 1° of the General Anti-Discrimination Act and Article 6, §1, 1° of the Gender Equality Act.

¹⁷⁵ See Article 4, §1 of the Gender Equality Act.

¹⁷⁶ See Article 4, §2 of the Gender Equality Act.

¹⁷⁷ See Article 3, *juncto* article 5, §1, 1° of the General Anti-Discrimination Act.

¹⁷⁸ Act of 30 July 1981 *tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*, *Moniteur Belge* 8 August 1981 (Anti-Racism Act).

¹⁷⁹ In order to be in line with the Gender Equality Act and the General Anti-Discrimination Act, this Anti-Racism Act was transformed considerably by the Act of 10 May 2007 *modifiant la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme et la xénophobie*, *Moniteur Belge* 30 May 2007.

¹⁸⁰ See Article 14 of the General Anti-Discrimination Act, Article 19 of the Gender Equality Act and Article 12 of the Anti-Racism Act.

open justification formula applicable to indirect discrimination in all those situations falling outside the scope of existing EU Directives.¹⁸¹

As for the use of gender in private pensions, specific rules can be found under Article 12 of the Gender Equality Act, allowing to take into account different life expectancy for men and women under the conditions provided under Directive 2006/54/EC.¹⁸² Article 12 of the General Anti-Discrimination Act further provides that, with regard to occupational social security schemes (including private pensions and work-related private health insurance), the fixing of the ages for admission and the use of age criteria in actuarial calculations is also allowed (implementation of Directive 2000/78/EC).¹⁸³

Current anti-discrimination legislation is reported by an industry association to have had no impact on operating costs, prices, demand, and sales in the field of banking and credit products.¹⁸⁴

As for insurance in general, the Insurance Ombudsman notes that the 2007 anti-discrimination legislation did not significantly modify the previous Anti-Discrimination Law of 2003. Nonetheless, the Insurance Ombudsman stressed the impact of the 2003 Anti-Discrimination Act, in particular because it required insurers to justify their decisions (objective and reasonable justification). Insurers felt obliged to explain to consumers the reasons underlying their premium setting and this enhanced a more open dialogue between the Insurance Ombudsman, insurers, and consumers.

In motor insurance, especially young women suffered premium increases.¹⁸⁵ In the meantime, according to the financial supervisor (CBFA) a proportional decrease in premiums for men could not always be observed. Consumer organisations and the Insurance Ombudsman also noticed a premium increase in private health insurance.¹⁸⁶ The Insurance Ombudsman explained that with the prospect of an obligation to use unisex tariffs in non-life insurance coming into effect, premiums only increased for men, but would not have not been reduced for women.¹⁸⁷

¹⁸¹ See C. Bayart and C. Deiteren 2008, Y. Thiery 2007. It is accepted in Belgian legal doctrine that this justification formula can be analogously interpreted as the proportionality test elaborated in the case law of the Belgian Constitutional Court and the European Court of Human Rights that also inspired the President of the Brussels Commercial Court in the case of Test-Achats and DKV (see Test-Achats, BE-3). See S. Sottiaux 2008.

¹⁸² See Article 12, §2 of the Gender Equality Act. See also Article 9, h, i and j of the 2006/54/EC Directive.

¹⁸³ See Article 12, §2 of the General Anti-Discrimination Act. See also Articles 6, 2 of the 2000/78/EC Directive.

¹⁸⁴ The *Union Professionnelle du Crédit* answered that member companies' operating costs, prices/premiums, demand, and the number of member companies remained the same when asked about the impact of restrictions related to use of sex, age, disability, race/ethnic origin, religion/belief, and sexual orientation.

¹⁸⁵ See Test-Achats 2010.

¹⁸⁶ See Age, European Women's Lobby and Test-Achats. See also Insurance Ombudsman 2009

¹⁸⁷ See Insurance Ombudsman 2008. In an interview, the Insurance Ombudsman notes that premiums for men rose to the same level as the already higher premiums for women. This statement was not confirmed by all private health

3.4 National legislation or regulation in force to ensure that essential financial products are available (and affordable) for all customers

In the field of credit and banking products, reference can be made to the Act of 24 March 2003¹⁸⁸ creating a so-called 'basic bank service' (*service bancaire de base*). This Act establishes a right for consumers¹⁸⁹ to open a current account and a right to use this account to perform (electronic and manual) banking operations¹⁹⁰ at a reduced price of 13.58 Euro.¹⁹¹ This legal intervention prohibits the refusal of customers based on their financial situation.¹⁹² This Act also offers a solution to customers having difficulties with the electronic performance of banking transactions.¹⁹³ Another access-improving measure is the provision in the law on consumer credit providing that the lender can never ask for information concerning racial/ethnic origin, sexual behaviour, health, political activities, religion, or membership of labour unions.¹⁹⁴

In the field of insurance, one can point to the legally instituted Tariff Bureau for motor vehicle liability insurance (*Bureau de Tarification Auto*). This Bureau's mission is to set premiums and insurance conditions for drivers who cannot find motor insurance on the market or at least not at an acceptable price.¹⁹⁵ An insurance candidate can register a complaint with the Bureau when at least three insurance companies refused to offer a motor insurance contract.¹⁹⁶ The Bureau sets a premium, taking into account the risk that is represented by the insured¹⁹⁷ and the solidarity between all policyholders.¹⁹⁸

insurers.

¹⁸⁸ Act of 24 March 2003 *instaurant un service bancaire de base*, *Moniteur Belge* 15 May 2003.

¹⁸⁹ This applies for those that have their principal residence in Belgium. See Article 2, 2° of the law of 24 March 2003.

¹⁹⁰ These operations include the (electronic and manual) transfer of money, cash withdrawals, standing orders, and direct debits that are included within the reduced and fixed maximum price of 13.58 Euro.

¹⁹¹ See Article 3 of the Act of 24 March 2003. The price was adapted from 12 Euro to 13.58 Euro on the basis of the consumer price index. The new price is applicable as of 1 January 2010. See *Moniteur Belge* 15 December 2009, ed.2, 79.096.

¹⁹² One can think of the absence of income, excessive debt, or the presence of the name of the consumer in the above-mentioned *Centrale des crédits aux particuliers*. See Y. Thiery 2004.

¹⁹³ See http://statbel.fgov.be/fr/consommateurs/Services_de_paiement/Service_bancaire/index.jsp.

¹⁹⁴ See Article 10 of the Act of 12 June 1991.

¹⁹⁵ The Bureau was established by the Act of 2 August 2002 (See Article 2 of the Act of 2 August 2002 *modifiant la loi du 21 novembre 1989 relative à l'assurance obligatoire de la responsabilité civile en matière de véhicules automoteurs et modifiant les articles 29 et 31 de la loi du 25 juin 1992 sur le contrat d'assurance terrestre*, *Moniteur Belge* 30 August 2002) modifying the Act of 21 November 1989 on compulsory third party liability insurance for motor vehicles. See Articles 9bis to 9quinquies of the Act of 21 November 1989 *relative à l'assurance de la responsabilité en matière de véhicules automoteurs*, *Moniteur Belge* 8 December 2009.

¹⁹⁶ See Article 9ter, §1-2 of the Act of 21 November 1989.

¹⁹⁷ This means that the level of the premium will have to be proportionate to the risk. See H. Cousy 2004.

¹⁹⁸ This means that at least part of the premium of the highest risk individuals can be transferred to the lower risk individuals, as long as the premiums received can cover the total loss. See Bureau de Tarification RC Auto 2009. See

Given the substantial number of claims of young drivers, the Bureau applies a surcharge, ranging from 25% to 75%, for young drivers under 26.¹⁹⁹ The Bureau may also impose conditions to reduce the risk of the insured.²⁰⁰ The further management of the priced risk and the insurance contract is imposed on one or more insurance companies.²⁰¹ The funding of the system is based on a mechanism of solidarity financed by all insurance companies providing motor insurance on the Belgian market (and finally by all insured paying premiums).²⁰²

3.5 New national legislation or regulation planned

The Centre for Equal Opportunities reports that it has made several recommendations to the Belgian federal government in order to improve insurability of persons representing a higher risk as a consequence of their health status.²⁰³ The Centre also prepared draft recommendations to the government on improved access to credit and banking products.²⁰⁴

3.6 Non-regulatory measures

The annual reports of the Insurance Ombudsman have the benefit of enhancing transparency as to the motives that are invoked for denials of access, higher premiums, the use of exclusions, etc. These reports can also improve the dialogue between the Insurance Ombudsman, companies, and consumers. The industry has further

also Article 9*quater*, §2 of the Act of 21 November 1989.

¹⁹⁹ Young and inexperienced drivers who drive a car with low engine power and have never caused an accident are given the opportunity of a lower surcharge (ranging from 10 to 25%). See Bureau de Tarification RC Auto 2009.

²⁰⁰ See Article 9*quater*, §2 of the Act of 21 November 1989. One can think of a prohibition to make use of the vehicle at night or on weekends, or the prohibition to drive a vehicle with a certain (higher) horse-power. See H. Cousy 2004.

²⁰¹ See Article 9*quiquies* of the Act of 21 November 1989.

²⁰² The solidarity function is created within the so-called '*Fonds commun de garantie*'. See Article 9*quinquies*, §2 of the Act of 21 November 2009. See also Bureau de Tarification RC Auto 2009.

²⁰³ These recommendations concern the need for legislation that obliges insurance companies to reassess individual risks when the insured's health status considerably improved; the instauration of a duty to expressly justify refusals, surcharges, and exclusions; the creation of an independent body that can examine this motivation and can also inquire into the exact figures that are used by the insurance companies and their reinsurers; and the creation of an independent tariff bureau that can offer insurance to people with an aggravated health risk who cannot find insurance on the private market. See Centre For Equal Opportunities and Opposition to Racism 2009. Some of these proposals have already been met in the field of loan insurance by the Act of 21 January 2010 *modifiant la loi du 25 juin 1992 sur le contrat d'assurance terrestre en ce qui concerne les assurances du solde restant dû pour les personnes présentant un risque de santé accru*. Other recommendations, like the proposed duty to reassess individual risks when the insured's health status improved, could become subject to the above-mentioned code of good conduct that could be drafted by the *Commission des Assurances*. See *Commission des Assurances* 2009.

²⁰⁴ One of the priorities the CEOOR has established in this respect is the fight against certain forms of indirect discrimination based on a person's disability and more specifically against the systemic refusal of certain companies to provide credit cards, bank loans, mortgages, and other forms of financial credit to persons who are granted a social income related to their disability.

developed initiatives of self-regulation providing guidelines for a standardized complaint management procedure at company level,²⁰⁵ increased accessibility to motor insurance for younger and older drivers (so-called '29/29 gentlemen's agreement'),²⁰⁶ and to more affordable private health insurance.²⁰⁷ In the latter code, 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 addition to this alternative. The same alternative was temporarily²⁰⁸ 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.

²⁰⁵ See the so-called '*Règles de conduite pour la gestions des réclamations*'. (http://www.ombudsman.as/fr/documents/regles_reclamations.pdf). The code requests, for instance, the appointment of an internal complaint manager, reply deadlines, reporting formats, standardization of complaint forms, etc.

²⁰⁶ The 29/29 agreement between Assuralia and the Minister for economic affairs. See also "Gentlemen's agreement tussen Minister van Economie Fientje Moerman en de BVVO betreffende de problematiek van de jongere en oudere bestuurders in de BA-Motorrijtuigenverzekering", <http://users.telenet.be/Fientje.Moerman/gentlemenagreementjongeren.htm>.

²⁰⁷ Assuralia 2009.

²⁰⁸ From 1 July to 30 September 2009.

Country report Germany

1 Current practices of financial service providers

1.1 The use of sex, age, and disability as a factor in design, supply or pricing of products

Use of sex

All surveyed insurance companies use sex in risk assessment for private health and term life insurances. Some insurers use sex as a factor in risk assessment in motor insurance. Sex is used as a factor in risk assessment for consumer credits and mortgage loans in some cases, but it is unclear the extent to which it is used and how great a role it plays as a factor. In an interview, a German credit scoring agency confirmed that information on sex and age is saved and these two factors combined can equal up to 20% of the overall credit score. Sex is never a causal factor in risk assessment. Rather, banking and insurance refer to a statistical correlation between sex and risk.

While gender is never ground for the denial of a contract, it affects the tariffs. However, sometimes an exclusion of costs for pregnancy is declared.

Use of age

Age is, with few exceptions, a factor in risk assessment for motor, travel, and term life insurance, and is always a relevant factor in risk assessment for private health insurance. Age is used indirectly in credit scoring for mortgage loans. BaFin and VZBV claim that age is a factor in risk assessment, albeit an indirect one according to BaFin. The German Savings Bank Association (*Deutscher Sparkassen- und Giroverband, or DSGV*)¹ and one of its members say that age is a minor factor in their scoring calculations: the older the customer, the higher is his/her calculated creditworthiness.² One bank states that age does not directly influence risk assessment, but can influence contractual conditions in that an older age can lead to a shorter credit period³ The Association of Private *Bausparkassen (Verband der Privaten Bausparkassen)*⁴ states that its members cannot differentiate on the basis of age as tariffs are approved by BaFin and comply with the basic principle of equal treatment of the *bauspar* customer (*Grundsatz der Gleichbehandlung der Bausparer*), which prohibits any differentiation of customers.

¹ The DSGV is the umbrella organisation of the Sparkassen-Finanzgruppe and its 477 savings banks, 11 Landesbanken, 11 Landesbausparkassen, 13 public insurance companies and many more financial service providers.

² "Age is a very small component of our scoring model for retail customers. Mathematically-statistic analyses have verified that a customer's age influences significantly his/her probability of default, i. e. his/her creditworthiness. The older the customer the better is his/her creditworthiness and therefore his rating class", Questionnaire DSGV.

³ Other banks responded to the survey did not explicitly deny or confirm the use of age.

⁴ The association currently represents the interests of all 14 private German Bausparkassen, which are specialised savings and loans credit providers. Mortgage loans are in general not re-financed with bonds or via the capital markets, but exclusively by the customers' savings.

When age is relevant, it affects premiums and contractual conditions. Age can also result in the denial of contracting.

Use of disability

The notion of 'disability' is problematic since insurance companies refer in their risk assessment to 'pre-existing diseases' for travel insurance and private health insurance or 'health condition' for term life insurance. A higher risk due to 'pre-existing diseases' or 'health condition' can cause higher premiums, the exclusion of certain benefits, and denial of contracting.

Disability does not influence the contractual conditions of motor insurances. In an interview, a German credit scoring agency stated that neither disability nor health conditions are used as factors.

Use of race/ethnic origin, religion/belief, and sexual orientation

These factors are never official reasons for direct or indirect differentiation. All surveyed industry associations, insurance companies, and banks state that there is no differentiation because of race/ethnic origin, religion/belief, and sexual orientation. However, there are complaints related to race/ethnic origin reported by civil society organisations and federal agencies (see section 2.1.2).

Insurance companies do not directly differentiate by race or ethnic origin when offering motor insurance. Nevertheless, evidence shows that it is common practice to differentiate the provisions for insurance agents depending on the origin of the clients.⁵ Citizens of new Member States, for example, are not actively marketed. The Hamburg-based CSO *Antidiskriminierungsberatung und Rechtsberatung für MigrantInnen* alleges the existence of disadvantageous tariffs and the denial of bank accounts, and credits based on racial/ethnic origin and religion/belief.

⁵ Michaels 2004.

2 Actual and potential problems of discrimination

2.1 Complaints concerning discriminatory treatment of consumers

Complaints are mainly recorded by civil society organisations, including consumer organisations, and the national authorities, namely BaFin and the Federal Anti-Discrimination Agency (FADA).⁶ There are also other organisations that deal with discrimination issues because of their focus on related issues (an NGO defending the rights of migrants would be interested in racial discrimination, for example). FADA is the only stakeholder that specialises in combating discrimination in general and offers counselling services according to the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, or AGG). The complaints are recorded by factor or by field, such as housing, mass commercial, finance, etc. The number of complaints BaFin and VZBV address is based on estimations. With the exception of the FADA's data that reports the number of complaints for each area, there is no exact data about discrimination in the field of banking and insurance. Therefore it is difficult to determine correlations between discriminating factors (sex, age, disability, etc); forms of discrimination (exclusions, contractual conditions); and fields of discrimination (certain products).

2.1.1 Problem areas to which reported/documented complaints relate

In 2008, BaFin received less than 10 complaints concerning discrimination in banking products and approximately 100 to 150 relating to discrimination in the field of insurance products. Relevant discriminatory factors are sex, age, and disability. For banking, complaints mainly relate to disability, while for insurance, complaints relate mainly to age.

FADA received complaints concerning discriminatory treatment especially in the field of deposit accounts (29 in the last three years), consumer credits (25), and private health insurances (25).⁷ The complaints that FADA received mainly relate to sex, age, disability, race/ethnic origin.

VZBV receives between 500-1,000 complaints about discriminatory treatment in financial services every year. VZBV estimates that complaints most frequently relate to consumer credits, access to current accounts, travel insurance, private health insurance, disability (income protection) insurance (*Berufsunfähigkeitsversicherung*). Most are claims of discrimination because of age and disability. According to VZBV, the most complaints concern private health insurance.

⁶ FADA was set up upon enforcement of the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, or AGG) in 2006 as a federal agency to avoid discrimination; in some federal states there are already branches of the FADA.

⁷ In particular, in the last three years (2007-2009) FADA reported complaints related to motor insurance (7), travel insurance (4), private health insurance (25), life insurance (5), annuities (4), disability (income protection) insurance (9), accident insurance (11), long-term care insurance (4), private liability insurance (2), mortgage loans (1), credit cards (1), consumer credit (25) and deposit accounts (29).

The banking companies, banking associations, and banking complaint agency⁸ that participated in the survey did not receive any complaints from consumers or their representatives concerning discriminatory treatment in the provision of financial services on the basis of sex, age, disability, race/ethnic origin, religion/belief, and sexual orientation over the last three years. The private health insurance industry has a complaint management scheme, the ombudsman of private health insurance. The ombudsman receives a total of about 5,000 complaints a year, but it did not register any complaints concerning discrimination. Among the insurance companies who participated in the survey, one term-life insurer did not receive a single complaint about discriminatory treatment over the last three years, one insurer reports one relevant complaint concerning the maximum age limit of a travel-accident insurance tariff which, however, it no longer offers. The German Insurance Association (*Gesamtverband der Deutschen Versicherungswirtschaft*, GDV) does not report numbers but states that complaints of alleged discriminatory treatment are very rare.

It is noteworthy that the national authorities (BaFin, FADA) and civil society and consumer organisations (VZBV, *Antidiskriminierungsberatung für MigrantInnen*⁹) all confirm that they receive complaints concerning discriminatory treatment.

There are possible explanations for this:

- Customers who experienced discriminatory treatment have more trust in consumer organisations such as the *Verbraucherzentralen* or public agencies such as FADA that are not close to banking and insurance companies;
- Lack of facilities that are specialised in counselling on issues associated with discriminatory treatment;
- Reported complaints concerning discriminatory treatment are not recognized as such in the banking and insurance industry, especially if the complainant does not refer to his or her complaint specifically as ‘discrimination’. That means that complaint management in the banking and insurance branches are not aware of discrimination as a problem and its legal relevance, especially since the enactment of AGG.
- Discrimination is not recognized because of the sometimes difficult proof of a causality between discriminatory treatment and denial of contracting. In particular, denial of access to a bank account usually happens without any statement of the grounds for denial.¹⁰

⁸ *Kundenbeschwerdestelle des Verbandes öffentlicher Banken e.V.* (complaints management system of the association of public banks).

⁹ *Antidiskriminierungsberatung für MigrantInnen* do not report number of complaints.

¹⁰ *Verbraucherzentrale Bundesverband* 2008.

2.1.2 ***Discrimination grounds to which reported/documentated complaints relate***

Sex

Both FADA and BaFin report complaints about discriminatory treatment on the basis of sex. FADA reports conflicts over refunding the costs of pregnancy, maternity, and gender reassignment, as well as the denial of access to private health insurance for pregnant women. This is in line with the practises reported by VZBV. BaFin reports complaints based on gender for travel insurance because policies do not cover the costs of pregnancy.

Age

Consumer credits

An age above 70 years can lead to the denial of credit (age as 'biological risk').¹¹ Several complaints concern the denial of consumer credits based on the age of the customer. According to VZBV, consumer credits are the most frequent areas of complaint. Sometimes among the conditions to obtain a credit is the signing of an expensive and uneconomical payment protection insurance (*Restkreditversicherung*). Although payment protection insurance is not mandatory, the consumer is pressured to purchase insurance and might have problems in paying back the entire amount. However, this requirement is not explicitly related to age of the customer.

Travel insurances

VZBV reports that many complaints refer to the age ceilings of travel insurers. Generally travel insurance contracts in Germany are long-term contracts that are renewed every year. These contracts automatically stop when the customer reaches a certain age or automatically change to tariffs that are two to three times higher.¹²

Banking accounts

Another field of complaints refers to inaccurate investment advice for seniors. It is charged that banking companies sell products to seniors without sufficient information about the risk. This situation has been reported, for instance, in connection with the bankruptcy of Lehmann Brothers.¹³ The topic received wide media coverage because the majority of depositors who experienced losses were reportedly seniors.¹⁴

¹¹ Verbraucherzentrale Bundesverband 2009.

¹² See also Finanztest 04/2009, p. 62.

¹³ Finanztest 09/2007, p. 37-39; Büro gegen Altersdiskriminierung, <http://altersdiskriminierung.org/themen/artikel.php?id=2872&search=beratung&searchin=3> [7.2.2010; Frankfurter Allgemeine Zeitung, faz.net vom 20.03.2010: „Banken ziehen Senioren über den Tisch“ (von Volker Looman): <http://www.faz.net/s/RubC98402BCC5D44EAB925FE13321328FA1/Doc~ED196FF9AFA1849EBAFE45338C7B7BB51~ATpl~Ecommon~Scontent.html> [09.04.10].

¹⁴ DSW (Deutsche Schutzvereinigung für Wertpapierbesitz e.V., association of private investors): http://www.dsw-info.de/uploads/media/DSW-PK_Lehman-Opfer-Statistik.pdf [7.2.2010].

Private health insurance

According to VZBV seniors have problems changing providers of private health insurance. New legislation establishes that the client's aging reserves accrued with an insurers can be transferred to another insurer. However this new provision does not apply to contracts signed before 2009. Therefore, at present seniors pay very high premiums if they change insurance companies, because their aging reserves accrued during the old contract are not considered for the premium calculation of the new contract. Furthermore, clients are legally permitted to change to a similar, but cheaper tariff of the same insurer, keeping their aging reserves. Nevertheless, VZBV reports that insurance companies have a great interest to pool young, healthy people in the new tariffs, while trying to avoid including seniors. VZBV claims that these strategies are unfair, such as requesting fees for changes, misinforming that changing isn't possible, or differentiating the coverage in such a way that the coverage is different and therefore permission to change to a cheaper contract can be denied.

Disability

FADA documented two complaints regarding denial of access to current accounts.¹⁵ In one case, the banking company denied a current account (call money account) to a deaf person on the grounds that deaf customers supposedly cause problems. The bank retracted its refusal after the intervention of the local press.¹⁶ In another case, a bank denied a current account to a physically handicapped person who was not able to sign a contract. Moreover, the mother of the affected person, who had general power of attorney attested by a notary, was denied opening the account on her son's behalf. The bank justified the denial with its business model (online bank), its standardised product spectrum and the way the mandatory credentials were managed. FADA concluded that, in such cases, an attorney should be able to open an account for such a disabled person.¹⁷

Another case documented by the *Antidiskriminierungsverband Deutschland* denounced the heavy burden of proof that a disabled person had to provide to prove that his spasms resulted from an accident and not from his disability. Following an accident in 1996, the complainant, disabled since birth, had to prove that his injuries (spasms) were caused by the accident and not by his disability. Reportedly, he could not prove that the spasms were related to the accident until 2004 and only then did he receive proper medical treatment, eight years after the accident. He also reportedly suffered from loss of working income and loss of compensation payment of his insurance for the accident.¹⁸ With the enactment of the AGG in 2006, the burden of

¹⁵ FADA , complaints DE-2 and DE-3.

¹⁶ FADA, complaint DE-3.

¹⁷ FADA, complaint DE-2.

¹⁸ *Antidiskriminierungsverband Deutschland*, complaint DE-4.

proof reversed: now the insurance company would have to prove that the symptoms resulted from a disability and not from an accident.

Racial/ethnic origin, religion/belief or sexual orientation

The reported complaints that relate to racial/ethnic origin revolve around the denial of access to bank accounts. In one case documented and classified by FADA as discrimination based on racial/ethnic origin, a bank offered to open a current account only on the condition that the German spouse of the applicant would sign the contract. The reason given by the bank was that the bank could not check the person's creditworthiness.¹⁹ This happened despite the fact that banks offer *Guthabenkonto* (accounts that don't permit overdrawing and therefore don't depend on credit risk), corresponding to the self-regulatory measure *Girokonto für jedermann* that aims to provide current accounts to everyone.²⁰

The *Antidiskriminierungsberatung für MigrantInnen* reports the refusal of accounts because of residential status and origin.

VZBV reports that in several cases banks justified the denial of banking accounts, credits, and credit cards to persons because they don't speak German. In one case the applicant spoke English, French, and Arabic, and was accompanied by her German-speaking husband. Nevertheless, a current account was denied because of language. It is not clear, though, whether the language, the racial/ethnic origin, or another reason lead to the refusal. Generally banks do not provide reasons for refusing a bank account.²¹

2.2 Court cases concerning discriminatory treatment in the provision of financial services on basis of sex, age, disability, race/ethnic origin, religion/belief and sexual orientation

There have been three court cases addressing discriminatory treatment in financial services and insurance: two deal with disability, one with pregnancy (sex).

2.2.1 Case OLG Saarbrücken

In the case *OLG Saarbrücken* (9.9.2009, AZ 5 U 26/09) an insurer denied benefits and rescinded a term life contract on the grounds that the deceased client fraudulently concealed a pre-existing disease at the time of the contract's conclusion. The court decided in favour of the insurer. The rescission of the contract was admissible because it was based on the applicant's fraudulent concealment of the disease and not on his disability. In the opinion of the court, the insurer could prove sufficiently that it would not

¹⁹ FADA, complaint DE-1.

²⁰ ZKA (Zentraler Kreditausschuss) *Pressemitteilung vom 06.09.2005: Konten auf Guthabenbasis für jedermann möglich*, online: [http://www.zka-online.de/zka/pressemitteilungen/volltext/backpid/29/article/konten-auf-guthabenbasis-fuer-jedermann-moeglich.html?tx_ttnews\[pS\]=1262300400&cHash=8d3328d672](http://www.zka-online.de/zka/pressemitteilungen/volltext/backpid/29/article/konten-auf-guthabenbasis-fuer-jedermann-moeglich.html?tx_ttnews[pS]=1262300400&cHash=8d3328d672) [09.04.2010].

²¹ See also *Stellungnahme ZKA Girokonto für jedermann*, VZBV, p. 5-13.

have concluded a term life insurance contract if it had been aware of the person's concealed disease. It was not relevant that the concealed disease was not causal for the death of the client. The court clarified that the notion of "accepted principles of risk-appropriate calculations"²² in § 20 (2) 3 AGG to justify discrimination if disability leads to an increased obligation to the insurer to explain and prove its calculation (except the risk relevant for the insurance contract is obvious). The insurer can choose the statistical data upon which its calculations are based on.

2.2.2 Case of LG Offenburg

In the case of *LG Offenburg* (13.11.2009; AZ 3 O 82/09), a disabled child was denied access to additional private health care insurance. The insurer claimed that there was insufficient data on the child's rare disease. In the judgement of the court, the denial of contracting was therefore declared compatible with Anti-Discrimination Law.

2.2.3 Case of AG Hannover

In the case of *AG Hannover* (26.08.2008; 534 C 5012/08), a pregnant woman applied for private health insurance. The insurer wanted to contract only if all costs for the pregnancy and related to pregnancy were excluded. In the opinion of the court, this practise was justified.

2.3 Conclusions

2.3.1 Factors, problem areas, and consequences

Most complaints addressed the factors of age and disability, followed by sex, and race/ethnic origin. Regarding the different financial products, complaints based on discriminatory treatment most frequently referred to consumer credits, private health insurances, and current accounts.

Since questioned stakeholders did not systematically record complaints by discrimination factor and product, it is difficult to classify problem areas and related consequences. Based on the evidence collected (surveys, interviews, documented complaints), the following problem areas can be identified:

- Refusal of private health insurers to cover the costs of pregnancy and birth;
- Denial of access for disabled people to private health insurance;
- Age ceilings for consumer credits and travel insurance. FADA reports that cases related to age often concern credits, bank account and also insurance products.
- Denial of access to current and other banking accounts. In two documented complaints the opening of current accounts was reportedly denied because of disability. FADA documented a case of racial/ethnic discrimination in which a

²² Section 20 (2) 3 AGG: "anerkannte Prinzipien der risikoadäquaten Kalkulation".

current account was denied. *Antidiskriminierungsberatung für MigrantInnen* reported denial of bank accounts based on the applicant's origin.

According to the FADA, most complaints about discriminatory treatment concern the denial of access to a product, although it also reports some complaints concerning higher premiums, in the case of disability and age.

2.3.2 Evidence

To legally justify differentiation because of sex, insurers need to prove that sex is a 'determining factor' in risk assessment (see section 3.1). To legally justify differentiation because of disability and age, they need to prove that the relevant calculations are based on recognized principles of risk-adequate calculations (see section 3.3).

To ensure that the differences in treatment based on sex, age, and disability are proportionate, insurers refer, depending on the product, to actuarial data, risk-adequate calculations, legislation (see section 3.1), and supervision by actuaries, such as *Treuhänder* (trustees) and BaFin.

Insurers use their own data and, for some products, exchange their data with insurance associations and reinsurance companies. Data exchange reportedly takes place for motor insurance, private health insurance, and term life insurance. The magazine *Finanztest* has reported about *Hinweis und Informationssystem der Versicherungswirtschaft* (HIS), a shared data basis of insurance companies through which insurers record the data of consumers whose insurance applications were refused or only taken under special contractual conditions.²³

For term life insurances, mortality tables are the most important source. Mortality tables are published by the German Association of Actuaries (*Deutsche Aktuarvereinigung*, or DAV) and the Federal Authority for Statistics (*Statistisches Bundesamt*).²⁴

One problem is the lack of statistical evidence on rare diseases. Insurers use statistics collected by reinsurance companies, their own data, and 'causal considerations' and 'insurance-medical experience'.

Furthermore, insurers refer to supervision through actuary and BaFin to ensure the proportionality of differentiation; private health insurance is additionally supervised by independent trustees (*Treuhänder*).

Banks use their own data and data stored by credit information agencies such as *Schufa* for risk assessment, although to what extent is unclear. A study that tested the quality of data saved by credit information agencies concluded that there was a high rate of false data and criticised that the calculation of the creditworthiness of individual

²³ *Finanztest* 04/2009, p. 71; according to *Finanztest*, in 2008 insurance companies added data of 600,000 consumers in the area of life and disability income protection insurance ("*Berufsunfähigkeitsversicherung*") to the HIS system.

²⁴ According to one of the interviewed insurer, compared to the statistics published by the Federal Authority for Statistics, "DAV's statistics look into the future and take also into account how the statistics develop in the next ten to twenty years".

consumers by credit information agencies is not traceable and leads to dubious results.²⁵ However, recent legislative changes have created more transparency for consumers regarding the data collected by credit scoring agencies (see Part III; Annex 4).

2.3.3 Proportionality

Legally, differentiation because of disability and age is permitted if it is based on 'recognised principles' of risk-adequate calculations. A differentiation because of sex is only justified if sex is a 'determining factor' in risk-assessment (Section 20 (2) AGG, see chapter 3). This notion of proportionality not only causes problems for affected persons and companies (see section 2.3.3), but also for mediation boards and courts. First, the notion of 'recognised principles' and 'determining factor' is legally vague and needs to be clarified by jurisdiction. Second, the evaluation of actuarial calculations requires expert knowledge. Though insurance companies have an increased obligation to explain and prove their calculations in trial, courts and mediation boards will in most cases not have the capability to review actuarial statistics and (to justify sex as a factor of differentiation) to check whether sex is a determining factor in risk assessment. Therefore courts (and mediation boards) have to rely on the evidence brought by insurance companies or they would have to appoint an independent expert to review the data and calculations. Finally, actuarial statistics do not offer unequivocal results. Rather they can lead to different and even contradictory interpretations.

²⁵ Korczak and Wilken 2009.

3 Existing measures to prevent discriminatory practices

3.1 Implementation of Directive 2004/113/EC

3.1.1 Interpretation of key terms of Article 5.2 of the Directive

In Germany, the principles of all European directives concerning equal treatment are reflected in the AGG. According to Section 19 (1) No. 2 AGG, “any discrimination on the grounds of race or ethnic origin, sex, religion, disability, age or sexual orientation shall be illegal when founding, executing, or terminating civil-law obligations which have as their object a private-law insurance”. Exceptionally, “differences of treatment on the ground of sex shall only be permitted in case of the application of Section 19 (1) No. 2 with reference to 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”.

Accordingly, an implementation of the term ‘proportionate differences’ cannot be found in the German non-discrimination law. The lack of the term ‘proportionate’ might be attributed to the assumption that in a proper risk assessment risk features are always proportionate to the calculated premiums. It is the purpose of the assessment to map individual risks in its result.

So far, no clear, consistent, and common interpretation of the term “relevant and accurate actuarial and statistical data” exists in Germany. The act's Explanatory Memorandum denotes only such data as relevant and accurate that make a valid statement about sex as an actuarial risk factor.²⁶ Until now, the criterion for relevance is understood as referring to significance and not causality.²⁷ The factor is determining if it is decisive in risk assessment, although it doesn't have to be the only factor.²⁸

In the area of private health insurance, a legal requirement concerning gender dependent calculation existed prior to the AGG. On the one hand, gender dependent calculation is legally mandated by Section 12 VAG. On the other hand, calculations are only permitted if they were based on probability tables and other appropriate statistical data.²⁹

3.1.2 Implementation of the publication requirement of Article 5.2

A number of statistics are published by the BaFin³⁰ and the DAV. Additionally, a statutory instrument – the *Kalkulationsverordnung*³¹ – substantiates the requirements

²⁶ BT-Drs. 16/1780, p. 45.

²⁷ See section 2.3.3.

²⁸ BT-Drs. 16/1780, p. 45.

²⁹ Section 12 (1) No. 1 *Versicherungsaufsichtsgesetz*; It is in question, if Section 12 VAG would endure because of it's obligation to gender dependent calculation. An amendment is not planned anyway.

³⁰ Section 103a VAG; BaFin is an independent public-law institution and is subject to the legal and technical oversight of the Federal Ministry of Finance. BaFin operates only in the public interest. Its primary objective is to guarantee the

that need to be met by the statistical evidence. The Association of Private Health Insurers (*Verband der privaten Krankenversicherungen*, or PKV), which represents 46 companies, publishes many kinds of statistics on differentiating characteristics, including gender differentiation. The data is generated in cooperation with the member companies.³² Finally, the Federal Department of Statistics publishes statistics on the different mortality and invalidity of men and women. These sources of data as a whole are said to satisfy the requirements of Art 5.2 Directive 2004/113/EC and Section 20 (2) 1 AGG.³³ They are regularly updated and published. As far as an insurance company wants to use its own statistics concerning gender differentiation, a certification by BaFin is necessary.³⁴ Moreover, the companies are obliged to document the basis for their calculations.³⁵ Additional statistics are published on the insurer associations' websites.³⁶

However, for competitive reasons, companies do not publish breakdowns of all actuary calculations, which would be necessary to understand the calculation of individual premiums. Similarly, because of the sensitivity of internal data and the control system by the BaFin, German insurance companies are not obliged to publish more data than described above. It is therefore not possible to reliably assess the additional organisational effort that would be caused by such an obligation. In principle, all of the insurers and insurer associations who answered the questionnaire assumed that the premiums and benefits were calculated according to an appropriate actuarial risk assessment based on the insurer's own interest in the permanent safeguarding of their ability to perform on their contracts. Thus, a variety of statistical data pertaining to the assessment of risks and the relevance of individual elements of the risk exists. In the case that Directive 2004/113/EC entails the general obligation to publish all internal data, insurers fear losing their competitiveness and expect stagnation in the process of development of new and low priced insurance products.³⁷

3.2 Implementation of the UN Convention on the Rights of Persons with Disabilities

The UN Convention on the Rights of Persons with Disabilities remains to be fully implemented. There is the intention to prepare an action plan to implement the aims of

proper functioning, stability and integrity of the German financial system. According to Section 81 VAG, BaFin acts as a supervisor for potential maladministration and possesses the authority to order remedial action.

³¹ Calculation regulation, KalV.

³² <http://www.pkv.de> [7.2.2010].

³³ Thüsing and Hoff 2007.

³⁴ Section 12 VAG and Section 6 (2) KalkV.

³⁵ Section 6 KalV.

³⁶ DAV: <http://www.dav.de> [7.2.2010]; DGVMF (German Society for Insurance- and Financial Mathematics): <http://www.aktuar.de/php/showsite.php?menu=0215&GSAG=5aaae34d1843a6d83504a36764364925> [7.2.2010]; PKV: <http://www.pkv.de/zahlen/pflichtveroeffentlichungen> [7.2.2010].

³⁷ See also Thüsing 2007.

the Convention in the present legislative period (2009-2012). It will be developed in cooperation with disabled people and the main association of persons with disabilities.³⁸ Within the campaign 'All inclusive! - The new UN Convention', initiated by the Federal Government's Commissioner for the Disabled, several expert conferences have already taken place. With the help of the associations, these conferences aimed at substantiating the purposes of the Convention, assessing the current situation, defining the need for action, and to support the public relations efforts concerning the Convention.³⁹ The results of these conferences now have to be implemented in the political process. The campaign stresses that special attention should be given to the ongoing support and extension of accessibility measures and the promotion of awareness of a culture of non-discrimination.⁴⁰ Independent of the Convention, a number of regulations in social security law stipulate the rehabilitation and integration of disabled people.⁴¹

3.3 Other national legislation or regulation in force that prevents or restricts the use of sex, age, disability, race/ethnic origin, religion/belief and sexual orientation in the design, supply or pricing of financial products

The German legislature combined the requirements of the European directives with further discrimination prohibitions in the General Act of Equal Treatment. The general prohibition of discrimination is summarized in Section 19 AGG.⁴² The legislation also established exceptions justifying different treatment. These exceptions are different with regard to the general civil law and the law of private insurances.⁴³ Within the possibility

³⁸ Press release of the Commissioner for the Disabled 26.03.2009, retrievable on <http://www.behindertenbeauftragte.de> [7.2.2010].

³⁹http://www.behindertenbeauftragter.de/cdn_108/nn_1415966/Al/Kampagne/Kampagne__node.html?__nnn=true [7.2.2010].

⁴⁰http://www.behindertenbeauftragter.de/cdn_108/nn_1620050/SharedDocs/Publikationen/Al/Ergebnisse_Kampagne__pdf__kk,templateId=raw,property=publicationFile.pdf/Ergebnisse_Kampagne_pdf_kk.pdf [7.2.2010], p. 32.

⁴¹ IX Sozialgesetzbuch.

⁴² (1) Any discrimination on the grounds of race or ethnic origin, sex, religion, disability, age or sexual orientation shall be illegal when founding, executing or terminating civil-law obligations which

1. typically arise without regard of person in a large number of cases under comparable conditions (bulk business) or where the regard of person is of subordinate significance on account of the obligation and the comparable conditions arise in a large number of cases ; or which

2. have as their object a private-law insurance.

⁴³ (1) Differences of treatment on grounds of religion, disability, age, sexual orientation or sex shall not be deemed to be a violation of the prohibition of discrimination if they are based on objective grounds. [...]

(2) Differences of treatment on the ground of sex shall only be permitted in case of the application of Section 19(1) No 2 with reference to 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. Costs arising from pregnancy and maternity may on no account lead to the payment of different premiums and benefits. Differences of treatment on the ground of religion, disability, age or sexual orientation in the case of application of Section 19(1) No 2 shall be permissible only where these are based on recognised principles of risk-adequate calculations, in particular on an assessment of risk based on actuarial calculations which are in turn based on statistical surveys.

to justify different treatment in insurance contracts under private law, there are different requirements concerning the characteristic sex.⁴⁴

In addition to the characteristic of race, as prescribed by Art. 3(1)(h) of Directive 2000/43/EC, the German legislature included all characteristics covered only by the European Employment Directive (2000/78/EC) in the scope of application of the non-discrimination principle of the Act of Equal Treatment concerning private-law insurances. Differentiation on the grounds of race or ethnic origin, religion, disability, age, and sexual orientation is prohibited in principle in the area of private-law insurances by Section 19 I No. 2 AGG. This prohibition is independent of the content of the insurance.

A justification for differential treatment according to characteristic of race/ethnic origin is not possible. For other characteristics, the Act provides exceptions in Section 20 (2) 3 AGG. Consideration of age, disability, religion, and sexual orientation is based on “recognised principles of risk-adequate calculations, in particular on an assessment of risk based on actuarial calculations which are in turn based on statistical surveys”. Differentiations are allowed and do not constitute discrimination.

To meet the justification conditions of Section 20 (2) 3 AGG, insurers have to fulfil similar, but not the same requirements as those that are prescribed for gender differentiation. According to the AGG's Explanatory Memorandum, a compendium of actuarial principles is used. For the calculation of premiums actuarial provisions should be applied as “recognised principles of risk-adequate calculations”.⁴⁵ In this process, best-estimate actuarial assumptions,⁴⁶ mathematic formulas, and calculative derivations have to be used, and statistical bases should be consulted as far as they exist or can be prepared at reasonable cost. Furthermore, recognized medical data and assessment tables of the reinsurers can be relied upon. Taken together, the insurer is affected by an increased burden of proof, explanation, and documentation.⁴⁷ Nevertheless, the requirements of justification are significantly lower because consideration of a characteristic does not have to refer to existing statistical data, but instead only to a risk assessment developed on the basis of recognized principles. This arrangement is designed to enable the insurer to develop new insurance products for which no statistics are available yet. The regulation will impact compositions of premiums and benefits just in individual cases, because the most insurers' products are already based on an actuarial risk assessment.

In addition to the explicit application of the non-discrimination principle to private insurance companies, the German legislature extended the characteristic's protection against discrimination to general civil law. According to Section 19 (1) No. 2 AGG, any discrimination on the grounds of race/ethnic origin, sex, religion, disability, age or

⁴⁴ See section 3.1.

⁴⁵ BT-Drs. 16/1780, p. 45.

⁴⁶ E.g. Section 11 VAG, 65 VAG and on it's basis enacted legal ordiances, e.g Section 341f HGB for life insurance.

⁴⁷ BT-Drs. 16/1780, p. 45.

sexual orientation is prohibited when founding, executing or terminating civil-law obligations that “typically arise without regard of person in a large number of cases under comparable conditions (bulk business) or where the regard of person is of subordinate significance on account of the obligation and the comparable conditions arise in a large number of cases”. ‘Bulk businesses’ are primarily transactions of daily life, for example, transactions in retail trade and gastronomy or electronic sales deals. However, different treatment on the ground of sex, religion, disability, age, and sexual orientation can be justified if it is based on objective grounds (Section 20 (1) 1 AGG).

For the characteristic of race/ethnic origin, the non-discrimination principle is extended to the whole area of the access to and supply of goods and services which are available to the public (cf. Section 19 (2) AGG, Section 2 (1) No. 5-8 AGG). In this respect no justification exists in Section 20 (1) AGG.

Financial service products (other than private insurances) are therefore not covered by the AGG expressly as far as they do not touch the issue of race. Typically, in the area of financial services, it is centrally important that the contracting partner include his/her individual characteristics. Thus, in principle, they are not covered by the category of *bulk business*.⁴⁸ In individual cases, a different interpretation might apply, for example if standardized consumer credits are concerned. In case of this kind of standardized credits, individual characteristics, with the exception of the creditworthiness of the client, play no role, thus requiring no individual risk assessment.⁴⁹ There is no agreement among legal scholars yet whether Section 19 I No. 1 applies to current accounts that offer the possibility to overdraw.⁵⁰

As far as financial products are not covered by the non-discrimination principle of the AGG, this seems especially problematic for insurance and related financial services, since they should have been covered at least for the characteristic of sex according to the Gender Directive (2004/113/EC).⁵¹

3.4 National legislation or regulation in force to ensure that essential financial products are available (and affordable) for all customers

As a result of the Law to Strengthen Competition in the Statutory Health Insurance Market, private insurance companies must offer a uniform base rate (*Basistarif*) that is geared to the social security law. The base rate serves to cover the obligation to be insured either in private or statutory health insurance, in force since January 1st, 2010. The base rate should enable everyone to contract private health insurance with

⁴⁸ Memorandum BT-Drs. 16/1780 p. 42.

⁴⁹ Däubler/Franke/Schlichtmann, AGG, 2. Edition 2008, Section 19 Rn. 34.

⁵⁰ Pro: MüKo/Thüsing, BGB, 2. Hb AGG, 5. Edition 2007, Section 19 Rn. 28; contra: Zypries, consumer protection by legal politics, 5.9.2006, available on <http://www.bmj.bund.de> [7.2.2010]

⁵¹ Art. 5.1 Directive 2004/113/EC.

affordable premiums irrespective of his/her individual conditions.⁵² In the area of state-sponsored pension insurance, there is a statutory obligation to offer unisex premiums.

3.5 New national legislation or regulation planned

According to the coalition agreement signed by the parties in the current federal government, it is planned to evaluate the establishment of an independent foundation for financial products. Further plans concern a possible restructuring and concentration of the current system of bank supervision at the level of the Federal Bank.⁵³ Concrete measures have not yet been taken.

3.6 Non-regulatory measures

A voluntary formal commitment of member companies of the GDV from 2003 concerning predictive genetic testing is effective until end of 2011. Member companies having signed the declaration commit themselves to not to make the conduct of predictive genetic tests a prerequisite for the conclusion of a contract.⁵⁴

In 1995, the Central Credit Committee (*Zentraler Kreditausschuss*, ZKA) published a recommendation for a model called *Girokonto für jedermann*. According to this model, credit institutions that offer current accounts to all population groups should not deny such an account, unless the opening or continuation cannot reasonably be expected from the institution.⁵⁵ The German parliament reconfirmed the need of the application of this recommendation in 2004.⁵⁶ There is no agreement on how far the recommendation has been implemented by the banking sector. The ZKA, stressing the effectiveness of self-regulatory measures, assumes that the recommendation has been proven successful, removing the need for judicial regulation.⁵⁷ In contrast, for the VZBV, the recommendation has not been implemented sufficiently, resulting in demands that the recommendation should be replaced by a legally binding regulation of the banks.⁵⁸

⁵² On the other hand, everyone is obliged to get health coverage. Before 01.01.2009, it depended on the income whether health liability was mandatory.

⁵³ Coalition agreement CDU, CSU, FDP p. 46/124.

⁵⁴ Voluntary formal commitment of member companies of the German Insurance Association (*Gesamtverband der Deutschen Versicherungswirtschaft e. V. – GDV*), dated 18.07.03

⁵⁵ Text of the recommendation and the reasons for unreasonableness on <http://www.zka-online.de/zka/zahlungsverkehr/girokonto-fuer-jedermann/zka-empfehlung.html> [7.2.2010].

⁵⁶ BT-Drs. 15/3274.

⁵⁷ [http://www.zka-online.de/zka/pressemitteilungen/volltext/backpid/0/article/hohe-akzeptanz-der-zka-empfehlung-zum-girokonto-fuer-jedermann.html?tx_ttnews\[arc\]=1&tx_ttnews\[pL\]=1262300399&tx_ttnews\[pS\]=1230764400&cHash=f7a3d70b04](http://www.zka-online.de/zka/pressemitteilungen/volltext/backpid/0/article/hohe-akzeptanz-der-zka-empfehlung-zum-girokonto-fuer-jedermann.html?tx_ttnews[arc]=1&tx_ttnews[pL]=1262300399&tx_ttnews[pS]=1230764400&cHash=f7a3d70b04) [7.2.2010].

⁵⁸ VZBV-Statement, Girokonto für jedermann, p. 3.

Country report Sweden

1. Current practices of financial service providers

The literature in Sweden on current practices of financial service providers regarding the use of the factors sex, age, disability, race/ethnic origin, religion/belief, and sexual orientation is limited. There is a 2009 presentation entitled “Sex Differentiation in the Insurance Sector” by the Swedish Actuary Association and Hannover Life Re.¹ In 2002, the Swedish Consumers Insurance Bureau and the Swedish Insurance Federation published a report entitled “Risk Assessment and Child Insurance”.² The following overview is based on a review of these documents, complemented by industry interviews and a survey of providers conducted in the framework of this study.

1.1. The use of sex, age, and disability as a factor in design, supply, or pricing of products

Sex

The survey indicates that sex is used as a factor in risk assessment for motor insurance and sometimes in relation to private health insurance and travel insurance. Furthermore, sex influences pricing with regard to term-life insurance and, to some extent, other insurance products.

Age

Age is commonly used as a factor in risk assessment for motor insurance, travel insurance, private health insurance, and to some extent, other insurance products. As for life insurance, age affects pricing, contractual conditions, and may lead to a requirement of additional medical checkups.

Mortgage loans may be offered exclusively to consumers above a specific age and age requirements may exist for student travel insurances. With regard to term-life insurances there often exists an upper age limit of about 64 years of age. Products for the elderly exist. There is also in general a lower age limit of 16 years.

Disability

With regard to private health insurance, disability is reported to be a factor used in risk assessment. Some companies allow disability to directly influence contractual conditions for travel insurance. As for term-life insurance, survey results indicate that disability affects pricing, contractual conditions, and may lead to a requirement of additional medical checkups.

Race/ethnic origin, religion/belief, and sexual orientation

There is no evidence that race/ethnic origin, religion/belief, and sexual orientation affect risk assessment or pricing of products.

¹ Alm, Erik: Könsdiskriminering inom försäkringen - eller existerar skillnader mellan könen?
http://www.aktuarieforeningen.se/filer/2009_Konsneutral.pdf

² Sveriges Försäkringsförbund och Konsumenternas Försäkringsbyrå: Barnförsäkring och riskbedömning (Child Insurance and Risk Assessment), Stockholm 2002. Available at: <http://www.konsumenternasforsakringsbyra.se/artikel/document/Rapport.pdf>

2. Actual and potential problems of discrimination

2.1. Complaints concerning discriminatory treatment of consumers

2.1.1. *Problem areas to which reported/documentated complaints relate*

Refusal to provide requested services

A case is reported by the Equality Ombudsman on denied health insurance for a child with a hearing impairment.³ The insurance company offered an accident insurance and the possibility of a renewed evaluation after 18 months of observation. The provider denied the requested health insurance arguing that the overall risk was too high and that it could not exclude the hearing loss from the insurance, since the reason for the hearing loss had not been ascertained. The Ombudsman found that the reasons given were not proportionate. The Ombudsman argued that it should have been possible for the insurance company to grant insurance, with the exception of future damages related to the established hearing loss. The Ombudsman filed the complaint to court.

Difficulties in finding a provider

General difficulties exist for disabled persons. In a report from 2001, 87 percent of the organisations representing people with disabilities reported that their members have had difficulties obtaining insurance.⁴

2.1.2. *Discrimination grounds to which reported/documentated complaints relate*

The Equality Ombudsman states that complaints that have been received mainly relate to ethnic origin and disability. Complaints related to age and sex were also received by the Equality Ombudsman.

Disability

An example for a complaint related to disability is the above-mentioned case of a child who was denied health insurance because of a hearing loss.

Racial/ethnic origin

One bank reports difficulties for customers with names similar to names on terrorist lists. Such difficulties are revealed by complaints reported by the Equality Ombudsman concerning money transfer services to send money within Europe. The money transfer service's data system found possible matches between the names of the complainants and names on lists of persons subjected to financial sanctions. Names of the

³ Swedish Equality Ombudsman, complaint SE-1.

⁴ The Consumers Insurance Bureau in cooperation with the Disability Organisations' Cooperation Unit and the Disability Organisations' Economic Insurance Association (Konsumenternas försäkringsbyrå i samarbete med Handikappförbundens samorganisation och Handikappförbundens ekonomiska försäkringsförening) (2001): Funktionshinder Försäkringshinder, p 44. Available at: http://www.konsumenternasforsakringsbyra.se/artikel/article.asp?_tp_article_id=63&avd=ART_RAP&menu=ART_RAP

customers matched the consolidated EU list, which consists mainly of names of Arabic and/or Islamic origin. The provider halted the transactions. The transfers were delayed for a few days, up to several weeks. The Equality Ombudsman came to the conclusion that the provider had not acted appropriately. For instance, according to the Ombudsman, it was not possible for the sender to provide additional birth data on the transaction form, in order to limit the number of possible matches. The Ombudsman filed the complaint to court.⁵

Sexual orientation

The former Ombudsman Against Discrimination on Grounds of Sexual Orientation has worked with companies offering occupational pension schemes not giving benefits to same-sex partners.⁶ The Ombudsman has furthermore worked with insurance companies to make sure that same-sex partners are treated as equals at every stage of the insurance cycle.⁷

2.2. Court cases concerning discriminatory treatment in the provision of financial services on basis of sex, age, disability, race/ethnic origin, religion/belief, and sexual orientation

Disability

At the time of reporting, the Equality Ombudsman had a pending case at a district court concerning the above-mentioned case of a child who was denied health insurance because of a hearing loss.⁸

Ethnic origin

At the time of reporting, a case related to money transfer services was pending at the Stockholm district court.⁹

2.3. Conclusions

2.3.1. Factors and problem areas

Most reported complaints addressed the use of the factor disability and ethnic origin, followed by age and sex.

In order to make actuarial calculations based on age, medical conditions, sex, or any other ground, insurance companies must have relevant information available. The Act on Personal Information (*Personuppgiftslagen*) contains the general rules on the right

⁵ See Swedish Equality Ombudsman, SE-2.

⁶ See <http://www.homo.se/o.o.i.s/1936>.

⁷ See <http://www.homo.se/o.o.i.s/1944>.

⁸ Swedish Equality Ombudsman, complaint SE-1. See also <http://www.do.se/sv/Om-DO/Nyheter/DO-stammer-Trygg-Hansa-for-diskriminering/>.

⁹ Swedish Equality Ombudsman, complaint SE-2.

to request personal information. There is a general prohibition to register such 'sensitive personal information' as ethnicity, religion, or other beliefs and information concerning health and sexual life, including sexual orientation (Sec. 13). With regard to health authorities, there is also a right to register such sensitive information when necessary for medical reasons, in which case there is a corresponding rule on secrecy (Sec. 18). In Sec. 16 there is also a general exception whenever legal claims make keeping record of sensitive information necessary in an individual case and this is also the case when the person registered has explicitly agreed to the registration (Sec. 15). Against this background, information is, as a general rule, not kept on ethnicity or religion, sexual orientation, and disability.

As a general rule health information is not registered. But when buying for instance a private health insurance, the customer fills in a health declaration. It normally contains information such as occupation, height, weight, smoking habits, etc.¹⁰ The person is also asked to state current illnesses, absence from work for medical reasons, consultations with doctors, current medications, and so on. The person also gives permission for the insurance company to request information from doctors and hospitals. Armed with this information, the insurance company can assess risks and calculate premiums in the individual case. Medical journals can for instance be used to achieve information on the life expectancy of persons with certain medical conditions.¹¹

2.3.2. Evidence

When companies use their own data, it is impossible for outsiders to assess its quality. Statistics Sweden, a government agency, publishes, for example, mortality data by sex and age.¹² The Swedish Insurance Federation provides statistical information to both insurance companies and the general public.¹³

Regarding sex there is cooperation between the insurance companies, through the Swedish Insurance Federation, and the Swedish Financial Supervisory Authority. The aim of this cooperation is to produce statistics needed to use sex for risk assessments and thus for calculating premiums. This statistic is created in order to fulfill the requirements of Article 5 in Directive 2004/113 and it is published on the Consumers Insurance Bureau's webpage.¹⁴

¹⁰ Disability and Uninsurability, p. 22.

¹¹ Response of a company to the survey questionnaire.

¹² http://www.scb.se/statistik/BE/BE0701/2000I02/BE51ST0303_09.pdf

¹³ See for example, http://www.forsakringsforbundet.se/templates/ProductList___373.aspx?epslanguage=SV, the list includes statistics for fires, car thefts, damages to cars, households and companies claims of different sorts of damages.

¹⁴ http://www.konsumenternasforsakringsbyra.se/artikel/article.asp?_tp_article_id=95&menu=ART_FAK&avd=ART_FAK, http://www.konsumenternasforsakringsbyra.se/artikel/article.asp?_tp_article_id=98&menu=ART_FAK&avd=ART_FAK, http://www.konsumenternasforsakringsbyra.se/artikel/article.asp?_tp_article_id=96&menu=ART_FAK&avd=ART_FAK

As for disability, the insurance companies rely on different forms of information. They use medical information, for instance from medical journals. A reinsurance company reported to use such material and to supply companies with manuals based on this information. Companies also use their own historical data.

2.3.3. *Proportionality*

With regard to age, there is no requirement of proportionality as it is exempted from the prohibition in Chapter 2 Section 12 of the Discrimination Act.

With regard to sex, if a difference is ascertained with statistical certainty, than this difference could be reflected in the price of the insurance. This is not so with regard to disability. Here the companies make individual assessments.

3. Existing measures to prevent discriminatory practices

3.1. Implementation of Directive 2004/113/EC

3.1.1. Interpretation of key terms of Article 5(2) of the Directive

The Gender Directive (2004/113/EC) has been implemented in Swedish law through the Discrimination Act (2008:567). Chapter 2 of the Act contains provisions prohibiting discrimination and reprisals. Section 12 has provisions about goods, services, and housing, etc:

“Discrimination is prohibited on the part of a natural or legal person who

1. supplies goods, services, or housing to the general public, outside the private and family sphere, or

2. organizes a meeting or event that is open to the public.”

A person who represents a person referred to in the first paragraph in relation to the public, shall be equated with that person.

However, this prohibition does not apply to age discrimination. The prohibition of discrimination associated with sex does not apply to the supplying of insurance services, nor does it prevent women and men being treated differently with regard to other services or housing if there is a legitimate purpose and the means used are appropriate and necessary to achieve that purpose”.

The Ministry of Finance has given the Swedish Financial Supervisory Authority the task of ensuring that Sweden fulfills its obligations according to Article 5 of the Directive. These two government bodies have reached an informal¹⁵ agreement with the Swedish Insurance Federation on those insurance products that should be exempted from the prohibition to use sex as a risk factor – life insurance, motor insurance, accident insurance, and health insurance. Furthermore, the agreement enables the Swedish insurance companies to use sex for other products in the future if statistical data is compiled and published in accordance to Article 5 of the Directive.

3.1.2. Implementation of the publication requirement of Article 5(2)

Relevant data is published on the Consumers Insurance Bureau’s webpage¹⁶ and compiled by the Swedish Insurance Federation. The two organisations have signed an agreement in which the quality of the data is ensured in line with the Directive. Also, the Supervisory Authority shall supervise this agreement.

¹⁵ The formal parts consist of the agreement between the Consumers Insurance Bureau, the Swedish Insurance Federation, the Swedish Financial Supervisory Authority, and the regulation letter from the government to the Financial Supervisory Authority. There is no written agreement that is binding on individual insurance companies.

¹⁶ <http://www.konsumenternasforsakringsbyra.se/artikel/document/sjukforsakring.pdf>

3.2. Implementation of the UN Convention on the Rights of Persons with Disabilities

The Swedish government believes that Sweden already fulfills the requirements of Article 12.5 and Article 25 of the convention.¹⁷ People with disabilities have the same legal capacity as others. Those who are disabled on mental grounds have the right to receive assistance so that they can make use of their legal capacity.¹⁸ Other provisions regarding legal support for people with serious mental disability are found in Act 1991:1128.¹⁹ The government thus concluded that there was no need to change the law.²⁰

3.3. Other national legislation or regulation in force that prevents or restricts the use of sex, age, disability, race/ethnic origin, religion/belief, and sexual orientation in the design, supply, or pricing of financial products

The Discrimination Act is the only act that deals directly with discrimination.

The Insurance Contract Act (2005:104) contains relevant principles. According to Chapter 3, Section 1, the company cannot refuse a consumer buying insurances at normal terms. In principle, insurance must be available for everyone.

Any denial must be motivated by special circumstances relating to the risk, the damage likely to arise should the risk occur, the type of insurance in question, or some other circumstance. Parts of Chapter 12 contain rules on medical conditions.

There is an Act on Genetic Integrity (2006:351) and Chapter 3 regulates the circumstances under which the National Board of Health and Welfare (*Socialstyrelsen*) can permit an insurance company or other persons to collect genetic information.

Normally a consumer can chose not to buy insurance. But with regard to personal injuries and third party injuries there is an obligation for a car owner to be insured in the Motor Traffic Damages Act (1975:1410).

3.4. National legislation or regulation in force to ensure that essential financial products are available (and affordable) for all customers

Insurance companies are free to decide which insurance they will offer consumers. If, for instance, a certain type of motorcycle is accident prone, the premium can be extremely high, especially for young men. There are no rules that give authorities the right to demand that insurance companies create insurances for certain groups or subsidize insurances for certain groups with profit made on other groups. On the contrary, a deliberate loss on one specific group of consumers might be perceived as

¹⁷ Government Bill 2008/09:28, p. 42 and 70.

¹⁸ This follows from chapter 11 of the provision *Föräldrabalken*.

¹⁹ Lagen (1991:1128) om psykiatrisk tvångsvård.

²⁰ Government Bill 2008/09:28, p. 42 and 70. The document is available on <http://www.regeringen.se/content/1/c6/11/25/54/df66fa4.pdf>

bad risk management by the Swedish Financial Supervisory Authority, depending on the amount of the losses and the circumstances.

Ensuring that financial products are available and affordable for all customers can only be done through social security or some other system based on either good risks being compelled to pay the average price or the state subsidizing the bad risks. In Sweden social security is thought of as 'social insurance' (*socialförsäkring*).²¹ Social insurance can be described as based on private insurance principles with the exemption that everybody must be covered at the same price.²²

3.5. New national legislation or regulation planned

The Swedish government decided on the 13 August 2009 to appoint a special investigator to make an inquiry into the need to change some provisions in the Discrimination Act (2008:567) with regard to age discrimination.²³ The inquiry shall suggest new legislation introducing a prohibition of age discrimination in many areas, inter alia Chapter 2 Section 12 of the Discrimination Act.²⁴

The suggested changes to the Discrimination Act shall anticipate the arrival of the proposed Council Directive²⁵ on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation. The inquiry shall report back to the government the 27 of August 2010.

3.6. Non-regulatory measures

There is a tradition of cooperation in Sweden. The degree of discapacity²⁶ resulting from several medical conditions is determined by tables agreed upon by the insurance companies and used by all²⁷ (but companies do compete on compensation levels and generally add extra compensation for 50 percent discapacity or more).²⁸

²¹ See for instance the Social Insurance Act (1999:799).

²² Mannelqvist. Samband i socialförsäkringen (The connection between benefits and contribution in social insurances), p. 96-105, Uppsala 2003.

²³ Dir 2009:72

²⁴ See <http://www.regeringen.se/sb/d/108/a/130215>

²⁵ COM (2008) 426 final.

²⁶ The Swedish term *invaliditet* is best translated as medical 'discapacity'. The term should not be confused disability (*funktionshindare*). A person who has HIV, but without symptoms, has no medical discapacity (*invaliditet*), but is disabled according to the definition in the Discrimination Act.

²⁷ http://www.konsumenternasforsakringsbyra.se/artikel/article.asp?_tp_article_id=97&avd=ART_FAK&menu=ART_FAK

²⁸ Tables comparing compensation levels can be found at http://www.konsumenternasforsakringsbyra.se/jamfor/jamfor_forsakring_oversikt_bolag.asp?_ci_insurance_type_id=11&NumOfCompanies=10&avd=JAMFOR&menu=JAMFOR&_ci_subcompany_=&numofchecked=10&newSubComp=&checkall=on&checkbox1=25&checkbox2=18&checkbox3=27&checkbox4=363&checkbox5=21&checkbox6=19&checkbox7=23&checkbox8=24&checkbox9=31&checkbox10=353&image1.x=13&image1.y=10#16.

Though not legally binding, most insurance companies follow the recommendations of the National Board for Consumer Complaints (*Allmänna reklamationsnämnden*). This board cannot take cases falling under the Swedish Insurance Federation's Insurance Board for Legal Costs or for Personal Incapacity.²⁹ As with the National Board for Consumer Complaints, the boards under the Swedish Insurance Federation issues recommendations that are normally followed by the insurance industry. In some cases, the consumer may choose the board he or she wishes to apply to. The main task of these boards is to arbitrate neutrally and to make decisions that the companies will follow out of goodwill. The National Board for Consumer Complaints, created by the state, reduces the need to go to court and creates opportunity for cost free legal processes for the consumer.

The Swedish Insurance Federation participates in many agreements and issues many recommendations. These are not legally binding, but members are expected to follow them.

Transparency toward the consumer is good in the sense that information is easily accessible through the websites of the Swedish Insurance Federation,³⁰ National Board for Consumer Complaints,³¹ Consumers Insurance Bureau,³² and the individual insurance companies.³³ According to the Swedish Equality Ombudsman, the information published is too general. More transparent and specific data would be of use.

The banking sector has, as far as there are complaints concerning discriminatory treatment, internal consumer ombudsman systems. One bank reported that it had a customer representative organisation that manages complaints and customer feedback. When it comes to complaints regarding racial/ethnic origin, the bank follows an internal procedure for dealing with them. This means that an investigator takes the case and devises a solution. The persons involved will be heard (the customer, the bank staff, other persons). Depending on the outcome of the case, the customer also has the option to go further and contact consumer agencies outside the bank, e.g. the National Board for Consumer Complaints or *Finansinspektionen*.

²⁹ Act (2007:683) changing the instruction to the National Board for Consumer Complaints.

³⁰ http://www.forsakringsforbundet.se/default___3.aspx?epslanguage=EN

³¹ <http://www.arn.se/Other-languages/English/>

³² http://www.konsumenternasforsakringsbyra.se/artikel/article.asp?_tp_article_id=54&avd=ART_CON&menu=ART_CON

³³ Most of the insurance companies can be found on this page http://www.konsumenternasforsakringsbyra.se/artikel/article.asp?_tp_article_id=54&avd=ART_CON&menu=ART_CON

Country report United Kingdom

1 Current practices of financial service providers

1.1 The use of sex, age, and disability as a factor in design, supply or pricing of products

1.1.1 *Use of sex, age, or disability as a factor in risk assessment*

Credit and banking products

Sex

According to the Finance and Leasing Association and the British Bankers' Association (BBA), sex is not used as a factor in risk assessment for credit and banking products.

Age

The Finance and Leasing Association indicated that age is used as a factor in risk assessment for consumer credit and credit cards, but not sex and disability. The British Bankers' Association indicated that age is used in consumer credit and deposit accounts. In consumer credit, age is used together with other factors in lending evaluations and ensures that members lend responsibly. According to BBA, including age in the assessment also helps preventing fraud. For deposit accounts, age-related criterion can be used in marketing to identify the target market for a particular product.

Disability

According to the Finance and Leasing Association and the British Bankers' Association (BBA), disability is not used as a factor in risk assessment for credit and banking products.

Mortgage loans

Sex

Neither mortgage nor other UK lenders use sex as factors to inform their decisions.

Age

In theory a person of any age can borrow money in the UK but legal restrictions on the offering of credit to minors and on enforcing debts against them mean that lenders will not contract with persons under the age of 18, which is the legal age of majority in the UK. Some mortgage providers require applicants to be at least 21 years of age.

Young persons generally may find it more difficult to secure credit than older people owing to assumptions about their (generally lower) earning capacity and the fact that their credit history will be thinner. However, it has been suggested that this is less of a problem for mortgage credit in the UK than for unsecured lending.¹

¹ H.M. Treasury 2008a.

There is always a minimum age for equity release mortgages, under which borrowers forfeit some of the equity value in their homes in exchange for either a lump sum or regular monthly instalments. There is no maximum age limit for equity release, although applications are not usually granted for anyone under the age of 65. In all instances, age is also the primary factor in determining the percentage of the value of the home that can be released. A person of greater age can release a higher percentage of the value than a younger person, as they are not expected to live as long. Conversely, in the case of an ordinary mortgage upper age limits may well apply in practice, particularly if the mortgage period extends into a period of retirement (commonly 60 or 65) when the income of the mortgagor is likely to drop. The UK financial regulator (the FSA) requires mortgagees to exercise caution in these circumstances so applicants are likely to undergo a more detailed assessment by the mortgage underwriters, with a greater chance of refusal.

Age is also a factor commonly used in the credit-scoring models employed by mortgage (and other) lenders, based on the premise that the risk of default generally reduces with age, making younger borrowers a greater risk.²

Disability

Neither mortgage nor other UK lenders use disability as factors to inform their decisions.

Motor insurance

Sex

Sex is a factor used in the pricing of motor insurance by most insurers in the UK. Female drivers have fewer accidents than men and are also likely to drive for a smaller total distance in the course of a year. The difference between premiums for men and women is likely to be most marked in the case of young men and women, since the former pose a much higher risk. A number of respondents³ suggested, however, that there is still an element of cross-subsidy involved, with young men paying premiums that are lower than their true actuarial premium and other groups paying rather more.

A few insurers, while not refusing to insure men, target women drivers and claim to offer policies better adapted to them.⁴

Age

Evidence from the UK suggests that young drivers (especially young men) present a greatly enhanced risk and elderly drivers a somewhat enhanced risk.⁵ Age (of the main

² See H.M. Treasury 2008a, p. 156.

³ Including the ABI and a representative of the UK Institute of Actuaries.

⁴ Differences appear to be cosmetic rather than substantial. For example, one car insurer specialising in female customers offers extra 'handbag' cover and 'female friendly repairers' but otherwise offers a fairly standard motor insurance product. See <http://www.sheilaswheels.com>.

user of the vehicle) is therefore a significant factor in the pricing of motor insurance. Many insurers employ pricing models with single integer age bands while others use wider bands of two years or more.

Some insurers will insure clients of any age. However, others refuse to insure the youngest drivers, especially if there are other adverse risk factors present (e.g. possession of a high-powered vehicle, poor driving record, high-risk use or occupation). About 90% of motor insurers will decline to quote for new customers above a certain age (the average upper age limit being 83)⁶ but many of these insurers do not impose any upper age limit on those renewing a policy.⁷

In some instances the age of the main driver may affect the terms on which insurance is offered. The most common examples are restrictions in the scope of cover for young drivers (e.g. a restriction of cover to named drivers or refusal to allow the policyholder to drive vehicles owned by another on his/her own insurance).

Some UK motor insurers target market segments defined, at least in part, by age. For example, one insurer offers insurance only to older people, and some, while not excluding younger or older clients, positively seek to attract what might be called 'mature' (but not very elderly) clients.⁸ Conversely, a few insurance companies (and a number of insurance brokers) specialise in adverse or hard-to-place risks, which may include young drivers, especially those with other adverse risk features.⁹

Disability

Insurers generally are not concerned about disability as such, only the extent (if any) to which the disability is likely to affect the insured risk. In the case of motor insurance, disability is relevant only to the extent that it affects the risk of motor accidents.¹⁰

In the UK the Driver and Vehicle Licensing Agency (DVLA) effectively screens drivers in order to determine whether, from a medical point of view, they are fit to hold a driving license. DVLA can refuse a license or impose conditions on it to take account of disabilities. Licensed drivers have a duty to notify DVLA if they subsequently develop a disability which might impede their ability to drive, with the result that the license may then be restricted or have to be surrendered. If certain restrictions are imposed by the

⁵ See for example Government Equalities Office 2009 (the Oxera study).

⁶ ABI 2009b, p. 27.

⁷ Government Equalities Office 2009, p. 18.

⁸ This may be part of a business strategy (e.g. based on a belief that 'mature motorists' are more likely to buy other products which the insurer offers).

⁹ For example, the website of the British Insurance Brokers Association enables consumers to obtain lists of brokers who can place cover for a very wide range of difficult and specialised risks, including young drivers: see <http://www.biba.org.uk/ConsumerHome.aspx>.

¹⁰ Though it may also affect the service that insurers need to provide in the event of a claim (e.g. the type of replacement car needed by a disabled driver).

licensing authority (e.g. concerning the type of vehicle a person is allowed to drive), insurers can provide cover only in line with these conditions.

UK insurers do not have a systematic pricing structure for disabled persons (as they do in the case of age) but look at them on an individual basis, sometimes basing their decision on medical reports. In some cases premiums are raised, but in others a policy is issued on normal terms.

Travel insurance

Sex

Available evidence suggests that most (but not all) insurers disregard the sex of the insured in the pricing and provision of travel insurance. However, cover is often limited for women in the later stages of pregnancy.¹¹

Age

Because travel policies are standardised low-cost products UK insurers adopt simplified pricing systems which employ only a relatively small number of rating factors – principally: destination, purpose and duration of travel and age (compared with 20 or more factors in the case of motor insurance).

Travel insurance claims divide between those which are medically-related (e.g. cost of medical treatment) and those which are not (e.g. claims for lost baggage). Evidence suggests that the expected average claim costs for each sort of claim tends to rise with the age of the insured person, and rises very steeply in the case of medical claims.¹² For this reason, travel insurance is markedly more expensive for older people. However, unlike motor insurers, UK travel insurers use a relatively small number of age bands, ranging from three only (e.g. age 18 or under, 18-59/64 and 64 or older) to seven or eight (e.g. with clients over the age of 64 dividing into a further five age bands). Premiums therefore tend to rise stepwise with age rather than in small increments.¹³

There are fewer travel insurance providers in the UK than there are motor insurers and many of them impose an upper age limit for customers. Age limits are more common, and sometimes lower, for annual policies. This means that an elderly person who travels regularly may be obliged to take a number of 'single trip' policies because the (usually) cheaper alternative of an annual policy is not available.

A few insurers provide cover only for older people or target this group. There is no evidence of restrictions being applied to young people or the explicit targeting of them, though a few insurers design special policies for groups of persons (such as students,

¹¹ 28 weeks (sometimes 32 weeks) is a common 'cut-off' point beyond which cover cannot be obtained from UK travel insurers.

¹² Government Equalities Office 2009, p. ii.

¹³ Government Equalities Office 2009, p. 33.

those on 'adventure' holidays or 'backpackers') which are more likely to contain young people.

Disability

If a travel policy provides no medical cover disability will not be a relevant factor. However, when cover for medical expenses is provided disability becomes important. To avoid the cost of individual medical screening for each applicant insurers commonly exclude claims arising from any pre-existing medical condition unless the condition has been declared to the underwriters.

A significant number of insurers will offer cover (at extra cost) for pre-existing medical conditions which are so declared, with premiums usually calculated via an on-line (or telephone based) screening process.¹⁴

Term life insurance

Sex

Sex is used universally by insurers as a pricing factor since women tend to live longer than men.

Age

The risk insured under a term policy – that of death within the term (time period) of the policy – is inevitably linked to the age of the person concerned at the time when the insurance starts. Mortality statistics enable insurers to calculate premiums for a 'normal' person of a given age with a high degree of precision.¹⁵ This basic rate of premium can then be modified to take account of factors which increase the mortality risk for a given client (e.g. medical history, tobacco or alcohol consumption etc.). Life insurance age limits vary considerably in the UK, generally falling within the 70-85 age range (70 or 75 being typical). However, the key issue is not so much the age at entry to the scheme but the age at 'exit', i.e. the age of the insured when the proposed period of cover will end. The effect of this is that elderly applicants are able to buy cover for only relatively short periods. In the UK there is no legal restriction on the minimum age of a person who can be insured under a life policy, but insurers rarely provide cover for persons under the age of majority.

A number of insurers actively promote insurance plans for older people (e.g. over 50s life insurance). As a general principle, insurers are more likely to require medical screening in the case of older applicants, especially if the amount to be insured is large. Although a significant number of insurers offer life cover for older people without medical screening there will always be a restriction on the amount of cover that can be bought on this basis, as there will be for any 'non-medical' life insurance.

¹⁴ One such claims to be able of offer cover in 96 % of cases (Free Spirit Insurance).

¹⁵ Details of mortality tables used in the UK are found on the website of the actuarial profession at http://www.actuaries.org.uk/knowledge/publications/life_tables and also on the Government Actuary Department's website <http://www.gad.gov.uk/Demography%20Data/Life%20Tables/index.html>.

Disability

If the applicant for life insurance has poor health when the policy begins, some causes of death may be excluded. However, this is uncommon in the provision of term life insurance.¹⁶ Insurers are able to accept most applications and charge an appropriate premium to cover the risk. In cases where the applicant is in poor health extra medical screening is likely before the application is accepted.

Private health insurance

In the UK this form of insurance is often called Private Medical Insurance (PMI). The UK operates a duplicative system working in parallel to the (free at point of use) national health system. Customers who buy PMI are not denied treatment under the national system and can always choose to be treated under it, but they usually prefer to use their PMI insurance as will usually offer speedier treatment and, possibly, a better or wider choice of medical facilities.

Sex

Available UK data suggests that claims cost under PMI policies is higher for women in the 30-60 age bracket than for men of the same age (significantly higher in the bracket 35-45), but similar to, or somewhat lower, for women who are under 30 or over 60.¹⁷ Some UK PMI insurers use gender to underwrite in accordance with requirements of the Gender Directive, others do not.

Age

In the UK age is a key pricing factor in PMI. Premiums rise with age to reflect increasing morbidity. There are no commonly used minimum ages for cover, but insurers rarely provide insurance beyond the age of 80.¹⁸ Furthermore, while medical screening is not generally used in the case of PMI, it may be required in the case of elderly applicants (e.g. those who are 75 or older).

Disability

Whether a person is disabled or not will not usually influence pricing for PMI in the UK but rather the contractual conditions of the policy, with pre-existing medical conditions excluded from the scope of cover in most cases.¹⁹

¹⁶ Exclusions of this sort would undermine the basic security provided by a life insurance policy and could lead to disputes in cases where the cause of death was not entirely clear and simple.

¹⁷ See ABI Date Bulletin Private Medical Insurance by Age and Gender, June 2009, available at http://www.abi.org.uk/Facts_and_Figures/40514.pdf.

¹⁸ A few insurers specialise in providing cover for older people (e.g. those over 65).

¹⁹ Some insurers will provide cover for pre-existing conditions if there has been no recent recurrence of the illness. A few insurers specialise in providing cover to those with significant health problems (e.g. cancer). ABI reminds that, if a pre-existing medical condition is excluded from private medical insurance, the National Health System provides care for that particular condition.

1.1.2 Existence of financial products that are offered exclusively to specific groups

In the UK there are (almost) no products that are offered exclusively to specific groups of persons defined by age, sex or disability. Perhaps the sole exception is the 'equity release' mortgage, discussed earlier, which is designed for and offered exclusively to older people. Apart from this, there are no 'special products' for old (or young) people, or for men or women, or for disabled or non-disabled persons – the products available to these groups are effectively the same. However, there may be some restrictions in the availability of these products to some groups.

First, for most products discussed there are upper and/or lower age limits for cover. This means, in one sense at least, that the product is offered 'exclusively' to persons falling within these limits. The limits which apply to various lines of insurance have already been discussed in detail.

Second, while there are no special insurance products for either men or women, the terms of cover may vary slightly in some cases (e.g. restrictions relating to pregnancy which obviously have no application to men).

Third, while there are no special products for disabled people, the terms of cover offered to them may differ slightly from the norm (e.g. exclusions relating to certain health conditions).

Finally, some specialised providers target their products at particular groups as part of a business strategy.

1.2 The use of race/ethnic origin, religion/belief and sexual orientation as a factor in design, supply or pricing of products

UK insurers do not make direct use of any of the factors race/ethnic origin, religion/belief and sexual orientation. However, motor insurers employ a 'zone rating' system which means that insurance may be more expensive (or cheaper) in areas dominated by certain ethnic groups and/or religions. Claims handlers also use 'fraud scoring' models in which the claimant's post code is one factor taken into account, which means that claims relating to certain localities may undergo a more stringent investigation than is usual, making it more difficult for people who live there to claim. Life insurers invariably ask questions relating to the applicant's risk of exposure to HIV infection and may also ask questions relating to individual personal behaviour (e.g. indulgence in unsafe sex or drug use), but they do not ask questions relating directly or indirectly to the applicant's sexuality, in conformity with guidelines issued by the ABI.²⁰

1.3 Conclusions

1.3.1 Use of sex

UK insurers are not precluded legally from using sex as an underwriting factor in any line of insurance. It is a relatively significant factor in motor insurance though less significant than age. Most (but not absolutely all) insurers disregard the sex of the insured in the pricing and provision of travel insurance but cover for medical expenses may be restricted in the case of pregnant women. Sex is a significant factor used by all UK insurers in the pricing of term life insurance, other forms of life insurance and annuity products. UK insurers may, if they wish, use sex as factor in the provision of health insurance in accordance with the Gender Directive and while some firms do so, others do not. Much the same is true of critical illness insurance, income protection insurance and long term care insurance. Sex is of little significance in the provision of mortgage (and other) credit.

1.3.2 Use of age

In the UK age is an important factor in a number of key products. These include motor insurance and travel insurance, where age can make a very significant difference in terms of price. Both are more difficult to obtain for the very old. The cost of term life and other forms of life insurance always rises with age at entry. However, because premiums are flat throughout the duration of the contract this is likely to be less of a problem, at least for those who buy insurance when they are relatively young. Similar principles apply (in reverse) to annuity products. Premiums also rise significantly for older people who buy private health insurance and cover can become increasingly difficult to obtain with age. Age plays only a minor part in the provision of mortgage (and other) credit and other banking products, including credit cards and deposit accounts.

²⁰ ABI 2008b.

1.3.3 Use of disability

UK motor insurers do not 'price' disability (or health condition) in a systematic way, rather they consider the (few) cases where a health condition might affect a person's driving on an individual basis and load premiums if necessary. For travel insurance which includes cover for medical expenses the client's health status or disability can be significant, because insurers exclude pre-existing medical conditions other than in cases where the condition has stabilised. Health condition is a key factor for any form of life insurance. If the answers given to questions asked by life insurers suggest that applicant is in poor health extra medical screening is likely to be carried out and premiums may be raised, especially if the sum insured is large. Similar considerations apply to private health insurance, where insurers usually deal with clients presenting adverse health conditions by excluding the condition concerned. These considerations also apply to related forms of insurance such as critical illness insurance, income protection insurance, long term care insurance and accident insurance. In each case disability may result in higher premiums, the exclusion of one or more conditions or even the denial of cover. Disability/health condition plays little or no part in the provision of mortgage loans or consumer credit, other banking products.

Finally, we can note that in the UK none of the factors discussed above is very significant in relation to the insurance of personal property, home insurance²¹ or private liability insurance (the last-mentioned is generally included within home insurance in the UK).

²¹ Although the ABI suggest that the age of the insured can be a (minor) rating factor in home insurance.

2 Actual and potential problems of discrimination

2.1 Complaints concerning discriminatory treatment of consumers

In the UK there is no central body which currently collects and categorises complaints data about alleged discrimination in financial services in a way that allows the number of complaints to be quantified or analysed by type. Although in theory the Equality and Human Rights Commission (EHRC) carries this responsibility it is a relatively new body. They reported during the course of this study that there was a lack of awareness on the part of consumers of the EHRC and their role. The EHRC run a telephone helpline but were not able to specify number or types of complaint. No relevant complaints data could be obtained from other sources. Therefore there is currently a dearth of information in the area within the UK and issues which occur before a contract is taken out seem to be falling into a void without the active involvement of an equality or redress body.

Due to the lack of specific information on complaints in the UK, in order to carry out the research for this study we have drawn on research carried out by other organisations who have investigated this area.²²

2.1.1 *Problem areas to which reported/documentated complaints relate*

According to Age Concern and the UK Treasury, motor and travel insurance generate the highest number of complaints. Age Concern specify that age limits and exclusions for pre-existing medical conditions are key problem areas. In motor insurance, the majority of insurers are reluctant to take on new customers over 70. In travel insurance, older travellers find it increasingly difficult to obtain single trip insurance and annual policies become unavailable. Use of broad age bands in travel insurance can lead to steep increases at certain ages.²³ There are also some reported problems in the credit and mortgage area where older customers are sometimes refused products or face higher charges due to their age.

²² These include Government Equalities Office 2009 (Oxera study) , Which? and Age Concern (Age Concern and Help the Aged are have been renamed Age UK.).

²³ Age Concern and Help the Aged 2007. A sample of 229 individuals aged 65+, together with 115 30–49 year-olds, was recruited to take part in a quotation exercise and quantitative interview survey. A total of 636 quotations were attempted; respondents having being asked to obtain two quotations for one of the three products (motor insurance, insurance for travel overseas, car hire), using two of three channels (face-to-face, telephone, internet). A qualitative phase was also undertaken. Government Equalities Office 2009, summary p.1 also refers to prices jumping "often significantly" as customers move into next age band.

2.1.2 *Discrimination grounds to which reported/documentated complaints relate*

Sex

Sex in general

There were very few concerns raised by survey respondents over differential treatment on grounds of sex. The sex-related differences in premiums in both life insurance and motor insurance do not seem to generate complaints in the UK.

Pregnancy and maternity

Very few issues were mentioned by survey respondents concerning pregnancy and maternity. The Equality Commission for Northern Ireland reported a case of a pregnant woman receiving less benefit on income protection insurance whilst on maternity leave.

Gender reassignment

Gender reassignment was not an area that generated complaints documented by us. The Equality Commission for Northern Ireland report one case of a bank refusing to recognise acquired gender in correspondence.

Age

Denial of access

Studies carried out in the UK provide evidence that age creates a barrier to access to motor and travel insurance.

Age Concern and Help the Aged commissioned research in 2007 to measure the extent of age discrimination when accessing motor insurance, travel insurance and care hire.²⁴ According to this study obtaining a quotation for motor insurance/travel insurance/car hire became more difficult the older the respondent, especially for those over 75. Some products such as annual travel insurance were almost impossible to find. Almost a third of over 80s felt discriminated against when trying to buy insurance and older travellers were sometimes deterred from travelling by difficulties in finding insurance.²⁵

²⁴ Age Concern and Help the Aged 2007.

²⁵ Age concern found that:

- 31 per cent of those aged 80+ felt discriminated against when trying to obtain quotations for motor insurance/travel insurance/car hire, compared with 2 per cent of those aged 30–49;
- Obtaining a quotation for motor insurance/travel insurance/car hire became more difficult the older the respondent. Nearly one in five of those aged 65+ trying to obtain a new quotation were unsuccessful, compared with only 3 per cent of those aged 30–49;
- The oldest respondents (those aged 75+) were particularly frustrated, the proportion being unable to get a quotation rising to 29 per cent. This made them nine times more likely to be refused cover than those aged 30–49;
- In the case of travel insurance, Age Concern's qualitative findings also suggest that older people find it particularly hard to access annual policies and the over 80s find it almost impossible to buy an annual policy;
- Age Concern's quantitative exercise found that 20% of travellers aged 75 and over had been refused cover or had restrictions imposed on it, compared with 4% for the 30-49 age group. Their research also showed that the 65+ age group is less likely to travel without insurance than the 30-49 age group. Therefore

A Which? survey carried out in 2008 found that nearly one in ten over 75s had difficulty getting cover at their last motor insurance renewal.

“Problems included being turned down altogether by insurers, and having to pay higher premiums than expected.”²⁶

A small-scale market investigation by the Equality Commission for Northern Ireland into travel insurance found that on an online insurance comparison site only 29 policies out of 450 were available to a person aged 75. For an 80-year old this number dropped to 14. The cheapest of these were restricted to online purchase. The consultants concluded that:

“There are substantial barriers to obtaining (...) travel insurance at all over certain ages (...) there are substantial differentials within providers depending on age (...) there appears to be a bias towards cheaper online quotes.”²⁷

Research carried out by Help the Aged in April 2006 found that around 95% of travel insurance policies impose upper age limits.²⁸

Problems with access in travel insurance market are recognised by the Association of British Insurers. Research commissioned by them found that 25% of people in their survey were turned down by at least one insurer.²⁹

Problems with access to car insurance are particularly acute for older customers wanting to change insurer. Whilst claiming that all insurers offer cover to existing customers as they grow older, without age restrictions, ABI states that the average upper age limit for new customers is 82. This compares to 74 ten years ago.³⁰ Although this is an improvement it indicates that older drivers will experience a lack of a competitive market place if wanting to change insurer which can leave them vulnerable to price rises with their existing insurer.

Whilst there is agreement that some consumers have difficulty finding insurance, there is no agreement about the scale of the problem. A research report for the UK Government Equalities Office found that the fact that providers of motor and travel insurance specialise mean that there are fewer providers for some specific age groups, particularly the young (motor) and the old (motor and travel). This report concluded that

difficulty obtaining insurance has a direct impact on freedom to travel. 5% of the 70-74 age group, 7% of the 75-79 age group and 13% of the 80+ age group had been put off travelling due to lack of access to insurance or high costs.

Age Concern point out that many insurers do not make upper age limits clear on their websites or in marketing literature, increasing the frustration for older consumers.

²⁶ Which? Reviews Car insurance: Insurance for older drivers www.which.co.uk/reviews-ns/car-insurance/insurance-for-older-drivers/index.jsp. Which? surveyed 2,708 of its online panel members in September 2008.

²⁷ Equality Commission for Northern Ireland 2008.

²⁸ Age Concern and Help the Aged 2007. The research looked at 288 single trip and 375 annual multi-trip policies.

²⁹ ABI 2009b, p. 66.

³⁰ ABI 2007.

only a small proportion of people experience refusal when trying to obtain cover based on age, and that:

*“No age group is excluded from the market in the sense that there is no provider at all that is willing to supply them”.*³¹

According to the report, 3% of respondents in a consumer survey aged 80 or over have been refused travel insurance cover in the last year because of their age; for motor insurance, the percentage of refusals experienced by those aged 80 or over is 1.5%. In both cases, these figures were significantly lower for 60- to 69- and 70- to 79-year-olds. The study also found that most of those refused insurance because of their age subsequently find an insurer willing to provide cover.³²

However, Age Concern dispute how the percentages of people who were turned down have been calculated, and maintain that the number of those actually trying to buy insurance who were turned down is much higher.³³ A report for HM Treasury report notes that:

*“Financial services providers...say that there is no robust, statistical evidence of widespread harmful age discrimination in financial services and that treating people differently according to age can be beneficial to all customers by keeping premiums low, encouraging innovation and incentivising safer behaviour.”*³⁴

High premiums

Age Concern investigated attitudes to obtaining insurance. This showed that people aged 65-plus find it harder to shop around.³⁵ Older people use the internet less than younger people, according to the communications regulator Ofcom in the UK only 25% of those over 65 have Internet access.³⁶ Many of the best insurance deals are however found online and this is where older consumers are least likely to shop. This contribute to a situation where older people are vulnerable to high prices.

Lack of transparency about age limits and restrictions on websites were reported as another barrier to ease of obtaining and comparing prices.³⁷

³¹ Government Equalities Office 2009.

³² Government Equalities Office 2009 p.ii., p.18 (the Oxera-Report).

³³ Age Concern and Help the Aged 2009 para. 45-46.

³⁴ See H.M. Treasury 2008a.

³⁵ Excess or deductible is the part of the claim that is not covered by the insurance provider.

³⁶ Age Concern and Help the Aged 2007, p. 37.

³⁷ Shopping around, comparing quotes and questioning premiums can lead to reductions in prices when buying insurance. Older people are not able to benefit from this process if for various reasons they are put off shopping around. The use of the internet for information-gathering and purchasing is significantly lower for those aged 65+ with 37% of 65-74s and 31% of 75+ using the web for their last search for motor insurance compared to 73% of 30—49s. Issues around page design and clarity, size of font, concern about fraud, concern over making a mistake and lack of flexibility were additional reasons that prevent some older people from using the internet for searching and purchasing.

Age-related price increases are often perceived as unjustified and can put people off purchasing the insurance, according to Age Concern. This can have a knock-on effect on freedom to travel.³⁸ Help the Aged report that in motor insurance, dramatically increased premiums even for those with full no claims bonus, were perceived as unfair.³⁹

Difficulties in finding a supplier

Older people can face obstacles when trying to shop around for insurance. A number of factors lead to a reduction in levels of choice of provider and increased difficulty in finding those providers for some consumers, and can result in some consumers giving up altogether. The following features characterise the market in insurance for older customers:

- A reduced number of providers are interested in non-standard risks.⁴⁰ There are some specialist providers who target older people;
- Providers and comparison/aggregator websites who advertise heavily and are therefore high-profile may not serve non-standard risks. Therefore consumers may be rejected by the companies they are most likely to contact. This may not be apparent and age limits are not always transparent in marketing literature, which increases wasted time and frustration in the search process;
- A lack of signposting by insurers to an alternative provider or source of advice at the point of refusal. This may lead consumers to give up trying to purchase at this point.⁴¹

Use of age bands

Age Concern report that large increases at specific age thresholds generate complaints, particularly in travel insurance where wide age bands are used in the UK. Which?'s research into car insurance shows that premiums rise sharply when the driver reaches 70.⁴² The Government Equalities Office report recognises that “prices can jump in a step-wise manner (and often significantly) as the customer moves to the next

Websites were also criticised for failing to explain why insurance was refused, and not stating clearly the conditions of cover and age limits that applied. Age Concern and Help the Aged 2007.

³⁸ Age Concern research found that 13 per cent of people aged 80+ have been put off traveling either because of the cost of insurance or the difficulty in accessing it. Age Concern and Help the Aged 2007.

³⁹ As one respondent put it: *Such greatly increased costs threaten independence and increase isolation, and do not reflect the actual risks posed by older people.* Age Concern and Help the Aged 2007.

⁴⁰ See for example Government Equalities Office 2009, Executive Summary and Age Concern and Help the Aged 2007 p. 3 and p.7.

⁴¹ Age Concern and Help the Aged 2007, p.9.

⁴² Which? Reviews Car insurance: Insurance for older drivers www.which.co.uk/reviews-ns/car-insurance/insurance-for-older-drivers/index.jsp.

age band”.⁴³ The jump can be perceived as unfair and arbitrary from the consumers who know that nothing has changed (except their age) in their own personal circumstances.

The use of wide age bands is defended by the industry as reducing costs of pricing and distribution thereby keeping premiums down and ensuring availability of products.

Disability

Denial of access

No disability organisation in the UK participated in the survey. In an interview, Macmillan Cancer Support Charity in the UK highlighted the issue of difficulties that people who have suffered from cancer experience when trying to obtain travel insurance. Their research amongst people affected by cancer found that high premiums and denial of access can prevent people from travelling.⁴⁴

Macmillan are concerned that people who have cancer now or have had it in the past can suffer from lack of access to travel insurance in different ways: current sufferers approaching the end of their lives may want to take a holiday and can find it extremely difficult to get insurance; people who have suffered cancer in the past (e.g. 5 years ago or more) and are now recovered, often experience difficulties obtaining insurance. Age Concern’s research reports that respondents’ health came under close scrutiny and controlled medical conditions still could lead to significant increases in premiums.⁴⁵

People with current and past health conditions can face obstacles when trying to shop around for insurance in a similar way to older people, as mainstream mass-market insurers may refuse cover and signposting on to an alternative provider is not always offered (see Difficulties in finding a supplier, above).

Racial/ethnic origin, religion/belief or sexual orientation

There was very little evidence of complaints on the grounds of racial/ethnic origin, religion/belief or sexual orientation. The Equality Commission of Northern Ireland reported one case of alleged discrimination in motor insurance on the grounds of sexual orientation. The complainants, however, withdrew the case.⁴⁶

⁴³ Government Equalities Office 2009.

⁴⁴ Macmillan research reported the following: a) 39% of people affected by cancer are quoted higher premiums for travel insurance; b) 6% said they were refused travel insurance altogether; c) 8% resort to travelling without insurance. Recovered but not Covered, Macmillan Research carried out with a sample of 1137 people affected by cancer from Dec 2005 to Feb 2006.

⁴⁵ Age Concern and Help the Aged 2007.

⁴⁶ Equality Commission of Northern Ireland, complaint UK-1. The complainants allege less favourable treatment (in the form of administrative delays) and harassment when trying to take out motor insurance. The Equality Commission of Northern Ireland has assisted in investigating the case. The insurer denied harassment of a same sex couple had taken place and blamed an administrative error. Complainants withdrew case.

2.2 Court cases concerning discriminatory treatment in the provision of financial services on basis of sex, age, disability, race/ethnic origin, religion/belief and sexual orientation

2.2.1 *Consumer A v Insurance provider 1*

This case confirmed that insurers can use the exemption from the Sex Discrimination Act within certain limitations. The case was brought by a dentist, as she objected to paying rates for permanent health insurance that were higher than those paid by a comparable man. The provider argued that they had acted within the terms of section 45, and exemption relating to “an annuity, life assurance policy, accident insurance policy or similar matter involving the assessment of risks”. This exemption covers treatment that a) was effected by reference to actuarial or other data from a source on which it was reasonable to rely and b) was reasonable having regard to the data and any other relevant factors”. The provider defended their position on the basis of evidence given by their actuaries and won the case.⁴⁷

2.2.2 *Consumer B v Bank 1*

The case, which went before the County Court of Northern Ireland, was about refusal of bank to supply a debit card to a woman from Lithuania living and in permanent employment in Northern Ireland. The woman alleged that she experienced delays in trying to obtain a debit card and she was told that she couldn't get one because she is not from the country. The bank stated she was refused a debit card on the basis of her credit score and credit reference check. The bank agreed to pay compensation without admitting liability, and agreed to review its equal opportunities policies and procedures.⁴⁸

2.3 Conclusions

2.3.1 *Factors and problem areas*

In UK the differentiation on the grounds of age, and age-related health conditions is the biggest area of concern. A reduced number of providers willing to service this market, combined with a lower propensity to shop around and to use the Internet means that some older people can find it difficult to access insurance products. There is a concern by some stakeholders that older people can become a captive market, and as a result may face high prices if they are unable to switch providers because of their age. Higher prices for financial services would have a disproportionately high impact on older people who are less well-off than younger age groups.⁴⁹

⁴⁷ Consumer A v Provider 1, complaint UK-8.

⁴⁸ Equality Commission of Northern Ireland, complaint UK-3.

⁴⁹ The Equalities Review in 2007 found that the average wealth of those aged 80+ was only a third of the average wealth of those aged 60 to 64. Fairness and Freedom - The Final Report of the Equalities Review, February 2007. Quoted from Discrimination Law Review – A Framework for a Fairer Future: Proposals for a Single Equality Bill for Great Britain, p. 139.

In the course of conducting the research for this study, we have found it difficult to find evidence to establish the scale of the problem with discrimination in financial services in the UK. This highlights some structural problems with the redress mechanism in the UK which may result in such problems going undetected. During the shopping-around phase, before a contract is taken out, there is a lack of a clear complaints process for people who may experience refusal or what they feel to be unsatisfactory terms. There is no central collection and categorisation of complaints about alleged discrimination which permits a quantification of the problem.

2.3.2 Evidence

Within the UK, direct discrimination on grounds of sex and disability are prohibited however there are exceptions for some areas including some financial services. These exceptions are restricted and require justification. Equality legislation includes an objective justification test whereby differential treatment must be shown to be a proportionate means of achieving a legitimate aim. However use of age is currently unrestricted. Therefore providers are free to offer products at any price or indeed refuse to offer products to older people regardless of any underlying data (see also section 3 of this report).

The Consumer A v Provider 1 mentioned above shows that actuarial data on claims for men and women has been regarded as acceptable data on which to base a differential treatment in permanent health insurance.

As there has been very little challenge to decisions in the UK, either at court or equality body level, there is very little material on which to base an analysis of the use of evidence and proportionality. However in debating the Equality Bill the use of similar terms has been widely discussed by the participating stakeholders. This Bill envisages allowing age discrimination in financial services as long as it could be shown to be “a proportionate means of achieving a legitimate aim”.

Definition of terms is a controversial area and with regard to age there has been much debate in HM Treasury working group on this.⁵⁰

Whether commercial considerations should be allowed to be taken into account in the way providers price products and accept business is a key area of disagreement. The working group report is clear that it is for the courts to decide whether an aim is legitimate, but gives some examples such as economic factors (e.g. business needs), health and welfare of individuals, and the particular requirements of the service.⁵¹

⁵⁰ H.M. Treasury 2008a.

⁵¹ H.M. Treasury 2008a, 3.14.

2.3.3 *Proportionality*

The HM Treasury working group report clarifies that to be ‘proportionate’ a firm’s actions must be appropriate to achieve a legitimate aim; cannot be achieved by less discriminatory means; and support a real need that is important enough to outweigh the impact of the discriminatory treatment.⁵² The report makes clear that industry is keen to have terms defined as precisely as possible in order to avoid ambiguity:

*“Firms have expressed a desire for proportionality to be clarified to ensure it allows financial service providers to make reasonable and commercial decisions based on the data they receive”.*⁵³

However the ABI stress that a precise mathematical definition of proportionality is not workable. Insurers do not use a strictly mathematical proportionate approach for a number of reasons including the need to forecast future trends, and the fact that age and disability are only two of a wide range of factors that determine prices. According to ABI, sometimes data for a specific group of customers is limited which makes a strict mathematical approach impossible.

Civil society organisations are not calling for strict proportionality either. However they are concerned that difference in treatment must be justified by a legitimate aim (i.e. not commercial considerations) and the means of achieving that are appropriate and necessary.

There is also concern about the definition of actuarial and statistical data and what part qualitative material plays in this. Predictions about future risk may be to some extent qualitative. Industry and civil society organisations agree that the use of such predictive data is legitimate.

Overall, the key concern of civil society organisations is for greater transparency and for data to be available to the public. Currently it is almost impossible for a civil society organisation to challenge the practices of an insurer on the grounds of underlying data as the level of expertise required to debate the actuarial principles is too high (and therefore expensive).

⁵² H.M. Treasury 2008a, 3.15.

⁵³ H.M. Treasury 2008a, 3.18.

3 Existing measures to prevent discriminatory practices

3.1 Implementation of Directive 2004/113/EC

3.1.1 Interpretation of key terms of Article 5.2 of the Directive

The UK Sex Discrimination Act 1975 was amended in 2008 to implement Council Directive 2004/113/EC. From 6 April 2008, the Sex Discrimination (Amendment of Legislation) Regulations specify the conditions under which insurance companies are allowed to differentiate based on gender differences when pricing insurance policies. Such treatment is not unlawful provided that:

- The use of sex as a factor in the assessment of risk is based on relevant and accurate actuarial or statistical data;
- The data...are compiled, published...and regularly updated in accordance with guidance issued by the HM Treasury;
- The differences in treatment are proportionate having regard to data; and
- The differences do not result from costs related to pregnancy or the fact that a woman has given birth at any time in the period of 26 weeks ending on the day the treatment occurs or begins.⁵⁴

In terms of the nature of the data, HM Treasury guidance mentions publicly available data such as government statistics, published research and material such as proprietary company research, claims and other data. The data may be from UK or non-UK sources. Actuarial modelling and forward-looking adjustments to this data are mentioned. The guidance notes that: “this data must demonstrate the case for differing treatment based on gender, but it is highly unlikely to present a direct correlation with the premiums charged or the benefits obtained in individual cases. Insurers may wish to prepare an explanation for the benefit of individual policyholders wishing to discuss the relationship with their own premiums and benefits.”⁵⁵

In terms of proportionality, the guidance states that there needs to be “a close relationship” between the data and the assessment of risk and consequent premium, but acknowledges that there is “some tolerance around the degree to which a differential may be held to be proportionate (...) provided that it is fair and reasonable”.

No respondents to Civic Consulting’s survey commented on this specific area and we have no evidence that there has been any controversy over these issues within the UK.

⁵⁴ H.M. Treasury 2008b, par 4.9.

⁵⁵ H.M. Treasury 2008a, 4.15.

3.1.2 Implementation of the publication requirement of Article 5.2⁵⁶

The HM Treasury is responsible for the publication of data and has issued guidance on the requirement.⁵⁷ The data is aggregated by the Association of British Insurers and published by them.

The ABI publish tables for private medical insurance and motor insurance showing average claim cost per policy for men and women within age bands. Policies for people over the age of 80 years are grouped together. ABI reported that for all other insurance policies, such as travel and property insurance, gender is not used as a factor when pricing these products so data has not been collected for these policies.

Data for life assurance, annuities, critical illness and income protection insurance are available from the Continuous Mortality Investigation.⁵⁸

The HM Treasury do not collect information on how often the data is accessed, who uses it and how useful it is.

Although aggregate data is published and obligations under this requirement are fulfilled, there is no evidence that the data has been helpful to consumers in understanding how insurance decisions are made. The ABI stress that information published may not allow consumers to work out how their individual policies are priced. This is because the information published is aggregated rather than company specific, and because of the factor sex is only one of many interrelated risk factors when pricing insurance.

Age Concern and the Equality and Human Rights Commission (EHRC) expressed concern that currently the data which is published is worthless as it is too high level and aggregate. EHRC also pointed out that there is no process of challenge for individuals who feel that they are not receiving a fair quotation, and the data is not presented in a consumer-friendly way.

3.2 Implementation of the UN Convention on the Rights of Persons with Disabilities

The UK ratified the UN Convention in June 2009. The Office for Disability (ODI) within the government has responsibility for implementation. Within the framework created for implementation and monitoring, the Equality and Human Rights Commissions have independent responsibilities from the government.⁵⁹ ODI must report to the UN Committee on the Rights of Persons with Disabilities on implementation by July 2011.

⁵⁶ See also http://www.abi.org.uk/Facts_and_Figures/Data_by_Age_and_Gender.aspx

⁵⁷ http://www.hm-treasury.gov.uk/d/consult_insurance070308.pdf

⁵⁸ <http://www.actuaries.org.uk/knowledge/cmi/gender>

⁵⁹ "The UK's existing Equality and Human Rights Commissions – the Equality and Human Rights Commission; the Scottish Human Rights Commission; and the Northern Ireland Human Rights and Equality Commissions – have agreed to be designated as the independent element of the framework to promote, protect and monitor implementation of the Convention". <http://www.officefordisability.gov.uk/docs/wor/uncon/un-response.pdf>

In the UK the Disability Discrimination Act 1995 makes it unlawful to discriminate on the ground of disability and this includes the fields of goods and services. The Act contains special rules affecting insurance which outline where differential treatment of disability is allowed. Less favourable treatment on the grounds of disability can be justified on a limited number of grounds and provided the underlying data is valid. The use of disability can be justified if:

- It is in connection with the insurance business;
- It is based on information that is relevant to the assessment of the risk;
- The information is from a source which you can reasonably rely on; and
- The treatment is reasonable having regard to the information relied on and any other relevant factors.

All four of the above conditions must apply in order for less favourable terms (for example, declining an application, charging a higher premium or imposing exclusions) to be acceptable. Relevant information includes actuarial or statistical data, medical research information, medical reports about an individual.

Insurers are obliged to review their information periodically to ensure it is up to date. There is no definition of 'reasonable' as regards sources of information. The ABI produced a guide to the Disability Discrimination Act, making clear that insurers should make every attempt to provide cover to disabled people. Full cover with an additional premium is recommended as preferable to reduced cover or refusal. Wherever possible insurers are urged to use underwriting manuals in order to ensure that their decisions are reasonable.

3.3 Other national legislation or regulation in force that prevents or restricts the use of sex, age, disability, race/ethnic origin, religion/belief and sexual orientation in the design, supply or pricing of financial products

As mentioned in section 3.1, the Sex Discrimination Act of 1975 was amended on 6 April 2008 to take into account the provisions established in the Gender Directive 2004/113/EC. The Disability Discrimination Act of 1975 restricts the use of the factor disability in the provision of goods and services. Specific provisions in the Sex Discrimination Act and the Disability Discrimination Act allow different treatment in financial products, provided this treatment is reasonable, and based on actuarial or other data or information from a source on which it was reasonable to rely.

Under UK law there is no current requirement for differences in treatment by insurers as regards age to be proportionate. However, this will change if and when the Equality Act 2010 is fully implemented.⁶⁰

The Act bans unjustifiable age discrimination in the provision of goods and services, including insurance. The Government Equalities Office (GEO) announced that

⁶⁰ The main provisions of the Equality Act 2010 will come into force in October 2010. For full details see: http://www.equalities.gov.uk/equality_act_2010.aspx.

secondary legislation will add a specific exception allowing age to be used in the provision of financial services where it is fair and reasonable. The ban on age discrimination does not come into effect until 2012 and the secondary legislation is anticipated to come into effect at the same time. Age discrimination can refer to a particular age, an age group or a range of ages (section 5). In the provision of services such as insurance, however, the ban on age discrimination will not apply to anyone under 18 (section 28). The latter provision may conflict with the provisions of the Commission's proposed Directive which does not have any limitation on age.

The Race Relations Act of 1976 (amended in 2000 to take account of the Racial Equality Directive 2000/43/EC) made it unlawful to discriminate on racial grounds in relation to employment, training and education, and the provision of goods, facilities and services.

Insurance companies cannot discriminate on grounds of sexual orientation, religion or belief under the Equality Act 2006 in the provision of goods and services.

There are no exceptions for differential treatment on the grounds of race or religion/belief. Some differentiation is allowed on grounds of sexual orientation.⁶¹

3.4 National legislation or regulation in force to ensure that essential financial products are available (and affordable) for all customers

Recent financial inclusion initiatives in banking (basic bank accounts and Post Office card account) have been aimed at reducing the number of people in the UK without a bank account. The UK government announced in March 2010 that banks and building societies will be forced to open a basic account for anyone who asks for one. Basic accounts will offer no overdraft, but they will have a debit card. They will also provide the ability to pay direct debits, thereby allowing consumers to save money on their utility bills and other services, because most companies offer discounts to people who pay by direct debit. The government estimates that an additional million consumers, who are currently 'financially excluded' will benefit from this measure over the next five years.

There are no initiatives on insurance products.

3.5 New national legislation or regulation planned

The Equality Act 2010, when fully implemented, will bring in measures to prevent all forms of discrimination in goods, facilities and services. It is aimed to level the playing field between different forms of discrimination.

Under section 29, a service provider (including a provider of financial services) providing a service to the public or a section of the public must not discriminate against a person by not providing, or by terminating, the service, by the terms it imposes or by subjecting the person to any other detriment. The Act is aimed to consolidate existing

⁶¹ <http://www.equalityhumanrights.com/your-rights/rights-in-different-settings/shops-and-services/financial-services-and-insurance/>

UK equality and discrimination law and levels the playing field between different forms of discrimination: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. An innovation in the Act is the introduction of 'dual discrimination'. Section 14 provides that a person who has suffered direct discrimination because of a combination of two relevant protected characteristics can, for the first time, bring a dual discrimination claim. The relevant characteristics are age, disability, gender reassignment, race, religion or belief, sex and sexual orientation. The Explanatory Notes⁶² to the Act gives the example of a black woman charged £100 for insurance who claims she has suffered dual discrimination on the grounds of race and sex. By showing that a white woman would be charged £100 but a black man £50, however, the insurer would be able to show that the difference in premium is entirely due to sex. If the insurer is then able to rely on the insurance exception in Schedule 3 the less favourable treatment on grounds of sex would be lawful and the Exceptions to section 29 relating to insurance are covered in Schedule 3, Part 5 of the Act. To a great extent these mirror pre-existing legislation in relation to disability, sex, gender reassignment, pregnancy and maternity.

For example, in the case of policies entered into after 6th April 2008, the rules on the use of sex as a factor in the assessment of risk replicate those in the Sex Discrimination Act 1975 (Amendment of Legislation), regulations which came into force on that date. These state that differences in treatment on grounds of sex will not breach the prohibition, provided they are proportionate and based on relevant and accurate actuarial and statistical data which is regularly updated and available to the public.

A further exception provides that insurers will not be in breach if they continue to apply terms in policies that were entered into before the relevant provision came into force. But where pre-existing policies are renewed or their terms are reviewed after that date, they will have to comply.

There is also a new exception relating to the provision of group health insurance schemes or group personal pensions under an arrangement with an employer.

Under the original Bill, section 29 would have meant the insurer or pension provider would have been responsible if it discriminated against an employee when providing the service, even though such schemes are offered on standard terms and do not involve an assessment of each employee's circumstances.

This has been amended in the Act, which now has a specific exception covering group insurance schemes and group personal pensions offered to employees as part of their benefits package (Schedule 3, Part 5, para 20).

Insurance and pension providers entering into such arrangements with employers will not be responsible for ensuring the scheme does not discriminate against individual employees. The employer, however, will be responsible for ensuring that the provision of benefits under the scheme complies with the work and employment provisions in the Act.

⁶² http://www.opsi.gov.uk/acts/acts2010/en/ukpgaen_20100015_en.pdf.

An exception is allowed in financial services to permit differential treatment on the grounds of age as long as differences can be objectively justified and shown to be a proportionate means of achieving a legitimate aim.⁶³

The Act envisages greater transparency of information about the use of age, along the lines of that required for gender, and improved signposting for consumers particularly in motor and travel insurance.⁶⁴

Schedule 3 does not include any specific provision relating to the use of age in insurance and financial services. In January 2010 the GEO issued a policy statement confirming that it intended to introduce a "tailored specific exception allowing age to be used where this is fair and reasonable".

3.6 Non-regulatory measures

No reports are available in the UK on whether some companies avoid or restrict the use of sex, age and disability on a voluntary basis.

The Equality Act 2010 contains a move towards a signposting system whereby consumers are directed to alternative sources of advice when they are rejected by a provider (particularly in the case of insurance). BIBA (British Insurance Brokers Association) are one such potential source, claiming they can direct consumers to brokers who can find specialist insurers for all risks.⁶⁵ Some insurers and consumer bodies direct consumers to BIBA. Other insurers refer on to a broker panel (for example one interviewed insurer refers on to More Than Select panel).

The Financial Services Authority (FSA) runs a section of its website specifically for consumers (Moneymadeclear).⁶⁶

FSA has a Handbook which governs rules of conduct. Discrimination law has not been expressly imported into this Handbook. However, the FSA uses a core principle that customers must be treated fairly and the Financial Ombudsman would use this in dealing with complaints. This applies pre-sale as well as when a sale has been made. This principle covers banking and mortgage lending.

The Consumer Credit Act 2006 (for which the Office of Fair Trading has responsibility) does not include anti-discrimination provisions, but various trade organisations have developed their own rules. For example, the Finance and Leasing Association Lending Code contains a commitment that members "do not discriminate against you because of your race, sex, disability, ethnic background or sexuality".

In the insurance field the Association of British Insurers has developed a number of guides to insurers to encourage good practice. These include:

⁶³ Department for Communities and Local Government UK 2007.

⁶⁴ http://www.equalities.gov.uk/news/age_consultation.aspx.

⁶⁵ BIBA

⁶⁶ <http://www.moneymadeclear.org.uk/>.

- Compliance with the Disability Discrimination Act. This gives guidance about relevant information or data, providing evidence, dealing with disputes etc.⁶⁷
- 'Concordat and Moratorium on Genetics and Insurance'. This is a policy agreement between the ABI and the Government on the use of genetic test results in insurance underwriting practices. The Concordat and Moratorium set out the policy on how predictive genetic tests may be used and the insurers' agreement not to use specified genetic tests. According to the document, insurers agree that customers will not be asked to, nor be put under any pressure to, undergo a predictive genetic test in order to obtain insurance. Customers will not be required to disclose the results of predictive genetic tests for policies up to £500,000 of life insurance, or £300,000 for critical illness insurance, or paying annual benefits of £30,000 for income protection insurance.⁶⁸
- The ABI has published a statement of best practice for HIV and insurance.⁶⁹ This document makes it clear that insurers do not ask questions about an applicant's sexual orientation or request an HIV test be taken solely because of perceived sexual orientation, and will not take into account sexual orientation in assessing an application if it is inadvertently revealed by an applicant. Insurers are allowed to ask questions about HIV risk, including about risky sexual behaviour, and about travel to or origin from areas of the world with high levels of HIV.

⁶⁷ ABI 2003.

⁶⁸ Concordat and Moratorium on Genetics and Insurance, March 2005. It is complemented by an ABI Code of Practice for Genetic Tests (ABI 2008c).

⁶⁹ ABI 2008b.

Country report Canada

1. Background of current legislative framework concerning discriminatory practices in the provision of financial services

Canada is a federal state. Under its constitution the power to regulate contracts between insurers and policyholders is assigned to the provinces.¹ This includes the power to prescribe human rights standards with which insurance contracts must conform. The power to regulate banking, including related human rights issues, rests with the Federal Government.²

Legislation targeting discrimination exists at both the federal and provincial levels. The relevant federal statute, which covers, among other things, banking services, is the *Human Rights Act*.³ Each province has a statute, entitled variously the *Human Rights Act*,⁴ the *Human Rights Code*⁵ or the *Charter of Human Rights and Freedoms*.⁶ In addition, some provinces include anti-discrimination provisions in their legislation dealing specifically with insurance⁷ and some have regulations (subordinate legislation) prohibiting specific forms of discrimination for particular types of insurance.⁸

As a result, there is a patchwork of legislation and regulations dealing with discrimination in the financial services sector. The federal jurisdiction and each of the ten provincial jurisdictions are subject to its own human rights legislation and its own rules dealing with discrimination. No two jurisdictions have identical legislation or the same combination of legislation, regulations and administrative practice. This is significant for the purposes of this study. As discussed below, with respect to automobile insurance there are important differences among provinces in their approaches to discrimination. Some allow differential pricing on the basis of age and sex, whereas some do not, while others allow it on the basis of sex but not age.

¹ *Constitution Act*, 1867 (U.K.) 30 and 31 Victoria, c.3, s. 92.13. This section refers to 'property and civil rights' which includes the law of insurance contracts.

² *Ibid*, s. 91.15, 16, 18.

³ R.S.C. 1985, c.H-6.

⁴ *Alberta Human Rights Act*, R.S.A. 2000, c.A-25.5; *New Brunswick Human Rights Act*, R.S.N.B. 1973, c.H-11; *Nova Scotia Human Rights Act*, R.S.N.S. 1989, c.214; *Prince Edward Island Human Rights Act*, R.S.P.E.I. 1988, c.H-12.

⁵ *British Columbia Human Rights Code*, R.S.B.C. 1996, c.210; *Manitoba Human Rights Code*, C.S.M. c.H175; *Newfoundland and Labrador Human Rights Code*, R.S.N.L. 1990, c.H-14; *Ontario Human Rights Code*, R.S.O. 1990, c.H-19, *Saskatchewan Human Rights Code*, S.S. 1979, c.S-24.1.

⁶ *Quebec Charter of Human Rights and Freedoms*, R.S.Q. c.C-12.

⁷ See, e.g. *Ontario Insurance Act*, R.S.O. 1990, c.I.8, s.140.

⁸ See e.g., *Newfoundland and Labrador Automobile Insurance Prohibited Underwriting Regulations*, N.L.R. 80/04 and *Nova Scotia Automobile Prohibited Risk-Classification Factors Regulations*, N.S.R. 183/2003 and *Automobile Insurance Underwriting Practices Regulations*, N.S.R. 125/2003.

2. Existing measures to prevent discriminatory practices and to ensure availability and affordability of financial products for all customers

2.1. Legal provisions prohibiting/restricting the use of one or several of the criteria (sex, age, etc.)

Federal Human Rights Act⁹

The federal *Human Rights Act* applies “within the purview of matters coming within the legislative authority of [the federal] Parliament.”¹⁰ Under this legislation entities subject to federal jurisdiction, such as banks,¹¹ may not discriminate, in “the provision of goods, services, facilities or accommodation customarily available to the general public”¹² by denying access to services etc. or differentiating (to the disadvantage of the individual concerned) on the basis of “race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and a conviction for which a pardon has been granted”.¹³

Exceptions to this general prohibition apply with respect to measures of affirmative action¹⁴ and where there is a *bona fide* justification for the discrimination.¹⁵

Provincial Human Rights Legislation¹⁶

As indicated above, each province has provisions in its human rights legislation bearing upon discrimination in insurance. Although no two of these statutes are identical, there is a common pattern. Each statute prohibits discrimination on specified grounds, invariably including age, sex, marital status and disability, in the provision of services generally available to the public. While there is one case¹⁷ that holds that life insurance

⁹ See footnote 3.

¹⁰ *Ibid* s. 2.

¹¹ See e.g. *Morrison v. HSBC Bank of Canada* 2008 FCA 340 (CanLII).

¹² See footnote 3, s.5.

¹³ *Ibid* s. 3. ‘Disability’ means “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug”. (s.25).

¹⁴ *Ibid* s. 16.

¹⁵ *Ibid* s. 15(q)

¹⁶ In addition to the 10 provinces, there are three ‘Territories’ in Canada, Yukon Territory, Northwest Territories and Nunavut. Each has its own human rights legislation. See R.S.Y. 2002, c.116; S.N.W.T. 2002, c.18; S.Nu. 2003,c.12. Although worded differently, these statutes follow the same general pattern banning discrimination on specific grounds in, among other things, the provision of services, without a reasonable and *bona fide* justification. None of them mentions insurance or financial services specifically.

¹⁷ *Nova Scotia (Human Rights Commission) v. Canada Life Assurance Co.* (1992), 9 C.C.L.I. (2d) 43 (N.S.C.A.).

marketed only to people who qualify according to certain age and health criteria is not “available to the general public”, that is an exception. Most cases assume insurance to be a service generally available to the public. This is certainly true of automobile insurance which is compulsory.

However, this general proscription of discrimination is subject to an exception applying to insurance. In some human rights codes, insurance is mentioned specifically.¹⁸ In others the exception is more general in that discrimination is permitted for any “*bona fide* and reasonable cause”.¹⁹ Some codes also allow discrimination in respect of employment-related insurance on the basis of, for example, pre-existing disability.²⁰ As we shall see, much of the relevant case law concerns the scope of these exceptions.

Provincial Insurance Legislation Dealing with Discrimination

In several provinces the legislation dealing with insurance law includes provisions dealing with discrimination. For example, section 140 of the Ontario *Insurance Act*²¹ provides:

Any licensed insurer that discriminates unfairly between risks in Ontario because of the race or religion of the insured is guilty of an offence.

Ontario,²² as well as Manitoba,²³ and New Brunswick²⁴ also include in their insurance legislation provisions banning “unfair or deceptive acts or practices”. In each case, this includes (quoting from the Ontario regulation; in the Manitoba and New Brunswick legislation, the language is similar, if not identical):

Any unfair discrimination between individuals of the same class and of the same expectation of life, in the amount or payment or return of premiums, or rates charged for contracts of life insurance or annuity contracts, or in the dividends or other benefits payable on such contracts or in the terms and conditions of such contracts, and;

Any unfair discrimination in any rate or schedule of rates between risks in [the province] of essentially the same physical hazards in the same territorial classification.

¹⁸ See e.g. Ontario *Human Rights Code*, see footnote 5, s.22.

¹⁹ See e.g. Manitoba *Human Rights Code*, see footnote 5, s.15.

²⁰ See e.g. Ontario *Human Rights Code*, see footnote 5, s. 25.

²¹ R.S.O. 1990, c.1.18.

²² *Ibid*, s. 438, O.Reg. 7/00, s.1, paras 2 & 3.

²³ R.S.M. 1987, c.140, s. 113.

²⁴ R.S.N.B. 1973, c.I-12, s. 369.1 – 369.5.

Provincial Regulations

Several provinces have regulations specifically addressing rating practices for automobile insurance. In broad terms, these follow one of two approaches. Alberta's regulation²⁵ sets out rating criteria that must be used exclusively. These criteria do not include age, sex or marital status. The other approach is to prohibit the use of some or all of these criteria. In New Brunswick²⁶ and Newfoundland and Labrador²⁷ age, sex and marital status are all listed as prohibited criteria. In Nova Scotia²⁸ age and marital status are prohibited as rating criteria and an insurer may not deny a person coverage altogether (or terminate it) because of his or her age, marital status or sex.²⁹ In Prince Edward Island³⁰ age is a prohibited rating criterion.

As previously mentioned, the provinces of British Columbia, Manitoba and Saskatchewan have government-run automobile insurance. In each case rating criteria do not include age, sex or marital status.

2.2. Relevant case law

Banking

The only reported case concerning the application of the federal *Human Rights Act* to financial services is *Morrison v. Canadian Imperial Bank of Commerce*.³¹ The complainant alleged that he had been treated rudely and was required to provide unnecessarily detailed identification information because of his race. The court held that the alleged facts were not proven.

Insurance

With respect to life, health, accident and sickness and disability insurance, it has been accepted by the courts and tribunals that age and pre-existing medical conditions are relevant factors for insurers and that considering them in relation to refusing coverage and setting premiums is *bona fide* and reasonable given the nature of the risk. In a hearing of the tribunal constituted under the British Columbia *Human Rights Code*, the adjudicator stated:

[T]he risk of sickness or accident to a person can only be determined on the basis of a detailed and searching analysis of subjective physical traits and history of the individual person concerned and a conclusion as to whether, and where,

²⁵ Alberta Reg. 124/2004.

²⁶ N.B. Reg. 2004 – 139, s. 5.

²⁷ N.L.R. 80/04, s.4 (e.1).

²⁸ N.S. Reg. 183/2003, s.3.

²⁹ N.S. Reg. 125/2003, s.4 (2).

³⁰ P.E.I. Reg. EC697/03.

³¹ See footnote 11.

*that person with those physical attributes fits into various categories of risk determined on a statistical basis.*³²

While this would normally be a straightforward application of the exception provided in all Canadian human rights statutes, the reasoning led one court to conclude that selling life, accident and sickness or disability insurance (as opposed to property insurance) is not “a service customarily provided to the public”.³³ The reasoning is that such insurance is intended to be sold, not to any member of the public who applies, but only to those whose age and medical history qualify them.³⁴

In *Thornton v. North American Life Insurance Co.*,³⁵ the HIV status of an employee brought him within an exclusion clause in his employer’s group disability insurance policy so that his entitlement to benefits was postponed. The Ontario Divisional Court held that this was reasonable and *bona fide* and consequently fell within the exception provided in section 25 (2) of the Ontario *Human Rights Code*.

However, more recent cases have shown a reluctance of tribunals to accept insurer’s claims about risk and probability without supporting evidence. In *Gibbs v. Battlefords and District Co-operative Ltd.*,³⁶ the Supreme Court of Canada held that an employer’s long term disability plan did in fact discriminate unfairly between treatment afforded claimants with mental illness as compared to those with physical injury, especially since no evidence was produced to justify the distinction on actuarial grounds. In *J. v London Life Insurance Co.*,³⁷ the claimant was denied life insurance because his wife was HIV-positive. The insurer based its decision not to insure on grounds of uncertainty – the *absence* of actuarial and statistical data about insuring spouses of people with HIV. The tribunal held that the onus fell on the insurer to demonstrate the *presence* of evidence justifying its decision. Since it had not done so, it was held to have discriminated without reasonable or *bona fide* grounds for doing so.

An insurer’s obligation to justify its apparently discriminatory treatment of customers also applies to property insurance. In *Fraser v. ING Insurance Co.*³⁸ the complainant alleged that the insurer’s cancellation of her homeowner’s insurance discriminated against her on the grounds of family status because she was a foster parent. Her policy included an exclusion relating to intentional acts of anyone living in her home. That risk was covered by a secondary policy provided by the government to all foster parents.

³² *Vitcoe v. Dominion Life Ins. Co.* (1984), 5 C.H.R.R. Dec. 355, p. D/2029, at para. 17297. See also D. Norwood and J. Weir 1993.

³³ *Nova Scotia (Human Rights Commission) v. Canada Life Assurance Co.* (1992), 9 C.C.L.I. (2d) 43 (N.S.C.A.).

³⁴ Leaving aside the issue of availability to the public, selling insurance generally is a ‘service’. See *Insurance Corp. of British Columbia v. Heerspink* [1982] S.C.R. 145.

³⁵ (1995), 28 C.C.L.I. (2d) 4 (Ont. Div. Ct.)

³⁶ (1996), 40 C.C.L.I. (2d) 1 (S.C.C.)

³⁷ (1999), 36 C.H.R.R. D/43 (B.C.H.R.T.)

³⁸ (2004), 50 C.H.R.R. D/452 (B.C.H.R.T.)

The primary insurer cancelled her policy on discovering the existence of the secondary policy (which covered some of the same risks as the primary one) because it suggested to the insurer the possibility of fraud. The tribunal held that the insurer's application of this blanket approach did not justify its treatment of the complainant in the individual case.

The issue that has attracted the most attention in respect of discrimination in insurance is the use of age, sex and, to a lesser extent, marital status as rating criteria in automobile insurance. The question is whether this use is reasonable and *bona fide* given statistics showing that, as a group, young males are involved in more, and also more serious, accidents than members of other groups. *Zurich Insurance Co. v. Ontario Human Rights Commission*³⁹ is a decision of the Supreme Court of Canada that addressed the use of age, sex and marital status as rating criteria. Despite being a decision of Canada's highest court, it has not put the matter to rest. The Court said that, to be 'reasonable', the practice must be based on sound and accepted insurance principles relating premiums to risk and there must be no practical alternative. To be '*bona fide*' it must be used honestly for sound business purposes and not to defeat rights protected by the *Human Rights Code*.

The Court held that, at the time the complaint was lodged (in 1983), the use of age and sex met this test. However, it also said that while it should be given time to do so, "the insurance industry must strive to avoid setting premiums based on the enumerated grounds". The clear implication was that insurers had an obligation to find alternative means of rating that avoided discrimination on the basis of age, sex or marital status.

Dissenting opinions in the case were of the view that the industry was already in breach of the Code. The absence of statistics does not mean there are no practical alternatives as rating criteria.⁴⁰ This foreshadowed subsequent decisions, mentioned above, that place the onus on insurers to justify with statistics or other evidence, their departure from human rights standards rather than relying on the absence of evidence.⁴¹

It has been suggested that recent cases dealing with employment discrimination, which have met employers' attempts to justify discrimination, for example on the basis of disability, with the response that there is a duty to accommodate, might influence future insurance cases.⁴² This view may be correct. Indeed, the courts' recent insistence on more cogent evidence to justify discrimination is consistent with such an approach. However, a note of caution is warranted. In a recent insurance case not involving discrimination, the Supreme Court of Canada was receptive to the insurer's argument based on the relationship between premiums and coverage.⁴³ The plaintiff argued for a

³⁹ [1992] 2 S.C.R. 321.

⁴⁰ See T. Lemmens and Y. Thiery 2007.

⁴¹ *Supra*, notes 36 – 38 and accompanying text.

⁴² See Lemmens and Thiery 2007.

⁴³ See e.g. *Co-operators Life Ins. Co. v. Gibbens* 2009 SCC 59.

wide definition of the term ‘accident’ to cover a disease he had contracted. The court held that this was not appropriate because the premiums charged for accident insurance did not justify coverage that would in effect amount to comprehensive health insurance. It is unlikely that the court would accept an argument in a discrimination case that had the effect of converting a product targeted at low-risk individuals into one covering even high-risk individuals for the same premium (assuming the distinction between high-risk and low-risk is based on valid criteria.)

But the force of this point varies with different classes of insurance. It is difficult to see a ‘duty to accommodate’ applying to life insurance in that insurers be required to sell insurance to anyone regardless of age or pre-existing health condition. On the other hand, as discussed below, it is becoming more widely accepted in Canada, at least by regulators, that appropriate risk rating in automobile insurance can be achieved without resort to factors listed in human rights codes as prohibited grounds of discrimination. In other words, the increasingly accepted view is that applicants for automobile insurance can be accommodated by using driving experience, both in terms of time and accidents or convictions, rather than age, sex or marital status.

2.3. Non-regulatory measures

Access

Although not strictly a ‘non-regulatory’ measure, an organisation called the Facility Association exists in Canada to provide automobile insurance to people unable to obtain it in the open market because of the operation of rating criteria. Basic automobile insurance (first-party accident benefits and liability insurance) is compulsory in all Canadian provinces and territories. Access is not a problem in British Columbia, Manitoba, Quebec and Saskatchewan where basic insurance is provided by government agencies. In all other provinces and the territories, every insurer licensed to write automobile liability insurance is required to become a member of the Association which, through a pooling arrangement, provides insurance to high risk customers.⁴⁴ It should be duly noted that factors such as sex, age and marital status alone rarely cause customers to have to resort to the Association, but they may contribute.

Education

The insurance industry provides information to the public primarily through two trade associations, the Canadian Life and Health Insurance Association⁴⁵ and the Insurance Bureau of Canada.⁴⁶ Information, including that relating to rating criteria is provided by provincial regulatory agencies such as the Financial Services Commission of Ontario.⁴⁷

⁴⁴ For more information on the Facility Association, see www.facilityassociation.com.

⁴⁵ See www.clhia.ca.

⁴⁶ See www.ibc.ca.

⁴⁷ See “Educational Auto Rate Tutorial” at www.fSCO.ca/english/auto/edurateguide.asp.

3. The impact of the measures taken and lessons learned

The use of age, sex and disability is generally considered to be, not only reasonable, but also essential for life insurance to function effectively. As authors Norwood and Weir put it:

It is submitted that [life] insurance discrimination is legitimate, lawful discrimination if it is grounded upon credible statistics which have measured similar risks. The very business of insurance is risk taking. The very heart of insurance is discriminatory risk measurement. Otherwise an insurer would have to insure all applicants at the same premium price, regardless of age, sex or health condition.⁴⁸

The same could be said for any type of insurance where an insured event may be caused or related to illness or advanced age, such as private health insurance, disability insurance, travel insurance, annuities and long-term care insurance.

Accordingly, the ‘impact’ of exceptions (to human rights proscriptions) based on reasonable and *bona fide* rating practices is the preservation of these classes of private insurance.

In Canada this is generally uncontroversial. One possible exception to this is the use of genetic information that has yet to manifest itself as an active health problem. Unlike some other countries, Canada does not regulate insurers’ use of such information, nor is there a voluntary moratorium. Accordingly, people with knowledge of their genetic history which is material to the coverage they are seeking have an obligation to disclose it to their insurers and the insurers may use that information in deciding whether to issue a policy and, if so, the amount of premium.⁴⁹

Automobile insurance is the area that has attracted most attention in Canada in relation to discrimination, specifically on grounds of age, sex and marital status. As described, six provinces, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, and Saskatchewan no longer permit the use of these criteria for rating purposes. In Nova Scotia, age and marital status are prohibited factors. In Prince Edward Island, age is prohibited. That leaves only Ontario, Quebec (with respect to property damage insurance which is not part of the government-run scheme) and the territories which continue to allow the use of all three contentious factors.⁵⁰

It is the contention of the insurance industry that abolition of these factors “dislocates” premiums so that members of low risk groups subsidize high-risk groups. In particular, young females would pay inappropriately high premiums and young males would pay

⁴⁸ See footnote 22.

⁴⁹ See E. Adjin-Tettey 2009. See also “Banning Insurance Companies Access to Genetic Information Results in Hikes, Prof Finds”, University of Guelph News Release, Nov. 5, 2007; www.uoguelph.ca/news/2007/11/banning_insuran.html.

⁵⁰ See footnotes 25 - 30 and accompanying text.

lower than appropriate premiums. This would encourage more young males to drive resulting in even more accidents and consequently higher premiums for all motorists. The industry also contends that other risk factors, not prohibited by human rights legislation, such as annual driving distance, are impractical and incomplete substitutes.⁵¹

The dislocation of premiums among groups of young people seems to be substantiated. A 1981 study on the likely effect of abolition of age, sex and marital status as rating factors on premium rates and rate of uptake of optional property damage coverage comparing young males and young females reached the following conclusions: for single females aged 21 – 22, premiums would increase by 62.3% and 36.5% for those 23 – 24. There would be a 10% decline in the number of females aged 21 – 22 purchasing collision insurance. The figure for those aged 23 – 24 was 6%. For married females aged 21 – 24, the figure was 2%.⁵²

A 2004 study done by the Nova Scotia Insurance Review Board of claims experience in the Atlantic Region of Canada for the period 1993 – 2002 demonstrated that, for drivers with under 6 years of driving experience, males experienced a significantly higher claims frequency rate (7 claims per 100 cars insured for third party liability coverage and 7.4 per 100 for collision coverage) than females (5.7 claims per 100 cars insured for third party liability coverage and 6.8 per 100 for collision coverage). The average claim severity was about the same for males and females for third party liability coverage but there was a significant difference for collision coverage (\$3,562 for females and \$4,444 for males).⁵³

However, the Nova Scotia study also suggested that, over time, the differences between females and males in accident frequency rates and severity have been decreasing for all age groups. This was so, although only marginally, even for collision coverage in respect of drivers with fewer than 6 years driving experience.⁵⁴ The report concluded:

The statistics [...] show that in the Atlantic Region any differences in the overall claim experience between male and female drivers is confined to the inexperienced drivers, and the differences generally have narrowed over time. It is noteworthy, however, that the majority of inexperienced drivers remain claims-free. In an average year between 1993 and 2002, approximately 93% of the vehicles operated by inexperienced male drivers in the Atlantic Region have been claims-free compared to 94.3% of the vehicles operated by inexperienced female drivers. The claims experience of males and females within this majority group of

⁵¹ See Nova Scotia Insurance Review Board 2004.

⁵² B.G. Dahlby 1983.

⁵³ See footnote 51.

⁵⁴ See footnote 51.

*inexperienced drivers is comparable within 1.3 percentage points. The Board finds this is not a sufficient difference to justify gender based rate differentials.*⁵⁵

This recommendation has yet to be implemented by the Nova Scotia government. If and when it does, that will leave only two provinces, Ontario and Quebec, allowing age sex and marital status as rating criteria for automobile insurance. Prince Edward Island continues to allow the use of sex and marital status. It is unclear why marital status continues to be used or allowed. As long ago as 1988, an Ontario inquiry into automobile insurance concluded it was not justified.⁵⁶ It also appears that age is difficult to justify as a criterion. Its use has been prohibited in all but two provinces. The relevant factor is not so much age as years of driving experience which, while often related to age, is not always the case. Years of driving experience continues to be allowed as a rating criterion.⁵⁷

Age discrimination

In view of the importance of age discrimination in the current study, it is appropriate to summarise here the situation in Canada pertaining to that topic. Distinctions on the basis of age are made routinely in respect of life insurance and financial products like annuities. In Canada this is uncontroversial and considered to be reasonable and *bona fide*. For other classes of insurance (including other sub-classes of insurance of the person, such as disability insurance or sickness insurance), courts and tribunals require cogent evidence demonstrating the relation between the age of the person insured or seeking insurance and the risk covered and that there is no reasonable alternative. Uncertainty about the relation between age and the insured risk resulting from the absence of statistics is not sufficient.

As regards automobile insurance, where this issue attracts the most discussion, age is becoming less relevant. Of the ten provinces in Canada, only two (as well as the three territories) continue to permit the use of age as a rating factor. Moreover, one of these provinces is Quebec which has a government-run insurance scheme covering personal injury and death caused in automobile accidents. The costs of this scheme are covered by vehicle and driver licensing fees in which personal characteristics, such as age, play no part. Age is only relevant to coverage for property damage (first and third party) which is sold by private insurers. It should be noted that, in those jurisdictions where age is not permitted, years of driving experience is retained as a rating factor, but this does not offend human rights legislation.

⁵⁵ See footnote 51.

⁵⁶ C.A Osborne 1988.

⁵⁷ See e. g. Prince Edward Island's regulations, see footnote 30.

Country report New Zealand

1. Background of current legislative framework concerning discriminatory practices in the provision of financial services

Anti-discrimination law was introduced into New Zealand via the Human Rights Commission Act 1977. The catalyst was the Government's decision to ratify the International Covenant on Civil and Political Rights (done in 1978). A statutory prohibition on discrimination was needed to bring New Zealand's law into line with the ICCPR.

In the 1977 Act the prohibited grounds of discrimination were sex, marital status, religion or ethical beliefs. The Act applied to employment, provision of goods and services, accommodation, and access to public places. A separate Race Relations Act 1971 had already prohibited discrimination based on colour, race, or ethnic or national origin (the catalyst then being the ratification of the Convention on the Elimination of Racial Discrimination).

The 1977 Act applied in the fields of employment, accommodation, provision of goods and services, and access to public places. Goods and services explicitly included banking and insurance, but there were specific exceptions designed to allow some 'discrimination' in insurance.

A review of the Human Rights Commission Act 1977 and Race Relations Act 1971 led to new legislation – the Human Rights Act 1993. This prohibits all public and private sector discrimination in the same fields as its predecessor. However it expands the grounds of discrimination. These now include sex; marital status; religious belief; ethical belief; colour; race; ethnic or national origins; disability; age; political opinion; employment status; family status; and sexual orientation.

The HRA contains a slightly wider insurance exception than its predecessor. The details are addressed in the next section of this report.

It should be noted that New Zealand's anti-discrimination legislation was not aimed at banking and insurance in particular. It was general legislation, designed to apply in many fields, but its application to financial and insurance services was recognised and planned for. Exceptions were placed in the Act to facilitate banking and insurance services.

2. Existing measures to prevent discriminatory practices and to ensure availability and affordability of financial products for all customers

2.1. Legal provisions prohibiting/restricting the use of one or several of the criteria (sex, age, etc.)

The specific prohibition, and the insurance and superannuation exceptions

The prohibition that affects insurance is s 44 of the Human Rights Act:

44. Provision of goods and services

(1) It shall be unlawful for any person who supplies goods, facilities, or services to the public or to any section of the public

(a) to refuse or fail on demand to provide any other person with those goods, facilities, or services; or

(b) To treat any other person less favourably in connection with the provision of those goods, facilities, or services than would otherwise be the case, by reason of any of the prohibited grounds of discrimination.

(2) For the purposes of subsection (1) of this section, but without limiting the meaning of the terms 'goods', 'facilities', and 'services' in that subsection, the term facilities includes facilities by way of banking or insurance or for grants, loans, credit, or finance.

There are exceptions for insurance and superannuation. The exception for insurance is s 48:

48. Exception in relation to insurance

(1) It shall not be a breach of section 44 of this Act to offer or provide annuities, life insurance policies, accident insurance policies, or other policies of insurance, whether for individual persons or groups of persons, on different terms or conditions for each sex or for persons with a disability or for persons of different ages if the different treatment

(a) Is based on

(i) Actuarial or statistical data, upon which it is reasonable to rely, relating to life-expectancy, accidents, or sickness; or

(ii) Where no such data is available in respect of persons with a disability, reputable medical or actuarial advice or opinion, upon which it is reasonable to rely, whether or not contained in an underwriting manual; and

(b) Is reasonable having regard to the applicability of the data or advice or opinion, and of any other relevant factors, to the particular circumstances.

(2) In assessing, for the purposes of this section, whether it is reasonable to rely on any data or advice or opinion, and whether different treatment is reasonable, the Commission or the Complaints Division may

(a) Require justification to be provided for reliance on the data or advice or opinion and for the different treatment; and

(b) Request the views of the Government Actuary on the justification for the reliance and for the different treatment.

Section 48 therefore allows for different treatment in providing insurance, which might otherwise be considered discriminatory, where that difference is on the basis of relevant data on which it is reasonable to rely or, where no such data is available, on reputable advice or opinion on which it is reasonable to rely. There is also a requirement that the different treatment be reasonable having regard to the applicability of the data, advice or opinion and of factors relevant to the particular circumstances. It has been suggested that the reference to 'particular circumstances' means commercial considerations will only be relevant if they relate to the facts of the particular case.¹

Notably absent is an exception for lenders. Some argue that the legislation should provide an exception for age discrimination by lenders.² That is, they argue that it would be reasonable to allow such discrimination. A survey carried out among seven banks in 2005 found that two openly discriminated on the basis of age, and a third said it might request extra security depending on age (which is prohibited by s 44).³

Section 70 makes an exception to the s 44 rule for superannuation schemes, as pension schemes are commonly known in New Zealand:

70. Superannuation schemes

(1) Subject to subsection (3) of this section, nothing in section 22 or section 44 of this Act relating to different treatment on the ground of age or disability shall apply to any condition in, or requirement of, a superannuation scheme in existence at the commencement of this Act in relation to a person who was a member of the scheme at the commencement of this Act or who becomes a member of the scheme before the [1st day of January 1996].

(2) It shall continue to be lawful for the provisions of a superannuation scheme to provide

(a) Different benefits for members of each sex on the basis of the same contributions; or

¹ Bell 2008.

² Shann 2005. Shann suggests that the small number of complaints, none of which were carried through to the Tribunal, may be due to the fact that provision of finance facilities in New Zealand are extremely competitive, so that people shop around and are able to obtain their requirements elsewhere.

³ See footnote 2.

(b) The same benefits for members of each sex on the basis of different contributions,

if the different treatment

(c) Is based on actuarial or statistical data, upon which it is reasonable to rely, relating to life-expectancy, accidents, or sickness; and

(d) Is reasonable having regard to the applicability of the data, and of any other relevant factors, to the particular circumstances.

(3) It shall continue to be unlawful to require an applicant for membership of a superannuation scheme to have attained a minimum age.

(4) Nothing in section 22 or section 44 of this Act shall prevent the provisions of a superannuation scheme from

(a) Providing or requiring different contributions for members; or

(b) Providing benefits for members that differ in nature or amount,—

by reason of the disability or age of those members, if the different treatment—

(c) Is based on

(i) Actuarial or statistical data, upon which it is reasonable to rely, relating to life-expectancy, accidents, or sickness; or

(ii) Where no such data is available in respect of persons with a disability, reputable medical or actuarial advice or opinion, upon which it is reasonable to rely, whether or not contained in an underwriting manual; and

(d) Is reasonable having regard to the applicability of the data or advice or opinion, and of any other relevant factors, to the particular circumstances.

(5) Nothing in section 22 or section 44 of this Act shall prevent the provisions of a superannuation scheme, or the trustees of the scheme, from

(a) Requiring an applicant for membership of the scheme to be under a specified maximum age; or

(b) Permitting a member of the scheme to elect to make increased or reduced contributions to the scheme either temporarily or indefinitely; or

(c) Specifying an age of eligibility for each type of benefit provided for members of the scheme; or

(d) Subject to section 9C of the Superannuation Schemes Act 1989, requiring persons who become members of the scheme on or after the 1st day of January 1995 to leave the scheme on reaching the age at which persons of that age ordinarily qualify for national superannuation

[under section 7 of the [[New Zealand Superannuation and Retirement Income Act 2001]]]; or

(e) Providing benefits on the death or disability of members of the scheme that decrease in value as the age of members increases; or

(f) Providing benefits for members of the scheme that differ in nature and amount according to the member's period of membership (including any period deemed by the trustees of the scheme to be membership) of the scheme and of any scheme replaced by that scheme, and, in the case of a superannuation scheme provided by an employer, of any scheme to which the employer has paid contributions on behalf of the employee.

(6) In assessing for the purposes of this section whether it is reasonable to rely on any data or advice or opinion and whether different treatment is reasonable, the Commission or the Complaints Division may

(a) Require justification to be provided for reliance on the data or advice or opinion and for the different treatment; and

(b) Request the views of the Government Actuary on the justification for the reliance and for the different treatment.

The section provides two sets of rules, one applying to schemes existing at the commencement of the Act in relation to any person who became a member prior to 1 January 1996 ('existing schemes'), and one applying to those schemes arising after the legislation came into force ('new schemes'). Essentially, subsection (1) provides that s 44 does not affect the validity of existing schemes where members are subject to different treatment on the ground of age or disability. On the other hand, s 70(4) provides that different treatment on the basis of age or disability with regard to new schemes must pass the same test as laid out in the insurance provision. However, subsection (3) makes it clear that it remains unlawful, so is applicable to both new and existing schemes, to require an applicant for membership of a scheme to have attained a minimum age. Different treatment on the basis of sex continues to be lawful if it is based on a stricter version of the test laid out in the insurance provision. The stricter test requires data, and omits the possibility of reliance on reputable advice or opinion. All other types of discrimination set out in s 21 (except for marital status, discussed later) were to be removed by the time the Act came into force.

Section 71 places an obligation on the Human Rights Commission to report to the Minister on whether prohibited discrimination has been eliminated from superannuation schemes. Importantly, s 72 empowers trustees to vary any superannuation scheme so as to give effect to ss 22, 44 and 70 of the Act.

The general exception in the Human Rights Act

To complete the picture, there is also a very general exception in the Human Rights Act. Section 97 allows for a 'genuine justification' exemption to *inter alia* the

requirements of s 44.⁴ The provision has been successfully invoked only once, and that case involved an insurance-related matter. It provides as follows:

97. Power in respect of exception for genuine occupational qualification or genuine justification

(1) The Tribunal may exercise the power referred to in subsection (2), but only

(a) in respect of a matter in which it has jurisdiction under this Act to make a final determination; and

(b) on an application by the Commission, a person or persons against whom a complaint under section 76(2)(a) has been made, or a person who is the subject of an inquiry under section 5(2)(h)

(2) The power is to declare that an act, omission, practice, requirement, or condition that would otherwise be unlawful under Part 2 is not unlawful because it constitutes either or both

(a) a genuine occupational qualification, in respect of sections 22 to 41:

(b) a genuine justification, in respect of sections 42 to 60.

The section allows the Tribunal, where it has jurisdiction in a proceeding, to make a 'final determination',⁵ to declare that a practice which is otherwise unlawful because it breaches Part 2 of the Act (containing the anti-discrimination provisions and exceptions) *not* unlawful because it constitutes a genuine justification.

Section 97 has a history that suggests it was not aimed specifically at providing any extra defence for banking and insurance. It appears to have been added to ensure that the Act did not inadvertently render unlawful some use of otherwise prohibited grounds that was genuinely justifiable.

In relation to there being no express exception for age discrimination by lenders, one commentator has suggested that s 97 may provide a justification for that. He points to the Australian Age Discrimination Act 2004, which contains a specific exception for age discrimination in the provision of finance. He suggests that this may have strengthened the chances of a New Zealand lender raising a 'genuine justification' defence under s 97 for age discrimination in lending.⁶

⁴ The provision also allows for a 'genuine occupational qualification' in relation to the employment-related provisions of the Act.

⁵ There is no definition of 'final determination' in the Human Rights Act 1993. See Bell 2008, for discussion on what this might mean.

⁶ Shann 2005. Shann also refers to s 65, which may provide a defence for lenders where the discrimination is indirect and 'good reason' can be established.

2.2. Case law

In 1994, in the case of *Coburn v Human Rights Commissioner*,⁷ the trustees of a superannuation fund applied to the High Court for a declaration as to whether their scheme was contrary to the anti-discrimination provisions of the HRA. The key issues regarded whether the scheme unlawfully discriminated on the separate bases of marital status and age.

A preliminary note must be made of the High Court judge's discussion regarding whether the members of a superannuation scheme administered by a private employer constituted a 'section of the public' for the purposes of s 44, so that the prohibition applies. He found that they should: "if I ask myself whether the legislature can 'have intended that such activity would not be subject to scrutiny under the Act', the answer seems to me to be obvious".

The judge held that there was *no* unlawful discrimination on the basis of age. The scheme provided for death benefits to remain at a particular rate until a member reached age 45 years, after which the benefit was reduced by a percentage for each year by which the member's age exceeded 45. He found that, while the relationship between the scheme's formula and the actuarial or statistical data was less than precise, there was no reason for rejecting the contention that "the increased mortality is reasonably well offset" by increased contributions that are generally available from the member prior to reaching age 45 years. He was therefore of the view that the use of age 45 as a factor for determining death benefits under the scheme was not a breach of the Act.

However, unlawful marital status discrimination was found to exist in the provision of spousal benefits. Spousal benefits provided members' spouses with half of the pension entitlements entitled to the member, for the life of the spouse, upon the death of the member. Because unmarried members paid the same premiums as married members but did not receive an equivalent benefit after death, the scheme discriminated against unmarried members. While the Court found that it could not apply s 73(1) directly (which provides an exemption from the provisions of the Human Rights Act for measures designed to encourage positive discrimination), it did find that the existence of that exemption provided an analogy that justified the resolution of issues of retrospectively. This was thought so on the assumption that the immediate and unqualified application of the marital status provisions to the scheme would impact particularly on the position of married women, a group who had benefited from what was arguably 'positive discrimination' *in the past*. Hence it was held that the HRA should only operate on contributions paid on or after the date that the Act came into effect. The Court declined to determine whether the provision of a spousal pension was unlawful under the 1977 Act, given it was an issue of such significance, and suggested that it was a matter for legislative rather than judicial determination.

⁷ [1994] 3 NZLR 323 ('*Coburn*').

The Human Rights Amendment Act was passed in 1994 in response to *Coburn*. Section 2(1) of the Amendment Act stated that, notwithstanding any rule of law, nothing in ss 21, 44 or 70 of the HRA shall prevent, or be taken to ever have prevented, a superannuation scheme from providing a spousal benefit.⁸

However, s 2(5) stated that nothing in the section applies to the provision of benefits under a superannuation scheme in respect of any person who becomes a member of the scheme on or after 1 January 1996.⁹ Section 6 of the Amendment Act extended the time for compliance on the basis of age or disability by one year (by exempting schemes from compliance in respect of members who joined within that extra year). Section 3 of the Amendment Act provided that certain provisions relating to marital status or dependency, which allowed for preferential treatment to members who have the care of children or other dependents, was a permissible exception.

There have been no other cases about superannuation and the operation of the Human Rights Act. The Human Rights Commission has issued Guidelines on the operation of the Act, discussed below. The observation has been made that, with the advent of managed funds and the decline of 'defined benefit' pension schemes in the marketplace, issues regarding superannuation and discrimination are likely to arise much less often than in the past.

Aside from the aforementioned case of *Coburn*, there have been no court cases directly on the issue of potentially discriminatory practices in insurance or superannuation. There are however some administrative tribunal decisions.

2.3. Decisions by complaints tribunal and ombudsman

Complaints Review Tribunal and Human Rights Review Tribunal

The Complaints Review Tribunal was established by the Human Rights Commission Act 1977, and continued under s 93 of the HRA. Section 93 was later amended, and as at 1 January 2002 the Tribunal was renamed the Human Rights Review Tribunal. One insurance case has reached the CRT/HRRT. This case was alluded to earlier, concerning s 97 (the genuine justification defence).

*Avis Rent a Car Ltd v The Proceedings Commissioner*¹⁰ (1998) concerned age discrimination in the provision of rental car services. Avis Rent a Car Ltd had a policy of refusing to rent motor vehicles to persons under the age of 25. The Tribunal concluded that refusing to rent cars to drivers under the age of 21 was genuinely justified under s 97, but the same was not true for those aged between 21 and 24. The Tribunal found, however, that drivers of the latter age group may be subject to different rental terms and conditions on the basis of the categories in s 48.

⁸ The actual provision refers to spouses and civil union or de facto partners.

⁹ Unless they fell within the very specific exception outlined in that subsection.

¹⁰ Decision No. 16/98, Human Rights Review Tribunal ('Avis').

The Tribunal considered that s 97 should be used in exceptional cases only, and that the onus of proving genuine justification is on the party asserting it. The Tribunal stated that no discriminatory practice ought to receive approval under s 97 if a non-discriminatory alternative exists for achieving substantially the same objective, without reasonable disruption. It also stated that while human rights rules should not be compromised for the sake of commercial expediency, anti-discrimination laws should not make business impossible or genuinely unworkable; however, where a balance must be struck, human rights must be given their full weight. The Tribunal noted:

At its broadest our task is to balance the rights of this group of drivers to hire this [late model and high performance] type of car against the rights of the community generally to be protected against the risk posed to it by this group in these cars. If the risk was simply economic or involved inconveniences of various kinds that were compensatable our task would have been a relatively straight forward one.

It found that the evidence of the road accident statistics justified serious concern about the risk that the young drivers, especially in late model high performing cars, posed to themselves and to other road users. Based on loose statistical grounds, the Tribunal found that “accident rates for drivers of the older subgroup justify a more limited kind of differential treatment”.

It can be noted that whereas s 48 (the specific insurance exemption) does not permit a refusal to insure (as discussed further below), the CRT was able to find under s 97 that there was a genuine justification for refusing to rent cars to persons under 21 years of age. It did not require, as seems to be the assumption under s 48 when insurance is involved (as stated in the Insurance Guidelines), that cars still be rented, albeit at a higher price (or premium).

Complaints Division of the Human Rights Commission

Until an amendment to the Human Rights Act in 2001, the Human Rights Commission operated a ‘Complaints Division’. This was because, as the Act then stood, the Commission had a statutory duty, upon a complaint being made, to determine if the complaint had substance and, if so, to seek a mediated solution (and thereafter, if no mediation was possible, it might proceed to litigation before the CRT). So until 2001 the records of the Complaints Division give details of cases believed to have substance. Only short accounts of these cases are made publicly available.

There are five cases addressing s 48 which were heard by the Complaints Division. There was also an insurance-related matter decided under s 65, the provision prohibiting indirect discrimination. Of the six cases, two pertain to disability discrimination, three to sex discrimination,¹¹ and one to age discrimination.

¹¹ Only two of the three sex discrimination cases are outlined below. The third is *J v S* Complaints Division C231/98, Human Rights Law and Practice 5(4) May 2000, 278-79.

In *J v I Ltd*¹² J complained that she was charged a much higher premium on mortgage repayment insurance because of a congenital heart defect, which had been corrected by an operation when she was a baby. On the basis of the evidence put forward by I Ltd, the Complaints Division was satisfied that the s 48(1)(a) exception applied. The evidence included information about the recommended premium loading of 150-250% from a survey of major world reinsurers from the United Kingdom, Europe and the United States; information from two medical experts with one containing information about the appropriateness of the increased premiums due to later complications associated with the condition; and an investigation by the Association of Life Insurance Medical Directors of America and the Society of Actuaries.

In *C v W*¹³ C complained that he was refused life insurance because he suffered from arteriovenous malformations, an abnormal tangle of arteries and veins in either the brain or the spinal cord. It was found that the s 48 exception did not permit refusal of insurance on the grounds of disability, but only 'different' terms where they can be actuarially or medically justified. However, W had made a subsequent offer of limited coverage for a range of defined causes. The Complaints Division found that if the offer was expressed in terms of an exclusion for death resulting from the complainant's pre-existing condition, this would appear to be lawful.

In *A v M*¹⁴ A complained that upon becoming a partner at a law firm, her income insurance premiums were substantially higher than male partners that were older than her. The insurance company successfully argued that the s 48 exception applied to its differential treatment of male and female clients because the variations were based on relevant statistical data. The company argued that its rates were based on overseas experience, in particular on a table produced as part of the 1985 report of the US Society of Actuaries' Disability Termination Study. The company also suggested that when it first introduced its policy in New Zealand, insufficient local experience meant its premiums were based on corresponding policies in Australia; and these levels were later reduced to better reflect the New Zealand experience. The company also demonstrated that its premiums were based on a number of overseas morbidity experience studies. The Commission referred the matter to the Government Actuary under s 48(2)(b). The Actuary was unable to obtain any satisfactory alternative statistical information relating to income protection insurance other than in the US, and it found that the use of aforementioned US tables was commonplace in Australia and New Zealand.

In *D v E Ltd*¹⁵ D, a homosexual male applying for life insurance, complained that the following question was discriminatory: "Have you engaged in any activity that could increase your exposure to the risk of contracting any of these conditions, ie, sexual

¹² Complaints Division C235/95, Human Rights Law and Practice 1(3), December 1995, 136-37.

¹³ Complaints Division C338/95, Human Rights Law and Practice 2(2) September 1996, 121.

¹⁴ Complaints Division C323/95, Human Rights Law and Practice 2(2) September 1996, 119-20.

¹⁵ Complaints Division C351/94, Human Rights Law and Practice 1(2), September 1995, 121.

activity with a partner of the same sex or intravenous drug abuse?" The Complaints Division found that the question was indirectly discriminatory, and thus breached s 65. The potential justification in s 65 is the defence of 'good reason'.¹⁶ It was found that E Ltd failed to establish 'good reason' for asking such an imprecise question, noting the other groups not identified in the question which are in the high risk category in relation to HIV infection. E Ltd's claim that the behaviours mentioned in the question were merely examples, and therefore the question was not discriminatory, was rejected.

In *R v M*¹⁷ R complained that upon turning 76 years old he was refused continued income protection cover, which he had enjoyed for the previous 30 years. The Complaints Division rejected the argument that an insurer was justified in limiting its services to a 'section of the public' consisting of individuals under 76 years because of a lack of relevant statistical data or industry practice in providing a service to people 76 years and over. Further, the insurer could not rely on the s 48 exception in order to refuse insurance outright, because the exception only applied to different treatment in the actual provision of services. The insurer offered R cover at a much increased premium, and the Commission referred the matter to the Government Actuary under s 48(2)(b). The Actuary found that it was reasonable for R to be offered the policy on the terms proposed.

Insurance and Savings Ombudsman Scheme Complaints

Another avenue for the resolution of insurance and savings services disputes is the complaints process within the Insurance and Savings Ombudsman ('ISO') Scheme. The Scheme was set up by the insurance industry in 1995, to resolve disputes between consumers and insurance and savings companies.¹⁸ Membership of the scheme is voluntary, and decisions are only binding on the participants by virtue of their agreement to participate in the Scheme. Since the publishing of casebooks began in 1999, there have been three cases which have referred to the HRA. Two concluded that discrimination on the basis of age in a policy governed by the Human Rights Commission Act 1977 was not prohibited.¹⁹ The third complaint was brought on the basis that a policy discriminated on the basis of disability, via a clause which excluded cover of particular kinds of disability.²⁰ It was considered more appropriate for the claim to be lodged with the Human Rights Commission.²¹

¹⁶ Section 65 is the prohibition on indirect discrimination. Unlike the prohibitions on direct discrimination, a defence is available – if there is 'good reason' for the indirectly discriminatory practice.

¹⁷ Complaints Division C154/95, Human Rights Law and Practice 2(1) June 1996, 65-66.

¹⁸ Insurance and Savings Ombudsman website, http://www.iombudsman.org.nz/html/the_iso_scheme/, 7 Dec 2009.

¹⁹ Complaint 107211, 2001, http://casestudies.co.nz/pdfs_case-studies/life/107211_2001.pdf, Complaint 108692, 2000, http://casestudies.co.nz/pdfs_case-studies/creditcard/108692_2000.pdf.

²⁰ Complaint 111633, 2006, http://casestudies.co.nz/pdfs_case-studies/firegeneral/111633_2006.pdf.

²¹ *ibid.* Unfortunately, there seems to be no further reporting on this claim.

Other accounts of disputes

Whilst there has been little action taken in the courts, and few cases which have made it to the Tribunal or Complaints Division, the author is aware of some disputes that have been resolved outside of these forums. An example is the case of Mrs X²², who alleged discrimination in relation to a health insurance policy. Mrs X had suffered from breast cancer prior to obtaining her policy. She disclosed this fact, and consequently was offered a policy which excluded cover for all kinds of cancer. Upon developing a different type of cancer, the question became whether the blanket exclusion for all cancer was in breach of the Act. The basis for including the exclusion clause in the policy was that developing another type of cancer may be more likely due to her having had breast cancer. The issue involved was essentially whether reputable medical opinion justified an 'all cancer' exclusion given the pre-existing breast cancer. The insurer settled a threatened claim.

In another case that was settled, the Human Rights Commission issued proceedings against three health insurers for age discrimination, after persons had complained about dramatic increases in health insurance premiums for those turning 65 years old. Before trial the matter was resolved by agreement between all parties. The agreement was that the insurers would cooperate with the Human Rights Commission in developing health insurance guidelines, and that compliance with the guidelines would be regarded as prima facie compliance with the Human Rights Act. These Guidelines were duly produced, and they incorporate the NZ Society of Actuaries Guidance Notes, already discussed at page 10 above. Salient aspects of those Guidelines are that:

- The actuary should ensure that the progression of premium rates from age to age and band to band (where age bands are used) is reasonable; and
- The premium pricing policy should be documented including with statements that set out how claim estimates are obtained from the data, such that any independent actuary is able to assess from the documentation the degree of compliance with the guidelines and the Act.

2.4. Non-regulatory measures and guidelines

Human Rights Commission Consultation and Guidelines

The Human Rights Commission produced, among others, two significant sets of guidelines in the mid-late 1990s: one covering insurance, and the other covering superannuation. An updated version of the Insurance Guidelines has since been published, in 2007. The Superannuation Guidelines were prepared according to s 5(1)(d) of the HRA, and the updated Insurance Guidelines were prepared according to the similar provision in force at the later date (s 5(2)(e)). These sections essentially state that one of the functions of the Human Rights Commission is to publish guidelines to avoid acts or practices that may be inconsistent with, or contrary to, the HRA. These

²² Real names are omitted for privacy purposes.

guidelines are not legal documents, nor a final statement of the law, but are of some use in understanding these areas of the law.

In the Superannuation Guidelines, various Commission statements are of interest:²³

- ❑ 'Dependent' is not defined in the Act. A partner of a member could be a 'dependent', but legal marriage alone is not a sufficient indicator.²⁴
- ❑ Trustees should be able to rely on benefits provided by an insurer, as insurers should be able to provide statistical or actuarial data according to their need to comply with s 48. However, this reliance will not protect trustees if insurers are later found to have discriminated.
- ❑ A group insurance scheme cannot rely on an exclusion clause relating to any of the prohibited grounds in the HRA unless reasonable statistical or actuarial data exists to support the reliance. While open-ended exclusion clauses breach the HRA, exclusions which are for limited periods, such as the first few years of membership, do not contravene the Act if the conditions are applied in a non-discriminatory manner.

In the Insurance Guidelines, various Commission statements are of interest:²⁵

- ❑ While the 1977 Act was repealed, it may still apply to policies issued between September 1978 and January 1994. However, if the terms of a policy are varied, then the variation must comply with the newer Act.
- ❑ Insurers cannot refuse to insure people by reason of any of the grounds in the Act. They may only offer different terms and conditions. This reflects the words of the exception. More is said on this below.
- ❑ A decision about the terms on which a policy is offered may be deferred for a reasonable time to quantify and assess the risk.
- ❑ It is permissible to charge an applicant for the cost of any assessment, but the cost should not be at a level that could be seen as a refusal to insure, by effectively acting as a deterrent. The assessment costs of high risk applications could be offset by an initial higher loading, to be reduced when information regarding the actual risk becomes available, or the fee could be waived if the information would be useful in assessing similar applications in the future, such as where it aids the insurer's understanding of a condition.
- ❑ It is not unlawful for proposal forms to include questions that appear to infringe the HRA, but care should be taken to comply with the Act. Insurance

²³ Human Rights Commission, Superannuation Guidelines: Based on the Human Rights Act 1993, 1995, 17-18 'Superannuation Guidelines'.

²⁴ For example, it is not a given that a wife will be considered a dependent of her husband. For a discussion of this issue, see *Coburn*, above footnote 7, 339-40.

²⁵ Human Rights Commission, Guidelines: Insurance and the Human Rights Act 1993, November 2007, 7 ('Insurance Guidelines').

companies should be aware that a particular pattern of questioning may indicate an intention to discriminate.

- ❑ While excluding cover for any existing condition that an applicant has when applying for insurance is a legitimate practice, whether a condition is designated as pre-existing should take into account individual circumstances. Further, the exclusion should be as specific to the condition as possible.
- ❑ In deciding whether differential treatment of an applicant is reasonable, the information or data relied on should be relevant to the individual applicant.
- ❑ Where medical advice or opinion regards situations where the condition may potentially be subject to dispute, such as mental illness or back pain, it may be appropriate to seek the advice of a specialist.
- ❑ The 'other relevant facts' referred to in s 48(1) must be linked to the data, advice or opinion used to justify different treatment in particular circumstances.
- ❑ Insurance companies can request applicants to disclose the results of any genetic tests, but the companies operating in New Zealand have agreed in a moratorium²⁶ that they cannot require applicants to undergo genetic testing.²⁷

An insurer offering a group policy is only responsible for the product it provides, not any discrimination by an employer in the way the policy is offered.²⁸

New Zealand Society of Actuaries (Inc) Guidance Notes

The New Zealand Society of Actuaries (Inc) ('NZSA') is a professional body for actuaries practising in New Zealand, and their purpose is to ensure the work performed by these actuaries meets internationally recognised professional standards.²⁹ The NZSA has produced two sets of guidance notes for actuaries which relate to the HRA. The first covers the exceptions in ss 48 and 70 (Guidance Note No.3), and the other, which is subsidiary and to be read in conjunction with the first, covers health insurance premiums (Guidance Note No.3A). Guidance Note No.3 is a predictable set of notes, reflecting the legislation, which need not be repeated here. Guidance Note No.3A, on the other hand, is of interest.

Guidance Note No.3A, effective from 1 March 2002, sets out the considerations that an actuary should take into account when providing advice regarding health insurance premiums, in accordance with the HRA. It was pointed out that the wide variation in age band premiums throughout the industry raised concerns regarding whether all such diverse practices all complied with the HRA.³⁰ The Guidance Note points out that there

²⁶ ISI Underwriting Guide issued by Investment Savings and Insurance Association, March 2000.

²⁷ Insurance Guidelines.

²⁸ Insurance Guidelines.

²⁹ New Zealand Society of Actuaries (Inc) website, <http://www.actuaries.org.nz/aboutus.html>, 7 Dec 2009.

³⁰ Such variations included premiums related to each year of age, premiums with 5 year age bands, and premiums

is evidence that health costs vary with age, among other factors, and so premiums that vary with age comply with the HRA per s 48. It goes further, however, to point out that the volatility in health insurance claim costs can cause difficulties. Such volatility derives from variation in the incidence and propensity to claim, changes in public health provision, and changes in medical techniques and technology. The Guidance Note sets out some considerations that an actuary must take into account, including that the groupings (i.e. subsets or bands) does not introduce any bias, and that the actuary should ensure that the deviation from the central estimate is reasonable at each age. When finalising premium rates, actuaries are directed to bear in mind the intention of the Act, and that any differentiation based on grounds of unlawful discrimination is justifiable under ss 48 or 51.³¹

with broader age bands.

³¹ Section 51 states that it shall not be a breach of s 44 to provide goods, service or facilities at a reduced fee on the ground of age, disability or employment status.

Genetic defects as a 'disability'

Developments in the understanding of the information genetics can provide has led to concerns regarding the proper use of that information. In particular, there are questions surrounding the extent to which an insurer is entitled to information regarding errors or mutations in a genes, which often lead to recognisable diseases. To complicate matters, some types of mutations may not have any apparent effects, and even where a disease genotype is present, it may not present itself clinically. It has been suggested that once a person has physical symptoms caused by a genetic error or mutation, that error or mutation is very likely to constitute a 'disability', as defined by s 21(1)(h)(v). This subparagraph refers to "[a]ny other loss or abnormality of psychological, physiological, or anatomical structure or function". One commentator suggests that a genetic error or mutation which has not so far resulted in physical symptoms (essentially a predisposition) could also fall within the above definition, in the sense that it is an abnormality of physiological structure or function.³² This suggests that genetic errors or mutations recognised as leading to particular diseases will be subject to the s 48 exception, even in advance of manifestation. If, however, a genetic predisposition is not a 'disability' for the purposes of the Act, then insurers can discriminate on that basis as it is not an excluded ground of discrimination. This point has not been resolved authoritatively.

However, as noted earlier, the Insurance Guidelines suggest that while insurance companies can request applicants to disclose the results of any genetic tests, many insurance companies have voluntarily agreed in a moratorium that they will not require applicants to undergo genetic testing.³³ There is no evidence that any insurance companies have required genetic testing. The agreed policy also states that if a genetic test is in fact available for a person, then insurers will not use information gained from that test in relation to that person's relatives.

³² Reynolds 2009.

³³ See ISI Underwriting Guide issued by Investment Savings and Insurance Association, March 2000.

3. The impact of the measures taken and current industry practice

There is surprisingly very little case law around discrimination in insurance.

Anecdotal evidence and a discussion by the author with an executive member of the Investment Savings and Insurance Association suggest that the industries have essentially learned to live with the Human Rights Act.

It is not clear whether this acceptance derives from acceptance of the law itself, or from satisfaction with the lack of challenge by consumers to traditional practices. John Edwards suggested in his 2008 article that “the absence of case law does not necessarily mean unlawful practices are not being followed by insurance companies”.³⁴ He pointed to the results of a survey for the Like Minds programme, in which some of the New Zealand respondents expressed concerns about the way in which they felt their mental illness had impacted upon their dealings with insurance companies. Allegations included that they were declined certain policies, told they could be reconsidered for particular policies at a later date, or obliged to pay higher premiums because of their illness. The latter two allegations are not necessarily unlawful discrimination under the Act, but the case law suggests that the former is.

Sylvia Bell, Policy Advisor at the Human Rights Commission, suggests that the reason superannuation (that is, pension scheme) complaints and litigation have come to a halt is because many similar schemes are now ‘managed funds’. She also points out that most consumer complaints derive from a lack of transparency on the part of insurance companies. Consumers are generally satisfied with price hikes or refusals to cover when they are given the reasons why.

The author was told that a principal concern of insurers about the impact of anti-discrimination law was this: Section 48 on its face purports to justify (at least where an insurer satisfies the balance of the section about data on which it is reasonable to rely etc) different treatment *but not a refusal to insure*. That is, it assumes, if a certain age or a certain disability is involved, that there will be a premium that can be charged to deal with the risk. The assumption is that it is then for the putative insured to decide whether to pay that premium.

But insurers say that this is not realistic. They say that data is in fact not always available with which to establish workable and justifiable terms and conditions. With severe disabilities such as cancer and heart defects, and with much reduced life expectancies, a medical report and risk assessment may lead to a premium being offered which equates almost to the sum insured (and perhaps even exceeds it, due to administrative costs and margins). Plainly no person would pay for such insurance, and the exercise is tantamount to a refusal. According to an industry representative, insurers feel, and with some justification, that this is what the Act assumes will happen. The example of the 76 year old seeking income replacement insurance was given. The

³⁴ John Edwards 2008.

author was told that actuarial data to calculate a premium was not in fact available in New Zealand (it is a small market and insurers commonly rely on world data or Australian data). In that particular case the matter was referred to the Government Actuary who, it was said, candidly admitted that fixing a premium was pure guess work. However, a premium was calculated on the basis of the Actuary's advice and put to the customer. The 76 year old refused the insurance on the basis of the now much increased premium. The view of insurers is that disallowing refusal is unrealistic, and that because it is not the way the rest of the world is operating it puts New Zealand insurers at a unique disadvantage.

That said, it was admitted that this scenario does not arise all that often.

The author has heard the comment that as most insurers off-load their risks to re-insurers, they need to be able to be sure that the risks they underwrite are re-insurable. Hence the concern has been voiced that New Zealand law about discrimination ought not to require that certain risks be written, when re-insurers (all overseas) would not wish to take that risk. However, examples of this happening were not given and are not available. In fact the concern appears to be taken care of by the way the Act operates. That is, if the risk is assessed accurately and an appropriate premium calculated on the basis of data upon which it is reasonable to rely, or reputable opinion when there is no data, then the outcome ought to be a risk that is re-insurable. In effect, this concern is really another way of putting the previous point: that the Act does assume that a premium should always be calculable, and that there should be no outright refusal of a risk (at least when a ground of discrimination is involved). But when this is done the practical outcome may be the same as a refusal: a very high premium may be justified, which effectively results in the offer of insurance not being taken up.

The general impression that is left by the lack of any significant body of litigation, and from consultation the author has had with the Human Rights Commission and with persons in the industry, is that the impact of anti-discrimination law on insurance has been duly accommodated by insurers in New Zealand. It is now well-recognised by insurers that the use of age, disability and sex require justification in terms of actuarial or statistical data, or reputable medical opinion.