

## ECJ ruling could cost young women drivers an extra £4,300

### Key points:

- On 1 March the EU's European Court of Justice (ECJ) could scrap the insurance industry's opt-out from the EU's 2004 Gender Directive, which will mean insurers can no longer offer different products and prices to men and women based on their gender.
- Open Europe has calculated that if EU judges rule to scrap the opt-out, UK insurance providers will need to raise an extra £936m in capital to cover themselves against the new uncertainties created in the market. The industry has warned that these costs will be passed on to consumers.
- So rather than equalising men and women's existing insurance costs, the ruling could in fact increase total costs for consumers taken as a whole. The ruling will affect several different insurance and pension products, including motor insurance, private medical insurance, life insurance and annuities.
- Taking motor insurance as an example, Open Europe estimates that, on average, a 17 year old female driver will have had to pay an extra £4,300 in insurance premiums by the time she is 26 as a consequence of the ruling. On the other hand, male drivers would save an estimated £3,250 over the same period of time. In a worst case scenario, women drivers' cumulative insurance costs between the ages of 17 and 26 could increase by as much as £9,300.
- The expected ruling is based on an opinion from an ECJ Advocate General that using gender to differentiate between male and female insurance policies is in violation of the Charter of Fundamental Rights, the EU's catalogue of justiciable human rights, which was given full legal effect for the first time under the Lisbon Treaty. The outcome of the ruling is unknown but ECJ judges rule in line with Advocate Generals' opinions in 80% of cases.

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## BACKGROUND

On 30 September 2010 Dr Juliane Kokott, an Advocate-General at the European Court of Justice (ECJ) delivered the opinion that sex discrimination in underwriting insurance policies is incompatible with EU law.<sup>1</sup> Judges at the ECJ are expected to give their ruling on the case on 1 March 2011.

The EU's 2004 Gender Directive<sup>2</sup> and current UK equality legislation<sup>3</sup> allows insurers to charge different rates for insurance premiums based on sex if it can be proven, using actuarial and statistical data, that gender is a determining factor in assessing risk.

However, in reference to Article 6 of the Lisbon Treaty, Dr Kokott notes that EU law "shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms" and the EU's own catalogue of justiciable rights, the Charter of Fundamental Rights, which was given full legal effect for the first time by the Lisbon Treaty. The Charter stipulates that "Equality between women and men must be ensured in all areas, including employment, work and pay."<sup>4</sup>

The references to both the European Convention on Human Rights, which the EU is due to join under the Lisbon Treaty, and the EU's Charter of Fundamental Rights illustrates the complex web of European human rights law that is now in the hands of European judges at both the Council of Europe's European Court of Human Rights in Strasbourg and the EU's European Court of Justice in Luxembourg<sup>5</sup>.

Dr Kokott's opinion is not binding on the ECJ judges deciding the case so the exact outcome of the ruling is unknown but Court officials have noted that, "Traditionally, the Court replicates the opinion of the Advocates General in 80% of the cases."<sup>6</sup>

### ***Not the first time the ECJ has increased the cost of EU laws***

This would not be the first time judges at the ECJ have changed the interpretation of an EU law, resulting in extra economic costs to the UK economy. In fact, there are plenty of examples of when this has taken place. For example, the ECJ has ruled to extend the scope of the EU's controversial Working Time Directive (WTD) on eight separate occasions, increasing its cost every time. The WTD now costs the UK economy between £3.4bn and £3.9bn a year.<sup>7</sup>

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<sup>1</sup> ECJ press release, 30 September 2010; <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-09/cp100093en.pdf>; the full opinion is available here: <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-236/09>

<sup>2</sup> Article 5(2) Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:EN:PDF>

<sup>3</sup> Schedule 1, The Sex Discrimination (Amendment of Legislation) Regulations 2008; <http://www.legislation.gov.uk/ukxi/2008/963/schedule/1/made>

<sup>4</sup> Article 23, Charter of Fundamental Rights; [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>5</sup> For a discussion see *Open Europe*, 'Prisoners' right to vote: the blurred line between the European Convention on Human Rights and the European Union', 2011; <http://www.openeurope.org.uk/research/EUECHRprisoners.pdf>

<sup>6</sup> Quoted in *Euractiv*, 'Parliament to press ahead with EU patent', 14 February 2011; <http://www.euractiv.com/en/innovation/parliament-press-ahead-eu-patent-news-502130>

<sup>7</sup> See *Open Europe*, 'New EU working time rules cost NHS 5,400 doctors', 31 July 2009; <http://www.openeurope.org.uk/media-centre/pressrelease.aspx?pressreleaseid=119>

These rulings have placed an extra burden on the NHS in particular. In combination with the Directive's 48 hour-a-week limit on doctors' working hours, two infamous ECJ rulings, *SiMAP* and *Jaeger*, are estimated to have cost the NHS between £420 million and £862 million a year – equivalent to losing around 5,400 doctors.

In the October 2000 *SiMAP* case, the ECJ ruled that time spent resident on call in a hospital or other place of work should count as working time, even if the worker is asleep for some of that on-call time. The then Health Minister John Hutton reacted with alarm to the ruling, saying, "it was certainly not within the intentions of the United Kingdom Government when we signed up for the Directive that time spent asleep would somehow magically count as time spent at work".

The April 2003 *Jaeger* ruling also placed extra burdens on the NHS, requiring rest periods entailed in the WTD to be taken immediately rather than within a "reasonable time" if the minimum rest period has been interrupted by an emergency.

## **COSTS**

### ***Insurance industry's capital requirements***

In 2004, when the EU's Gender Directive (2004/113/EC) was originally being negotiated, the Financial Services Authority estimated that insurance companies would require extra capital to cover potential losses caused by the uncertainty of new market conditions if a gender ban was imposed. The extra capital potentially required was estimated at around 1-2% of new single premiums for annuities, 3-4% of annual premiums for motor insurance, together with a higher percentage (30-40%) of new regular premiums for life insurance.<sup>8</sup>

The latest figures obtained from the Association of British Insurers put new premiums for annuities at £11.1bn (2010); for motor insurance at £9.8bn (2009); and for life insurance at £805m (2010). In total, applying these percentages to current levels of premium income, this gives the figure of £936m.

Michaela Koller, head of the European Insurance Federation, has warned that, "The core principle of risk assessment is that people in comparable situations are treated equally and those in different situations are treated differently. If this risk-based, factual principle is not maintained, premiums will increase, coverage will decrease and some products will be withdrawn from the market entirely."<sup>9</sup>

The UK insurance industry will be disproportionately affected as the UK is currently the largest market in Europe and the third largest in the world.<sup>10</sup>

### ***Impact on motor insurance and road safety***

The Association of British Insurers (ABI) estimates that, on average, female drivers under 26 are likely to see increased costs of around 25% while men under the age of 26 will see reductions of around 10%, on average.<sup>11</sup> Applying these

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<sup>8</sup> See Supplementary Memorandum from the Financial Services Authority to the House of Lords EU Committee, 8 June 2004;

<http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/165/165we16.htm>

<sup>9</sup> CEA press release, 30 September 2010;

<http://www.cea.eu/uploads/Articles/documents/100930%20ECJ%20opinion.pdf>

<sup>10</sup> 2009 figures. See *CityUK*, 'Insurance 2010', Table 3, p3;

<http://www.thecityuk.com/media/194078/insurance%202010.pdf>

<sup>11</sup> ABI, 'The use of gender in insurance pricing', 2010, p58; <http://www.abi.org.uk/Publications/51810.pdf>

increases/reductions to the average annual male and female insurance premiums for ages 17 through to 26, Open Europe has reached the cumulative costs of the expected ruling.<sup>12</sup>

Looking beyond the average impact, we also examined the worst case scenario which could see female premiums increase by 50% and male premiums not decrease at all. As with the average impact we assumed premiums would decrease at a rate of around 1% per year throughout our age range (based on ABI estimations).<sup>13</sup>

The ruling could also have significant implications for road safety as less risky young women drivers will be forced to subsidise riskier young male drivers. Incentives may also be created for young men to use the money saved from cheaper prices to insure higher powered cars. The AA has previously warned that, "Prohibiting insurers from applying rates related to risk would result in a statistically safer group of drivers subsidising the less safe group."<sup>14</sup>

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<sup>12</sup> The AA's Insurance Premium Index provides a sample of 2,800 car insurance premiums representing different groups averaged to provide a market 'average quoted premium'. It can be downloaded here: <http://www.theaa.com/services/insuranceandfinance/insuranceindex/>

<sup>13</sup> ABI, 'The use of gender in insurance pricing', 2010, p59; <http://www.abi.org.uk/Publications/51810.pdf>

<sup>14</sup> Evidence to the House of Lords, April 2004; <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/165/165we02.htm>