

December 2012

## UK Pensions

### Should trustees switch to unisex actuarial factors?

The “money” pages of many newspapers have recently been reporting that, from 21 December 2012, women will have to pay more for their car insurance and men will have to pay more for their pensions.

This follows a decision of the European Court of Justice in 2011.

In the *Test-Achats* case, the ECJ said that insurers must stop using factors that differ according to the policyholder’s sex, even if the differences are “based on relevant and accurate actuarial and statistical data”.

The *Test-Achats* case does not directly affect occupational pension schemes. However, trustees may wish to consider whether they too should change.

#### **Equal pensions for men and women: the *Barber* case**

In 1990, the ECJ ruled in the *Barber* case that pensions were to be treated as “pay” and must therefore be equal for men and women. However, in 1993, the ECJ backtracked a bit, in the case of *Neath v Hugh Steeper*.

In the *Neath* case, the ECJ said that “the use of actuarial factors differing according to sex ... does not fall within the scope of Article 119 of the EEC Treaty”, which was the law that requires equal pay for men and women. The *Neath* decision allowed schemes to continue using different actuarial factors for men and women if this could be justified on actuarial grounds.

Following the *Neath* case, some trustees still use sex-based actuarial factors, which reflect actuarial advice that, on average, women live longer than men.

#### **Recent cases cast doubts on *Neath***

*Test-Achats* is the second case to suggest that the ECJ is changing its mind about the use of sex-based actuarial factors.

In 2007, the ECJ ruled in *Lindorfer v EU Council* that the EU’s staff pension scheme had to provide women with the same benefits as men in return for a transfer payment from a previous employer’s scheme.

The ECJ rejected an argument that sex-based factors were needed for sound financial management of the scheme, saying:

*“It is sufficient to observe, in that regard, that the identical level of contributions from the remuneration of male and female officials does not adversely affect such management.”*

#### **In short:**

*From 21 December 2012, insurers must stop using factors that differ according to the policyholder’s sex.*

*The Neath case allowed occupational schemes to use sex-based actuarial factors if this could be justified on actuarial grounds ...*

The *Lindorfer* and *Test-Achats* cases were based on different laws from *Neath*, so the *Neath* decision has not been formally overturned. However, the reasoning in *Lindorfer* and *Test-Achats* casts doubt on the *Neath* decision.

In particular, the ECJ in *Test-Achats* relied on the Charter of Fundamental Rights of the European Union. The ECJ read the Charter as saying that “any discrimination based on sex is prohibited and that equality between men and women must be ensured in all areas”. The Charter was adopted only in 2000, so the ECJ could say that it changed the law since the *Neath* case.

### **Risk management for trustees**

From 21 December 2012, insurers are going to start using unisex actuarial factors to calculate insurance premiums. People who buy insurance will therefore start to pay the same premiums regardless of their sex.

This is looking like the way of the future. We think trustees will reduce their legal “risk” if they follow this trend.

People are going to get used to the idea of equal treatment from insurance companies and may challenge pension schemes that do not do the same. We think that using unisex factors will reduce the risk of challenge.

### **Other considerations for trustees**

Another factor for trustees to think about is that they are generally expected to treat all members of their scheme equally.

We know that some people feel strongly that women should get bigger lump sums from giving up pension, to reflect the fact that they live longer than men (so their pensions are worth more). However, it is worth noting that employers pay higher contributions for women than men because they want to provide equal benefits – not because they want to provide bigger benefits for women.

Nobody now argues against the principle that defined benefit schemes must provide equal pensions for men and women. It seems increasingly out of step with this principle to pay different amounts when members choose to give up all or part of their pension for a lump sum.

### **Unisex cash equivalent transfer values?**

Until now, it might have seemed reasonable, when considering whether to use unisex factors, to make a distinction between:

- “benefits” that are paid direct to members – where the focus is on the amount that the member receives; and
- “transfer values” that are used to buy future benefits – where the aim has been to provide equal benefits for men and women, and the cost of doing so has generally been higher for women than for men.

However, if insurance companies start using unisex premiums for annuities, there will no longer be a good reason for using sex-based factors to calculate transfer values. Different transfer values will simply mean different benefits.

*... but the Lindorfer and Test-Achats cases cast doubt on the Neath decision.*

*Trustees are generally expected to treat all scheme members equally ...*

*... which may be hard to achieve with sex-based transfer values in a unisex annuity world.*

## Converting lump sums (including AVCs) to pension

The *Lindorfer* and *Test-Achats* cases both concerned the conversion of a cash amount (a transfer value or a premium) to an insured benefit (“added years” under a pension scheme or insurance).

The *Neath* case concerned the opposite calculation – conversion of pension to a cash amount. There is a risk that the ECJ might say that the *Neath* decision never applied to the conversion of cash to pension, such as where the trustees provide an internal annuity in respect of AVC funds or a transfer value.

Trustees can again avoid this risk by providing internal annuities only on a unisex basis. Members can exercise an open market option if they want the benefit of an insurance company’s rates instead.

We hear that some insurers may continue offering sex-based annuities to pension trustees. If so, we expect the trustees to choose the best annuity for each member, regardless of how it is calculated. Of course, this may mean choosing unisex annuities for women and sex-based annuities only for men. If this happens, sex-based annuities are unlikely to be available for much longer!

## Conclusions

It is not clear beyond all doubt that trustees “must” now use unisex actuarial factors. However, in light of the *Lindorfer* and *Test-Achats* cases, we suggest that trustees should consider doing so.

We think there are risks for trustees and employers in continuing to use sex-based actuarial factors under occupational pension schemes.

The risks are much less if trustees use unisex factors for all purposes.

Author: Tim Cox

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

© Linklaters LLP. All Rights reserved 2012

Linklaters LLP is a limited liability partnership registered in England and Wales with registered number OC326345. It is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of Linklaters LLP or an employee or consultant of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP together with a list of those non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ or on [www.linklaters.com](http://www.linklaters.com) and such persons are either solicitors, registered foreign lawyers or European lawyers.

Please refer to [www.linklaters.com/regulation](http://www.linklaters.com/regulation) for important information on our regulatory position.

We currently hold your contact details, which we use to send you newsletters such as this and for other marketing and business communications.

We use your contact details for our own internal purposes only. This information is available to our offices worldwide and to those of our associated firms.

If any of your details are incorrect or have recently changed, or if you no longer wish to receive this newsletter or other marketing communications, please let us know by emailing us at [marketing.database@linklaters.com](mailto:marketing.database@linklaters.com).

## Contacts

For further information please contact Tim Cox, Richard Kandler or your usual Linklaters pensions contact.

*“We think there are risks for trustees and employers in continuing to use sex-based actuarial factors under occupational pension schemes.”*

One Silk Street  
London EC2Y 8HQ

Telephone (+44) 20 7456 2000  
Facsimile (+44) 20 7456 2222

[Linklaters.com](http://Linklaters.com)