

**Response to the Questionnaire on Discrimination
by the AIDA German Chapter**

GERMAN NATIONAL REPORT

ON

DISCRIMINATION

1) Give a short description of the evolution of insurance practice in your country, as regards differentiations made in policy conditions and tariff setting on grounds that might be discriminatory in a general sense

Please,

- identify the insurance branches (insurance of persons, motorcar insurance, etc.)
- identify the grounds: gender, age, etc.
- identify the techniques used: exclusions, premium tariffs, deductible, selection, etc.

Motorcar insurance:

Potentially discrimination by age: Drivers who contract their first motorcar insurance (predominantly young drivers) are charged with a higher insurance rate. Every year they earn a no-claims-bonus and the rate will decrease annually if the insurance has not been claimed. Beyond that, the age is also a tariff criteria (e.g. higher rate if anyone of the drivers – the motorcar insurance in Germany is vehicle-bound – is under 25 years old).

Race/Origin: Until 1988 it was common to insure citizens of certain countries only in a special tariff (Ausländertarif – foreigner-tariff). The Federal Administrative Court ruled this as inadmissible. Since 1994: Section 81e VAG (Act on the Supervision of Insurance Undertakings) *Premium rate terms and premium calculations made based on the nationality or ethnicity of the policyholders or insured persons are also deemed to be irregularities within the meaning of section 81 (2).*

Before Test Achats: Gender: Higher rates especially for (young) male drivers.

Accident insurance:

Age: Higher rates for old insurance holders or automatic expiration of the contract without the possibility to renew the contract.

Before Test Achats: Gender: Classification of the male insurance holders in risk category A or B depending on their job (E.g. A=office employee; B=workman). Female insurance holders have been classified in category A irrespective of their job.

Life/Health Insurance:

Age: Higher rates for old insurance holders.

Before Test Achats: Gender: Different rates depending on gender. (E.g.: Higher rates for male insurance holders in life insurance. Higher rates for female insurance holders in health insurance, long term care insurance, annuity insurance, disability insurance.) But it was not allowed that costs arising from pregnancy and maternity lead to the payment of different premiums and benefit.

2) Legislation specifically focusing on discrimination

- fundamental or constitutional rights
 - **Art. 3 Grundgesetz (article 3 constitution) - [Equality before the law]**
 - (1) All persons shall be equal before the law.*
 - (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.*
 - (3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.*

- other legislation :
 - general
 - **Allgemeines Gleichbehandlungsgesetz (AGG) (General Equal Treatment Act)**
 - Section 1 - Purpose*
 - The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.*
 - **Behindertengleichstellungsgesetz (BGG) (Equal Opportunities for Disabled People Act)**
 - **Federal state Acts of disability equality and gender equality**
 - specific to insurance (or financial services or other services)
 - **Section 19 AGG (General Equal Treatment Act) - Prohibition of Discrimination Under Civil Law**
 - (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.*
 - [...]*

(Inapplicable since December 21, 2012 – Test Achats; should be repealed in the near future by amendment.)

(1) [...]

(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.

○ **Section 11 VAG (Act on the Supervision of Insurance Undertakings) – Premium calculation in life insurance; equal treatment**

(1) Premiums in life insurance must be calculated on the basis of reasonable actuarial assumptions and sufficient to enable the insurance undertaking to meet all its liabilities, and in particular, to establish adequate premium reserves (Deckungsrückstellungen) for the individual contracts. For this purpose, the financial situation of an insurance undertaking may be taken into account, without the inclusion of any regular and permanent funding from resources other than premiums.

(2) All factors being equal, the same principles must be used to calculate premiums and benefits.

○ **Section 11d VAG (Act on the Supervision of Insurance Undertakings) – Accident insurance with premium refund**

If accident insurance undertakings write contracts with premium refund, sections 11 to 11c above apply accordingly.

○ **Section 12 VAG (Act on the Supervision of Insurance Undertakings) – Substitutive health insurance**

(1) To the extent that health insurance is suitable as a full or partial substitute to statutory health insurance (substitutive health insurance) it shall be operated in Germany only in accordance with the technical principles of life insurance, i.e.

1. premiums shall be calculated in accordance with actuarial principles on the basis of probability tables and other pertinent statistical data, specifically taking into account any relevant assumptions with respect to the risk of invalidity and illness, to mortality, to the dependence of the risk on age and

gender and to the probability of cancellation, also taking into account safety loadings and other loadings and a technical interest rate,

[...]

(4) Section 11 (2) applies accordingly for substitutive health insurance. The premiums for new business may not be lower than the premiums for the insured of the same age under the existing portfolio of insurance contracts, not including their ageing provision.

[...]

○ **Section 21 VAG (Act on the Supervision of Insurance Undertakings) - Equal treatment**

(Only in the context of Mutual insurance companies = insurance companies owned entirely by its policyholders)

(1) All factors being equal, member contributions and benefits must be calculated based on the same principles.

(2) The mutual society may not offer insurance coverage against fixed premiums without the policyholder becoming a member, unless this is expressly permitted by the memorandum and articles of association.

○ **Section 81e VAG (Act on the Supervision of Insurance Undertakings) – Discrimination**

Premium rate terms and premium calculations made based on the nationality or ethnicity of the policyholders or insured persons are also deemed to be irregularities within the meaning of section 81 (2).

- specific regulations (from official or non-official entities, bodies or institutions: insurance supervision authorities, specific authorities with competence for discrimination matters)
- insurance industry codes of conduct
- other

3) Implementation of anti-discrimination rules

Are there any institutions or official bodies that regulate, control or decide on discrimination issues in your country? Specifically, are there any courts or institutions having specific jurisdiction as regards complaints of discrimination?

There is no anti-discrimination-agency with extensive executive powers. But there are plenty of complaints offices everyone can go to complain a discrimination. The offices are dedicated very versatile (e.g.: Federal, country-level, county, city, university, employer, workers' council, Commissioner for the Disabled, women's officer, etc.) and can be regulated by public or private law. Usually, the office gives advice for further action against the discrimination, for example how to file a suit.

There are no courts having specific jurisdiction as regards complaints of discrimination.

- Institutions having specific jurisdiction:

○ **Antidiskriminierungsstelle des Bundes – Federal Anti-Discrimination Agency**

The Federal Anti-Discrimination Agency (FADA) is an independent agency to which persons affected by discrimination may turn. It was established in 2006, after the AGG (General Equal Treatment Act) had entered into force. The FADA and its tasks have been stipulated in this Act and comply with the EU directives on equal treatment. The FADA informs about rights in a case of discrimination, shows opportunities of whether and how to enforce the discriminated person rights, helps to seek an amicable settlement of the conflict, tries to give the names and addresses of experts in the neighborhood. (www.antidiskriminierungsstelle.de)

- Institutions/official bodies consumers can complain about discrimination for insurance issues:

○ **Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) - Federal Financial Supervisory Authority**

The Federal Financial Supervisory Authority (BaFin) brings together the supervision of banks and financial services providers, insurance undertakings and securities trading. It is an autonomous public-law institution and is subject to the legal and technical oversight of the Federal Ministry of Finance. It is funded by fees and contributions from the institutions and undertakings under its supervision. Any person has the right to complain at the BaFin about the supervised companies. Complaints are free for consumers. The dismissal of the complaint has no negative consequences or costs to the complainant. The BaFin does not give any legal advice and does not interfere in a running trial. The BaFin checks on every complaint if regulatory action is required or if there is a violation of applicable statutory provisions. If the BaFin – as the competent supervisory authority – discovers issues requiring an intervention, they pursue the matter further with the company. Pursuant to Section 81VAG (Act on the Supervision of Insurance Undertakings) the BaFin has the right to *issue any orders with respect to the undertakings, the members of their management boards and other managers, or persons controlling the undertaking, which are appropriate and necessary to prevent or remedy irregularities. An irregularity is any conduct by an insurance undertaking which conflicts with the supervisory objectives under subsection (1) above.* An irregularity can also be an infringement of the nondiscrimination precept. (www.bafin.de)

○ **Ombudsmann für Versicherungen – Insurance Ombudsman / Ombudsmann Private Kranken- und Pflegeversicherung – Ombudsman health- and long term care insurance**

Any customer has the option of contacting the Ombudsman. Once received, the complaint is passed to the Ombudsman for an assessment of responsibility. Should there be a difference of opinion between the customer and the company on the matter of reliability, the Ombudsman makes his determination to a certain extent "ex officio". This decision is made only on the basis of the documentation and opinions submitted, as under the procedural rules the conducting of personal hearings or interviewing of

witnesses is not permitted. Excluded from this procedure are cases where: A court is already investigating the proceedings; the complainant has involved the state attorney's office; the complaint is out of time and the insurance company has invoked the statute of limitations. The value of the dispute for a judgment which is binding on the insurance company is up to a maximum of EUR 5,000. If the amount in dispute is more than this, the Ombudsman can make recommendations to settle the dispute up to an amount of EUR 50,000, although the recommendation is not binding on either side. (Health and Care Insurance: only non-binding recommendation)
(www.versicherungsombudsmann.de)

4) Please describe very succinctly major cases or decisions that were taken by

- courts

- There is no case law in Germany.
- BGH, Urt. v. 9. 5. 2012 – IV ZR 1/11 – Bundesgerichtshof – Federal Court of Justice, judgment from May 9, 2012
The sex change of an originally male policyholder does not entitle the private health insurance to change the tariff of the policyholder from a male into a female tariff.
- OLG Hamm, Urteil vom 12. 1. 2011 - 20 U 102/10 – Oberlandesgericht Hamm – Higher Regional Court of Hamm, judgment from January 12, 2011
Does health insurance cancel a contract because the policy holder did not mentioned complications during pregnancy, is this a gender-discrimination under section 19 I AGG. The policy holder has an entitlement to damages.
- OLG Karlsruhe: Urteil vom 27.05.2010 - 3 O 82/09 – Oberlandesgericht Karlsruhe – Higher Regional Court of Karlsruhe, judgment from May 27, 2010
Does an insurance company consider in its decision – to accept a private insurance – a disease that is the cause of disability, it may constitute an indirect discrimination on grounds of disability under section 3 II AGG.
- BVerfG, Beschluss v. 7. 7. 2009 - 1 BvR 1164/07 – Bundesverfassungsgericht – Federal Constitutional Court, decision from July 7, 2009
The unequal treatment of marriage and registered partnership in the company pension scheme of public legal staff is discriminating.

- instances with specific jurisdiction

- None

- institutions or bodies within the insurance industry

- None

5) For EU Member States

Does the Court of justice decision of 1 March 2011 in the *Test Achat* case have an impact on legislation and/or practice in your country? Briefly explain the actual problems that are created by the judgment.

Directly affected of Test-Achats are all private insurance policies that include gender differentiating premiums and benefits. After December 21, 2012 it is not permitted to offer tariffs which differentiate the gender. This applies across all classes of insurance but is predominant important for the life and health insurance.

In addition, the judgment also affects directly the premium and benefit law, indirectly the changing of tariffs. The principle of equal treatment in Section 11 II VAG has to be interpreted that it is forbidden to calculate the premium gender based in life insurance. The part of Section 12 I No. 1 VAG which says that the gender is part of premium calculation is inapplicable.

The judgment has also direct impact on the applicability of Section 20 II AGG. Section 20 II AGG is inapplicable and will be repealed in the near future by amendment. So the prohibition to offer bisex rates in private insurance treaties (Section 19 I No. 2 AGG) is in force.

Not that clear is the question how to proceed with contracts agreed before December 21, 2012 which are infringing Test-Achats. If the legislative authority decides to erase Section 20 II AGG, the contracts will be contradictory to Section 19 AGG. So the legislative authority should keep Section 20 II AGG for those “old-contracts” or restrict Section 19 AGG.

Otherwise, lawsuits in this context are expected.

Insurances with the statutory law to change to another tariff (at the same insurance company) cannot forbid changing. So e.g. in the health insurance it is expected that women will change to a less expensive tariff.

(Section 204 VVG Insurance Contract Act – Change of tariff

(1) In the case of an existing insurance agreement, the policyholder may demand that the insurer

1. accept applications to change to other tariffs with equivalent insurance cover, taking into account the rights acquired under the contract and old age reserves; insofar as the benefits payable according to the tariff to which the policyholder wishes to change are higher or more comprehensive than those in the previous tariff, the insurer may demand to be released from obligation to effect payment for the additional benefit or may demand an appropriate risk premium and, thus, a qualifying period; the policyholder may avoid the agreement of a risk premium and a qualifying period by agreeing release from obligation to effect payment in respect of the additional benefits; in case of a change from the basic tariff into another tariff, the insurer may also demand the risk premium which was calculated on conclusion of contract) [...]

In the motorcar insurance (which always can be canceled to December 31) young male drivers will cancel their contract and close a new contract with a unisex-tariff if this is advantageous.