

LEPL Insurance State Supervision Service of Georgia
Recommendation №4
On prevention and elimination of age discrimination by Insurers and/or insurance
intermediaries in the type of Travel Insurance

April 01, 2021

Tbilisi

In accordance with Articles 11 and 14 of the Constitution of Georgia, Article 800, Article 319 (2) and (3), and Articles 408 and 413 of the Civil Code of Georgia, Articles 1, 2 and 10 of the Law of Georgia On the Elimination of All Forms of Discrimination, Article 20 (1) and Article 21(l) of the Law of Georgia On Insurance, and Article 3 (m) of the Statute of the Legal Entity of Public Law - Insurance State Supervision Service of Georgia, approved by the Ordinance No 102 of the Government of Georgia issued on May 2, 2013, taking into account the Recommendation of the Public Defender “On establishing of discrimination by age”, issued on September 2, 2019 and the best international practice and experience in prevention and elimination of discrimination by age regarding consumers in the field of insurance, the Insurance State Supervision Service of **Georgia issues the following recommendation:**

Article 1. Purpose of recommendation

The purpose of the present recommendation is to prevent any age discrimination of consumers by the Insurers and/or insurance intermediaries in the type of travel insurance, to provide elimination of any signs of discrimination, and thus to ensure the basic right of free movement for each consumer, as provided by the Constitution of Georgia.

Article 2. General provisions

1. This recommendation applies to every Insurer, insurance broker and insurance agent participating in the type of travel insurance in Georgia.
2. In order to reach the goal set by this recommendation, the Insurers/insurance intermediaries must take all the measures listed in Article 3 of this document, which will ensure equal availability of insurance services and help avoiding obstacles for consumers in exercising their human rights and full integration in the international community.
3. Considering the fact that the consumer’s age is an important factor in assessing the risk and establishing the price of a travel insurance product, implementation of this recommendation by the Insurer/insurance intermediary, provides the basis for the protection of interests of both consumers and providers of insurance products. In particular, this will improve transparency of information related to risk assessment and establishing of insurance premium, increasing trust to insurance companies and availability of travel insurance products.

Article 3. Recommended activities

1. In order to prevent and eliminate any age discrimination of consumers by the Insurers/insurance intermediaries, the providers of travel insurance products must undertake:
 - a) To specify in their internal policies all the approaches related to consumer's age in the provision of insurance services;
 - b) Not to establish an age limit as a categoric and unequivocal reason of refusing in insurance services;
 - c) To state that different insurance rates, different insurance conditions or refusal in provision of insurance services is based on generally accepted risk assessment principles. In particular, the risk should be assessed based on the relevant, new and accurate data, showing that the given age is associated with increased risk.
 - d) In assessing the risk by age, to take in consideration also individual information on health condition;
 - e) In all individual cases to provide the grounds for refusal in insurance services due to the age, including in writing at the request of the consumer;
 - f) When offering different rates or conditions based on the consumer's age, to provide the detailed information and to formulate the conditions in such a way that would not be misleading for the consumer. At the same time, if requested, the consumer must be provided with written justification.
2. The Insurer is entitled not to enter into a travel insurance agreement with the interested person or to set a higher rate or different conditions, only if all the circumstances listed in paragraph 1 of this article are cumulative. Otherwise, a reference to the applicant's age only as a ground for refusing in insurance agreement may be considered discriminatory.
3. In the event of discrimination, the victim of discriminatory treatment has the right to claim moral and/or material damages in court.
4. Insurers should be encouraged to discuss within their professional association / union and further develop innovative approaches to guide travel Insurers in a way that does not interfere with the Constitutional right of free movement of the consumers / persons interested in purchasing an insurance product.

**Head of LEPL Insurance State Supervision
Service of Georgia**

David Onoprishvili

/Signature/

Explanatory note

For the recommendation of LEPL Insurance State

Supervision Service of Georgia

On prevention and elimination of age discrimination

by Insurers and/or insurance intermediaries in the

type of Travel Insurance

1. General information about the recommendation

a) Reason

One of the main goals and functions of LEPL Insurance State Supervision Service of Georgia is implementation of the state policy in the area of insurance, within the scope of competence granted to it by the Law of Georgia on Insurance. For this purpose, the Service receives applications from insurance consumers, corresponds with them and monitors the compliance of the Insurers with supervisory norms. Based on the applications of the consumers, the Service identifies the current problems between the Insurers and the Insureds/consumers and in case of violation of the law takes appropriate measures.

As part of implementation of these powers, the number of consumer referrals has significantly increased. The Service has considered consumers' complaints about age discrimination by the Insurers. It should be noted that the claims in all cases concerned the refusal of Insurers to sell a travel insurance product based on the age of the consumer, as well as, imposition of conditions that were significantly different from the other consumers. The claimants point to stereotypical attitude of Insurers towards the elderly people, which prevents their integration in the society. It is the problems identified on the basis of such claims and statements that prompted the Service to issue this recommendation to the Georgian Insurers operating in the travel insurance industry.

b) Purpose

The purpose of the present recommendation is to prevent any age discrimination of consumers by the Insurers and/or insurance intermediaries operating in the field of travel insurance, to preclude any cases of discrimination, and thus to ensure the right of free movement for each consumer, as provided by the Constitution of Georgia.

The most important circumstance for the Service is the fact that in case of discriminatory treatment, apart of putting elderly people in a morally unfavorable position, they are unlawfully deprived of a *basic human right guaranteed to them by the Constitution, such as freedom of movement*. This happens because travel insurance policy is a mandatory document for crossing the border, and if an Insurer refuses to issue such policy, the customer has no alternative way of travelling abroad, which limits his/her possibility of traveling abroad.

It is noteworthy that according to the recommendation of the Public Defender of Georgia dated September 2, 2019, restriction of access to travel insurance is considered to be discriminatory against the elderly people.

In view of the urgency of the matter, the Service has studied in detail both international and national anti-discrimination legislation, as well as case law regarding age discrimination in insurance industry. Based on the statements submitted to the Service and the facts described in the Public Defender's recommendation, in view of the current legislation / case law, the Service considers that there is a number of challenges in terms of age discrimination in the Georgian insurance market. The main purpose of this recommendation is to address these challenges by means of prevention and preclusion of age discrimination in the field of travel insurance.

c) **Main essence of recommendation**

This recommendation provides for a number of measures that must be taken by Insurers and insurance intermediaries to secure equal availability of insurance services and help avoiding the obstacles for insurance applicants in exercising their human rights and full integration in the international community.

2. Legal rationale of the recommendation

All people are equal to the law. The anti-discrimination standard enshrined in Article 11 of the Constitution of Georgia ensures equality of all people, regardless their race, skin color, gender, origin, ethnicity, language, religion, political or other views, social affiliation, property or rank, place of residence or other features.

According to the Constitutional Court of Georgia, the right to equality is “a universal constitutional norm of equality - the principle of ensuring equal conditions for the protection of human rights [...] This principle is both the basis and the goal of a democratic and legal state”.¹

Like the right to equality, Article 14 of the Georgian Constitution enshrines the freedom of movement as a fundamental human right. According to the first part of this Article, everyone legally present in Georgia has the right of free movement within the country, free choice of residence and *free departure from Georgia*. Freedom of movement is also secured by international human rights acts.²

When entering the territory of the EU / Schengen, both in the conditions of visa-free travel and visa regime, any citizen goes through border control, as a result of which a final decision is made on his/her entry into the respective country. The representative of the Border Service has the right to request travel insurance documents.³

According to Article 1 of the Law of Georgia “, the purpose of this law is to eliminate all forms of discrimination and to ensure equal rights established by the legislation of Georgia for any natural or legal person.

¹ Decision N 1/1/493 II, 1 of the Constitutional Court of Georgia of December 27, 2010

² Universal Declaration of Human Rights, Article 13; International Covenant on Civil and Political Rights, Article 12

³ Available on the web site: <http://mfa.gov.ge/visa-free-guide.aspx>

According to Article 2, Paragraph 2 of this law, direct discrimination is the kind of treatment or creating the conditions when one person is treated less favorably than another person in a comparable situation on any grounds specified in Article 1 of this Law or when persons in inherently unequal conditions are treated equally in the enjoyment of the rights provided for by the legislation of Georgia, unless such treatment or creating such conditions serves the statutory purpose of maintaining public order and morals, has an objective and reasonable justification, and is necessary in a democratic society, and the means of achieving that purpose are appropriate.

According to the Article 2 of this law, unequal treatment or creating conditions for unequal treatment shall not be considered discrimination, if it serves the legitimate purpose, has a sound and reasonable justification, and the means of achieving that purpose are proportionate.

The same principle follows from the case law of the European Court of Human Rights.⁴

In order to identify unequal treatment, it is important to have a comparable subject in relation to which the person concerned was found to be in an unfavorable position. In the field of travel insurance, when talking about age discrimination, the comparable subject will be any younger consumer who benefits and/or can benefit from travel insurance.

According to Article 800 of the Civil Code of Georgia, a person who publicly offers to conclude an insurance contract shall enter into the contract unless there is a valid reason for refusal. This means that if an insurance company offers to conclude an insurance contract to an indefinite number of people through advertisements and other means, it has no right to unreasonably refuse to enter into a contract and is obliged to enter in an insurance contract with the client.

The insurer can be released from this obligation only if there is reliable information about the Insured or the subject-matter insured, which gives grounds for refusal to enter in an insurance contract.⁵

⁴ ECtHR, *Eweida and others v. United Kingdom*, nos: 48420/10, 59842/10, 51671/10, 36516/10, 15/01/2013, §§ 87-88; *Burden v. United Kingdom*, no: 13378/05, 29/04/2008, § 60

⁵ Comments to the Civil Code of Georgia, Article 800, p 114

According to the first part of Article 319 of the Civil Code of Georgia, the subjects of private law are free to enter in agreements based on the law and determine the content of these agreements, while according to part 2 of the same article, " If one of the parties to a contract holds a dominant position in the market, then it shall be bound by the obligation to enter into a contract in this field of activity."

The first part of the article under consideration enshrines the principle of autonomy of will recognized in the civil law, and the freedom of contract, the recognition of which ensures the right of a person to achieve the set goal in accordance with his/her own interests. However, "this freedom cannot be absolute. Unrestricted freedom can lead to arbitrariness of the parties. A party with more economic resources may force the future counterparty to play only a passive role in determining the content of the contract and agree to the proposed terms, thereby gaining a contractual advantage, which will put the other party in an unfavorable position. This will bring us to contractual injustice."⁶ Based on the above, it is necessary to restrict the freedom of contract, which aims at minimal protection of public interests and the interests of the weak party, and to achieve contractual justice.⁷

This is the purpose of Article 319, Part 2 of the Civil Code of Georgia, which implies the obligation to enter into a contract even in the absence of will and thus the coercion of the counterparty, and associates such coercion to the dominant position of the person in the market and his/her entrepreneurial activity.

On the one hand, by imposing such a norm, the legislator's goal is to protect the consumers and thus perform the social function of justice, while on the other hand, such a restriction is conditioned by the provision of the Law of Georgia "On the Elimination of All Forms of Discrimination".⁸

It should be noted, however, that this recommendation does not apply to a single Insurer with a monopoly position in the market, but rather to all insurance companies operating in the Georgian insurance market who create "dominant position" by refusing in insurance cover, when the applicant has no alternative choice to get the needed product. Such a situation, by analogy with the norm, directly creates the possibility of extending the provisions of Article 319 of the Civil Code of Georgia to the case in question and obliges Insurers to enter in an agreement.

According to part 3 of the same article, "Persons who acquire or use property and services either for non-commercial purposes or for meeting their vital needs may not be unjustifiably denied entry into a contract, provided that the other party to the contract is acting within the scope of its business".

⁶ Comments to the Civil Code of Georgia, Article 319, p 61

⁷ *ibid*, p 62

⁸ *ibid*, p 61

It should therefore be clearly distinguished that under the above norm, coercion of a contractor applies only in relation to persons who acquire or use property for non-profit purposes or to meet vital needs. At the same time, the contractor has no right to unreasonably refuse to enter into a contract with the consumer, but the refusal must be justified and well grounded.⁹

The prevalence of this provision in the field of travel insurance depends on the content and purpose of the insurance contract. As already mentioned, freedom of movement is a basic human right recognized by the Constitution of Georgia and international acts. In turn, the travel insurance product is a direct (legal) precondition for exercising of the constitutional right of free movement outside the country.

Refusal to conclude an insurance contract directly restricts a basic human right. However, in this case we are not talking about exercising of a certain right, but rather about objective vital needs, which creates the obligation of the Insurer to provide this service to the consumer.

Regarding the cases of rejection of the insurance contract, an important explanation is made by the Supreme Court of Georgia, according to which, the law gives the Insurers the right to reject the contract of insurance after assessing the insurance risk. The same explanation defines the insurance risk as an event containing signs of the possibility and fortuitousness of its occurrence, and which is the reason for insurance.¹⁰

The reason why *insurance companies* refuse to provide insurance services to elderly people can be partly explained by the fact that they *use segmentation techniques, which does not automatically mean discrimination if the Insurer can properly justify it*.

Segmentation techniques must imply:

- Accurate, up-to-date and relevant data confirming that - age is associated with an increased risk;
- Individual assessment of an applicant so that possible rejection should not be based solely on age;
- Legitimate objective of differential approach, while the measures required to achieve this objective must be appropriate and necessary.¹¹

⁹ Comments to the Civil Code of Georgia, Article 319, p 62

¹⁰ Decision of the Supreme Court of Georgia of November 4, 2016, Case AS-760-728-2016 <http://prg.supremecourt.ge/DetailViewCivil.aspx>

¹¹ Equinet European network of equality bodies, “Fighting Discrimination on the Ground of Age”, p.g. 35-36 Available at web site: http://equineteurope.org/wp-content/uploads/2019/03/Age-Discrimination_updated-electronic.pdf

Different approach on the ground of age group may also be based on rational factors and serve social and economic purposes. However, such approach may be based on generalized conclusions and stereotypes. Age stereotypes may affect both young and elderly people. These assumptions and conclusions may be misleading and not reflect individual diversity of people. Age discrimination has also negative social consequences, such as exclusion of elderly people from the society and inaccessibility of basic services and products.¹²

Interestingly, the decision of the German Federal Financial Supervisory Authority (BAFIN) on age discrimination law and policy did not establish any discrimination or violation of the German General Equal Treatment Act. According to this Act, age differentiation is allowed only when it is based on generally accepted principles of risk assessment. Higher rates above a certain age limit were not considered discriminatory by the German Federal Financial Supervisory Authority, as the study found that the age-dependent rates in motor insurance were based on the principle of adequate risk assessment.¹³

According to the European Commission, age alone should not be considered a sufficiently accurate indicator of health condition. Even when age is statistically associated with a higher morbidity rate, a person's individual circumstances may be so different from the current trend that age becomes an inaccurate indicator for drawing a conclusion about that person.¹⁴

In parallel with the above-mentioned important explanations made at the national or international levels for age segmentation and rejection of contract, it should be noted that the "State Policy Concept on the Ageing Issue in Georgia", which was reflected in the relevant action plan in November 2017, refers to the Madrid International Plan on Aging. The latter in turn defines the obligations entrusted to the state. The obligation to pursue this policy applies to any area of the state. The commitment, inter alia, includes full integration and inclusion of the elderly people in the society and promotion of independent life style.¹⁵

¹² European Commission, age discrimination and european law - Employment & social affairs, Fundamental rights and anti-discrimination; 2005, p.g. 12

¹³https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Meldung/2020/meldung_2020_07_01_tarifierung_kfz-versicherung.html

¹⁴ European Commission, age discrimination and european law - Employment & social affairs, Fundamental rights and anti-discrimination; 2005, 33. 35- 37

¹⁵ Available at web site: http://gov.ge/files/469_63003_384301_490.pdf

The most important explanation in this regard is the explanation of the Public Defender of Georgia, according to which, "the definition of the age limit by the insurance company, beyond which, a person is formally denied travel insurance, is unjustified".¹⁶

Taking into account all the above, in accordance with domestic and international legislation and practice, the Insurance State Supervision Service of Georgia has developed recommendations aimed at the prevention and elimination of discriminatory treatment in the field of travel insurance.

In addition to the recommended measures, this recommendation provides for the possibility for the consumers to claim for damages in court in the event of discriminatory treatment.

According to the Civil Code of Georgia, Article 408, Part 1, a person who is liable to pay damages shall restore the state of affairs that would have existed if the circumstances giving rise to the duty to pay damages had not occurred. According to Article 413 of the Civil Code of Georgia, monetary compensation for non-property damages may be claimed only in the cases precisely prescribed by law, in the form of a reasonable and fair compensation. At the same time, according to Article 10, Part 1 of the Law of Georgia On the Elimination of All Forms of Discrimination, "any person considering himself/herself to be a victim of discrimination, may bring a court action against the person/institution which he/she considers to have committed the discrimination and may claim for moral and/or material damages". Therefore, based on the above-mentioned norms, it is obvious that every victim of discrimination has the right to bring an action in court and claim for both material and moral damages incurred by a groundless refusal to enter in a contract.

3. Reference of the recommendation to international legal standards

The recommendation does not contradict (or, conversely / is in full compliance with) the EU law and obligations arising from Georgia's membership in international organizations.

4. Financial rationale of the Recommendation

The Recommendation will not lead to additional costs from the state budget. It does not affect the revenue part of the state budget. The recommendation does not lead to an increase in the state budget or a new financial commitment by the state.

¹⁶<https://www.ombudsman.ge/geo/191127024245skhva-nishani/sakhalkho-damtsvelma-samogzauro-dazghvevaze-khელმისაქმობის-სეზღუდვა-კანდაზმული-ადამიანების-მიმართ-დისკრიმინაციის-მიჩნევა>

The recommendation does not deteriorate financial status of the persons to whom it applies.

Author and initiator of the recommendation:

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