

Case No: 76496
Document No: 826619
Decision No: 083/17/COL

The logo of the EFTA Surveillance Authority, featuring the text 'EFTA SURVEILLANCE AUTHORITY' in white capital letters on a dark blue rectangular background.

EFTA SURVEILLANCE
AUTHORITY

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Liechtenstein's breach of the principle of equal treatment and non-discrimination between men and women as implemented in Article 5(1) of Directive 2004/113/EC or, alternatively, of the principle of equal treatment and non-discrimination between men and women as a general principle of EEA law, as well as of the obligations set out in Article 3 of the EEA Agreement

1 Introduction

1. This reasoned opinion concerns the implementation in Liechtenstein of the principle of equal treatment and non-discrimination between men and women. The EFTA Surveillance Authority (“the Authority”) is of the opinion that Liechtenstein infringes EEA law by allowing in the field of insurance and related financial services the use of gender in the calculation of premiums and benefits which leads to different premiums and benefits for women and men.

2 Correspondence

2. By letter dated 19 December 2014 (Doc. No 731201), the Authority informed the Liechtenstein Government that it had opened an own initiative case regarding the principle of equal treatment between men and women in the field of insurance and related financial services.

3. By the same letter of 19 December 2014, the Authority requested information from the Liechtenstein Government concerning the applicable Liechtenstein rules in the field.

4. The Liechtenstein Government responded by letter of 25 February 2015 (ref. 9421.2-A18, Doc. No 747291).

5. On 18 December 2015 (Doc. No 785590), the Authority sent Liechtenstein an additional request for information.

6. On 13 January 2016 (Doc. No 786049), the Authority sent Subcommittees I-IV of the Standing Committee of the EFTA States a letter concerning the case.

7. By letter of 21 March 2016 (Doc. No 798348), the Liechtenstein Government replied to the Authority’s letter of 18 December 2015.

8. By letter of 12 April 2016 (Doc. No 800431), Subcommittees I-IV replied to the Authority’s letter. For a more detailed account of the correspondence with Subcommittees I-IV the Authority refers to **Part 2.2** of the letter of formal notice.

9. The case was also discussed at the package meeting in Liechtenstein in 2015¹ and 2016².

10. On 6 July 2016 (Doc. No 757520), the Authority issued a letter of formal notice to Liechtenstein in which it concluded that by maintaining in force a national provision allowing in the field of insurance and related financial services the use of gender in the calculation of premiums and benefits which leads to different premiums and benefits for women and men, such as the provision in Article 4a(5)(c) of Act of 10 March 1999 on the equality of women and men (Equal Treatment Act) (LR 105.1, as last amended)³, Liechtenstein has failed to fulfil its obligation arising from the principle of equal treatment and non-discrimination between men and women as implemented in Article 5(1) of Directive 2004/113/EC⁴. Alternatively, by maintaining in force such a national provision

¹ See the follow-up letter to the package meeting in 2015 (Doc. No 755552).

² See the follow-up letter to the package meeting in 2016 (Doc. No 803234).

³ Gesetz vom 10. März 1999 über die Gleichstellung von Frau und Mann (Gleichstellungsgesetz, GLG) (LR 105.1, idgF).

⁴ Act referred to at point 21c of Annex XVIII to the EEA Agreement (*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*), as adapted to the EEA Agreement by Protocol 1 thereto.

Liechtenstein has failed to fulfil its obligation arising from the principle of equal treatment and non-discrimination between men and women as a general principle of EEA law. Moreover, by enacting such a national provision Liechtenstein has failed to respect the obligations set out in Article 3 EEA.

11. After the extension of the deadline the Liechtenstein Government replied to the letter of formal notice by letter of 8 November 2016 (ref. 9421.2-A18, Doc. No 825691).

3 Relevant national and EEA law

12. For the account of relevant national and EEA law the Authority refers to, correspondingly, **Part 3** and **Part 4** of the letter of formal notice.

4 The Authority's Assessment

Infringement of the principle of equal treatment and non-discrimination between men and women

13. The Authority refers to its assessment in **Part 5.2** of the letter of formal notice to conclude that a national provision such as Article 4a(5)(c) of the Equal Treatment Act allowing in the field of insurance and related financial services the use of gender in the calculation of premiums and benefits which leads to different premiums and benefits for women and men is not compatible with the principle of equal treatment and non-discrimination between men and women as implemented in Article 5(1) of Directive 2004/113/EC.

14. Alternatively, such a provision is not compatible with the principle of equal treatment and non-discrimination between men and women as a general principle of EEA law.

15. In its reply to the letter of formal notice, the Liechtenstein Government agrees with the assessment of the Authority that equal treatment of men and women forms a part of the EEA Agreement. It claims, however, that Article 5(2) of Directive 2004/113/EC is a *lex specialis* and that the Liechtenstein law does not, therefore, infringe the right of equal treatment for men and women.

16. The Liechtenstein Government further claims that the insurance business practically affected by a possible abolition of Article 4a(5)(c) of the Equal Treatment Act in Liechtenstein is confined to the motor vehicle insurance and the life insurance sector. However, with the exception of the ruling in *Test-Achats*⁵, the case law cited by the Authority in the letter of formal notice is solely based on discrimination regarding pension schemes. In contrast to pension schemes policy holders, motor vehicle insurances and life insurances policy holders can invite and compare offers of different insurance companies. This freedom of choice should be taken into account in the assessment of the restriction allowed in Article 4a(5)(c) of the Equal Treatment Act.

17. As regards the Liechtenstein Government's argument described in paragraph 15 above concerning the possibility for EEA EFTA States to rely on the exemption in Article 5(2) of Directive 2004/113/EC, the Authority refers to its assessment in **Parts 5.2.7, 5.3.1 and 5.3.2** of the letter of formal notice.

18. As regards the argument that the freedom of choice in the field of insurance sector should be taken into account when transposing the principles initially established in the

⁵ Judgment in *Test-Achats*, C-236/09, EU:C:2011:100.

field of pension schemes, the Authority notes that this argument is not supported by the judgment in *Test-Achats* itself. Moreover, as explained in **Part 5.2.5** of the letter of formal notice, in the judgment in *X*⁶, subsequent to the judgment in *Test-Achats*, the Court of Justice of the European Union (“the Court of Justice”) referred to its judgment in *Test-Achats* concerning the question of whether the infringement of Directive 79/7/EEC⁷ at issue in the case *X* must be classified as a “sufficiently serious” infringement of EU law.

19. Therefore, in the view of the Authority, the content of the prohibition on the use of statistical and actuarial factors where the basis for distinction is, solely, or at least essentially, gender is the same throughout all the sectors (see **Part 5.2.6** of the letter of formal notice).

20. It can be added that, as exemplified by the situation prevailing in Liechtenstein, when the national legislation allows an exemption from the rule of “*unisex*” premiums and benefits, all the insurance companies in the field operate under the same rules and the consumers cannot choose between the insurance companies applying “*unisex*” premiums and benefits and those operating under the rules allowing the exemption.

The effect on EEA law of the interpretation provided for by the Court of Justice in its rulings, including the rulings on the validity of an EU act or of a provision of an EU act

21. As regards the effect on EEA law of the interpretation provided for by the Court of Justice in its rulings, including the rulings on the validity of an EU act or of a provision of an EU act, the Authority refers to its assessment in **Parts 5.3.1 and 5.3.2** of the letter of formal notice.

22. In its reply to the letter of formal notice, the Liechtenstein Government agrees that the rulings of the Court of Justice shall be taken into due account for the interpretation of the EEA Agreement. It argues, however, that a distinction needs to be made between rulings of the Court of Justice on the interpretation on the one hand and rulings on the invalidity of an EU act on the other. An annulment of an EU act or parts of an EU act by the Court of Justice cannot – without a respective EEA Joint Committee Decision – change the EEA *acquis* directly. The competence for changes of the EEA *acquis* lies solely by the EEA Joint Committee. That means that the rulings on the interpretation of an EU act need to be taken into due account, but rulings on the invalidity of an EU act need to be incorporated into the EEA Agreement by the EEA Joint Committee. The principle of homogeneity does not change the necessity of the incorporation of an EU act (or invalidation of an EU act) into the EEA Agreement by Decision of the EEA Joint Committee.

23. The above arguments are, however, already dealt with by the Authority in **Part 5.3.2** of the letter of formal notice where the Authority assessed whether, in the interpretation and application of the EEA Agreement, a difference should be made between the principles laid down by the rulings of the Court of Justice on the interpretation and by the rulings on the validity of an EU act or of a provision of an EU act within the meaning of Article 267 TFEU and concluded that the answer should be negative.

24. The Liechtenstein Government furthermore claims that the argumentation of the Authority in the letter of formal notice means that the rulings of the Court of Justice have a direct effect and a *Vorwirkung* (pre-emptive effect) on the national legislative procedure

⁶ Judgment in *X*, C-318/13, EU:C:2014:2133.

⁷ Act referred to at point 19 of Annex XVIII to the EEA Agreement (*Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security*), as adapted to the EEA Agreement by Protocol 1 thereto.

of the EEA EFTA States. It, however, opposes to any such effects, because this would contradict the set-up of the EEA Agreement.

25. The Authority does not agree that its reasoning in the letter of formal notice implies such effects of the rulings of the Court of Justice. As explained in **Parts 5.3.1 and 5.3.2** of the letter of formal notice, the effects of the rulings of the Court of Justice in the interpretation and application of the EEA Agreement are established in Article 6 EEA and Article 3(2) SCA and, moreover, stem in general from the homogeneity objective of the EEA Agreement. There are no indications neither in the EEA Agreement nor the SCA that a difference in this respect should be made between the rulings of the Court of Justice concerning interpretation and the rulings concerning validity of an EU act or of a provision of an EU act within the meaning of Article 267 TFEU. Accordingly, due account has to be taken of the principles laid down by the rulings of the Court of Justice, irrespectively of whether they concern invalidity or interpretation in the preliminary ruling procedure under Article 267 TFEU, to arrive at as uniform an interpretation as possible of the provisions of the EEA Agreement and those provisions of EU legislation which are substantially reproduced in the EEA Agreement.

26. As concerns the principle of equal treatment between men and women, the provisions of EU law and EEA law are materially the same. This is even more so in the field of insurance and related financial services covered by Directive 2004/113/EC, including its Article 5, which forms part of EU, as well as of EEA law, despite the fact that Article 5(2) of Directive 2004/113/EC was declared invalid by the Court of Justice in the preliminary ruling procedure under Article 267 TFEU.

27. The EEA law obligation to take account of the principles laid down in the ruling of the Court of Justice therefore also covers the judgment in *Test-Achats*.

Economic difficulties potentially arising in an EEA EFTA State as a justification for non-implementation of the requirements of EEA law

28. In its reply to the letter of formal notice, the Liechtenstein Government again refers to the difficulties which are generated by the dependency of Liechtenstein from the Swiss insurance market. It states that internal examinations are currently being carried out by the Liechtenstein Financial Market Authority to assess the impact of the possible withdrawal of the Swiss insurers to the Liechtenstein insurance market.

29. In addition, the need of a country-specific adaptation in the EEA Joint Committee Decision when incorporating the annulment of Article 5(2) of Directive 2004/113/EC into the EEA Agreement is analysed.

30. The Authority refers to **Part 5.3.3** of the letter of formal notice to stress again that the Liechtenstein arguments concerning economic difficulties potentially arising in that EEA EFTA State due to the implementation of the principle of equal treatment and non-discrimination between men and women as, *inter alia*, implemented in Article 5(1) of Directive 2004/113/EC cannot be considered as relevant.

31. As regards the country-specific adaptation the Authority notes that is an issue for the Contracting Parties to decide on in the EEA Joint Committee and in any event no such adaptation has yet been adopted by the Committee.

The principle of loyal cooperation under Article 3 of the EEA Agreement

32. The Authority refers to its assessment in **Part 5.4** of the letter of formal notice to conclude that by enacting a national provision such as Article 4a(5)(c) of the Equal Treatment Act allowing in the field of insurance and related financial services the use of gender in the calculation of premiums and benefits which leads to different premiums and benefits for women and men Liechtenstein has failed to respect the obligations set out in Article 3 EEA.

33. In its reply to the letter of formal notice, the Liechtenstein Government contests the alleged infringement of Article 3 EEA. Liechtenstein concurs with the Authority that Article 3 EEA contains a duty of loyalty and a duty of cooperation for the EEA EFTA States and that the EEA EFTA States shall ensure the fulfilment of the obligations arising out of the EEA Agreement, abstain from measures which could jeopardize the achievement of the objectives of the EEA Agreement and facilitate cooperation within the framework of the EEA Agreement. It stresses, however, that the possibility of an exemption under Article 5(2) of Directive 2004/113/EC still forms a part of the EEA Agreement. Therefore, Liechtenstein fulfils its obligations arising out of the EEA Agreement and complies with the duty of loyalty and cooperation laid out in Article 3 EEA.

34. The Authority notes, however, that, as explained in the abovementioned **Part 5.4** of the letter of formal notice, Liechtenstein adopted legislation making use of Article 5(2) of Directive 2004/113/EC already after the delivery of the judgment in *Test-Achats* which, at the very least, casted serious doubts as to the compatibility of such national provisions with EEA law. Moreover, Liechtenstein adopted that legislation without conferring with the Authority on whether its adoption was in compliance with EEA law. By doing this Liechtenstein has, therefore, failed to respect the obligations set out in Article 3 EEA.

35. In view of the above, the Authority must conclude that, by maintaining in force a national provision allowing in the field of insurance and related financial services the use of gender in the calculation of premiums and benefits, which leads to different premiums and benefits for women and men, such as the provision in Article 4a(5)(c) of Act of 10 March 1999 on the equality of women and men (Equal Treatment Act) (LR 105.1, as last amended), Liechtenstein has failed to fulfil its obligations arising from the principle of equal treatment and non-discrimination between men and women as implemented in Article 5(1) of Directive 2004/113/EC.

36. Alternatively, by maintaining in force such national provision Liechtenstein has failed to fulfil its obligations arising from the principle of equal treatment and non-discrimination between men and women as a general principle of EEA law.

37. Moreover, by enacting such a national provision Liechtenstein has failed to respect the obligations set out in Article 3 EEA.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Liechtenstein the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

That, by maintaining in force a national provision allowing in the field of insurance and related financial services the use of gender in the calculation of premiums and benefits, which leads to different premiums and benefits for women and men, such as the provision in Article 4a(5)(c) of Act of 10 March 1999 on the equality of women and men (Equal Treatment Act) (LR 105.1, as last amended), Liechtenstein has failed to fulfil its obligations arising from the principle of equal treatment and non-discrimination between men and women as implemented in Article 5(1) of the Act referred to at point 21c of Annex XVIII to the EEA Agreement (*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*), as adapted to the EEA Agreement by Protocol 1 thereto.

Alternatively, by maintaining in force such a national provision Liechtenstein has failed to fulfil its obligations arising from the principle of equal treatment and non-discrimination between men and women as a general principle of EEA law.

Moreover, by enacting such a national provision Liechtenstein has failed to respect the obligations set out in Article 3 of the EEA Agreement.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Liechtenstein to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

Done at Brussels, 26 April 2017

For the EFTA Surveillance Authority

Frank J. Büchel
College Member

Carsten Zatschler
Director

This document has been electronically signed by Frank J. Buechel, Carsten Zatschler on 26/04/2017