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EFTA SURVEILLANCE AUTHORITY

EEA Coordination Unit
Europark
Austrasse 79
FL-9490 Vaduz
Liechtenstein

Dear Dr. Entner-Koch,

Subject: Letter of formal notice to Liechtenstein concerning the principle of equal treatment between men and women in the field of insurance and related financial services

1 Introduction

1. This letter of formal notice concerns the implementation in the field of insurance and related financial services in Liechtenstein of a general principle of EEA law, *i. e.* the principle of equal treatment between men and women.
2. 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

2.1 General correspondence

3. 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.
4. By the same letter of 19 December 2014, the Authority requested information from the Liechtenstein Government concerning the applicable Liechtenstein rules in the field.
5. The Liechtenstein Government responded by letter of 25 February 2015 (ref. 9421.2-A18, Doc. No 747291).
6. On 18 December 2015 (Doc. No 785590), the Authority sent Liechtenstein an additional request for information.

7. 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.

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

9. By letter of 12 April 2016 (Doc. No 800431), Subcommittees I-IV replied to the Authority's letter.

10. The case was also discussed at the package meeting in Liechtenstein in 2015[1] and 2016.[2]

2.2 Correspondence with Subcommittees I-IV

11. On 13 January 2016 (Doc. No 786049), the Authority sent Subcommittees I-IV of the Standing Commitee of the EFTA States a letter enquiring on the possibility of amending point 21c of Annex XVIII to the EEA Agreement in order to bring it in line with the ruling in *Test-Achats,* C-236/09.

12. In the letter, the Authority presented its view that Liechtenstein might be infringing the principle of equal treatment and non-discrimination between men and women as a general principle of EEA law. The Authority informed Subcommittees I-IV that before taking a decision on whether to initiate infringement proceedings against Liechtenstein, the Authority invited Subcommittees I-IV to discuss the issue of possible amendments to point 21c of Annex XVIII to the EEA Agreement at its earliest convenience, in order to ensure compliance with the *Test-Achats* ruling and, accordingly, homogeneity in the EEA by legislative means in accordance with Article 105 and Article 3 of the EEA Agreement and Article 2 of the Surveillance and Court Agreement.

13. The Authority noted that there was precendent for such a decision, as Annexes to the EEA Agreement had previously been amended in order to be aligned with judgments of the CJEU on invalidity of Union acts. The example being most recent, Joint Commitee Decision No 315/2015 of 11 December 2015, which was prompted by the judgment of the CJEU in Case C-362/14.[3]

14. By letter of 12 April 2016 (Doc. No 800431), Subcommittees I-IV replied to the Authority's letter. In that letter, Subcommittees I-IV stated that the issue of amending point 21c of Annex XVIII to the EEA Agreement in order to bring it in line with the *Test-Achats* ruling, had been on the agenda of the meeting of Subcommittees I-IV on 27 January 2016.

15. The Subcommittees I-IV informed the Authority that it was the understanding of all three delegations of the EFTA States that this was an issue involving only Liechtenstein, and that there was already an ongoing dialogue with the Authority. It was therefore suggested that a solution should be sought along this bilateral track.

3 Relevant national law

[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] Case C-362/14 *Schrems* EU:C:2015:650.

16. Act of 10 March 1999 on the equality of women and men (Equal Treatment Act) (LR 105.1, as last amended)[4], *inter alia*, transposes Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services[5] into Liechtenstein national legislation.

17. Article 4a(5)(c) of the Equal Treatment Act[6] provides that 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 considered as discrimination by Liechtenstein where gender is a determining factor in the assessment of risk; the assessment of risk is based on relevant and accurate actuarial and statistical data; the data is publicly available and regularly updated; and the difference in treatment on costs is not associated with pregnancy and maternity.

18. The application of the derogation at issue is not limited in time by the Equal Treatment Act or any other national provision.

4 Relevant EEA law

19. The Preamble to the EEA Agreement notes the importance of the development of the social dimension, including equal treatment of men and women, in the European Economic Area.

20. Article 3 of the EEA Agreement reads as follows:

> *"The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*
>
> *They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.*
>
> *Moreover, they shall facilitate cooperation within the framework of this Agreement."*

21. Article 69(1) EEA establishes the principle that men and women should receive equal pay for equal work.

22. Article 70 EEA provides that the Contracting Parties shall promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII.

23. Annex XVIII to the EEA Agreement lists the following directives in the field of equal treatment for men and women: Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security[7],

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

[5] 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.

[6] Article 4a(5)(c) was inserted in the Equal Treatment Act by the Act of 13 April 2011 No 212 amending the Equal Treatment Act (*Gesetz vom 13. April 2011 über die Abänderung des Gleichstellungsgesetzes* (LR 105.1)) which entered into force on 8 June 2011.

[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.

Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity[8], Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation[9] and Directive 2004/113/EC.

24. Directive 2004/113/EC implements the principle of equal treatment between men and women in access to the supply of goods and services, including insurance and other financial services.

25. As regards the insurance sector, Directive 2004/113/EC imposes in Article 5(1) "unisex" premiums and benefits for contracts concluded after 21 December 2007. However, it provided for an exemption to this principle in Article 5(2), with the possibility for Member States to decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits after this date, where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The second and third sentences of Article 5(2) of Directive 2004/113/EC read:

> "[...] *The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission*".

26. Directive 2004/113/EC was incorporated into the EEA Agreement by Joint Committee Decision No 147/2009 of 4 December 2009, which entered into force on 1 November 2012. The time limit for the EEA EFTA States to transpose the Act expired on the same date.

27. Article 1 of the Joint Committee Decision stated:

> "[...] *The provisions of the Directive shall, for the purposes of this Agreement, be read with the following adaptation:*
>
> *In Articles 5 and 17 the references to "21 December 2007" shall be read as "30 June 2010".*"

28. On 1 March 2011, the Court of Justice of the European Union ("the Court of Justice") gave its judgment in *Test-Achats*, C-236/09[10].

29. The Court of Justice ruled in *Test-Achats* that derogation from the principle of equal treatment between men and women in the field of insurance, provided for by Article 5(2), worked against the achievement of the objective of equal treatment between men and women, which was the purpose of Directive 2004/113/EC, and was incompatible with Articles 21 and 23 of the Charter of Fundamental Rights of the European Union

[8] Act referred to at point 21 of Annex XVIII to the EEA Agreement (*Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC*), as adapted to the EEA Agreement by Protocol 1 thereto.

[9] Act referred to at point 21b of Annex XVIII to the EEA Agreement (*Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*), as adapted to the EEA Agreement by Protocol 1 thereto.

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

("the Charter")[11]. Consequently, the Court declared this provision to be invalid upon the expiry of the appropriate transitional period, *i. e.* from 21 December 2012[12].

30. Therefore, starting from that date no differences in treatment between women and men are permitted in the EU Member States under Directive 2004/113/EC where the use of sex is a determining factor in the assessment of risk.

31. On 13 January 2012, the European Commission issued Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice in Case C-236/09 (*Test-Achats*)[13]. The Guidelines aimed to facilitate compliance with the *Test-Achats* ruling at national level by specifying, *inter alia*, the contracts concerned by the ruling and the gender-related insurance practices which remained possible. The Commission's position in the Guidelines is however without prejudice to any interpretation the Court of Justice may give in the future[14].

5 The Authority's assessment

5.1 The situation in Liechtenstein and other EEA States

32. As mentioned above, Liechtenstein national legislation provides for an exemption from the rule of "unisex" premiums and benefits enshrined in Article 5(1) of Directive 2004/113/EC. The application of the derogation at issue is not limited in time by the Equal Treatment Act or any other national provision. The national legislation making use of this exemption was adopted on 13 April 2011 and entered into force on 8 June 2011, after the adoption of the judgment in *Test-Achats*.

33. In its reply of 25 February 2015 to the request for information and at the package meeting, the Liechtenstein Government stated that no changes to the national legislation to abolish or introduce temporal limitation for the derogation in Article 4a(5)(c) of the Equal Treatment Act, were envisaged.

34. The Liechtenstein Government states that the abolition of the derogation would be detrimental to the insurance market in Liechtenstein. In particular, the Swiss Insurance Association had stated that Swiss insurers would exit the Liechtenstein market; insurance undertakings domiciled in the EEA had no intention or incentive to provide insurance contracts in Liechtenstein due to the size of the market; lack of competition would be detrimental to consumers; and affected insurance classes (motor vehicle insurance and life insurance) might no longer be available to Liechtenstein consumers.

35. The Liechtenstein Government also claims that it is allowed to maintain the derogation in Article 4a(5)(c) of the Equal Treatment Act. This derogation is based on Article 5(2) of Directive 2004/113/EC, as incorporated in Annex XVIII point 21c of the EEA Agreement, and the EEA Agreement does not foresee that Article 5(2) of Directive 2004/113/EC is invalid nor that the provision in Article 5(2) of Directive 2004/113/EC should be limited in time.

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[11] Judgment in *Test-Achats*, C-236/09, cited above, paragraph 32.
[12] Judgment in *Test-Achats*, C-236/09, cited above, paragraphs 33 and 34.
[13] European Commission. Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (*Test-Achats*), (2012/C 11/01), OL C 11, 13.1.2012, p. 1.
[14] See paragraph 4 of the Guidelines.

36. Moreover, for the Report on the implementation of the *Test Achats* ruling into national legislation prepared by the European Insurance and Occupational Pensions Authority (EIOPA)[15] Liechtenstein provided the following information:

> "*There are currently no plans to implement the ruling of the ECJ. Case-law of the ECJ delivered after the signing of the EEA Agreement (thus after 2 May 1992) is not binding on the EEA EFTA States (see Art. 6 of the EEA Agreement).*"

37. As regards the implementation of the *Test-Achats* ruling by other EEA EFTA States it is noted that on 20 June 2014, the Norwegian Parliament adopted amendments to the Act on Insurance Companies, Pension Funds and their Activities etc., which entered into force on 1 January 2015 and abolished the derogation which Norway had availed itself under Article 5(2) of Directive 2004/113/EC.

38. In Iceland Directive 2004/113/EC was fully implemented by adopting, on 30 June 2015 Act No 79/2015 amending Act No 10/2008 on Act Equal Status and Equal Rights of Women and Men (goods, services). The Act entered into force on 1 September 2015. The implementation of Directive 2004/113/EC in the Icelandic legal order comprises also the compliance with the *Test-Achats* ruling.

39. As regards the implementation of the ruling in the EU Member States, according to the Report from the Commission of 5 May 2015[16], 27 Member States have already implemented the ruling into their legislation. The majority of the Member States implemented the ruling within the deadline given by the Court of Justice, *i. e.* 21 December 2012. In a few Member States, the legislation entered into force later.

5.2 The fundamental character of the principle of equal treatment between men and women in the EU and EFTA pillars and the use of statistical and actuarial factors based on distinction between the sexes

40. The principle of equal treatment and non-discrimination between men and women was recognised early by the Court of Justice as a general principle of EU law[17] and is now specifically laid down as a fundamental right in Articles 21(1) and 23(1) of the Charter.

41. Under EU law direct discrimination on grounds of sex is – with the exception of specific incentive measures to benefit members of a disadvantaged group ("*affirmative action*") – only permissible if it can be established with certainty that there are relevant differences between men and women which necessitate such discrimination[18].

42. As regards, in particular, the principle of equal treatment between men and women and the use of statistical and actuarial factors where the basis for distinction is gender,

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[15] European Insurance and Occupational Pensions Authority (EIOPA): Report on the implementation of the *Test Achats* ruling into national legislation of 6 February 2014 (EIOPA-CCPFI-13/091). May be found on https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/reports/8.2._EIOPA-CCPFI-13-091_Test_Achats_rev2.pdf.

[16] Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, 5 May 2015, COM(2015) 190 final.

[17] Judgment in *Defrenne*, 43/75, EU:C:1976:56, paragraph 12 ("*Defrenne II*"); and judgment in *Defrenne*, 149/77, EU:C:1978:130, paragraphs 26 and 27 ("*Defrenne III*").

[18] Opinion in *Test-Achats*, cited above, paragraph 60. See also the definitions of direct discrimination and indirect discrimination in, *inter alia*, Directives 2010/41/EU, 2006/54/EC and 2004/113/EC. As may be seen from these definitions, only indirect discrimination could be objectively justified by a legitimate aim where the means of achieving that aim are appropriate and necessary.

the Authority refers to the following case law of the Court of Justice: the judgments in *Neath*[19], *Coloroll Pension Trustees*[20], *Lindorfer*[21], *Brouwer*[22], *Test-Achats*[23] and *X*[24].

5.2.1. Neath and *Coloroll Pension Trustees*

43. In its judgments in *Neath* and *Coloroll Pension Trustees* the Court of Justice examined the compatibility of the actuarial factor that women live on average longer than men, on which the financing of the pension systems at issue in those cases was based, with the current Article 157 TFEU under which each Member State must ensure that the principle of equal pay for men and women for equal work or work of equal value is applied.

44. The Court did not comment on the compatibility of that factor with the prohibition of discrimination on grounds of sex under EU law and held that the principle of equal pay under the current Article 157 TFEU was not applicable because the pension contributions paid by the employers under defined-benefit schemes which ensured the adequacy of the funds necessary to cover the costs of the pensions promised did not constitute "*pay*" within the meaning of this Article.

45. The contributions paid by the employees into the occupational pensions' schemes however had to be the same for all employees, male and female, because they were an element of their pay[25].

46. In the view of the Authority, these seminal judgments in *Neath* and *Coloroll Pension Trustees* suggest that the prohibition of discrimination on grounds of sex under EU law precludes purely statistical differences between men and women from being taken into consideration with regard to insurance risks[26].

5.2.2. Lindorfer

47. The question at issue in the judgment in *Lindorfer* was the possibility to use the statistical and actuarial factor that women live on average longer than men when transferring to the EU scheme the pension rights of an EU staff member which were acquired under a national scheme. Since actuarial values for women were higher they received fewer years of pensionable service than men in the case of transfer.

48. The Court of Justice noted in its judgment that the current Article 157 TFEU and the various provisions of secondary legislation, as well as Article 1a(1) of the Staff Regulations of officials of the European Communities, are the specific expression of the general principle of equality of the sexes[27].

49. When the EU legislature lays down rules on the transfer to the EU scheme of pension rights acquired by EU officials under a national scheme, it must comply with the principle of equal treatment. It must therefore avoid laying down rules under which officials are treated differently, unless the circumstances of the persons concerned at

[19] Judgment in *Neath*, C-152/91, EU:C:1993:949.
[20] Judgment in *Coloroll Pension Trustees*, C-200/91, EU:C:1994:348.
[21] Judgment in *Lindorfer*, C-227/04 P, EU:C:2007:490.
[22] Judgment in *Brouwer*, C-577/08, EU:C:2010:449.
[23] Cited above.
[24] Judgment in *X*, C-318/13, EU:C:2014:2133.
[25] Judgment in *Neath*, cited above, paragraphs 31 and 32, and judgment in *Coloroll Pension Trustees*, cited above, paragraphs 80 and 81.
[26] See also opinion of Advocate General Kokott in *Test-Achats*, C-236/09, EU:C:2010:564, paragraph 57.
[27] Judgment in *Lindorfer*, cited above, paragraph 50.

the time when they entered the service of the EU justify differences in treatment in view of the particular characteristics of the scheme under which the pension rights were acquired or in view of the fact that they have no such rights[28].

50. The Court of Justice in its judgment allowed the appeal of Ms Lindorfer against the judgment of the Court of First Instance as regards the unequal treatment on ground of sex.

51. According to the Court of Justice, the Court of First Instance did not explain why the situations of men and women officials are not comparable in the context of the determination as to the possibility of discrimination based on sex on the occasion of a transfer of pension rights. Moreover, the Court of First Instance did not explain on what criteria, other than that of sex, it intended to base a distinction between the treatment of men and that of women transferring their pension rights to the EU scheme, despite the fact that there is no such distinction as regards the contributions levied on the salaries of male and female officials[29].

52. Moreover, the Court of Justice observed that the difference in treatment between men and women cannot be justified by the need for sound financial management of the pension scheme. In that regard, the identical level of contributions from the remuneration of male and female officials did not adversely affect such management. In addition, the fact that the same equilibrium can be attained with "unisex" actuarial values is also shown by the fact that, subsequently to the facts of this case the EU Institutions decided to use such values[30].

53. In its judgment in *Lindorfer* the Court of Justice followed two Opinions of Advocates General who both suggested to uphold Ms Lindorfer's plea of illegality on this ground[31]. As was noted by Advocate General Jacobs, discrimination of the kind in issue involved ascribing to individuals average characteristics of a class to which they belong. In relation to the individual, such average characteristics cannot in any way be described as "objective". What is objectionable (and thus prohibited) in such discrimination is the reliance on characteristics extrapolated from the class to the individual, as opposed to the use of characteristics which genuinely distinguish the individual from others and which may justify a difference in treatment. In order to see such discrimination in perspective, it may be helpful to imagine a situation in which (as is perfectly plausible) statistics might show that members of one ethnic group lived on average longer than those of another. To take those differences into account when determining the correlation between contributions and entitlements under the Community pension scheme would be wholly unacceptable, and the use of the criterion of sex rather than ethnic origin cannot be more acceptable[32].

5.2.3. Brouwer

54. The judgment in *Brouwer* concerned a statutory pension scheme and Directive 79/7/EEC. Ms Brouwer disputed the amount of pension granted to her, pointing out that the calculation of that amount was based upon notional and/or flat-rate wages which, during the period in question, were lower for female workers than for their male colleagues.

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[28] Judgment in *Lindorfer*, cited above, paragraph 51 and the case law cited therein.
[29] Judgment in *Lindorfer*, cited above, paragraphs 53 and 54.
[30] Judgment in *Lindorfer*, cited above, paragraphs 56-58.
[31] Opinion of Advocate General Jacobs in *Lindorfer*, C-227/04 P, EU:C:2005:656, paragraph 69; and opinion of Advocate General Sharpston in *Lindorfer*, C-227/04 P, EU:C:2006:748, paragraphs 38 and 39.
[32] Opinion of Advocate General Jacobs in *Lindorfer*, cited above, paragraphs 59 and 60.

55. The Belgian Government argued in its written observations that the notional wages were based on income statistics, according to which women's wages were lower than men's wages. Therefore, it was right to differentiate also for purposes of calculation of pensions.

56. The Court of Justice found such a national measure contrary to Directive 79/7/EEC and the principle of equal treatment. The Court added that the Belgian authorities were not entitled to take the view that the fact that the wages of female workers were lower than those of male workers resulted from the existence of objective factors and not from simple wage discrimination, which then had consequences in discriminatory calculation of pensions in the statutory pension scheme[33].

5.2.4. Test-Achats

57. The question considered by the Court of Justice in *Test-Achats* concerned the validity of Article 5(2) of Directive 2004/113/EC in the light of the principle of equal treatment between men and women.

58. The Court of Justice started its analysis from referring to Article 6(2) EU which provides that the EU is to respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") as they result from the constitutional traditions common to the Member States, as general principles of EU law. Those fundamental rights are incorporated in the Charter, which, with effect from 1 December 2009, has the same legal status as the Treaties[34].

59. The Court further referred to the prohibition of any discrimination based on sex and the principle of equal treatment between men and women enshrined in Articles 21 and 23 of the Charter, to which Recital 4 to Directive 2004/113/EC expressly refers and in the light of which the validity of Article 5(2) of Directive 2004/113/EC must be assessed; Article 157(1) TFEU under which each Member State must ensure that the principle of equal pay for men and women for equal work or work of equal value is applied; Article 19(1) TFEU which confers on the Council competence to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; and Article 8 TFEU under which, in all its activities, the EU is to aim to eliminate inequalities, and to promote equality, between men and women[35].

60. The Council expressed doubts in the case as to whether, in the context of certain branches of private insurance, the respective situations of men and women policyholders might be regarded as comparable, given that, from the point of view of the modus operandi of insurers, in accordance with which risks are placed in categories on the basis of statistics, the levels of insured risk might be different for men and for women.

61. The Court addressed these doubts by referring to its established case law that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified. The comparability of situations in that regard must be assessed in the light of the subject-matter and purpose of the EU measure which makes the distinction in question and Directive 2004/113/EC is based on the premise

[33] Judgment in *Brouwer*, cited above, paragraphs 31 and 38.
[34] Judgment in *Test-Achats*, cited above, paragraph 16.
[35] Judgment in *Test-Achats*, cited above, paragraphs 17-19.

that, for the purposes of applying the principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable[36].

62. However, such a provision, as the provision in Article 5(2) of Directive 2004/113/EC, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of "unisex" premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113/EC, and is incompatible with Articles 21 and 23 of the Charter[37].

63. That provision must therefore be considered to be invalid upon the expiry of an appropriate transitional period[38].

64. As regards the comparability of situations Advocate General Kokott stated in her opinion in *Test-Achats* that there are actually no objective differences between men and women where insurance premiums and benefits are calculated differently solely, or at least essentially, on the basis of statistics in respect of men and women. There is then a sweeping assumption that the different life expectancies of male and female insured persons, the difference in their propensity to take risks when driving and the difference in their inclination to utilise medical services – which merely come to light statistically – are essentially due to their sex. In fact, however, many other factors play an important role in the evaluation of the abovementioned insurance risks. Thus, for instance, the life expectancy of insured persons is strongly influenced by economic and social conditions as well as by the habits of each individual (for example, the kind and extent of the professional activity carried out, the family and social environment, eating habits, consumption of stimulants and/or drugs, leisure activities and sporting activities)[39].

65. Studies which have tried to remove lifestyle, social class and environmental factors from the equation have shown that the difference in average life expectancy between men and women lies between zero and two years with the conclusion that the growing gap in life expectancy witnessed in the general population in some Member States cannot be attributed to biological differences. Sex is at the very best a proxy for other indicators of life expectancy. The inference which can be drawn from such studies is that the practice of insurers to use sex as a determining factor in the evaluation of risk is based on the ease of use rather than real value as a guide to life expectancy. Commentators have noted that insurers are more likely to pool together healthy and unhealthy persons rather than men and women[40].

66. Rules which are directly linked to gender — with the exception of those based on unquestionably biological characteristics such as maternity — are, therefore, in accordance with the system of values adopted by the EU legislature, just as unacceptable as those based on race or colour and are in consequence not to be permitted in the field of social security law, whatever the findings of any statistical

[36] Judgment in *Test-Achats*, cited above, paragraphs 28-30.
[37] Judgment in *Test-Achats*, cited above, paragraph 32.
[38] Judgment in *Test-Achats*, cited above, paragraph 33.
[39] Opinion of Advocate General Kokott in *Test-Achats*, cited above, paragraphs 61 and 62. See also opinion of Advocate General Kokott in *X*, C-318/13, EU:C:2014:333, paragraphs 50 and 51; and Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, COM(2003) 0657 final.
[40] Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, COM(2003) 0657 final.

surveys may be. If the position were otherwise, there would be, on the one hand, a risk that the prohibition on discrimination laid down by the Charter would be undermined under the veil of statistics and, on the other hand, a risk of unsuitable outcomes in individual cases if reliance were mechanically placed on statistics which are ultimately irrelevant to the case in question rather than on material criteria which are relevant for the purposes of projections of life expectancy[41].

5.2.5. X

67. The question at issue in the judgment in *X* concerned a statutory pension scheme and Directive 79/7/EEC and, in particular, the method of calculation of the amount of compensation due in respect of harm resulting from an accident at work, which is paid as a single payment in the form of a lump sum. That calculation had to be carried out on the basis, *inter alia*, of the age of the worker and his remaining average life expectancy. In order to determine the latter factor, the worker's sex was taken into account. By virtue of that method a woman in an analogous situation was entitled to a higher lump-sum compensation than that paid to a man.

68. The Finnish Government argued in the case that women and men were not in comparable situations. The method of calculating the compensation paid as a single payment for the compensation for long-term harm was intended to set the amount thereof at a level equivalent to the overall amount of that compensation were it to be paid as a life-long pension. Given that the life expectancy period of men and women is different, the application of an identical mortality coefficient for both sexes would mean that the compensation paid as a single payment to an injured female worker would no longer correspond to the remaining average life expectancy of its recipient. The differentiation on account of sex was therefore necessary to avoid placing women at a disadvantage compared to men. Since women have a statistically longer life expectancy than men, the lump-sum compensation to remedy the harm suffered for the remainder of the injured person's life must be higher for women than for men. Thus, in the Finnish Government view, the provisions did not discriminate between men and women[42].

69. The Court of Justice rejected the arguments by the Finnish Government by stating that, despite the fact that the lump-sum compensation is provided for in a scheme which also lays down the benefits for harm due to an accident at work which are paid for the remainder of the lifetime of the person injured, the calculation of that compensation cannot be made on the basis of a generalisation as regards the average life expectancy of men and women. Such a generalisation is likely to lead to discriminatory treatment of male insured persons as compared to female insured persons. Among other things, when account is taken of general statistical data, according to sex, there is a lack of certainty that a female insured person always has a greater life expectancy than a male insured person of the same age placed in a comparable situation[43].

70. EU law precludes therefore national legislation on the basis of which the different life expectancies of men and women are applied as an actuarial factor for the calculation of a statutory social benefit payable due to an accident at work, when, by applying

[41] Opinion of Advocate General Kokott in *X*, cited above, paragraphs 53 and 54.
[42] Judgment in *X*, cited above, paragraphs 29 and 30.
[43] Judgment in *X*, cited above, paragraphs 37 and 38.

this factor, the lump-sum compensation paid to a man is less than that which would be paid to a woman of the same age and in a similar situation[44].

71. As to the question of whether the infringement of Directive 79/7/EEC at issue in the case must be classified as a "*sufficiently serious*" infringement of EU law constituting one of the conditions for the Member State concerned to be deemed liable, the Court of Justice referred to its judgment in *Test-Achats* which made clear, already on 1 March 2011, that enabling the Member States to maintain without temporal limitation an exemption from the rule of "unisex" premiums and benefits works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113/EC and that that provision, due to its discriminatory nature, must therefore be considered to be invalid[45].

5.2.6. Conclusions regarding the Court of Justice case-law

72. In the view of the Authority the case law described above confirms that, first, in the current stage of development of EU law, the principle of equal treatment and non-discrimination between men and women as a general principle of EU law comprises also the prohibition on the use of statistical and actuarial factors where the basis for distinction is, solely, or at least essentially, gender. Second, this prohibition is based on the assumption that the situations of men and women in the assessment of risk based on actuarial and statistical data are comparable and the use of statistics regarding, for example, average life expectancy of men and women is merely a generalisation. Third, in the judgment in *Test-Achats* the prohibition on the use of statistical and actuarial factors where the basis for distinction is, solely, or at least essentially, gender was confirmed specifically for the insurance and related financial services and, finally, the content of the prohibition is the same throughout all the sectors, because, as indicated by the judgment in *X*, for the purposes of establishing a "sufficiently serious" infringement of EU law in the field covered by Directive 79/7/EEC account must be taken to the principles established by the judgment in *Test-Achats*.

5.2.7. Application in the EEA

73. It is the Authority's view that the same conclusion should apply for the EEA.

74. First, the provisions on which the Court of Justice founded its interpretation of the principle of equal treatment between men and women in the case law described above find their counterparts under EEA law.

75. In particular, Article 69(1) EEA reproduces in principle Article 157(1) TFEU[46] and Article 70 EEA provides that the Contracting Parties shall promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII, *i. e.* by implementing the EU legislation adopted on Article 19(1) TFEU to combat discrimination based on sex.

76. Moreover, as mentioned above, Annex XVIII lists all the EU directives in the field of combating discrimination based on sex: Directives 79/7/EEC, 2010/41/EU, 2006/54/EC and 2004/113/EC.

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[44] Judgment in *X*, cited above, paragraph 40.
[45] Judgment in *X*, cited above, paragraph 49.
[46] See also Case E-2/07 *EFTA Surveillance Authority* v *Norway* [2007] EFTA Ct. Rep. 280, paragraph 25.

77. Furthermore, the Authority notes that according to established case law of the EFTA Court the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights and the provisions of the ECHR and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights[47].

78. As regards discrimination on the grounds of sex, Article 14 of the ECHR corresponds essentially to that in Article 21 of the Charter.

79. Article 23 of the Charter establishes that equality between women and men must be ensured in all areas, including employment, work and pay. The principle that men and women should receive equal pay for equal work is enshrined in Article 69(1) EEA. Furthermore, the Preamble to the EEA Agreement notes the importance of the development of the social dimension, including equal treatment of men and women, in the European Economic Area.

80. Moreover and more specifically, the EFTA Court has established that, in the light of the homogeneity objective underlying the EEA Agreement, the concept of discrimination on grounds of gender cannot be redefined for the EEA compared with the same concept, as established by the Court of Justice. The EFTA Court has moreover recognised the right to equal treatment, including equal treatment between men and women, as a fundamental right of the individual[48].

81. The lack, within the EEA, of the legal value of the Charter should not be an obstacle to recognising that the principle of equal treatment between men and women lies at the heart of the EEA Agreement and that its content coincides with that in the EU[49].

82. Therefore, the Authority holds the view that the principle of equal treatment and non-discrimination between men and women is also a general principle of EEA law precluding the use of statistical and actuarial factors where the basis for distinction is, solely, or at least essentially, gender.

83. The principle of equal treatment and non-discrimination between men and women finds its specific expression as regards the use of gender in the calculation of premiums and benefits which leads to different premiums and benefits for women and men in the field of insurance and related financial services in Article 5(1) of Directive 2004/113/EC.

84. 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 thus 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.

85. 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.

5.3 The Liechtenstein Government's objections

86. The Liechtenstein Government claims however, first, that it is allowed to maintain the derogation in Article 4a(5)(c) of the Equal Treatment Act. This derogation is based on

[47] Case E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, paragraph 49 and the case law cited therein.
[48] Case E-1/02 *EFTA Surveillance Authority* v *Norway* [2003] EFTA Ct. Rep. 1, paragraph 45.
[49] See Case E-10/14 *Deveci* [2014] EFTA Ct. Rep. 1364, paragraph 64.

Article 5(2) of Directive 2004/113/EC, as incorporated in Annex XVIII point 21c of the EEA Agreement, and the EEA Agreement does not foresee that Article 5(2) of Directive 2004/113/EC is invalid or that the provision in Article 5(2) of Directive 2004/113/EC should be limited in time.

87. Second, in the EIOPA Report, the Liechtenstein Government claimed in general that case law of the Court of Justice delivered after the signing of the EEA Agreement (thus after 2 May 1992) is not binding on the EEA EFTA States (see Article 6 EEA).

88. Finally, the Liechtenstein Government refers to serious economic difficulties potentially arising in this EEA EFTA State in case of the introduction of "unisex" premiums and benefits.

89. The Authority therefore proceeds further to discussing each of the arguments presented by the Liechtenstein Government.

5.3.1. The effect on EEA law of the interpretation provided for by the Court of Justice in its rulings

90. As regards the effect on EEA law of the interpretation provided for by the Court of Justice in its rulings, reference is made, first of all, to Article 6 EEA according to which the provisions of the EEA Agreement, in so far as they are identical in substance to corresponding rules of EU law, shall be interpreted in conformity with the relevant rulings of the Court of Justice given prior to the date of signature of the EEA Agreement.

91. However, that does not mean that only the rulings of the Court of Justice given prior to the date of signature of the EEA Agreement are relevant for the EEA. In particular, the homogeneity objective of the EEA Agreement as expressed, *inter alia*, in Articles 1 EEA, 105 EEA and in the fourth and fifteenth recitals of the Preamble to the EEA Agreement obliges the Contracting Parties 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.

92. Reference is also made to the objective to ensure coherence of EEA law and the reciprocity of the rights of EEA EFTA and EU nationals and economic operators in the EU and EFTA pillars. It must be noted that reciprocity in this context is emphasised both by the EFTA Court[50] and by the Court of Justice[51].

93. Admittedly, there are differences in the scope and purpose of the EEA Agreement as compared to the Treaty on the Functioning of the European Union, and it cannot be ruled out that such differences may, under specific circumstances, lead to differences in the interpretation. But where parallel provisions are to be interpreted without any such specific circumstances being present, homogeneity should prevail[52].

94. Moreover, according to Article 3(2) of the Agreement between the EFTA States on establishment of a Surveillance Authority and a Court of Justice ("SCA") the EFTA Court and the EFTA Surveillance Authority, in the interpretation and application of the EEA Agreement, are to pay due account to the principles laid down by the

[50] See Case E-11/12 *Koch* [2013] EFTA Ct. Rep. 272, paragraph 116; Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraphs 57 and 58; Case E-14/11 *DB Schenker I* [2012] EFTA Ct. Rep. 1178, paragraph 118; Case E-3/12 *Jonsson* [2013] EFTA Ct. Rep. 136, paragraph 60; Case E-12/13 *ESA* v *Iceland* [2014] EFTA Ct. Rep. 58, paragraph 68.

[51] See Opinion of Advocate General Kokott in *UK* v *Council*, C-431/11, EU:C:2013:187, paragraph 42; and judgment in *UK* v *Council*, C-431/11, EU:C:2013:589, paragraph 55.

[52] See, for example, Case E-3/98 *Herbert Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 21.

relevant rulings by the Court of Justice of the EU given after the date of signature of the EEA Agreement.

95. When interpreting EEA law the EFTA Court therefore widely uses the case law of the Court of Justice, irrespective of the fact whether it was adopted before or after the signing of the EEA Agreement.

96. There is moreover no indication in the case law of the EFTA Court that a difference is made between case law of the Court of Justice delivered before and after the signing of the EEA Agreement.

97. Therefore, a general and unconditional statement, as that made by Liechtenstein for the EIOPA Report mentioned in paragraph 26 of this letter, that the case law of the Court of Justice delivered after signing of the EEA Agreement is not binding on the EEA EFTA States, is at least imprecise.

5.3.2. The effect of the interpretation provided for by the Court of Justice in its rulings on the validity of an EU act or of a provision of an EU act

98. The question arises however whether the same principles apply in case of the rulings of the Court of Justice on the validity of an EU act or of a provision of an EU act.

99. The Authority notes in this respect, first, that there are no indications in the EEA Agreement or SCA that only the rulings of the Court of Justice concerning *interpretation* (rather than *validity*) of EU law provisions within the meaning of Article 267 TFEU are relevant for the EEA.

100. Moreover, it should be noted that a judgment of the Court of Justice on the invalidity of an EU act in the preliminary ruling procedure under Article 267 TFEU does not affect the formal existence of the act or the provision which is declared invalid, but only its applicability in the concrete case at hand. However, according to the case law of the Court of Justice, although a judgment given under Article 267 TFEU declaring an EU act or an EU law provision to be void is directly addressed only to the national court which brought the matter before the Court of Justice, it is a sufficient condition for any other national court to regard that act or provision void for the purposes of a judgment which is has to give[53].

101. It is true that, in the EEA, there is no analogous *erga omnes* effect of a judgment by the Court of Justice on the invalidity in the preliminary ruling procedure under Article 267 TFEU. There is however strictly speaking no *erga omnes* effect of a judgment by the Court of Justice on the *interpretation* in the preliminary ruling procedure under Article 267 TFEU either, and those judgments are nevertheless accepted as having very considerable weight.

102. The absence of *erga omnes* effect does not preclude taking the principles laid down by such rulings into due account in the interpretation and application of the EEA Agreement. It does not negate the obligation to take due account of these principles and 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.

103. In other words, in the absence of an *erga omnes* effect of the rulings of the Court of Justice in the EEA, the effect of those rulings in the EEA stems in general from the homogeneity objective of the EEA Agreement rather and the obligations enshrined in

[53] Judgment in *SpA International Chemical Corporation*, 66/80, EU:C:1981:102, paragraph 18.

Article 6 EEA and Article 3(2) SCA to take due account of the principles laid down by these rulings.

104. The Authority does not see why, for the purposes of these obligations, a distinction should be made between, on the one hand, rulings by the Court of Justice on the invalidity in the preliminary ruling procedure under Article 267 TFEU and, on the other hand, rulings on the interpretation in the preliminary ruling procedure under Article 267 TFEU.

105. The homogeneity objective of the EEA Agreement and the obligation enshrined in Article 3(2) SCA obliges to take due account of the principles laid down by the rulings of the Court of Justice and 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.

106. As explained above, 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.

107. The Authority recalls that both the Court of Justice and the EFTA Court have recognised the need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly[54].

108. A national provision such as Article 4a(5)(c) of the Equal Treatment Act is therefore 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, nor with the principle of equal treatment and non-discrimination between men and women as a general principle of EEA law.

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

109. Finally, for the sake of completeness, it should be noted 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 could not be considered as relevant.

110. It is true that, for example, in its judgment in *Campus Oil*[55] the Court of Justice took note of the economic considerations in the context of the elimination of barriers to intra-EU trade and held that, in the light of the seriousness of the consequences that an interruption in supplies of petroleum products may have for a country's existence, the aim of ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations and thus as capable of constituting an objective covered by the concept of public security[56], which is clearly not the case here.

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[54] Judgment in *Keller Holding*, C-471/04, EU:C:2006:143, paragraph 48 and the case law cited therein, judgment in *Commission* v *Portugal*, C-345/05, EU:C:2006:685, paragraph 40, and Case E-1/03 *EFTA Surveillance Authority* v *Iceland* [2003] EFTA Ct. Rep. 143, paragraph 27.

[55] Judgment in *Campus Oil*, 72/83, EU:C:1984:256.

[56] Judgment in *Campus Oil*, cited above, paragraph 35.

111. Directive 2004/113/EC does not provide for a possibility to derogate from the principle of equal treatment between men and women, as enshrined in Article 5(1), based on economic difficulties nor on any reasons of public interest.

112. Moreover, as explained paragraph 32 above, in the field of equal treatment of men and women a measure of direct discrimination is only permissible if it can be established with certainty that there are relevant differences between men and women which necessitate such discrimination. However, this is not the case where sex is a determining factor in the assessment of risk based on actuarial and statistical data.

113. Furthermore, the Court of Justice has established that direct discrimination on grounds of sex cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave[57].

114. In view of the above, it seems 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 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/EC.

115. Alternatively, by maintaining in force such national provision 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.

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

116. The principle of loyalty is enshrined in Article 3 of the EEA Agreement. The principle of loyalty entails both a duty of loyalty and a duty of sincere cooperation for EEA States.[58] According to Article 3 of the EEA Agreement, EEA States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from the EEA Agreement. Moreover, EEA States shall abstain from any measure which could jeopardize the attainment of the objectives of the EEA Agreement and they shall facilitate cooperation within the framework of the EEA Agreement.

117. A corresponding provision exists in the Treaty on the European Union, namely Article 4(3) of the Treaty on the European Union (formerly Article 10 of the EC Treaty and Article 5 of the EEC Treaty). The EFTA Court has acknowledged that Article 3 of the EEA Agreement mirrors the obligations set out in Article 10 of the EC Treaty.[59]

118. The CJEU has recognised the importance of Article 5 of the EEC Treaty. In Case C-96/81[60] the CJEU reached to the conclusion that: "[...] *the member states are obliged,*

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[57] Judgment in *Dekker*, C-177/88, EU:C:1990:383, paragraph 12; judgment in *Bush*, C-320/01, EU:C:2003:114, paragraphs 35 and 44 and the case law cited therein.

[58] See, to that effect, Case E-18/11, *Irish Bank Resolution Corporation Ltd* v *Kaupþing hf* [2012] EFTA Ct. Rep. 592, paragraph 58, and Case E-3/04 *Tsomakas Athanasios and Others with Odfjell ASA as an accessory intervener v The Norwegian State* [2004] EFTA Ct. Rep. 95, paragraph 30.

[59] See, to that effect, Case E-1/04 *Fokus Bank ASA* v *The Norwegian State, represented by Skattedirektoratet*, [2004] EFTA Ct. Rep. 11, paragraph 41.

[60] See, to that effect, Case C-96/81 *Commission* v *Netherlands* EU:C:1982:192.

by virtue of article 5 of the EEC treaty, to facilitate the achievement of the Commission's tasks which, under article 155 of the EEC treaty, consist in particular of ensuring that the provisions of the treaty and the measures adopted by the institutions pursuant thereto are applied."[61]

119. The EFTA Court has, on many occasions, referred to Article 3 of the EEA Agreement while dealing with the obligation for EFTA States regarding the incorporation of EEA law. In ESA v. Norway[62], the Court noted that:

> *"(...) Article 3 of the EEA Agreement imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Agreement (...)."*

120. Other examples exist in the case law of the EFTA Court where the Court has used this provision to underpin obligations for EEA States. In *Þór Kolbeinsson*[63] the EFTA Court used Article 3 EEA in order to conclude that, even if a Directive does not provide any penalty for an infringement, it is up to the EEA States to guarantee the application and the effectiveness of EEA law. Article 3 of the EEA Agreement has also been used in order to ensure that despite a lack of rules governing administrative proceedings in the EEA legal orders, EEA States have to act in order to ensure the concrete application of their obligation.[64]

121. The jurisprudence of the EFTA Court demonstrates that the obligation deriving from Article 3 EEA are far-reaching. It has been summarised in the Case E-7/97[65]:

> *"(...) Article 3 of the EEA Agreement imposes upon the Contracting Parties two general obligations. There is a positive obligation for the Contracting Parties to "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. There is, correspondingly, a negative obligation to "abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. These fundamental legal obligations require loyal co-operation and assistance."*

122. The facts of this case demonstrate that Liechtenstein acted contrary to the principle enshrined in Article 3 of the EEA Agreement. Indeed, by adopting a national measure in contradiction with the judgment of the CJEU in *Test-Achats*, Liechtenstein has not taken all the appropriate measures to ensure the correct application of EEA law.

123. The judgment of the CJEU in the *Test-Aschats* case was handed down on 1 March 2011. The CJEU concluded that Article 5(2) of Directive 2004/113/EC was not compatible with the principle of equal treatment of men and women under EU law. Following this judgment, it became clear that there were at least serious doubts whether Article 5(2) of Directive 2004/113/EC was compatible with EEA law.

124. Despite the *Test-Achats* judgment, shortly thereafter Liechtenstein adopted legislation making use of Article 5(2) of Directive 2004/113/EC.[66] Article 4a(5)(c) was inserted

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[61] Case C-96/81 *Commission* v *Netherlands*, cited above, parapgrah 7.
[62] Case E-2/99 *ESA* v *Norway* [2001] EFTA Ct. Rep. 1, paragraph 15; See also Case E-10/97 *EFTA Surveillance Authority* v *The Kingdom of Norway* [1998] EFTA Court Report 134, at paragraph 15
[63] See, to that effect, Case E-2/10 *Þór Kolbeinsson* v *the Icelandic State* [2009-2010] EFTA Ct. Rep. 234, paragraph 46.
[64] See, to that effect, Case E-1/04 *Fokus Bank ASA* v *The Norwegian State, represented by Skattedirektoratet*, cited above, paragraph 41.
[65] Case E-7/97 *The EFTA Surveillance Authority* v *Norway* [1998] EFTA Ct. Rep. 62, paragraph 16.

in the Equal Treatment Act by the Act of 13 April 2011 No 212 amending the Equal Treatment Act (*Gesetz vom 13. April 2011 über die Abänderung des Gleichstellungsgesetzes* (LR 105.1)) ("the Amendments") which entered into force on 8 June 2011. The second reading of the Amendments took place on 13 April 2011.

125. Therefore, the adoption of the legislation took place nearly a month and a half after the ruling in *Test-Achats* was handed down. In addition, it should be noted that the Amendments entered into effect on 8 June 2011, three months after the ruling in *Test-Aschats*.

126. It follows from the application of Article 3 of the EEA Agreement that EEA States must abstain from adopting measures which are incompatible with the objectives of the EEA Agreement. They must also cooperate with the Authority in order to achieve a result which is compatible with EEA law.

127. The duty of loyal cooperation is a cornerstone principle in the field of transposition of Directives. In the *Inter-Environnement Wallonie* case, the CJEU stated that Member States shall adopt all appropriate measures for the transposition of a Directive:

> *"It should be recalled at the outset that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation* [...] *by the directive itself* [...]. *That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States* [...]*."*[67]

128. In sharp contrast to that obligation, Liechtenstein adopted legislation making use of Article 5(2) of Directive 2004/113/EC without conferring with the Authority on whether this adoption was in compliance with EEA law. In case of difficulties[68] or doubts regarding their legal obligations, EEA States have to contact the Authority in order to resolve any potential problems which could lead to future infringements. Such a proactive approach is an emanation of the principle of loyal cooperation.

129. Liechtenstein thus adopted the Amendments after the ruling in *Test-Achats*. Furthermore, Liechtenstein did so without conferring with the Authority as to the possibility of still relying on Article 5(2) of Directive 2004/113/EC under EEA law. Liechtenstein therefore failed both its duty of loyalty and its duty of sincere cooperation. In doing so, the Authority considers that Liechtenstein has infringed the principle of loyalty laid down in Article 3 of the EEA Agreement.

6 Conclusion

Accordingly, as its information presently stands, 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 obligation 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

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[66] Article 4a(5)(c) was inserted in the Equal Treatment Act by the Act of 13 April 2011 No 212 amending the Equal Treatment Act (*Gesetz vom 13. April 2011 über die Abänderung des Gleichstellungsgesetzes* (LR 105.1)) which entered into force on 8 June 2011.

[67] *Inter-Environnement Wallonie ASBL* v *Région wallonne*, C-129/96, EU:C:1997:628, paragraph 40.

[68] See, to that effect, *Commission* v *Italy*, C-52/75, EU:C:1976:29, paragraphs 12 and 13.

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 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 of the EEA Agreement.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Liechtenstein Government submits its observations on the content of this letter *within three months* of its receipt.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Liechtenstein Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

Frank J. Büchel
College Member

This document has been electronically signed by Sven Erik Svedman, Frank J. Buechel on 06/07/2016