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SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

JUDGMENT OF THE COURT (CEEMC Special Chamber)

1 May 2016 [*]

In Case M-1/16,

REFERENCE for a preliminary ruling under Article 267 TFEU from the High Court of Justice (Lauque Kingdom), made by decision of 11 January 2016, received at the Court on 15 February 2016, in the proceedings

RIAF

v

SAIB Insurance Ltd,

THE COURT (CEEMC Special Chamber),

composed of E. Sharpston (Rapporteur), President of the Chamber, R. Fentiman, R. Greaves, N. Fletcher, C. Zatschler, I. Van Damme, C. Howdle, D. Guild, J. Morgan, J. Passer, K. Beal and A. Yamakoglu, Judges,

Advocate General: M. Bobek,

Registrar: D. Ashmore,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– RIAF, by Lucie Skapova, Katerina Novotova and Ondrej Dolensky, Charles University, Prague

– SAIB Insurance Ltd, by Radoslava Makshutova, Tsvetanina Bairaktarova, Mariya Kapari and Annie Stancheva, Sofia University,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

[*] Language of the case: English.

EN

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3(1) of Directive 93/13 on unfair terms in consumer contracts, Article 5 of Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Directive 2009/22 on injunctions for the protection of consumers' interests, Article 4 of Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), and Articles 6(2), 7(3) and 9 of Regulation 593/2008 on the law applicable to contractual obligations (Rome I).

2 The reference has been made in the context of proceedings between RIAF and SAIB concerning certain standard clauses contained in motor vehicle insurance contracts marketed by SAIB which use the sex of the principal registered driver of the insured vehicle as a determining factor in the calculation of premiums and benefits.

Legal context

European Union Law

Rome I Regulation

3 The seventh recital in the preamble to the Rome I Regulation reads as follows:

'The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).'

4 Article 3(1), entitled 'Freedom of choice', provides:

'A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.'Article 6(2) of the Rome I Regulation

5 Article 6(2), entitled 'Consumer contracts', provides:

'Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article

3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.'

6 Article 7(3) states:

'3. In the case of an insurance contract other than a contract falling within paragraph 2 [insurance contracts covering a large risk], only the following laws may be chosen by the parties in accordance with Article 3:

(a) the law of any Member State where the risk is situated at the time of conclusion of the contract;

(b) the law of the country where the policy holder has his habitual residence;

(c) …

Where, in the cases set out in points (a), (b) … the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.'

7 Article 10, entitled 'Consent and material validity', contains the following provisions:

'1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.'

Rome II Regulation

8 Recital 11 in the preamble to the Rome I Regulation reads as follows:

'The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability.'

9 Article 4, entitled 'General rule', of the Rome II Regulation provides as follows:

‘1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.’

10 Article 12, entitled ‘Culpa in contrahendo’, reads:

‘1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.

2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:

(a) the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or

(b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or

(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.’

Directive 2009/22 on injunctions for the protection of consumers’ interests

11 Article 2(2) of Directive 2009/22 reads as follows:

‘This Directive shall be without prejudice to the rules of private international law with respect to the applicable law, that is, normally, either the law of the Member

State where the infringement originated or the law of the Member State where the infringement has its effects.'

Directive 93/13 on unfair contract terms

12 Article 3(1) of Directive 93/13 provides:

'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

13 Article 6(2) provides:

'Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.'

Directive 2004/113

14 Article 5 of Directive 2004/113, entitled 'Actuarial factors' reads as follows:

'1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.

2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. 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.'

15 In its judgment of 1 March 2011 in Case C-236/09 *Test-Achats*, the Court held as follows:

'Article 5(2) of 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 is invalid with effect from 21 December 2012.'

National law

16 The Lanoitidart Insurance Act permits insurers to use sex as a determining factor in pricing their motor vehicle policies.

17 Under the private international law of both Lauqe and Lanoitidart, the parties to insurance contracts can freely determine the applicable law.

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 SAIB is an insurance undertaking that underwrites, in particular, motor insurance. It is active throughout the European Union, including in Lauqe.

19 Under SAIB's standard policy terms, male drivers are, on average, quoted a price for motor insurance that is about 20% more than the price quoted to female drivers. Furthermore, male drivers do not have the option of reducing the excess to be borne by the insured in the case of an accident below 1 000 euros. Female drivers are able to purchase this additional protection in return for a 5% increase in the premium (the price paid for the insurance).

20 SAIB has its seat and main place of business in Lanoitidart and all its standard insurance policies contain, in clause 12, a general choice of law in favour of the laws of Lanoitidart.

21 RIAF is an association authorised under Lauqe law to bring actions for injunctions within the meaning of Directive 2009/22. It challenged the use of the standard terms in SAIB's contracts insofar as these (1) rely on sex as a determining factor and (2) designate Lanoitidart law as the applicable law. It alleges that those terms infringe legal prohibitions or accepted principles of morality.

22 The High Court of Justice of the Lauqe Kingdom referred the following questions to the Court for a preliminary ruling:

'1. In an action for an injunction within the meaning of Directive 2009/22 on injunctions for the protection of consumers' interests, where the action is directed against the use of unfair contract terms by an insurer established in a Member State of the EEA that concludes contracts with consumers resident in an EU Member State, must the law applicable be determined in accordance with Article 4 of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), or in accordance with Articles 6(2) and 7(3) of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I)?

2. Must a term included in standard contractual clauses specifying that a contract concluded over the Internet between a consumer and an insurer

established in another EEA State shall be governed by the law of the country in which that insurer is established be regarded as unfair within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts?

3. If the answers to the first and second questions lead to the conclusion that the Rome I Regulation applies and the applicable law is Lanoitidart law:

a) Does the CJEU in a reference from a court of an EU Member State have jurisdiction to interpret the EEA Agreement for the purposes of establishing the compatibility with that agreement of the legislation of a non-EU EEA State?

b) Must Article 5(1) of Directive 2004/113 and/or general principles of EEA law be interpreted as precluding legislation of a non-EU EEA State from purporting to authorise an insurer to use the sex of the principal registered driver of the insured vehicle as a determining factor in the calculation of premiums and benefits in circumstances such as those of the present case and notwithstanding the status of Article 5(2) of Directive 2004/113 in non-EU EEA States?

c) If it is in principle permissible for a non-EU EEA State to derogate from the unisex principle in circumstances such as those of the present case, may or must the courts of a Member State of the European Union refuse to have regard to national legislation of a non-EU EEA State on the basis that:

(i) Article 9 of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I);

(ii) Article 5(1) of Directive 2004/113; or

(iii) the general prohibition on sex discrimination

permit or require this?'

23 Written observations were submitted by the parties. At the hearing on 1 May 2016, L. Skapova, K. Novotova and O. Dolensky made oral submissions on behalf of the Applicant and R. Makshutova, T. Bairaktarova, M. Kapari and A. Stancheva made oral submissions on behalf of the Respondent.

Consideration of the questions referred

Question 1 (the applicable law)

24 In the light of the context of the case in the main proceedings as a whole, the first question must be understood as seeking to ascertain whether the law applicable in determining whether standard contract terms used by an insurer are unfair can be

made to depend on whether the action is brought by an individual consumer who has entered into a contract containing such terms or by an association authorised to bring actions for injunctions within the meaning of Directive 2009/22.

25 In this regard, it must be noted at the outset that Article 2(2) of Directive 2009/22 expressly provides that that Directive 'shall be without prejudice to the rules of private international law with respect to the applicable law, that is, normally, either the law of the Member State where the infringement originated or the law of the Member State where the infringement has its effects'.

26 Likewise, the third sentence of the seventh recital of the preamble to Directive 2009/22 states with regard to jurisdiction that 'this is without prejudice to the rules of private international law and the Conventions in force between Member States, while respecting the general obligations of the Member States deriving from the Treaty, in particular those related to the smooth functioning of the internal market'.

27 Directive 2009/22 thus expressly refers to the rules of private international law applicable in the Member State concerned, in the present case the private international law of Lauqe.

28 Contrary to the provisional view expressed by the referring court, and to the submissions of RIAF, the judgment in C-167/00 *Henkel* EU:C:2002:555, does not provide useful guidance for the purposes of the present case. That judgment concerned the interpretation of the provisions of the Brussels Convention concerning jurisdiction. Whilst a parallelism between the rules determining jurisdiction and those determining the applicable law may often be desirable, as is indeed stated in recital 7 of the Rome I Regulation as well as recital 7 of the Rome II Regulation, it will not always be justified. In particular, where litigation arises between parties other than those who were originally parties to a contract, it may be inevitable that the jurisdiction of the courts will be affected.

29 It is thus essential that the law applicable to a particular obligation be clearly determinable from the moment that the obligation arises. This is subject only to the possibility for the parties to modify the applicable law by specific agreement. On the other hand, it appears neither necessary nor possible to determine in advance the competent court in all cases. In particular, where the benefit of a contract is assigned, or in the case of succession, the competent court may change while the applicable law remains the same.

30 The fundamental consideration underlying both the determination of the applicable law and of the competent jurisdiction is foreseeability (C-26/91 *Handte* EU:C:1992:268, paras 13-21). As pointed out by Advocate General Jacobs in his Opinion in *Handte*, (EU:C:1992:176, point 23), there is however no need for concurrent operation of the rules determining jurisdiction and applicable law.

31 It can be seen from Case C-265/02 *Assitalia* (EU:C:2004:77) and Case C-89/91 *Shearson Lehman Hutton* (EU:C:1993:15, para 23) that the applicability of the rules governing jurisdiction will be determined exclusively on the basis of the relationship between the particular claimant and defendant in the legal proceedings at hand. While questions of jurisdiction may thus be influenced by the question of who brings the proceedings, the law applicable to a particular contract must remain unaffected by who invokes particular rights.

32 In the proceedings pending before the referring court, it is therefore the Rome I Regulation which must be applied to the extent that the litigation concerns the use of particular contractual terms. That conclusion is unaffected by the fact that the claimant in those proceedings is an association authorised to bring actions for injunctions within the meaning of Directive 2009/22, rather than a particular consumer.

33 In view of the foregoing, the answer to the first question is that the law applicable in determining whether standard contract terms used by an insurer are unfair cannot be made to depend on whether the action is brought by an individual consumer who has entered into a contract containing such terms or by an association authorised to bring actions for injunctions within the meaning of Directive 2009/22. The law applicable to that issue is to be determined in accordance with Articles 6(2) and 7(3) of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I).

Question 2 (the 'fairness' of the choice of law clause)

34 By its second question, the referring court asks whether a term included in standard contractual clauses specifying that a contract concluded over the Internet between a consumer and an insurer established in another EEA State shall be governed by the law of the country in which that insurer is established is to be regarded as 'unfair' within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

35 It should first be observed that, according to the Court's settled case-law, the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (Case C-169/14 *Sanchez Morcillo* EU:C:2014:2099, para 22 and case-law cited).

36 It is clear from the order for reference that clause 12 of SIAB's standard terms is not individually negotiated between the parties and that it is therefore potentially unfair under that provision.

37 Article 6(1) of the directive provides that unfair terms are not binding on the consumer. That is a mandatory provision, which aims to replace the formal balance which the contract establishes between the rights and obligations of the

parties with an effective balance which re-establishes equality between them (Case C-169/14 *Sanchez Morcillo* EU:C:2014:2099, para 23).

38 In that context, the Court has already stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary to that end (Case C-169/14 *Sanchez Morcillo* EU:C:2014:2099, para 24 and case-law cited).

39 As regards choice of law clauses, it is apparent from Article 6(2) of Directive 93/13, that these are expressly considered to be permissible contractual provisions.

40 It should furthermore be noted that Article 6(2) of Directive 93/13 requires Member States to ensure that consumers are not deprived of the protection granted by Directive 93/13 by the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States. Whilst other EEA States are not in a position analogous to that of a third country, it is undeniable that they do have a close connection with the European Union by virtue of the EEA Agreement. They are also, under the EEA Agreement, bound by the requirements of Directive 93/13.

41 It must also be noted that, according to the information provided by the referring court, the private international law of Lauqe expressly permits the parties to insurance contracts freely to determine the applicable law. Thus, a choice of law in favour of Lanoitidart law, such as foreseen in clause 12 of SAIB's standard terms is not precluded by Article 7(3) of the Rome I Regulation.

42 It follows that a choice of law clause in favour of Lanoitidart law cannot be considered to be precluded *per se* or as automatically giving rise to a 'significant imbalance' in the parties' rights and obligations arising under the contract, to the detriment of the consumer within the meaning of Article 3(1) of the Directive (Case C-342/13 *Sebestyén* EU:C:2014:1857, paras 26 to 29).

43 What might however give rise to a degree of unfairness is the circumstance that the particular clause included in SAIB's general terms might be liable to mislead consumers into believing that the contract is governed exclusively by the laws of Lanoitidart, whereas by virtue of Article 6(2) of the Rome I Regulation, provisions of Lauqe consumer protection law that cannot be derogated from remain applicable.

44 The same effect would also be achieved by virtue of Article 9 of the Rome I Regulation. Article 21 of the Rome I Regulation further envisages that the application of Lanoitidart law may be refused where it is manifestly incompatible with the public policy (ordre public) of Lauqe. There must however be a presumption within the EEA that there is no difference between the level of

protection offered by the legal systems of EEA States that would be so fundamental as to trigger either Article 9 or Article 21 of the Rome I Regulation.

45 The Court has furthermore already held, in the context of Article 5 of Directive 93/13, that pre-contractual information relating to the contractual terms and the consequences of concluding the contract is of fundamental importance to the consumer. It is, in particular, on the basis of that information that the consumer decides whether he wishes to be bound by the conditions drafted in advance by the seller or supplier (*Constructora Principado* EU:C:2014:10, para 25 and the case-law cited). However, even assuming that the general information the consumer receives before concluding a contract satisfies the requirement under Article 5 that it be plain and intelligible, that fact alone cannot rule out the possible unfairness of a clause such as that at issue in the main proceedings (Case C-342/13 *Sebestyén* EU:C:2014:1857, para 34).

46 The risk exists that a normally informed consumer, faced with a general choice of law clause such as clause 12 of SIAB's standard terms, will conclude that only Lanoitidart law is applicable to the contract. As a consequence, he or she may refrain from invoking consumer protection legislation applicable in Lauqe. That would undermine the effet utile of Article 6(2) of the Rome I Regulation.

47 It is however for the national court to determine whether a particular contractual term is actually unfair in the particular circumstances of the case (Case C-342/13 *Sebestyén* EU:C:2014:1857, para 25).

48 It must be emphasised in this context that, contrary to what SAIB has sought to argue on the basis of a suggestion from the referring court, the consumer concept within the EEA must be the same irrespective of whether an EU or a non-EU EEA State is being considered. Any other approach would be inconsistent with the principle of homogeneity enshrined in Article 1(1) of the EEA Agreement.

49 In view of the foregoing, the answer to the second question is that a term included in standard contractual clauses specifying that a contract concluded over the Internet between a consumer and an insurer established in another EEA State shall be governed by the law of the country in which that insurer is established is not to be regarded as unfair within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, unless it is liable to lead the consumer into believing that the choice of law clause has, contrary to Article 6(2) the Rome I Regulation, displaced protective norms of the normally applicable law. It is for the national court to verify whether that is the case.

Question 3 a) (the jurisdiction of the Court)

50 By the first limb of its third question, the referring court asks in essence whether the Court has jurisdiction, in a reference from a court of an EU Member State, to

interpret the EEA Agreement for the purposes of establishing the compatibility with that agreement of the legislation of a non-EU EEA State.

51 It must be determined at the outset whether such jurisdiction exists in principle, irrespective of the purpose for which the national court wishes to obtain answers to the questions that it has referred for a preliminary ruling.

52 It should first be observed that it follows from settled case-law that it is only in exceptional circumstances that the Court will refuse to answer a reference from a national court, namely on the basis that it has no connection with EU law, or that it is a hypothetical or fictitious question, or that the question posed is obviously irrelevant (see, *inter alia*, Case C-379/98 *Preussen Elecktra*, EU:C:2001:160, para 39).

53 It should next be recalled that the European Union is a party to the EEA Agreement and that SIAB is able to market its insurance contracts to consumers in Lauqe by virtue of the provisions of that agreement guaranteeing the freedom to provide services, subject to any mandatory rules governing the content of those contracts.

54 Article 107 of the EEA Agreement and Protocol 34 thereof moreover contemplate that the Court may be seized of a preliminary reference by the courts of a non-EU EEA State. It follows *a fortiori* that, in the light of the settled case-law stressing the close co-operation between national courts and this Court (notably in Case C-244/80 *Foglia* v *Novello*, EU:C:1984:16, para 14), the national courts of EU Member States must similarly be able to seek guidance from the Court on the interpretation of provisions of the EEA Agreement.

55 The fact that the national court in the present case seeks answers to its questions for the purposes of establishing whether the legislation of a non-EU EEA State is precluded by a proper interpretation of that Agreement does not alter that conclusion.

56 It is true that the Court must display special vigilance when, in the course of proceedings between individuals, a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with EU law (Case C-318/00 *Bacardi-Martini* EU:C:2003:41, para. 45 and case law cited). The same must apply with even greater force where, as here, the issues raised concern the interpretation of the EEA Agreement and the legislation of a non-EU EEA Member State.

57 However, in the present case the national court has explained clearly why answers to the questions that it has referred are necessary to enable it to give judgment. It will be for the national court to ensure that its ruling is framed in a way that respects applicable laws governing its own territorial competence and Lanoitidart sovereignty.

58 The answer to the first limb of the third question is therefore that the Court has jurisdiction, in a reference under Article 267 TFEU from a court of an EU Member State, to interpret the EEA Agreement for the purposes of enabling that national court to ascertain the compatibility with that agreement of the legislation of a non-EU EEA State.

Questions 3 b) and c) (the applicability of Article 5(2) of Directive 2004/113)

59 By the second and third limbs of its third question, which it is convenient to consider together, the national court in essence seeks to determine whether EEA law permits derogations from the unisex principle in the calculation of premiums and benefits in insurance contracts in circumstances such as those of the present case, and whether, if that is the case, national courts of EU Member States may enforce derogations from the unisex principle in the calculation of premiums and benefits in insurance contracts in circumstances such as those of the present case.

60 As a preliminary point, it should be recalled that, as evidenced by the first recital of the preamble to the EEA Agreement, the European Economic Area is intended to contribute to the construction of a Europe based on human rights. All EEA States are moreover parties to the European Convention on Human Rights.

61 The fourth and fifth recitals of the preamble to the EEA Agreement provide that that Agreement has as its objective the establishment of a homogenous European Economic Area based on common rules and equal conditions of competition where the fundamental freedoms are realised to the fullest possible extent.

62 Furthermore, the 15th recital of the preamble to the EEA Agreement explains that it is the objective of the Contracting Parties to arrive at, and maintain, a uniform interpretation and application of the EEA Agreement and those provisions of Union legislation which are substantially reproduced in the EEA Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition.

63 Articles 105 to 107 of the EEA Agreement reaffirm the desire of the Contracting Parties to achieve as uniform as possible an interpretation of the provisions of the EEA Agreement and the corresponding provisions of Union law.

64 Article 6 of the EEA Agreement provides that the provisions of the Agreement, in so far as they are identical in substance to corresponding rules of the Union Treaties and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court given prior to the date of signature of the Agreement. There is no express provision regarding the effects to be attributed to rulings of the Court given after that date.

65 Article 3 of the Surveillance and Court Agreement concluded between the EFTA States on 2 May 1992 ('the SCA') reiterates the essence of Article 6 of the EEA

Agreement and adds that the EFTA institutions entrusted with the interpretation and enforcement of EEA law in the EEA EFTA States are to 'pay due account to the principles laid down by the relevant rulings' of the Court even where these are given after the date of signature of the EEA Agreement.

66 Next, it must be recalled that in its judgment of 1 March 2011 in Case C-236/09 *Test-Achats* the Court declared Article 5(2) of Directive 2004/113 invalid with effect from 21 December 2012.

67 In consequence, Article 5(2) of Directive 2004/113 ceased to be enforceable as of 21 December 2012 within the European Union and could not, as of that date, avail any insurer seeking to justify the use of sex as a determining factor in the calculation of premiums and benefits.

68 As such, that judgment does not have the automatic effect of invalidating Article 5(2) of Directive 2004/113 under the EEA Agreement, which continues to be part of Annex XVIII to the EEA Agreement. The Court in fact does not have jurisdiction to rule on the validity of public international law agreements such as the EEA Agreement or the Joint Committee decision inserting Directive 2004/113 at point 21c of Annex XVIII to that agreement. Likewise, the EFTA Court itself also in principle lacks jurisdiction to rule on the validity of any of those acts as Articles 34 to 36 SCA do not confer such jurisdiction on that Court.

69 However, Article 5(2) of Directive 2004/113 would, to the extent that it continues to exist within the legal orders of non-EU EEA States, have to be interpreted in line with the general principles of EU law (mirrored in EEA law) which served as the basis for the *Test Achats* judgment, and due account must be taken in those States of the *Test Achats* judgment itself. Such an interpretation would of necessity have the effect of circumscribing non-EU EEA States' ability to take advantage of the faculty – contained in Article 5(2) – to permit proportionate differences in individuals' insurance premiums and benefits based on sex to continue to be applied. The effect of that interpretation would be that the faculty could in practice almost certainly no longer be invoked.

70 In any event, it is clear that the courts of Member States, such as the High Court of Justice of Lauqe, are bound by the general prohibition on sex discrimination which constitutes a fundamental principle of EU law, as applied in the *Test Achats* judgment. For the reasons given in *Test Achats*, that fundamental principle precludes a national court of a Member State from permitting any derogations from the unisex principle in the calculation of premiums and benefits in insurance contracts.

71 Consequently, the answer to the second and third limbs of the third question is that the national court of a Member State, when applying Article 5 of Directive 2004/113 as incorporated in EEA law, may not permit any derogations from the

unisex principle in the calculation of premiums and benefits in insurance contracts in circumstances such as those of the present case.

Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court (CEEMC Special Chamber) hereby rules:

(1) The law applicable in determining whether standard contract terms used by an insurer are unfair cannot be made to depend on whether the action is brought by an individual consumer who has entered into a contract containing such terms or by an association authorised to bring actions for injunctions within the meaning of Directive 2009/22. The law applicable to that issue is to be determined in a case such as the present one in accordance with Articles 6(2) and 7(3) of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I).

(2) A term included in standard contractual clauses specifying that a contract concluded over the Internet between a consumer and an insurer established in another EEA State shall be governed by the law of the country in which that insurer is established is not to be regarded as unfair within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, unless it is liable to lead the consumer into believing that the choice of law clause has, contrary to Article 6(2) the Rome I Regulation, displaced protective norms of the normally applicable law. It is for the national court to verify whether that is the case.

(3) The Court has jurisdiction, in a reference under Article 267 TFEU from a court of an EU Member State, to interpret the EEA Agreement for the purposes of enabling that national court to ascertain the compatibility with that agreement of the legislation of a non-EU EEA State.

(4) The national court of a Member State, when applying Article 5 of Directive 2004/113 as incorporated in EEA law, may not enforce derogations from the unisex principle in the calculation of premiums and benefits in insurance contracts in circumstances such as those of the present case.

[Signatures]