OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 30 September 2010[1]

I — Introduction

1. Is it compatible with the fundamental rights of the European Union to take the sex of the insured person into account as a risk factor in the formulation of private insurance contracts? That is, in essence, the question which the Court has to examine in the present reference for a preliminary ruling. In doing so it has to consider for the first time the substantive provisions of Directive 2004/113/EC,[2] one of the directives known as the anti-discrimination directives,[3] which have recently been the subject of much debate.

2. Article 5(2) of Directive 2004/113 allows Member States to permit differences related to sex in respect of insurance premiums and benefits if sex is a determining risk factor and that can be substantiated by relevant and accurate actuarial and statistical data. Numerous Member States have made use of that derogation in respect of one or more types of insurance.

3. The Belgian Constitutional Court now asks whether that provision of the directive is compatible with higher-ranking European Union Law, more specifically with the prohibition of discrimination on grounds of sex which is enshrined as a fundamental right. The background to this reference for a preliminary ruling is an action brought by the consumer organisation Association Belge des Consommateurs Test-Achats ('Test-Achats') and two private individuals to have declared unconstitutional the Belgian Law to transpose Directive 2004/113.

1 — Original language: German.

2 — 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 (OJ 2004 L 373, p. 37), 'Directive 2004/113'.

3 — The following also belong to the anti-discrimination directives: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16) and 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 (OJ 2006 L 204, p. 23).

II — Legal framework

A — *European Union law*

4. The framework for this case in European Union law is determined by the fundamental rights applicable at European Union level, to which Article 6 of the Treaty on European Union refers. It is in the light of those fundamental rights, as expressed in particular in the Charter of fundamental rights of the European Union, [4] that the validity of Article 5(2) of Directive 2004/113 must be examined.

The Treaty on European Union

5. Until the Treaty of Lisbon entered into force on 1 December 2009 the Treaty on European Union, in the version arising from the Treaty of Amsterdam, contained the following Article 6 ('Article 6 EU'):

'1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

…'

6. In the version arising out of the Treaty of Lisbon, the relevant parts of Article 6 of the Treaty on European Union ('TEU') are worded as follows:

'1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

…

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

4 — The Charter of fundamental rights of the European Union was solemnly proclaimed for the first time on 7 December 2000 in Nice (OJ 2000, C 364, p. 1) and for the second time on 12 December 2007 in Strasbourg (OJ 2007, C 303, p. 1, and OJ 2010, C 83, p. 389).

The Charter of Fundamental Rights

7. Title III of the Charter of Fundamental Rights contains provisions relating to equality. Article 20 of the Charter, headed 'Equality before the law', provides:

'Everyone is equal before the law.'

8. Article 21(1) of the Charter contains the principle of non-discrimination, which is worded as follows:

'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

9. Furthermore, Article 23(1) of the Charter stipulates, under the heading 'Equality between women and men', that:

'Equality between women and men must be ensured in all areas, including employment, work and pay.'

Directive 2004/113

10. Directive 2004/113 is based on Article 13(1) EC (now Article 19(1) TFEU). Its purpose is set out in Article 1:

'The purpose of this Directive is to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.'

11. Article 4(1) of Directive 2004/113 contains a definition of the principle of equal treatment for the purposes of that directive:

'For the purposes of this Directive, the principle of equal treatment between men and women shall mean that

(a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity;

(b) there shall be no indirect discrimination based on sex.'

12. Article 5 of Directive 2004/113, headed 'Actuarial factors' provides the following:

'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.

3. In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits.

Member States may defer implementation of the measures necessary to comply with this paragraph until two years after 21 December 2007 at the latest. In that case the Member States concerned shall immediately inform the Commission.'

13. In addition, reference should be made to the preamble to Directive 2004/113, recitals 1, 4, 18 and 19 of which are worded as follows:

'(1) In accordance with Article 6 of the Treaty on European Union, the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States, and respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions

common to the Member States as general principles of Community law.

…

(4) Equality between men and women is a fundamental principle of the European Union. Articles 21 and 23 of the Charter of Fundamental Rights of the European Union prohibit any discrimination on grounds of sex and require equality between men and women to be ensured in all areas.

…

(18) The use of actuarial factors related to sex is widespread in the provision of insurance and other related financial services. In order to ensure equal treatment between men and women, the use of sex as an actuarial factor should not result in differences in individuals' premiums and benefits. To avoid a sudden readjustment of the market, the implementation of this rule should apply only to new contracts concluded after the date of transposition of this Directive.

(19) Certain categories of risks may vary between the sexes. In some cases, sex is one but not necessarily the only determining factor in the assessment of risks insured. For contracts insuring those types of risks, Member States may decide to permit exemptions from the rule of unisex premiums and benefits, as long as they can ensure that underlying actuarial and statistical data on which the calculations are based, are reliable, regularly up-dated and available to the public. Exemptions are allowed only where national legislation has not already applied the unisex rule. Five years after transposition of this Directive, Member States should re-examine the justification for these exemptions, taking into account the most recent actuarial and statistical data and a report by the Commission three years after the date of transposition of this Directive.'

B — *National Law*

14. As regards Belgian law, the Law of 21 December 2007, [5] which transposes Directive 2004/113, [6] is relevant. That law amended a

5 — Law of 21 December 2007 amending the Law of 10 May 2007 combating discrimination between men and women with respect to gender in insurance matters (*Moniteur belge* No 373 of 31 December 2007, p. 66175).

6 — That aim is clear from Article 2 of the Law of 21 December 2007.

provision of law which had been adopted only a few months earlier, more specifically Article 10 of the Law of 10 May 2007 combating discrimination between men and women,[7] as follows with effect as from 20 December 2007:[8]

'Article 10(1). By way of derogation from Article 8, a direct proportionate distinction may be drawn on the basis of gender for the purposes of calculating insurance premiums and benefits where sex is a determining factor in the assessment of risk on the basis of relevant and accurate actuarial and statistical data.

That derogation shall apply only to life assurance contracts within the meaning of Article 97 of the Law of 25 June 1992 on non-marine insurance contracts.

(2) With effect from 21 December 2007, costs related to pregnancy and maternity may not under any circumstances continue to result in differences in insurance premiums and benefits.

(3) The Banking, Finance and Insurance Committee shall collect the actuarial and statistical data referred to in (1), publish them by 20 June 2008, then publish updates every two years, and post them on its website. This data shall be updated every two years.

The Banking, Finance and Insurance Committee shall be authorised to require the institutions, undertakings and individuals concerned to supply the data required for this purpose. It shall specify which data are to be sent, how and in what form.

(4) The Banking, Finance and Insurance Committee shall provide the European Commission with the data at its disposal in accordance with this article by 21 December 2009. It shall forward the data to the European Commission whenever they are updated.

(5) The legislative Chambers shall, by 1 March 2011, assess the application of this article on the basis of the data referred to in subparagraphs (3) and (4), the European Commission report referred to in Article 16 of Directive 2004/113/EC, and the situation in the other Member States of the European Union.

7 — *Moniteur belge* No 159 of 30 May 2007, p. 29031.

8 — The amendment is effected by Article 3 of the Law of 21 December 2007; the date on which it comes into force arises out of Article 5 thereof.

That assessment shall be made on the basis of a report submitted to the legislative Chambers by an Assessment Committee within two years.

By decree deliberated in the Council of Ministers, the King shall lay down the more detailed rules relating to the composition and appointment of the Assessment Committee, as well as the form and content of the report.

The Committee shall report in particular on the effects of this article on the market situation and shall also examine segmentation criteria other than those related to sex.

(6) This provision shall not apply to insurance contracts concluded under a supplementary social security scheme. Such contracts shall be subject exclusively to Article 12.'

15. In addition Article 4 of the Law of 21 December 2007 contains the following provision:

'Pending publication by the Banking, Finance and Insurance Committee of the relevant and accurate actuarial and statistical data referred to in Article 10(3) of the Law of 10 May 2007 combating discrimination between men and women with respect to gender in insurance matters [as amended by this Law] a direct distinction on grounds of sex shall be permitted for the purposes of calculating insurance premiums and benefits if it is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. The Banking, Finance and Insurance Committee shall publish the data by 20 June 2008 at the latest.'

III — The main proceedings

16. An action for annulment of the Law of 21 December 2007 is pending before the Constitutional Court of the Kingdom of Belgium. That action was brought in June 2008 by Test-Achats as a non-profit-making consumer organisation and two private individuals.

17. In essence the applicants in the main proceedings submit that the Law of 21 December 2007 is incompatible with the principle of equal treatment for men and women. It infringes Articles 10, 11 and 11a of the Belgian constitution read in conjunction with Article 13 EC, Directive 2004/113, Articles 20, 21 and 23 of the Charter of Fundamental

Rights, Article 14 ECHR, [9] Article 26 of the International Covenant on Civil and Political Rights [10] and the Convention on the Elimination of All Forms of Discrimination against Women. [11]

18. The Constitutional Court finds that the Law in dispute makes use of the exemption under Article 5(2) of Directive 2004/113 and that the applicants' complaints therefore also apply to that provision of the directive. In those circumstances the Constitutional Court regards it as necessary, before ruling on the action pending before it, to decide on the validity of Article 5(2) of Directive 2004/113. The Constitutional Court expressly accepts that the Court of Justice alone has jurisdiction to decide on that issue of validity and that under the third paragraph of Article 234 EC (now the third paragraph of Article 267 TFEU) it is required, as a national court against whose decisions there is no judicial remedy under national law, to bring the matter before the Court.

IV — Reference for a preliminary ruling and procedure before the Court

19. By judgment of 18 June 2009 the Belgian Constitutional Court referred the following questions to the Court of Justice for a preliminary ruling: [12]

'(1) Is Article 5(2) of Directive 2004/113/EC compatible with Article 6(2) EU, and more specifically with the principle of equality and non-discrimination guaranteed by that provision?

(2) If the answer to the first question is negative, is Article 5(2) of the Directive also incompatible with Article 6(2) EU if its

9 — European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR', signed in Rome on 4 November 1950). The Court has consistently held that the ECHR has special significance in determining the standard of fundamental rights which the European Union must observe; see, inter alia, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 29, with further references); see also Article 6(2) EU or 6(3) TEU.

10 — Opened for signature on 19 December 1966, entered into force on 23 March 1976 (*UNTS* Vol. 999, p. 171).

11 — Opened for signature on 1 March 1980, entered into force on 3 September 1981 (*UNTS* Vol. 1249, p. 13).

12 — Judgment No 103/2009, Ref. 4486, available on the Internet page of the Belgian Constitutional Court under http://www.const-court.be/de/common/home.html (last visited on 1 September 2010).

application is restricted to life assurance contracts?'

20. In the proceedings before the Court the Belgian Government, Ireland, the French, Lithuanian, Finnish and United Kingdom Governments, the Council of the European Union and the European Commission have submitted written observations in addition to Test-Achats. Test-Achats, the Belgian Government, Ireland, the United Kingdom Government, the Council and the Commission took part in the hearing of 1 June 2010.

V — Appraisal

21. Article 5(2) is a provision of Directive 2004/113 which was not contained in the Commission's original Proposal for a Directive. [13] What is more, in the statement of reasons for the Proposal for the Directive the Commission, after examining in detail the problem at issue in the present case, declared itself firmly against allowing differences based on sex in respect of insurance premiums and benefits and expressly found them to be incompatible with the principle of equal treatment. [14]

22. It is all the more astonishing that in the present case the Commission emphatically takes the view that Article 5(2) of Directive 2004/113 does not infringe the principle of equal treatment between men and women, but is in fact an expression of that principle. Even when asked, the Commission was unable to provide a plausible explanation for its sudden change of mind.

23. For my part, I have considerable doubts whether Article 5(2) of Directive 2004/113 in the form chosen by the Council is at all suitable for expressing the principle of equal treatment, in particular the requirement not to treat different situations in the same way. A provision having that objective should be applicable in all Member States. In fact, however, Article 5(2) of Directive 2004/113 is, according to the European Union legislature, only to be applicable 'where national legislation has not already applied the unisex rule'. [15] The provision therefore has the effect that in some Member States it is possible for men and women to be treated differently with

13 — 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) 657 Final.

14 — Commission Proposal (cited in footnote 13, p. 7 et seq., in particular the bottom of p. 9).

15 — See the fourth sentence of recital 19 in the preamble to Directive 2004/113.

regard to an insurance product whereas in other Member States they must be treated in the same way with regard to the same insurance product. It is difficult to understand how such a legal situation could be the expression of the principle of equal treatment under European Union law.

A — *The first question*

24. By its first question the Belgian Constitutional Court seeks information as to whether Article 5(2) of Directive 2004/113 is valid. In essence, it wishes to know whether that provision is compatible with the principle of equal treatment and non-discrimination.

25. While Test-Achats is of the opinion that Article 5(2) of Directive 2004/113 infringes that principle, all the Member States and European Union institutions involved in the proceedings are of the opposite view.

1. General remarks

26. The European Union is a union based on the rule of law; neither its institutions nor its Member States can therefore avoid a review of the question whether the measures adopted by them are in conformity with the 'basic constitutional charter' of the European Union, as it is set out in the Treaties. [16]

27. A condition of the lawfulness of all European Union acts is respect for fundamental and human rights. [17] This is because the Union is founded on the principles of liberty, respect for human rights and fundamental freedoms, and the rule of law (Article 6(1) EU). [18] It is to respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States as general principles of law (Article 6(2) EU). [19]

28. A summary of the fundamental rights guaranteed at Union level is now to be found in the Charter of Fundamental Rights of the European Union, which has the same legal value as the Treaties since the entry into force

16 — Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23, and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International* [2008] ECR I-6351, paragraph 281, '*Kadi*'.

17 — See to that effect *Kadi* (cited in footnote 16), paragraph 285.

18 — That provision now corresponds in essence to Article 2 TEU.

19 — That provision now corresponds in essence to Article 6(3) TEU.

of the Treaty of Lisbon (Article 6(1) TEU). [20] Even with respect to the period before the entry into force of the Treaty of Lisbon when the Charter had not yet acquired any binding legal effects comparable with primary legislation, it can however be referred to as a source of inspiration with regard to the protection of fundamental rights at Union level; [21] that applies not least when a legal measure is being examined in which the European Union legislature has itself referred to the Charter, as has occurred in the present case in the fourth recital in the preamble to Directive 2004/113. [22]

29. The general principle of equal treatment and non-discrimination is expressed in Article 20 of the Charter of Fundamental Rights, which stipulates that everyone is equal before the law. The present case however concerns the principle of equal treatment and non-discrimination between men and women, which was recognised early on by the Court of Justice as a basic principle of European Union law [23] and is now specifically laid down as a fundamental right in Article 21(1) and Article 23(1) of the Charter of Fundamental Rights. I will deal in the following only with that principle. As there is no fundamental difference for the purposes of the present case between the concepts 'principle of equal treatment', 'principle of non-discrimination' and 'prohibition of discrimination', I will use them as synonyms.

30. That the European Union legislature does not in Article 5(2) of Directive 2004/113 itself differentiate according to the sex of the insured person, but merely authorises the Member States to do so, has no influence on the examination of the compatibility of that provision with higher-ranking law. That is because the European Union legislature may not authorise Member States to take measures which would infringe the fundamental rights of the European Union and it is for the Court of Justice to examine that. [24]

20 — See also Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 22, and Case C-407/08 P *Knauf Gips* v *Commission* [2010] ECR I-6375, paragraph 91.

21 — See to that effect Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, paragraphs 43 and 44; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraphs 90 and 91; and Case C-244/06 *Dynamic Medien* [2008] ECR I-505, paragraph 41.

22 — See to that effect Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 38, 'Family reunification'.

23 — Case 43/75 *Defrenne* [1976] ECR 455, paragraph 12, 'Defrenne II', and Case 149/77 *Defrenne* [1978] ECR 1365, paragraphs 26 and 27, 'Defrenne III'.

24 — See to that effect, *Family reunification* (cited in footnote 22), in particular paragraphs 76, 84, 90 and 103.

2. The fundamental importance of the principle of equal treatment between men and women

31. The Court has consistently stressed the fundamental importance of the principle of equal treatment for men and women. [25] That importance is also emphasised in the Treaties at prominent points; at the time of the adoption of Directive 2004/113, for example in Article 2 EC and Article 3(2) EC, and now in Article 2 TEU, the second subparagraph of Article 3(3) TEU, Article 8 TFEU and Article 10 TFEU.

32. Nevertheless, some of the parties to the proceedings have attempted to play down the importance of that principle in the present case. However, none of the arguments put forward in that regard is convincing.

33. By contrast to what the Council and the Commission appear to think, it does not follow, first, from the legal basis of Article 13(1) EC, on which Directive 2004/113 is based, that the European Union legislature has a largely free hand to determine the content of measures to combat discrimination.

34. Article 13(1) EC is a provision under which the Council 'may' take 'action' to combat discrimination. It therefore undoubtedly has a certain discretion as regards appropriateness, material scope and content of the anti-discrimination provisions which it is to adopt. Within the limits of the prohibition on taking arbitrary measures the Council could therefore in principle also have exempted some services like insurance entirely from the scope of Directive 2004/113.

35. However, with Directive 2004/113, particularly with Article 5, the Council made a conscious decision to adopt anti-discrimination legislation in the field of insurance. Such provisions must, without restriction, withstand examination against the yardstick of higher-ranking European Union law, in particular against the yardstick of the fundamental rights recognised by the Union. They must, to use the words of Article 13(1) EC (now Article 19(1) TFEU), be 'appropriate' for combating discrimination; they may not themselves lead to discrimination. The Council cannot evade that examination by simply arguing that it could also have taken no action.

36. Secondly, the importance of the principle of equal treatment between men and women in the present case cannot be diminished by stating that it is 'not an absolute right', that is

25 — See, for the leading cases, Case 152/84 *Marshall* [1986] ECR 723, paragraph 36; Case 262/84 *Beets-Proper* [1986] ECR 773, paragraph 38; Case C-343/92 *Roks and Others* [1994] ECR I-571, paragraph 36; Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 39; Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 60; and Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, paragraph 85.

to say not an unrestricted fundamental right. That is because, even though fundamental rights can as a rule be restricted, they should be used as a yardstick in examining the legality of legal measures. [26]

37. Differences in treatment between the sexes may of course be justified in particular circumstances. A justification for *direct* discrimination on grounds of sex, examination of which is the sole issue in the present case, is however conceivable only in limited circumstances and has to be carefully reasoned. The Union legislature is by no means at liberty to allow arbitrary exceptions to the principle of equal treatment and thereby to undermine the prohibition against discrimination.

38. I would like to add that the prohibition against discrimination on grounds of sex does not have to be spelled out in any way by the Union legislature. The fact that the Union legislature from time to time resorts – and in light of the aims of the Treaties [27] *should* resort – to measures of secondary law to promote equal treatment for men and women and to combat continuing discrimination between them does not qualify the importance of the principle of equal treatment as a fundamental right and a constitutional principle of the European Union, but actually emphasises its prominent position in all areas.

39. If the Union legislature takes 'action' within the meaning of Article 13(1) EC (now Article 19(1) TFEU) to combat discrimination and to promote equality between men and women, then it has to do so in accordance with the requirements of the principle of equal treatment, which is enshrined in primary law.

3. Examination of the compatibility of Article 5(2) of Directive 2004/113 with the principle of equal treatment for men and women

40. Article 5(2) of Directive 2004/113 allows Member States to permit sex-specific

26 — See as regards the principle of equal treatment Case C-37/89 *Weiser* [1990] ECR I-2395, paragraphs 13 and 14 and Case C-227/04 P *Lindorfer* v *Council* [2007] ECR I-6767, paragraph 51; see to the same effect as regards the fundamental right to respect for family life, *Family reunification* (cited in footnote 22), in particular paragraphs 76, 90 and 103.

27 — See in that regard the provisions of the Treaties referred to above (paragraph 31 of this Opinion).

differences in insurance premiums and benefits subject to the conditions stated in that article. The provision thus permits differences in insurance contracts, which are directly linked to the sex of the insured person. [28]

41. That does not necessarily mean that Article 5(2) of Directive 2004/113 paves the way for direct discrimination on grounds of sex, which is prohibited under European Union law. According to settled case-law, [29] the principle of equal treatment or non-discrimination, of which the prohibition of discrimination on grounds of sex is merely a particular expression, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. [30]

42. What therefore has to be examined is whether the situations in which men and women find themselves with regard to insurance services may differ in a way that is legally significant.

43. The elements which characterise situations and their comparability must in particular be determined and assessed in the light of the subject-matter and purpose of the rule which makes the distinction in question. The principles and objectives of the field to which the rule relates must also be taken into account. [31]

44. As a number of the parties to the proceedings before the Court have submitted, Article 5(2) of Directive 2004/113 is intended to take into account the specific characteristics of insurance. Insurance companies offer services with regard to which it cannot be said with certainty at the time when the contract is concluded if, when and to what extent the insured person will have recourse to them. Recourse to prognoses is indispensable in actuarial calculations of premiums and services in order to make that risk calculable and develop the products in such a way as to do justice to the risk.

28 — From time to time the sex of the beneficiary of the insurance contract, who does not necessarily have to be identical with the policyholder, may be at issue. To simplify matters I will, however, refer throughout the following to the insured person.

29 — Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 63; Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 23, '*Arcelor*'; and Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5783, paragraph 74.

30 — Furthermore, that is also laid down in Article 2(a) of Directive 2004/113 itself, which defines direct discrimination as follows: 'where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation'. The other anti-discrimination directives also contain corresponding definitions (see Article 2(2) of Directive 2000/43, Article 2(2)(a) of Directive 2000/78 and Article 2(1)(a) of Directive 2006/54).

31 — *Arcelor* (cited in footnote 29), paragraph 26.

45. For example with regard to life assurance and pension insurance what matters is the predicted life expectancy of the insured person, in cases of third-party motor vehicle liability insurance it is the likelihood of the insured person's causing an accident whilst driving, and with regard to private health insurance it is the likelihood of the insured person's utilising particular medical services.

46. In that regard, the making of an individual prognosis in respect of each insured person is not normally the first priority; instead recourse is had to experiential values. That is above all because exact statements with regard to the insurance risks linked to individuals are difficult, if not actually impossible to make. It is therefore in principle perfectly legitimate with regard to risk evaluation to carry out a group examination instead of – or in addition to – an individual examination.

47. However, the question of which comparison groups may be constituted for that purpose is always ultimately dependent on the respective legal framework conditions. In establishing such framework conditions, which involves political, economic and social choices and may require complex assessments and evaluations, the Council enjoys a broad 'discretion' [32] in the exercise of the powers conferred on it. Numerous parties to the proceedings have rightly pointed that out. In the context of its discretion the Council may – and must – also take into account the specific characteristics of insurance.

48. However, that discretion on the part of the Council is not boundless. In particular, the exercise of that discretion cannot have the effect of frustrating the implementation of a fundamental principle of European Union law. [33] Those fundamental principles of European Union law include not least the specific prohibitions of discrimination laid down in Article 21(1) of the Charter of Fundamental Rights.

49. The Council may not therefore, for example, permit a person's race and ethnic origin to be used as a ground for differentiation in insurance. [34] In a Union governed by the rule of law, which has declared respect for human

32 — Settled case-law, see only *Arcelor* (cited in footnote 29), paragraph 57; *S.P.C.M. and Others* (cited in footnote 29), paragraph 42; and Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, paragraph 52.

33 — Case C-25/02 *Rinke* [2003] ECR I-8349, paragraph 39. See to the same effect, although in relation to measures by the Member States in the area of social policy, Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraphs 74 and 75; *Kutz-Bauer* (cited in footnote 25, paragraphs 55 to 57); Case C-77/02 *Steinicke* [2003] ECR I-9027, paragraph 63; and Case C-385/05 *Confédération générale du travail and Others* [2007] ECR I-611, paragraphs 28 and 29. The Court has proceeded in a similar way in some more recent judgments relating to the prohibition of discrimination on grounds of age; see Case C-144/04 *Mangold* [2005] ECR I-9981, paragraphs 63 to 65; Case C-88/08 *Hütter* [2009] ECR I-5325, paragraphs 45 to 50; and *Kücükdeveci* (cited in footnote 20), paragraphs 38 to 42.

34 — Directive 2000/43, with which the Council created a European Union legislative framework to combat discrimination on the basis of race or ethnic origin, logically contains no exemption to take into account actuarial factors.

dignity, human rights, equality and non-discrimination to be its overriding principles, [35] it would without doubt be extremely inappropriate if for instance, in the context of medical insurance, varying risks of contracting skin cancers were to be linked to the skin colour of the insured person and either a higher or lower premium were thus to be demanded of him.

50. It is equally inappropriate to link insurance risks to a person's sex. There is no material reason to assume that the prohibition of discrimination on grounds of sex under European Union law provides less protection than the prohibition of discrimination on the basis of race or ethnic origin under European Union law. Like race and ethnic origin, gender is also a characteristic which is inseparably linked to the insured person as an individual and over which he has no influence. [36] In addition, a person's gender, unlike, for instance, his age, [37] is not subject to any natural changes.

51. It is therefore only logical that in Article 5(1) of Directive 2004/113 the Council prohibited in principle the use of sex in the calculation of insurance premiums and benefits. Even costs related to pregnancy and maternity, although they can for obvious biological reasons only arise in the case of women, [38] must, under Article 5(3) of Directive 2004/113, not result in differences in premiums and benefits for male and female insured persons.

52. Nevertheless, the Council, in Article 5(2) of Directive 2004/113, permits the use of sex in the calculation of premiums and benefits where it is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The provision at issue therefore – unlike Article 5(3) of Directive 2004/113 – does not focus on any clear biological differences between insured persons. On the contrary, it concerns cases in which different insurance risks can at most be associated *statistically* with gender.

53. In the proceedings before the Court the following two examples were primarily put

35 — Article 2 TEU in the version of the Treaty of Lisbon; similar to Article 6(1) EU previously.

36 — In this connection I will disregard the rare, special cases of gender reassignment.

37 — It is true that age is a characteristic which is also inseparably linked to an individual but every human being passes through different categories of age in his life. If insurance premiums and benefits are therefore calculated differently according to age, that does not yet as such give rise to any fear that the insured person will be disadvantaged as an individual. Everyone may, on the basis of age, in the course of his life be in receipt of insurance products which are more or less favourable to him.

38 — The fact that male insured persons are enlisted to finance the costs related to pregnancy and maternity is of course justified by the principle of causation. It is true that only women can become pregnant, but every pregnancy also involves a man.

forward in support of that: Women have – from a statistical point of view – a higher life expectancy than men and serious traffic accidents are – from a statistical point of view – more often caused by men than by women. In addition, it is from time to time stated as regards private health insurance policies that women – from a statistical point of view – take advantage of more medical benefits than men. [39]

54. The Court has not so far ruled on the question whether, in shaping insurance products, differences between people, which can be merely statistically linked to their sex, can or even must lead to different treatment of male and female insured persons.

55. It is true that the Court took note in the judgments in *Neath* and *Coloroll Pension Trustees* of the point that the different life expectancy of men and women was one of the actuarial factors on which the financing of the pension systems at issue in those cases was based. [40] The Court did not however comment on the compatibility of that factor with the prohibition of discrimination on grounds of sex under European Union law. On the contrary, it held that the principle of equal pay under Article 119(1) of the EEC Treaty (now Article 157(1) TFEU) *was not applicable* because only the pension contributions made by the employers were dependent on the actuarial factor, but not those made by the employees; therefore at that time, in the Court's view, no pay within the meaning of European Union law was affected. [41]

56. However, the Court stated *in obiter dicta* in both *Neath* and *Coloroll Pension Trustees* that *the contributions paid by the employees* into occupational pensions schemes, which were covered by Article 119(1) of the EEC Treaty, had to be the same for all employees, male and female, because they are an element of their pay. [42]

57. If anything, the case-law in *Neath* and *Coloroll Pension Trustees* suggests the

39 — In particular it is stated that women take part more in preventive tests and consume more medicinal products.

40 — Case C-152/91 *Neath* [1993] ECR I-6935, paragraph 24, and Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389, paragraph 73.

41 — *Neath* (paragraphs 26 to 34) and *Coloroll Pension Trustees* (paragraphs 75 to 85), cited in footnote 40.

42 — *Neath* (paragraph 31, second sentence) and *Coloroll Pension Trustees* (paragraph 80, second sentence), cited in footnote 40.

conclusion that the prohibition of discrimination on grounds of sex under European Union law precludes differences between men and women which are purely statistical from being taken into consideration with regard to insurance risks.

58. That should also serve as a guideline for the present case.

59. It is true that in the field to which the prohibitions of discrimination under European Union law apply statistical data may, according to settled case-law, suggest that there is *indirect discrimination*. [43] However, the Court does not ever appear to have accepted statistics as the sole point of reference – and therefore ultimately as a justification – for *direct discrimination*.

60. That restraint on the part of the Court must be connected with the prominence which the prohibition of discrimination on grounds of sex has in European Union law. Direct discrimination on grounds of sex is – with the exception of specific incentive measures to benefit members of a disadvantaged group ('affirmative action') [44] – only permissible if it can be established with certainty that there are relevant differences between men and women which necessitate such discrimination.

61. However there is no such certainty precisely 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.

62. In fact, however, as Test-Achats has submitted without being contradicted, many

43 — See for example Case 171/88 *Rinner-Kühn* [1989] ECR 2473, paragraphs 11 and 12; *Steinicke* (cited in footnote 33), paragraphs 56 and 57; Case C-256/01 *Allonby* [2004] ECR I-873, paragraphs 75 and 81; and Case C-313/02 *Wippel* [2004] ECR I-9483, paragraph 43.

44 — See the second subparagraph of Article 3(3) TEU; Article 8 TFEU and Article 157(4) TFEU.

other factors play an important role in the evaluation of the abovementioned insurance risks. Thus, for instance, the life expectancy of insured persons, which is of particular interest in the present case, 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 [45] and/or drugs, leisure activities and sporting activities).

63. In view of social change and the accompanying loss of meaning of traditional role models, the effects of behavioural factors on a person's health and life expectancy can no longer clearly be linked with his sex. To refer once again to a few of the examples just mentioned: both women and men nowadays engage in demanding and sometimes extremely stressful professional activities, members of both sexes consume a not inconsiderable amount of stimulants and even the kind and extent of sporting activities practised by people cannot from the outset be linked to one or other of the sexes.

64. It is not apparent from the recitals in the preamble to Directive 2004/113 that the Council took those circumstances into account in any way at all. [46]

65. The Council does not in any event do justice to the complexity of the problem when, in Article 5(2) of Directive 2004/113, it simply allows differences between insured persons to continue to be linked solely, or at least essentially, to the sex of the person concerned, even though certain hurdles are set up in that respect ('determining factor'; 'proportionate differences'; 'relevant and accurate … data', which are published and regularly updated).

66. Admittedly, it is especially easy to implement distinctions on the basis of sex in respect of insurance products. The correct recording and evaluation of economic and social conditions and of the habits of insured persons is much more complicated and is also more difficult to verify, particularly since those factors may be subject to changes over time. Practical difficulties alone do not however justify the use, to an extent for reasons of convenience, of the insured person's sex as a distinguishing criterion.

45 — In particular tobacco, alcoholic drinks, coffee and tea.

46 — See in particular recital 19 in the preamble to Directive 2004/113.

67. The use of a person's sex as a kind of *substitute criterion* for other distinguishing features is incompatible with the principle of equal treatment for men and women. It is not possible in that way to ensure that different insurance premiums and benefits for male and female insured persons are based exclusively on objective criteria which have nothing to do with discrimination on grounds of sex.

68. Purely financial considerations, such as the danger of an increase in premiums for a proportion of the insured persons or even for all of the insured persons, do not in any event constitute a material reason which would make discrimination on grounds of sex permissible. [47] In addition it seems reasonable to assume that the premiums for some insured persons would be higher than at present if there were no exemption clause like Article 5(2) of Directive 2004/113; that would normally have to be balanced against lower premiums for insured persons of the other sex in each case. In any event none of the parties to the proceedings has submitted that the introduction of so-called unisex rates would give rise to a serious danger to the financial equilibrium of private insurance systems.

69. Against that background, I, like Advocate General Van Gerven [48] before me, am of the opinion that the use of actuarial factors based on sex is incompatible with the principle of equal treatment for men and women.

70. All in all I therefore propose that the Court should declare Article 5(2) of Directive 2004/113 to be invalid due to infringement of the prohibition of discrimination on grounds of sex, which is enshrined as a fundamental right. The Court would be keeping good company if it delivered such a judgment: more than 30 years ago the Supreme Court of the United States of America held in connection with pension insurance funds that the Civil Rights Act of 1964 prohibits different treatment of insured persons on the basis of their sex. [49]

47 — See, to that effect, *Roks* (cited in footnote 25), paragraph 36; *Schönheit and Becker* (cited in footnote 25), paragraph 85; *Steinicke* (cited in footnote 33), paragraph 66; and Case C-196/02 *Nikoloudi* [2005] ECR I-1789, paragraph 53.

48 — Joined Opinions of Advocate General Van Gerven in Cases C-109/91, C-110/91, C-152/91 and C-200/91 *Ten Oever and Others* [1993] ECR I-4879, points 34 to 39. In *Lindorfer* v *Council* (cited in footnote 26), which was discussed by a number of parties to the proceedings, Advocates General Jacobs (Opinion of 27 October 2005, point 70) and Sharpston (Opinion of 30 November 2006, point 46) did not provide a closer analysis of the issue of interest here and in end effect left it open.

49 — Judgments of the United States Supreme Court of 25 April 1978 in *City of Los Angeles* v *Manhart* (435 U.S. 702 [1978]), and of 6 July 1983 in *Arizona Governing Comm.* v *Norris* (463 U.S. 1073 [1983]).

71. It is not, however, necessary for Directive 2004/113 to be declared invalid in its entirety. It is true that the isolated annulment of a single provision of a directive is not allowed if that provision is inextricably linked with the rest of the directive; the partial annulment of that directive would then alter the substance of the provisions which have been laid down and that is a matter for the European Union legislature alone. [50] In the present case, however, in response to my express question, none of the parties, particularly not the Council as the author of Directive 2004/113, denied that Article 5(2) constitutes a severable part of that directive and may therefore be declared invalid in isolation. The fact that Article 5(2) was not originally envisaged and was added to Directive 2004/113 only later, in the course of the legislative procedure, also militates in favour of that view.

72. Should the Court nevertheless consider Article 5(2) of Directive 2004/113 to be valid, the provision would, as a derogating provision, have to be interpreted restrictively. Compliance with the conditions provided for in that article for the use of sex-specific actuarial and statistical data would have to be monitored regularly and strictly by the national body responsible, taking account of the principle of equal treatment between men and women. [51]

4. Limitation of the temporal effects of the judgment

73. No express provision is made in the Treaties for the consequences that flow from a preliminary ruling declaring a European Union measure to be invalid. However, as the reference for a preliminary ruling on the validity of a European Union act and the action for annulment are the two complementary mechanisms provided by the Treaties for reviewing the legality of the acts of European Union, [52] it is established case-law that the consequences of a declaration of invalidity are to be determined by analogy with the provisions of Articles 264 TFEU and 266 TFEU applicable to judgments on annulment actions. [53]

50 — See, for example, Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, paragraph 117; Case C-244/03 *France* v *Parliament and Council* [2005] ECR I-4021, paragraphs 15, 19 and 20; and *Family reunification* (cited in footnote 22), paragraphs 27 and 28.

51 — In that connection it is of relevance that Member States not only have to interpret their national law in conformity with European Union law, but also have to take care not to rely on an interpretation of a provision of secondary European Union law which conflicts with the fundamental rights protected by European Union law or the other general principles of European Union law (*Ordre des barreaux francophones et germanophone and Others*, cited in footnote 9, paragraph 28).

52 — Case C-212/94 *FMC and Others* [1996] ECR I-389, paragraph 56, and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 40.

53 — Case 4/79 *Providence agricole de la Champagne* [1980] ECR 2823, paragraphs 44 and 45; Case 109/79 *Maïseries de Beauce* [1980] ECR 2883, paragraphs 44 and 45; Case 145/79 *Roquette Frères* [1980] ECR 2917, paragraphs 51 and 52; Case 300/86 *van Landschoot* [1988] ECR 3443, paragraph 24; Case C-228/99 *Silos* [2001] ECR I-8401, paragraph 35; and Case C-333/07 *Regie Networks* [2008] ECR I-10807, paragraph 121.

74. In principle, therefore, a judgment of the Court in proceedings for a preliminary ruling declaring an act invalid has retroactive effect, like a judgment annulling an act. [54] A finding of invalidity is also sufficient reason for any national court to regard the act concerned as void for the purposes of measures to be pronounced by it. [55]

75. Based on the legal principle expressed in Article 264(2) TFEU, the Court nevertheless has the power to order specific effects of a contested act to be maintained if it considers it necessary and it has a discretion in this respect. [56]

76. The Court has in the past made use of that possibility, in particular, where, having regard to all the interests at stake in the cases concerned, overriding considerations of legal certainty made it necessary, [57] and in doing so has taken into account not least the consequences of any annulment or declaration of invalidity on the rights of traders. [58] These considerations can also be usefully applied in the present case.

77. As has been pointed out in particular by the United Kingdom Government, many, presumably even millions, of insurance contracts based on sex-specific risk assessments have been concluded since the entry into force of Directive 2004/113, in which parties involved relied on the validity of the respective provisions of national law adopted on the basis of Article 5(2) of Directive 2004/113.

78. For reasons of legal certainty the effects of Article 5(2) of Directive 2004/113 should therefore be maintained in two respects.

79. First, sex-specific differences in respect of insurance premiums and benefits should not be called into question with regard to the past. The declaration of invalidity in respect of Article 5(2) of Directive 2004/113 should therefore only have effect for the future.

54 — Case C-228/92 *Roquette Frères* [1994] ECR I-1445, paragraph 17, and *FMC and Others* (cited in footnote 52), paragraph 55; see on the retroactive effects of judgments annulling an act Case C-199/06 *Centre d'exportation du livre français* [2008] ECR I-469 ('*CELF*'), paragraphs 61 and 63.

55 — Case 66/80 *International Chemical Corporation* [1981] ECR 1191, paragraph 13, and order of 8 November 2007 in Case C-421/06 *Fratelli Martini and Cargill*, paragraph 54.

56 — Case 112/83 *Société des produits de maïs* [1985] ECR 719, paragraph 18, and Case 41/84 *Pinna* [1986] ECR 1, paragraph 26.

57 — *Pinna* (cited in footnote 56), paragraphs 26 to 28; *Silos* (cited in footnote 53), paragraph 36; Joined Cases C-38/90 and C-151/90 *Lomas and Others* [1992] ECR I-1781, paragraph 24; and *Régie Networks* (cited in footnote 53), paragraph 122.

58 — Case C-239/01 *Germany* v *Commission* [2003] ECR I-10333, paragraph 78; the judgments in *Defrenne II* (cited in footnote 23), paragraphs 63 to 75; Case C-262/88 *Barber* [1990] ECR I-1889, in particular paragraphs 40 to 45; and *Régie Networks* (cited in footnote 53), paragraph 123, first sentence, are in end effect based on similar considerations.

80. Secondly, Member States should be granted an appropriate period in which to draw the relevant conclusions from the invalidity of Article 5(2) of Directive 2004/113 in respect of their domestic law. Thus insurance companies would at the same time have a transitional period in which they could adjust to the new legal framework conditions and adapt their products accordingly. On the basis of that which the European Union legislature itself laid down in Article 5(1) of Directive 2004/113, I would consider a three-year transitional period to be appropriate. [59] That period would begin to run with the delivery by the Court of the judgment in the present case.

81. After that transitional period had expired all future insurance premiums, in the calculation of which sex-specific differences are currently still being made, and also the benefits financed out of the new premiums would however have to be neutral in terms of sex. That would also have to apply to existing insurance contracts. It would not be justified to permanently deny insured persons who have been discriminated against, who may, for example, in the past have concluded life assurance contracts, the adjustment to which they are entitled, particularly since such contracts may in many cases continue to run for a period of many years. [60] The general principle of non-retroactivity under European Union law does not prohibit a new legal situation from being applied to the future effects of existing situations. [61]

82. According to settled case-law, [62] only persons who, prior to the date of delivery of the judgment of the Court in the present case, initiated legal proceedings or raised an equivalent claim under the applicable national law should be excluded from the temporal limitation of the effects of the judgment.

59 — The date of 21 December 2007, to which reference is made in Article 5(1) of Directive 2004/113, is exactly three years after the date on which Directive 2004/113 entered into force on 21 December 2004 (day of its publication in the *Official Journal of the European Union*, see Article 18 of the directive).

60 — Accordingly, the Court in *Barber* (cited in footnote 58), paragraph 44, exempts entirely from the effects of the judgment only 'legal situations which have exhausted all their effects in the past'. To the same effect is the so-called 'Barber Protocol' (now Protocol 33 to Article 157 TFEU, OJ 2010 C 83, p. 319) which exempts benefits only 'if and in so far as they are attributable to periods of employment prior to 17 May 1990', that is to say prior to the date of delivery of the judgment in *Barber*.

61 — Case 143/73 *SOPAD* [1973] ECR 1433, paragraph 8; Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 50; and Case C-428/08 *Monsanto Technology* [2010] ECR I-6765, paragraph 66.

62 — *Pinna* (cited in footnote 56), paragraph 30, and *Régie Networks* (cited in footnote 53), paragraph 127; to the same effect, *Defrenne II* (cited in footnote 23), paragraph 75, and *Barber* (cited in footnote 58), paragraph 44.

B — *The second question*

83. By its second question, which is worded more narrowly than the first one, the Belgian Constitutional Court wishes to know whether any doubts as to the compliance of Article 5(2) of Directive 2004/113 with fundamental rights exist even if its application is restricted to *life assurance contracts*. The background to the second question is that the Belgian legislature made use of the derogating provision as laid down in Article 5(2) of Directive 2004/113 only in respect of that type of insurance contract anyway.

84. The second question has been asked in the event that the answer to the first question is, as I propose it should be, negative because Article 5(2) of Directive 2004/113 infringes the prohibition of discrimination on grounds of sex. The second question must therefore be examined.

85. I can, however, see nothing that may convincingly be said in favour of allowing life insurance premiums and benefits which are contingent upon a person's sex. As regards life insurance, the predicted life expectancy of the insured person is a central risk factor. I have already explained in connection with the first question [63] that in that regard it is not permissible for the purposes of risk assessment to take into account wholesale differences between male and female insured persons that are merely statistically verifiable.

86. None of the arguments put forward in the present case makes it possible to conclude that life insurance is special in comparison with other types of insurance, in which a risk assessment is traditionally carried out on the basis of sex. On the basis of the information before the Court there is therefore no reason to rule on the substance of the second question differently from that of the first question. The answer to the second question of the Belgian Constitutional Court must therefore be affirmative.

63 — See in that connection in particular paragraphs 61 to 68 of this Opinion.

VI — Conclusion

87. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Belgian Constitutional Court for a preliminary ruling as follows:

(1) Article 5(2) of Directive 2004/113/EC is invalid.

(2) The effects of the provision which has been declared invalid will be maintained until the expiry of a period of three years following the delivery of the judgment of the Court in the present case. That does not apply to persons who, prior to the date of delivery of the judgment of the Court in the present case, have initiated legal proceedings or raised an equivalent claim under the applicable national law.