Translation of a Request for an Advisory Opinion from
Fürstlicher Oberster Gerichtshof, Liechtenstein
Registered at the EFTA Court under Case E-15/15-3
Original language: German

PRINCIPALITY OF LIECHTENSTEIN
FÜRSTLICHER OBERSTER GERICHTSHOF
(SUPREME COURT)

ORIGINAL

Registered at the EFTA Court under No E-15/15-3 08 CG.2012.111-60
9th day of July 2015

ORDER

In the case brought by the applicant, **Franz-Josef Hagedorn**, Turnierstieg 9, D-22159 Hamburg, represented by Schwärzler Rechtsanwälte, 9494 Schaan, against the defendant, **Vienna-Life Lebensversicherung AG**, Vienna Insurance Group, Industriestrasse 2, 9487 Gamprin-Bendern, represented by Walch & Schurti, Rechsanwälte, 9490 Vaduz, for payment amounting to CHF 464 422.09 [Revisionsrekursinteresse], following an appeal on a point of law brought by the defendant against the order of the Fürstliches Obergericht (Princely Court of Appeal) of 4 February 2015, 08 CG.2012.111, ON 43, by which the appeal brought by the applicant on 20 September 2013, ON 20, against the judgment of the Fürstliches Landgericht (Princely Court of Justice) of 25 July 2013, ON 19, was granted such that the judgment under appeal was set aside and the case was remitted to the court of first instance for a fresh hearing and decision whilst a right of further consideration was reserved, and following the written request from the EFTA Court of 17 June 2015 pursuant to Article 96 of the Rules of Procedure of the EFTA Court, at a closed sitting, the Fürstlicher Oberster Gerichtshof, the court hearing the appeal on a point of law, through its First Chamber, chaired by the President, Prof. Dr Hubertus Schumacher, and Supreme Court Judges Dr Lothar Hagen, Dr Marie-Theres Frick, Dr Thomas Hasler and Thomas Ritter, lic. iur., and in the presence of the Rapporteur, Astrid Wanger, has made the following order:

I. An abbreviated version of the request for an Advisory Opinion of 3 June 2015 is referred to the EFTA Court pursuant to Article 34 of the SCA Agreement, replacing that request and forming the basis for the preparation of the Advisory Opinion.

II. The proceedings pending before the Fürstlicher Oberster Gerichtshof under reference 08 CG.2012.111 (OGH 1.2015.33) are hereby

suspended.

III. The following questions are referred to the **EFTA Court** in Luxembourg with a request for an Advisory Opinion:

1. Is Article 36(2) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance to be interpreted as meaning that the duties to provide information referred to therein and in Annex III(A)(a)(11) and (a)(12) and (B)(b)(2) for unit-linked life assurance policies must also be fulfilled in the case where a person who, by a legal transaction, acquires a unit-linked life assurance policy from another person with the consent of the assurer through the transfer of the contract ('second-hand policies')?

In the event that the Court answers the first question in the affirmative, the following additional questions are asked:

2.(a) Is Article 36(2) of Directive 2002/83/EC concerning life assurance to be interpreted as meaning that in the event that a unit-linked life assurance policy is acquired by a legal transaction, only general information must be provided to the new policy holder or is the assurance company also required to provide the new policy holder with information specifically regarding the assurance product to be acquired by him, in particular regarding any differences between the investor or risk profiles of the existing policy holder and of the transferee?

In the event that Question 2(a) is answered in the negative, the following question is asked:

2.(b) Is specific information to be given to the transferee of the contract regarding the assurance product to be acquired by him where the existing policy holder is an undertaking, while the transferee of the contract is a natural person or a consumer?

In the event that Question 2(b) is answered in the negative, the following question is asked:

2.(c) Is specific information to be given to the transferee of the contract regarding the assurance product to be acquired by him where the transferor of the policy dispensed with information regarding the assurance product in question, for example because he did not disclose to the assurance company the information necessary in order to assess his own risk or investor profile?

Furthermore, the following additional question is asked:

3. Are the provisions concerning the assurer's obligations under Annex III(B)(b)(2) of Directive 2002/83/EC concerning life assurance effectively transposed into national law even if national law provides, in Annex 4(II)(2) of the Versicherungsaufsichtsgesetz (Law on insurance supervision), in the case of unit-linked assurance policies, that during the term of an assurance contract information must be provided on the units underlying the assurance policy and the nature of the assets contained therein only where the changes in the information provided stem from 'amendments of the law' but not also 'in the event of a change in the policy conditions' (Annex III(B)(b)(2) to Directive 2002/83/EC)?

IV. The applicant's requests that further additional questions be referred to the EFTA Court are refused.

Grounds:

In the above case, by letter of 17 June 2015 the EFTA Court requested that, pursuant to its Rules of Procedure and in particular Article 96 thereof, the Fürstlicher Oberster Gerichtshof send an abbreviated version of the request for an Advisory Opinion under Article 34 of the SCA Agreement which, by order of the Fürstlicher Oberster Gerichtshof, is intended to replace the request of 3 June 2015 and to form the basis for the preparation of the Advisory Opinion by the Court.

Under Article 96(3) of the Rules of Procedure of the EFTA Court, a request for an Advisory Opinion is to be accompanied by 'a summary of the case before the national court'.

The Fürstlicher Oberster Gerichtshof hereby complies with this request by the EFTA Court and thus revises its order for reference of 3 June 2015 to the effect that an abbreviated version of that decision to refer the case is adopted, replacing the request of 3 June 2015 and forming the basis for the preparation

of the Advisory Opinion by the Court. This does not entail any substantive amendment of the questions referred to the EFTA Court.

1. Facts of the case

1.1. The applicant is claiming EUR 371 537.67 plus expenses from the defendant essentially on the ground that he took out a unit-linked life assurance policy with the defendant at the end of 2006. According to the applicant, it was an existing assurance contract which he acquired. He was approached by Frank Weber from Swiss Select Asset Management AG (SSAM) regarding a better alternative for occupational retirement provision. The intermediary sold a structured product predefined by the defendant which was purportedly intended to meet his wish for a secure investment. However, it was in fact a high-risk product. The horrendous cascading costs precluded any increase in value from the outset. This was never fully explained. If it had been fully explained, he would never have concluded the contract with the defendant. The intermediary advised him that it was a secure, conservative investment with a 100% capital guarantee. In actual fact it was a high-risk derivative and the purported guarantee and security never existed.

There was a permanent asset management contract between the defendant and SSAM. SSAM formed part of the defendant. SSAM invested the assets covered by the policy incompetently and in breach of the contract.

1.2. The defendant has contended that the application should be dismissed and that the applicant be ordered to pay the costs, essentially raising the following objections:

It did not sell anything to the applicant, but the applicant purchased a second-hand life assurance policy on the secondary market. It merely complied with the shared wish of the old policy holder and the applicant, as the new policy holder, to change the policy holder. The original policy holder was Gold Bank Finance Ltd, which had submitted to it the relevant application to take out a life assurance policy with asset management on 30 December 2004. The defendant has nothing to do with the investment, but merely accepts it as one of many portfolios for the assurance contract. Gold Bank wanted SSAM, as the asset manager, to be fully authorised to manage the premium reserve fund. The applicant acquired the policy without any substantive changes. It was transferred without any participation by the defendant and without its knowledge. It neither arranged that transfer nor promoted it in any other way,

and it did not have any interest itself in the transfer. It merely made out the existing policy to the applicant on 19 December 2006 as requested. The life assurance policy was mediated for the applicant by SSAM or by Mass & Partner Capital Management GmbH. In addition, SSAM was not in a permanent contractual relationship with it. It is not the defendant's task or duty to talk the applicant out of his desired asset manager. The applicant should have recourse against SSAM or its former organs. The actions of SSAM are not attributable to the defendant since SSAM cannot be regarded as a subordinate to the defendant.

The fees levied were transparent and as agreed and had, moreover, been perfectly reasonable.

1.3. By judgment of 25 July 2013, the *Fürstliches Landgericht* dismissed the applicant's claim in its entirety and ordered the applicant to reimburse the costs.

The court of first instance established the following facts:

At a time that cannot be precisely determined in 2006, the applicant was contacted by Udo Mass, the managing director of Mass & Partner Kapitalmanagement GmbH. At the time Mr Mass was opening a new office in Hamburg. Mr Mass' target clientele for an acquisition campaign at the time were tax advisers, including the applicant. Mr Mass visited the applicant at his office and introduced himself as, among other things, having worked in the financing and investment business in the Nuremberg area for 15 years and as now wanting to gain a foothold in northern Germany. On a further visit around two to three weeks later, Mr Mass then presented to the applicant the 'financing product' of a Liechtenstein life assurance company with a guarantee product and crediting. At the time the applicant had liquid funds available following the sale of a property and was therefore interested in a relatively secure, long-term investment for his retirement provision.

Mr Mass also offered the applicant the opportunity, rather than concluding a new assurance contract, to acquire an already existing assurance policy. Mr Mass assured the applicant in this regard that it would make no difference whether he concluded a new contract or acquired an existing policy. It was nevertheless more beneficial to acquire an existing policy for tax reasons, as the tax legislation in Germany had been amended at the end of 2004. In presenting the product Mr Mass also showed the applicant advertising brochures with charts indicating the product's past performance. It cannot be ascertained in this connection whether Mr Mass showed the applicant the advertising brochure for the 'Swiss Select Garantie 2' product or the 'Swiss Select Garantie 3' product. The two brochures have similar content although Swiss Select Garantie 2 (SSG2) related to a capital guarantee from Société Générale and the brochure for Swiss Select Garantie 3 (SSG3) a capital guarantee from Barclays Bank. Under the heading 'Higher returns with security' the following points were listed in each document:

SSG2:
105% capital guarantee
75% highest return guarantee
Investment in EUR, 12 year maturity
Guarantor: Société Générale (Rating AA-/Aa3)

SSG3:
105% capital guarantee
75% highest return guarantee
Investment in EUR, 15 year maturity
Guarantor: Barclays (S&P AA, Moody's Aa1)

In addition, it was explained in those brochures that the underlying fund invested mainly in conservative strategies and was distinguished by its combination of low volatility, consistent performance and preferably low correlation to conventional stock and bond markets. The instrument thus had the aim of generating consistently positive returns. The risk-averse orientation and broad spread across different investment styles and managers for alternative investments characterised the product as an investment instrument that could be used as the basic building block for a well-diversified investment portfolio.

Clarification was given of the 105% capital guarantee to the effect that the invested capital was secured at 105% on maturity. This was covered by the capital guarantee from the major French bank Société Générale (SSG2) or the major English bank Barclays (SSG3). Société Générale is one of France's largest banks and is assessed by international rating agencies as having sound financial strength at AA-/Aa3 (Moody's/Standard & Poors) (SSG2). Barclays is one of the ten largest banks in the world and is assessed by international rating agencies as having sound financial strength at AA/Aa1 (Standard & Poors/Moody's) (SSG3).

With regard to the 75% highest return guarantee it was stated that at maturity the investor was entitled to repayment of his invested capital plus 75% of the highest return ever achieved as established during the term on the relevant observation dates.

Under the heading 'Investment objective', the following statement was made:

The SwissSelect … portfolio strategy is geared to achieving an annual net return of 10-12% (SSG2)/8-12% (SSG3) with the lowest possible volatility (fluctuation) and with a low correlation (synchronism) with stock and bond markets. In order to achieve this investment objective, sectoral fund assets are invested in different alternative investment strategies using a number of hedge fund managers and commodity trading advisers in accordance with the principle of risk diversification. These are a pool of recognised alternative investment specialists who have proved their expertise over many years with both private and institutional investors. The criteria for the selection of the fund managers include the following: period of real-time performance in the past, numbers of positive months, correlation, as an important indicator of portfolio balance, and trading in diverse markets.

The key data for Swiss Select Garantie 2 were set out as follows:

Name	Swiss Select Garantie 2
Type	EMT (Euro Medium Term Note)
Guarantor	Société Générale (AA-/Aa3)
Currency	euro (EUR)
Denomination	EUR 10 000
Minimum investment	EUR 10 000
Issue date	29 March 2005
Maturity	29 March 2017
ISIN Code	XS0216038645
Issue price	100% of nominal amount
Capital guarantee on maturity	105% of nominal amount and 75% highest return guarantee

This will be based on the relevant annual financial statement for the net asset value for years 4 and 8

Capital growth	100% of SwissSelect Fund 2
Initial service charge	up to 5%
Repurchase charge	3% in year 1, 2% in year 2, 1% in year 3, none thereafter
Marketability	monthly with a maximum bid-offer spread of 1%
Participation	initially 160%

The key data for Swiss Select Garantie 3 were set out as follows:

Name	Swiss Select Garantie 3
Type	EMTN (Euro Medium Term Note)
Guarantor	Barclays Bank PLC (AA/Aa1)
Currency	euro (EUR)
Issue date	3 March 2006
Maturity	3 March 2021
ISIN Code	to be assigned
Issue price	100% of nominal amount
Payout on maturity	at the current rate
or	
Capital guarantee	105% of nominal amount and 75% highest return guarantee

This will be based on the relevant annual financial statement for the net asset value for years 4, 8 and 12

Initial service charge	5%
Repurchase charge	6% in year 1, 5% in year 2, etc., none from year 6
Marketability	monthly with a maximum bid-offer spread of 1%
Participation	initially 180%

These brochures were produced by Swiss Select Asset Management AG (SSAM) or its managing director Frank Weber in consultation with the respective issuers (Société Générale and Barclays Bank). After they had been produced, SSAM submitted the brochures to the issuers for approval and they were subsequently found to be in order by the issuers. In the case of Barclays Bank, Mr Weber himself presented the relevant advertising leaflets for approval in Zurich and was personally given approval there.

In addition to these advertising brochures, SSAM provided its intermediaries and sub-intermediaries with a program in the form of Excel tables using which (sub-)intermediaries were able to produce a model calculation for the product offered to the customer. It cannot be established whether Mr Mass produced such a model calculation for the applicant or only outlined the functioning of monetary growth on sheets.

After Mr Mass had presented the product, the applicant explained that he would carefully reconsider what to do. After making his decision he telephoned Mr Mass and informed Mr Mass that he could now prepare the contracts. Subsequently, on 28 November 2006 the documents were signed.

At that appointment the applicant finally acquired the second-hand life assurance contract and second-hand policy No 5.061.662 (sum assured: EUR 500 000.00, name of existing policy holder: Gold Bank Finance Limited, Finchley Road 788-790, GB-17 London).

1.4. With regard to legal considerations, the Fürstliches Landgericht held that the mediation of a second-hand life assurance policy does not entail the conclusion of an assurance contract but results only in the acquisition of entitlements stemming from an assurance contract. The original contract continues to operate in any case. Duties to provide information and explanations exist only in connection with the preparation of an assurance contract and prior to its conclusion. The mediation of a second-hand policy does not constitute assurance mediation, but is an activity consisting in investment advice. SSAM's activity cannot be attributed to the defendant. According to the established facts, the outgoing contractual party, Gold Bank Finance Ltd, was not given inadequate explanation. A conservative, secure, long-term investment, as was claimed by the applicant, had not been arranged, according to the findings made. The applicant's claim therefore had to be dismissed.

2. The *Fürstliches Obergericht* granted the appeal brought by the applicant such that the judgment under appeal was set aside and the case was remitted to the court of first instance for a fresh hearing and decision.

3. Following the appeal on a point of law brought by the defendant, the Fürstlicher Oberster Gerichtshof considers that it should refer this case to the

EFTA Court in order to obtain an Advisory Opinion on the questions asked at the beginning, on the following grounds:

4. European legal framework

4.1. Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 60/2004 (LGBl. 2004 No 203).

4.2. Article 36 of that directive reads as follows:

'*1. Before the assurance contract is concluded, at least the information listed in Annex III(A) shall be communicated to the policy holder.*

2. The policy holder shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B).'

Annex III(B) states, in so far as unit-linked life assurance policies are concerned:

'*B. During the term of the contract*
In addition to the policy conditions, both general and special, the policy holder must receive the following information throughout the term of the contract.
…
(b)2 All the information listed in points (a)(4) to (a)(12) of A in the event of a change in the policy conditions or amendment of the law applicable to the contract.'

The provisions on information contained in A, referred to in B(b)(2), concerning unit-linked policies, state:

'*A. Before concluding the contract*

(a)11 For unit-linked policies, definition of the units to which the benefits are linked

(a)12 Indication of the nature of the underlying assets for unit-linked policies.'

4.3. Recital 52 in the preamble to Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ

2002 L 345, p. 1) requires that the consumer 'must be provided with whatever information is necessary to enable him/her to choose the contract best suited to his/her needs. This information requirement is all the more important as the duration of commitments can be very long. The minimum provisions must therefore be coordinated in order for the consumer to receive clear and accurate information on the essential characteristics of the products proposed to him/her …' (see in this regard Case C-386/00 *Axa Royale Belge* [2002] ECR I-2209, paragraph 20; *Feurstein/Fuchs*, Versicherungsaufsichtsrechtliche Mitteilungspflichten liechtensteinischer Versicherungsunternehmen in der fondsgebundenen Lebensversicherung, liechtenstein-journal 3/2013, p. 72 et seq. [73]; European Court of Justice, 5 March 2002, C-386/00, paragraph 30.

In its ruling of **13 June 2013** in **Case E-11/12**, the EFTA Court held, in **paragraph 63**, that the average consumer, i.e. a consumer who is reasonably well informed and reasonably observant and circumspect, must be taken into consideration when interpreting Directive 2002/83. Life assurance contracts are in general of a complex nature the details of which may be difficult to understand for the average consumer. Moreover, such contracts may involve considerable financial commitments for consumers over a long period of time. This underlines the importance of clear information to consumers when entering into life assurance contracts (see *ESA* v *Norway*).

Furthermore, the EFTA Court made clear in its ruling of 13 June 2013 in Case E-11/12, in paragraphs 69, 72 and 78, that even though life assurance contracts are in general of a complex nature the details of which may be difficult to understand for the average consumer, the directives do not impose any obligation on the assurance undertaking to provide advice. The Court also found in paragraph 70 that Article 31 of Directive 92/96 and Article 36 of Directive 2002/83 and Annex II(A) and Annex III(A), respectively, show that the legislature considered the information required pursuant to these provisions sufficient to protect the average consumer before the contract is concluded. According to those provisions, when the listed information is communicated to the consumer before the contract is concluded, he/she will be able to compare the essential elements of a contract – and then to choose the contract best suited to his needs.

5. National legal framework

5.1. The Principality of Liechtenstein transposed Directive 2002/83/EC by means of the Versicherungsaufsichtsgesetz (VersAG), LR 961.01, the

Versicherungsaufsichtsverordnung (Insurance Supervision Ordinance, VersAV), LR 961.011, the Versicherungsvertragsgesetz (Law on insurance contracts, VersVG), LR 215.229.1, the Gesetz über das internationale Privatrecht (Law on private international law, IPRG), LR 290, and the Gesetz über das internationale Versicherungsvertragsrecht (Law on international insurance contract law, IVersVG), LR 291 (LR = systematic collection of Liechtenstein legislation; available on the internet at www.gesetze.li).

5.2. In so far as is relevant to the present case, reference should be made to the following provisions of the VersAG:

'*Article 45*

Duties to inform policy holders

Prior to conclusion and during the term of insurance contracts, specific information shall be provided to policy holders for purposes of their information and protection. The content and scope of these duties to provide information are regulated in Annex 4.'

In so far as is relevant here, Annex 4 reads as follows:

'Duties to inform policy holders under Articles 45 and 49

Where the policy holder is a natural person, insurance undertakings shall inform him of the essential facts and rights pertaining to the insurance relationship prior to conclusion and during the term of a contract in accordance with the following provisions. In the case of insurance of large risks, it shall be sufficient to indicate the applicable law and the competent supervisory authority. Information shall be provided in writing.

Section I

1. Information required for all classes of insurance:
(a) name, address, legal form and registered office of the insurance undertaking and, where appropriate, any branch through which the contract is to be concluded;
(b) the general insurance conditions applicable to the insurance relationship, including the terms concerning scales of premiums, and indication of the law applicable to the contract;

(c) information on the nature, scope and maturity of the insurance undertaking benefits, where no general insurance conditions or where no terms concerning scales of premiums are applied;
(d) information on the term of the insurance relationship;
(e) information on the amount of the premiums, which should be identified individually if the insurance relationship is to include several autonomous insurance contracts, and on the method of payment of premiums, as well as information on any additional fees or costs, with an indication of the total amount to be paid;
(f) information on the period for which the applicant is to be bound by the application;
(g) instructions concerning the right of cancellation or withdrawal;
(h) address of the competent supervisory authority which the policy holder may contact in the event of complaints about the insurance undertaking.

2. Additional information required for life assurance or accident insurance with premium refund:
(a) information on the calculation principles and criteria used for profit determination and profit participation;
(b) indication of surrender values;
(c) information on the minimum sum insured for conversion into a fully paid-up insurance policy and on the benefits from a fully paid-up insurance policy;
(d) information on the extent to which the benefits under (b) and (c) are guaranteed;
(e) for unit-linked insurance policies, information on the unit underlying the insurance policy and the nature of the assets contained therein;
(f) general information on the tax rules applicable to this type of insurance policy.

Section II

Information to be provided by the insurance undertaking during the term of an insurance contract

1. changes of name, address, legal form and registered office of the insurance undertaking and any branch through which the contract is to be concluded;

2. changes to the information provided in accordance with Section I(1)(c) to (e) and (2)(a) to (e), where such changes stem from amendments of the law;

3. annual notification of the status of profit participation in life assurance and accident insurance policies with premium refund.'

5.3. The Fürstlicher Oberster Gerichtshof required, in connection with the conclusion of unit-linked life assurance policies, information on investment and cost structure, in particular information on the returns that should be generated in order to cover all costs arising from the conclusion of a unit-linked life assurance policy (OGH, 6 December 2013, 10 CG.2009.270).

6. The questions referred for a preliminary ruling

6.1. Question 1:

Article 36(2) of Directive 2002/83/EC mentions only 'policy holders' who must be kept informed 'throughout the term of the contract' of any change concerning the information listed in Annex III(B). Reference is thus made, first, to the 'original' policy holder who concluded the assurance contract as the recipient of the information. However, it is uncertain whether the provision also applies to a 'policy holder' who, during the term of the assurance contract, *acquires that contract from the original policy holder by a legal transaction*. That person thus also becomes the 'policy holder' with the result that the wording applies to him. On the other hand, it cannot be inferred from the directive with any certainty whether he must accept that he is covered by the explanations, information or warnings given to the original policy holder. A duty to provide explanation is uncertain in general where the policy holder transferring the contract was not given an explanation, for example where he could not be given an explanation because he did not disclose his investment or risk profile (see Question 2(c) below). In the view of the Fürstlicher Oberster Gerichtshof, it could be inferred from recital 52 in the preamble to the directive that a policy holder who enters into the assurance relationship as a contracting party only *during an ongoing contractual relationship* must also be provided with the relevant information, tailored to his investor and risk profile. If he is to be able to profit fully from the diversity of the internal market for assurance and from increased competition (which is assumed by recital 52), that policy holder who purchases a policy – albeit a 'second-hand' policy – could not simply be denied the need for information mentioned in recital 52.

Consequently, the question certainly also arises whether the explanation given to the applicant, which is at issue here, as the person who assumes the position of the outgoing policy holder in an assurance contract, actually falls within the

scope of Article 36(2) of the directive or whether he is simply to be regarded as a ‘new’ policy holder who must in any case benefit from the general duties to provide information and explanations to which the assurance undertaking is subject. Lastly, it should also be considered whether the new policy holder must accept that he is covered by the explanations and information already provided to the outgoing policy holder. In that case, the assurer would not be subject to any further duties to provide information or explanations where a policy is sold by the existing policy holder, although, as a party to the contract, it must consent to the transfer of the contract. This variant would, however, require that such explanations were actually provided to the original policy holder by the assurer.

6.2. Question 2(a):

According to the ruling of the EFTA Court of 13 June 2013 in Case E-11/12 (paragraph 89), a contract with an assurance company is considered to be not concluded in accordance with the requirements of the relevant directive where any part of the information listed in Annex II(A) to Directive 92/96 and Annex III(A) to Directive 2002/83 has not been provided to the policy holder before the contract is concluded.

In the view of the Fürstlicher Oberster Gerichtshof, considerable importance can also be attached to this finding in the case of the legal transfer of an assurance contract. In that case too, a contract is concluded with the assurance company because all the contracting parties must consent to the purchaser of the second-hand policy entering into the assurance relationship. The assurance undertaking must also therefore accept the new, incoming policy holder. The question thus arises whether the duties to provide information also apply in this case in respect of the new policy holder entering into the assurance relationship.

If, in the case of unit-linked life assurance policies, the assurer is also subject to a basic obligation to provide information to the transferee of the contract, that is to say during an ongoing assurance contract, the further question arises whether Article 36(2) of Directive 2002/83/EC is to be interpreted as meaning that only general information must be provided to the person to whom the life assurance policy has been transferred by a legal transaction or information specifically regarding the assurance product chosen by the outgoing policy holder. The question therefore arises in particular whether the transferee must also be provided with a relevant risk disclosure. In the view of the Fürstlicher Oberster Gerichtshof, this would require – on the basis of the investment and risk profile of the newly incoming policy holder – information (also) to be

provided to him on whether the assurance product to be transferred is actually suitable for the purchaser (in particular having regard to his investor or risk profile, which may potentially differ from that of the outgoing policy holder). In the view of the Austrian Oberster Gerichtshof (Supreme Court, öOGH), unit-linked life assurance policies have at least 'quasi-investment character' (öOGH, 21 July 2011, 1 Ob 115/11k, ZFR 2011/176, p. 325 = ecolex 2012/11, p. 28 = ÖBA 2012/1787, p. 183 = ZIK 2012/284, p. 198 = VersE 2370). The Bundesgerichtshof (German Federal Court of Justice, BGH) also repeatedly refers, in connection with the duties to provide explanation in relation to unit-linked life assurance policies, to their 'investment character' (BGH, 11 July 2012, IV ZR 151/11m; 26 September 2012, IV ZR 71/11; see also Heiss, Anlegerschutz bei Versicherungsprodukten? in Lorenz [ed.], Karlsruher Forum 2014: Anlegerschutz durch Haftung, VersR-Schriften p. 55, 65 et seq.).

6.3. Question 2(b):

If a general duty, as described above, to provide information to the policy holder during an ongoing assurance relationship is rejected, the additional question nevertheless arises whether such a duty should be taken to exist where the transferor of the assurance policy is an undertaking, while the transferee is a natural person or even a consumer. In this regard the view could possibly be taken that in the case of such a change in the 'capacity' of the policy holder, a duty to provide information or advice tailored to the new, incoming policy holder should be affirmed because the information provided to the original policy holder does not relate to the transferee's risk or investment profile. In this case the fundamental question arises whether the need for protection of the incoming policy holder, which is – possibly markedly – different from that of the outgoing policy holder requires information to be provided. Annex III(B)(b)(2) requires information to be provided for unit-linked assurance policies in accordance with (A)(a)(11) and (a)(12) at least 'in the event of a change in the policy conditions', an expression which the Liechtenstein legislature did not, however, transpose into national law (see Question 3).

6.4. Question 2(c):

The question of a duty to provide information to the transferee of a 'second-hand policy' which applies only in certain cases also arises where the existing policy holder has not received and was not able to receive information on risks from the assurer because he was not willing to disclose his financial circumstances or his investment and risk profile and did not therefore receive

the relevant explanations from the assurer. Consequently, Question 2(c) had to be asked additionally for cases where an explanation was not provided to the existing policy holder at all or only to a limited extent because, for example, in the absence of information on his financial circumstances and on his risk and investment profile, he dispensed with a (comprehensive) explanation from the assurer. In this case it would not be possible to uphold the justification that in the existing assurance relationship which is to be transferred all explanations have already been provided by the assurer (to the original policy holder) (see above, Section [6].1. with regard to Question 1).

6.5. Question 3:

The Liechtenstein VersAG has laid down rules governing the substance and the scope of the duties to provide information to policy holders in Annex 4 (Article 45 of the VersAG). Under that Annex, in the case of unit-linked life assurance policies information must also be provided on the unit underlying the assurance policy and the nature of the assets contained therein (Annex 4 (2)(e)) and, during the term of such assurance policies, on changes to information 'where such changes stem from amendments of the law'. This wording constitutes a more restrictive approach to the provision of such information during the term of the unit-linked life assurance policy than is required by Annex III(B)(b)(2) to the directive because under that provision all the information listed in points (a)(4) to (a)(12) of A *must also be provided in the event of a change in the policy conditions*, that is to say not only in the event of amendment of the law applicable to the contract. The contract with the newly incoming policy holder could also be construed as a 'change in the policy conditions'.

In the view of the Fürstlicher Oberster Gerichtshof, the mention of the 'change in the policy conditions' in Annex III(B)(b)(2) to Directive 2002/83/EC potentially therefore indicates that, in the event of *contractual changes* during the term of the original assurance contract, the policy holder, in the case of unit-linked life assurance policies, must be provided with, in addition to the general information in accordance with Annex III(A)(a)(4) to (a)(10), explanations in accordance with Annex III(A)(a)(11) and (a)(12). This would therefore relate to the definition of the units to which the benefits are linked and indication of the nature of the underlying assets for unit-linked policies.

A transposition of Directive 2002/83/EC to the effect that such information must also be provided in the event of a 'change in the policy conditions' would potentially imply that, where the originally concluded assurance contract is

transferred to a transferee by a legal transaction, (new) relevant information and explanations must be provided as they were to the first policy holder. The question therefore also arises whether the requirement to transpose the directive was fulfilled by the Liechtenstein VersAG, even though the case of 'a change in the policy conditions' provided for by the directive for information during ongoing assurance relationships was omitted.

7. In order to observe the right to be heard the Fürstlicher Oberster Gerichtshof has granted the parties to these proceedings the opportunity to submit observations within 14 days by written pleading to the Fürstlicher Oberster Gerichtshof.

8. The requests made by the applicant to include further questions to the EFTA Court had to be refused, especially because the questions referred by the Fürstlicher Oberster Gerichtshof to the EFTA Court already cover the requested additional questions and those questions are considered by the Fürstlicher Oberster Gerichtshof to be relevant to the outcome of the case. Furthermore, it was not necessary to consider the suggestion made by the defendant not to refer the questions to the EFTA Court because the Fürstlicher Oberster Gerichtshof is asking these questions in order to clarify the legal situation under European law.

Fürstlicher Oberster Gerichtshof
First Chamber
Vaduz, 3 July 2015
The President
Prof. Dr Hubertus Schumacher

Certified true copy
[signed]
Astrid Wanger

Appeals:

No appeals may be lodged against this order.