*Translation of a Request for an Advisory Opinion from*
*Fürstlicher Oberster Gerichtshof, Liechtenstein*
*Registered at the EFTA Court under Case E-16/15-3*
*Original language: German*

PRINCIPALITY OF LIECHTENSTEIN
FÜRSTLICHER OBERSTER GERICHTSHOF
(SUPREME COURT)

**ORIGINAL**

Registered at the EFTA Court under No E-16/15-3 09 CG.2012.97-108
9th day of July 2015

# ORDER

In the case brought by the applicant, **Rainer Armbruster**, D-77709 Wolfach, represented by Schwärzler Rechtsanwälte, 9494 Schaan, against the defendant, **Swiss Life (Liechtenstein) AG**, 9494 Schaan, represented by Sele Frommelt & Partner, 9490 Vaduz, for (an increased sum of) EUR 638 260.94 (amount in dispute: EUR 436 391.70), following appeals on a point of law brought by both parties against the order of the Fürstliches Obergericht (Princely Court of Appeal) of 28 January 2015, 09 CG.2012.97, ON 86, by which the appeal brought by the defendant against the judgment of the Fürstliches Landgericht (Princely Court of Justice) of 11 July 2014, ON 70, was granted, the judgment under appeal was set aside and the case was remitted to the court of first instance 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 09 CG.2012.97 (OGH 1.2015.30) 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, has acquired 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 question is asked:

**2. Is Article 36(2) of Directive 2002/83/EC concerning life assurance to be interpreted as meaning that, in the case of the legal transfer of the contract for a unit-linked life assurance policy, 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 risk profiles of the existing policy holder and of the transferee?**

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, VersAG), 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 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

The defendant in the case is a public limited company and an insurance company governed by Liechtenstein law having its registered office in Schaan. It is subject to the provisions of the Liechtenstein VersAG and other legislation applicable to approved insurance companies. It is the universal successor to CapitalLeben Versicherung AG and acquired CapitalLeben Versicherung by way of universal succession in 2007.

1.1. The defendant concluded a cooperation agreement with Swiss Select Asset Management AG (SSAM) with the aim of supplementing and expanding its range of services offered. To that end SSAM 'Liechtenstein FundLife' included in its range a unit-linked life assurance and/or annuity insurance policy with an initial

contribution and/or premium of EUR 100 000 and stated that it would, if necessary, take on the asset management of the portfolio in question on the basis of the Investment Advisory Agreement without being permanently entrusted by the defendant with the mediation or the conclusion of insurance contracts.

1.2. In 2003 the applicant's legal predecessors (Werner Finzel and Ute Finzel-Heidinger) had submitted to CapitalLeben an application to take out a unit-linked life assurance policy, with a term of insurance of 30 years, a premium payment period of five years and a total premium of EUR 725 000. In the abovementioned application form, under point 'I. Declarations and notes', the following statements were made:

*'**Product description**: Liechtenstein FundLife Kapital is a unit-linked life assurance policy with five-year premium payment combined, if so desired, with a premium deposit. After the expiry of the contract we pay the monetary value of the existing investment, calculated using the redemption price on the last trading day prior to the expiry of the contract. If the assured person dies during the term of the contract, CapitalLeben will repay the value of the existing investment on the maturity date, but at least 60% of the total premium after the end of the third year of premium payments.*

*Premiums are invested in a premium reserve fund managed by CapitalLeben Versicherung AG which is in line with the policy holder's chosen investment strategy.*

*If the payment is a lump sum, it is invested in a premium deposit. The calculations of the net present value of the deposit are based on annual interest of 4%. From that deposit, consisting of the original contribution and any interest accrued, five equal annual premiums are used for your assurance policy and are redeployed for that purpose. Interest accrued is not therefore paid out to the policy holder. The interest rate is not guaranteed by CapitalLeben. Any residual credit balance existing at the time of the liquidation of the premium deposit is repaid. The premium deposit is legally autonomous from the assurance contract, but forms a single entity with the assurance policy and, accordingly, cannot be terminated, assigned or pledged separately.*

*…*

*Declarations by the policy holder:*

***Investment**: I have been informed of the risks connected with the investment of financial assets, i.e. that, as the policy holder, I may, if the prices of securities rise, increase the value of the premium reserve fund but must also bear the risk of a reduction in value in the event of price losses. In the case of foreign currency funds it should be borne in mind that such funds are subject to exchange rate fluctuations and the value of my life assurance policy may be affected. I have been informed that CapitalLeben Versicherung AG has no influence on the performance of the assets and that CapitalLeben cannot therefore be held liable in the event of performance that is unfavourable for me. I hereby expressly release CapitalLeben Versicherung AG, the intermediary and the asset manager from any liability in connection with the performance of the assets. Furthermore, I hereby expressly release CapitalLeben from any liability that may arise in connection with the acquisition, holding and sale of US securities (in particular with regard to US rules on the withholding of tax).*

*…*

***Further declarations:** I am aware that the costs are covered by a proportion of the premium(s). During this period a smaller amount is therefore available to form the credit balance. I have also been informed that the respective deposit management costs will be charged directly to the deposit. I have further been informed that all costs incurred in connection with transactions involving securities and their custody and management will be charged to the premium reserve fund.*

*I acknowledge that this application, the general policy conditions, all amendments to the contract, the investment strategy, the risk warning notice and Liechtenstein law form the basis for this assurance contract. I further declare that I have received a copy of this application and the general policy conditions for the unit-linked deferred life assurance policy.*'

In their application, the applicant's predecessors indicated that they were taking out the life assurance policy for reasons of 'tax benefits'. The money would be able for an investment over twenty years. The applicant's predecessors considered their attitude to investment to be '*dynamic – possible high returns against high risks (fluctuations in value)*'. According to the further information provided, they had regular experience of securities, namely stocks, bonds and funds.

The '*investment strategy*' form was attached to the application made by the applicant's predecessors; it stated:

*'Management of assets is based on the "Classic" investment strategy.*

*Base currency: EUR*

*Investment aim: asset growth*

*Allocation of initial investment: bonds based on hedge funds: Plenum focus hedge 122%*

*Restrictions: none*'

The applicant's predecessors requested Liechtensteinische Landesbank, Zürich (CH), as the depositary bank.

It is also stated in the '*investment strategy*' form:

'*I expressly agree that the following asset manager is fully authorised to manage the premium deposit and the premium reserve fund:*

*Plenum Zürich*'.

The '*risk disclosure/record of discussions*' form was also attached to the application form, in which the applicant's predecessors confirmed that the risk disclosure and the risk warning notices were communicated orally at a personal meeting with the customer on 15 May 2003 in Stein. In pre-printed text it is stated:

'*Which risks were considered in particular (individual explanation)? Price fluctuations for bonds*'.

Aside from the verbatim reproduction of those documents, no findings can be made regarding the content and scope of the advice provided by Mass und Partner GmbH or regarding the specific scope of the risk information that was provided.

1.3. Acquisition of the life assurance policy by the applicant:

On the reference dates of 17 May/21 May 2007 (purchase agreement date) and 9 July 2007 (policy transfer), the applicant acquired the defendant's unit-linked annuity insurance policy, Policy No 1810/003123, from the former policy holders 1. Werner Finzel and 2. Ute Finzel-Heidinger. This was based on the purchase agreement of 17 May/21 May 2007 concluded between Ute Finzel-Heidinger (Werner Finzel had already died at the time) and the applicant, which was prepared by SSAM. Under the terms of the agreement, the seller transferred Policy No 1810/003123 with all rights and obligations to the purchaser; the date of transfer of the policy and of payment of the purchase price was fixed as the reference date for acquisition. The purchase price was EUR 243 000.00, an amount calculated by SSAM which was to become due upon the transfer of the original policy. The new policy made out to the applicant was issued on 9 July 2007. The purchase price was paid to the 'community of heirs of Werner Lorenz Finzel' on 4 June 2007, or in any case the purchase price was debited from the deposit account on that date.

The acquisition of this unit-linked annuity insurance policy resulted from a consultation between the applicant and Frank Weber from SSAM. He was introduced to the applicant by the independent financial adviser Mr Calmund, through whom the applicant had already invested EUR 100 000.00 in late 2004/early 2005. When, at the beginning of 2007, he informed Mr Calmund that he was expecting a bonus payment of EUR 500 000.00 and wanted to invest that money, Mr Calmund referred him to Mr Weber, who the applicant then contacted by telephone.

In that conversation the applicant was asked about his financial circumstances, in particular as regards real property, assets and income. Subsequently a personal meeting took place between Mr Weber and the applicant and his wife at SSAM's office in Zürich. At that meeting the applicant informed Mr Weber that he wished for a secure investment, and in particular did not want to invest in stocks. It was intended to be for retirement provision.

Thereupon Mr Weber recommended that he acquired a life assurance policy invested in Swiss Select Garantie 26 with a 100% capital guarantee. The premiums had not yet been fully paid in and one of the two policy holders had died. The acquisition was beneficial for the applicant for tax reasons, according to Mr Weber. The applicant was not given further information, in particular

regarding the previous level of investment or the amount of the premium reserve fund. He was only informed of the amount that he was required to pay in and the pay-out he could expect in ten years. The applicant was not offered any other products.

Investment in a life assurance policy appealed to the applicant because he already had several life assurance policies in Germany and problems had never arisen. In addition, a long-term investment strategy with an investment target of 11 years was stipulated, which could be brought into line with his planned retirement provision.

Mr Weber also explained to the applicant that he could increase the capitalised value of earnings by taking out a loan. He showed the return on the product for the last 6-7 years, where an average yield of 11-16% had been generated. As interest on a loan would be around 4%, there would still be a profit, according to Mr Weber. With the annual investment income, the loan would be paid off within the term without further injections. At the consultation Mr Weber used the brochures presented at the outset.

When asked what Mr Weber's services would cost, he stated that, on the one hand, 0.8% of the total amount would be charged as a set-up fee and, on the other, SSAM would be entitled to 10% of the annual investment income. There would be no further costs except for his own and those of SSAM.

After the applicant had agreed to these terms, he arranged with Mr Weber that Mr Weber would prepare the contacts in time for the next meeting. Mr Weber recommended LLB as the lending bank and said that he would also prepare the relevant loan application and the documents for opening an account.

Neither in the course of those discussions nor subsequently was the applicant informed about the content and the scope of the transferred initial agreement with the policy holders 1. Werner Finzel and 2. Ute Finzel-Heidinger. He was aware of neither their application for insurance nor their amounts contributed and premium reserve fund. In particular, it was also not clarified to the applicant that his investment strategy with a view to conservative retirement provision was completely different to that of his predecessors who – according to the written application at least – were pursuing dynamic investment behaviour for reasons of 'tax benefits'. Furthermore, the applicant was also not given any information on 'existing' rights and duties under the preliminary binding agreement.

After those contracts and documents had been prepared, Mr Weber contacted the applicant, who travelled with his wife to Zürich on 17 May 2007 in order to sign those papers. On that date the applicant signed, in addition to the purchase agreement, the 'change of policy holder' and 'change of investment strategy' documents. The applicant also signed the application to open an account and a deposit with LLB and applied to that bank for a loan of EUR 250 000 in order to be able to invest a total amount of EUR 750 000, including equity of EUR 500 000. Credit financing was arranged through the intermediary of SSAM, which charged a fee of 2% of the amount of the loan, but did not explain this to the applicant. The loan was disbursed by LLB in the requested amount against the applicant's entitlements under the life assurance policy as collateral. The defendant was notified of that assignment and, by letter of 10 September 2008, confirmed the notices of assignment with LLB. Only after receiving that confirmation did LLB release the loan and disburse the amount of the loan.

Credit financing for investment in a ratio of 2:1 (equity to debt) is not consistent with a conservative investment approach. If someone wished to make a conservative investment, they would probably not be recommended leverage. Such leverage would suggest 'dynamic' investment behaviour.

The 'change of policy holder' was signed by the former second policy holder, Ute Finzel-Heidinger, the applicant, the intermediary SSAM, represented by Mr Weber, and an authorised representative of the defendant. It also bears a handwritten note by the applicant in which he confirms that he is aware of the existing premium reserve fund (currently time deposit). There is also the following passage, which is reproduced verbatim:

'*The new policy holder was informed and expressly agreed that by entering into the assurance contract he acquires the same rights and duties which applied to the existing policy holders at the time he entered into the contract. This also holds for all agreements made with the existing policy holders (e.g. investment strategy, risk disclosure, any ancillary arrangements, supplementary agreements etc.)*'

With the '*change of investment strategy*' asset management was switched from 'Swiss Select Garantie' to 'Swiss Select Strategie "Sicherheit"'. In addition, it was stated:

'*I expressly agree that the following asset manager will be used to manage the premium reserve fund:*

*Swiss Select Asset Management AG*
*Churerstr. 22*
*CH-8808 Pfäffikon SZ*'

1.4. The *Fürstliches Landgericht* ordered the defendant to pay a sum of EUR 436 391.70 plus expenses. The supplementary claim for EUR 202 869.24 plus expenses was dismissed. As grounds for its decision, the Fürstliches Landgericht essentially stated that it was apparent from the outset that the investment product sold to the defendant could not work.

The applicant could not be accused of contributory negligence. By acquiring the assurance contract from his predecessors he had not automatically accepted their dynamic investment behaviour. He had not been given any information at all from the initial agreement, either regarding his predecessors' rights and duties or regarding previous contributions and the premium reserve fund. On the contrary, he had been wrongly advised on this point by the intermediary from the defendant, Frank Weber, and had not been given the least clarification as to the kind of product, the risks and principles he had taken on from his predecessors. Consequently, the initial agreement, the declarations made vis-à-vis his predecessors and their own notes, notifications and explanations were not binding on the applicant, despite his declaration of acquisition. The applicant had also not been advised of the onerous cost structure or that the promised capital guarantee had been 'shaky'. The fact that the applicant himself had leveraged one third of the investment did not make him a dynamic investor. From the very beginning the applicant had described his attitude to investment as conservative and Mr Weber had nevertheless offered him an investment product for dynamic investors and virtually 'pressured' him to provide leverage. This wrong advice could not be held against him retroactively.

Accordingly, the defendant was liable in principle for a breach of its duties to provide information and, on account of the wrong advice, for the contractual claims for repayment made by the applicant in so far as they relate to the life assurance contract.

1.5. The *Fürstliches Obergericht* granted the appeal brought by the defendant against the judgment of the Fürstliches Landgericht, set aside the judgment

under appeal and remitted the case to the court of first instance for a fresh hearing and decision.

1.6. The *appeals on a point of law brought by both parties* are directed against this decision of the Fürstliches Obergericht of 28 January 2015, ON 86, with the corresponding claims that the contested order of the Fürstliches Obergericht be annulled and that the Fürstliches Obergericht be instructed, subject to the binding effect of the legal opinion of the Fürstlicher Oberster Gerichtshof, to grant the appeal (defendant) or to grant the still contested claims made by the applicant.

2. Following the appeals on a point of law brought by both parties, 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.

2.1. European legal framework

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).

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.*'

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.

## 2.2 National legal framework

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

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 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.*'

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).

2.3. The questions referred for a preliminary ruling

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. 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 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 '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 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 or 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.

Question 2:

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 or that information specifically regarding the assurance product chosen by the outgoing policy holder and a relevant risk disclosure must also be provided. In the view of the Fürstlicher Oberster Gerichtshof, this would require – on the basis of the investment and assurance profile of the newly incoming policy holder – information to be provided to the incoming policy holder on, for example, whether the assurance product to be transferred is actually suitable for the purchaser (in particular having regard to his investor 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).

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 mention of the 'change in the policy conditions' in Annex III(B)(b)(2) potentially indicates that contractual changes during the term of the original assurance contract require the policy holder, in the case of unit-linked life assurance policies, to be provided with explanations in accordance with Annex III(A)(a)(11) and (a)(12), that is to say 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, relevant information and explanations must be provided (again) as they were to the first policy holder. The question therefore also arises whether the directive

was duly transposed by the Liechtenstein VersAG, in that the case of ‘a change in the policy conditions’ was omitted.

2.4. Observations of the parties

In order to observe the right to be heard the *Fürstlicher Oberster Gerichtshof* granted both parties the opportunity to submit observations on the proposed reference of the abovementioned questions. Both parties have submitted observations by written pleading.

The Fürstlicher Oberster Gerichtshof is not extending the series of questions, especially since all the additional questions requested by the applicant are already covered by the questions drawn up by the Fürstlicher Oberster Gerichtshof. The applicant’s requests to that effect were therefore refused.

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.