REPORT FOR THE HEARING

in Case E-11/12

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Fürstliches Landgericht des Fürstentums Liechtenstein (Princely Court of the Principality of Liechtenstein) in the case of

Beatrix Koch,
Lothar Hummel, and
Stefan Müller

and

Swiss Life (Liechtenstein) AG

on the interpretation of 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) and Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ 2003 L 9, p. 3).

I Introduction

1. By a decision of 31 October 2012, registered at the EFTA Court on 8 November 2012, the Princely Court of the Principality of Liechtenstein ("the national court", or "the Princely Court") made a request for an Advisory Opinion in a case pending before it between Beatrix Koch, Lothar Hummel and Stefan Müller ("the plaintiffs"), and Swiss Life (Liechtenstein) AG ("the defendant").

2. The case before the national court concerns four life assurance contracts concluded between the plaintiffs and the defendant during 2004. The plaintiffs claim damages from the defendant, asserting that the value of their life assurance contributions has been reduced to almost nothing. Before the national court, they assert that it was impossible for them to assess the level of risk and the structure of the life assurance product at issue.

II Legal background

EEA law

The UCITS Directive

3. Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended ("the UCITS Directive" or "Directive 85/611"), [1] is incorporated into the EEA Agreement at point 30 of Annex IX to the Agreement.

4. Article 1(2) and (3) of Directive 85/611, as amended, reads:

> *2. For the purposes of this Directive, and subject to Article 2, UCITS shall be undertakings:*
>
> *— the sole object of which is the collective investment in transferable securities and/or in other liquid financial assets referred to in Article 19(1) of capital raised from the public and which operates on the principle of risk-spreading and*
>
> *— the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such re-purchase or redemption.*
>
> *3. Such undertakings may be constituted according to law, either under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies).*
>
> *For the purposes of this Directive "common funds" shall also include unit trusts.*

The life assurance directives

5. Directive 2002/83/EC of the European Parliament and the Council of 5 November 2002 concerning life assurance ("the life assurance directive" or "Directive 2002/83")[2] is incorporated into the EEA Agreement at point 11 of Annex IX to the Agreement.

6. The life assurance directive was incorporated into the EEA Agreement by EEA Joint Committee Decision No 60/2004 of 26 April 2004. The decision entered into force on 27 April 2004.

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[1] OJ 1985 L 375, p. 3.

[2] OJ 2002 L 345, p. 1.

7. Joint Committee Decision No 60/2004 repealed the First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance,[3] Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC[4] (the second life assurance directive) and Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive) [5] in the EEA.

8. Article 23(1) of Directive 2002/83 ("Categories of authorised assets") reads:

> *1. The home Member State may not authorise assurance undertakings to cover their technical provisions with any but the following categories of assets:*
>
> *A. investments*
>
> *(a) debt securities, bonds and other money- and capital-market instruments;*
>
> *(b) loans;*
>
> *(c) shares and other variable-yield participations;*
>
> *(d) units in undertakings for collective investment in transferable securities (UCITS) and other investment funds;*
>
> …

9. Article 25(1) and (2) of Directive 2002/83 ("Contracts linked to UCITS or share index") reads:

> *1. Where the benefits provided by a contract are directly linked to the value of units in an UCITS or to the value of assets contained in an internal fund held by the insurance undertaking, usually divided into units, the technical provisions in respect of those benefits must be represented as closely as possible by those units or, in the case where units are not established, by those assets.*

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[3] OJ 1979 L 63, p. 1.

[4] OJ 1990 L 330, p. 50.

[5] OJ 1992 L 360, p. 1.

2. Where the benefits provided by a contract are directly linked to a share index or some other reference value other than those referred to in paragraph 1, the technical provisions in respect of those benefits must be represented as closely as possible either by the units deemed to represent the reference value or, in the case where units are not established, by assets of appropriate security and marketability which correspond as closely as possible with those on which the particular reference value is based.

10. Article 36 of Directive 2002/83 ("Information for policy holders") reads:

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).

3. The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex III only if it is necessary for a proper understanding by the policy holder of the essential elements of the commitment.

4. The detailed rules for implementing this Article and Annex III shall be laid down by the Member State of the commitment.

11. Annex III to Directive 2002/83 ("Information for policy holders") lists the information which is to be communicated to the policy holder before the contract is concluded (Section A) and during the term of the contract (Section B), in a clear and accurate manner, in writing, and in an official language of the Member State of the commitment.

12. Points (a)11 and (a)12 of Annex III(A) to Directive 2002/83 provide that the following information must be provided to the policy holder before the contract is concluded:

(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.

13. Before it was repealed in the EEA and replaced by Article 23 of Directive 2002/83 by Joint Committee Decision No 60/2004, Article 21 of Directive 92/96/EEC provided:

1. The home Member State may not authorise assurance undertakings to cover their technical provisions with any but the following categories of assets:

A. investments

(a) debt securities, bonds and other money- and capital-market instruments;

(b) loans;

(c) shares and other variable-yield participations;

(d) units in undertakings for collective investment in transferable securities (UCITS) and other investment funds;

…

14. Before it was repealed in the EEA and replaced by Article 25 of Directive 2002/83 by Joint Committee Decision No 60/2004, Article 23 of Directive 92/96/EEC provided:

1. Where the benefits provided by a contract are directly linked to the value of units in an UCITS or to the value of assets contained in an internal fund held by the insurance undertaking, usually divided into units, the technical provisions in respect of those benefits must be represented as closely as possible by those units or, in the case where units are not established, by those assets.

2. Where the benefits provided by a contract are directly linked to a share index or some other reference value other than those referred to in paragraph 1, the technical provisions in respect of those benefits must be represented as closely as possible either by the units deemed to represent the reference value or, in the case where units are not established, by assets of appropriate security and marketability which correspond as closely as possible with those on which the particular reference value is based.

15. Before it was repealed in the EEA and replaced by Article 36 of Directive 2002/83 by Joint Committee Decision No 60/2004, Article 31 of Directive 92/96/EEC provided:

1. Before the assurance contract is concluded, at least the information listed in point A of Annex II 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 point B of Annex II.

3. The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex II

only if it is necessary for a proper understanding by the policy-holder of the essential elements of the commitment.

4. The detailed rules for implementing this Article and Annex II shall be laid down by the Member State of the commitment.

16. Annex II to Directive 92/96/EEC is identical to Annex III to Directive 2002/83. The relevant details are set out in paragraphs 11 and 12 above.

The insurance mediation directives

17. Directive 2002/92/EC of the European Parliament and the Council of 9 December 2002 on insurance mediation ("the insurance mediation directive" or "Directive 2002/92")[6] is incorporated into the EEA Agreement at point 13b of Annex IX to the Agreement.

18. The insurance mediation directive was incorporated into the EEA Agreement by EEA Joint Committee Decision No 115/2003 of 26 September 2003. Constitutional requirements were indicated and the decision entered into force on 1 May 2004. Before that date, Liechtenstein notified its implementation of Directive 2002/92 on 16 February 2004.

19. As a result of Directive 2002/92, the previous directive regulating the matter, Council Directive 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities ("Directive 77/92"), was repealed in the European Union from 15 January 2005.

20. Directive 77/92 was repealed in the EEA by Joint Committee Decision No 12/2010 of 10 November 2010. Constitutional requirements were indicated and the decision entered into force on 1 November 2012.

21. Article 2(5) of the insurance mediation directive reads:

"insurance intermediary" means any natural or legal person who, for remuneration, takes up or pursues insurance mediation;

22. Article 12 of the insurance mediation directive ("information provided by the insurance intermediary") reads:

1. Prior to the conclusion of any initial insurance contract, and, if necessary, upon amendment or renewal thereof, an insurance intermediary shall provide the customer with at least the following information:

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[6] OJ 2003 L 9, p. 3.

…

(e) …

In addition, an insurance intermediary shall inform the customer, concerning the contract that is provided, whether:

(i) he gives advice based on the obligation in paragraph 2 to provide a fair analysis, or

(ii) he is under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings. In that case, he shall, at the customer's request provide the names of those insurance undertakings, or

(iii) he is not under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings and does not give advice based on the obligation in paragraph 2 to provide a fair analysis. In that case, he shall, at the customer's request provide the names of the insurance undertakings with which he may and does conduct business.

2. When the insurance intermediary informs the customer that he gives his advice on the basis of a fair analysis, he is obliged to give that advice on the basis of an analysis of a sufficiently large number of insurance contracts available on the market, to enable him to make a recommendation, in accordance with professional criteria, regarding which insurance contract would be adequate to meet the customer's needs.

3. Prior to the conclusion of any specific contract, the insurance intermediary shall at least specify, in particular on the basis of information provided by the customer, the demands and the needs of that customer as well as the underlying reasons for any advice given to the customer on a given insurance product. These details shall be modulated according to the complexity of the insurance contract being proposed.

23. Article 2(2) of Directive 77/92, with the adaptations inserted for the purposes of the EEA Agreement, reads as follows:

This Directive shall apply in particular to activities customarily described in the Member States as follows:

(a) activities referred to in paragraph 1 (a):

in Liechtenstein:

- *Versicherungsmakler*

…

(b) activities referred to in paragraph 1 (b):

in Liechtenstein:

- *Versicherungs-Generalagent*
- *Versicherungsagent*
- *Versicherungsinspektor*

24. Directive 77/92 does not contain any provisions corresponding to Articles 2 and 12 of the insurance mediation directive.

Commission Recommendation 92/48/EEC

25. Commission Recommendation 92/48/EEC of 18 December 1991 on insurance intermediaries (OJ 1992 L 19, p. 32) was incorporated into the EEA Agreement by EEA Joint Committee Decision No 7/94.

26. The recommendation was added as point 37 in Annex IX under "Acts of which the contracting parties shall take note".

27. Constitutional requirements were indicated and the decision entered into force on 1 July 1994.

National law

28. Liechtenstein has implemented Directive 2002/83 by way of the Insurance Supervision Act (VersAG), LR 961.01, by way of the Insurance Supervision Regulation (VersAV), LR 961.011, by way of the Insurance Contracts Act (VersVG) LR 215.229.1, by way of the International Private Law Act (IPRG) LR 290 and by way of the International Insurance Contracts Act (IVersVG), LR 291.

29. Article 45 of the Insurance Supervision Act ("Duties to inform policy holders") provides as follows:

> *Prior to the conclusion and during the term of the insurance contracts, specific information must be given to the policy holders for their information and protection. The content and scope of this duty of information is regulated under Annex 4.*

30. Annex 4 to the Insurance Supervision Act ("Duties to inform policy holders under Articles 45 and 49") provides as follows:

Where the policy holder is a natural person, insurance undertakings must inform him of the essential facts and rights under insurance contract before conclusion and during the term of a contract in accordance with the following provisions. In the case of the insurance of large risks, it is sufficient to mention the applicable law and the competent supervisory authority. The information must be made available in writing.

Section I

1. Information required for all classes of insurance:

…

2. Additional information required for life or accident insurance with premium refund:

…

e) for unit-linked policies, definition of the units to which the insurance is linked and indication of the nature of the underlying assets;

…

31. Article 3 of the Insurance Contracts Act ("Duty of the insurance undertaking to provide information") provides as follows:

1. The generally applicable special insurance provisions and the information required under Art. 45 and 49 of the Insurance Supervision Act must either be included in the insurance application form or made available to the applicant by other means prior to submission of the application.

2. In the event of a failure to comply with this condition, the applicant will not be bound by the application. Following conclusion of the contract, the policyholder may rescind the contract if there is a breach of the duty to provide information under paragraph 1. The right of rescission shall expire no later than four weeks after receipt of the policy which includes notification of the right of rescission.

III Facts and procedure

32. Two of the plaintiffs (Beatrix Koch and Lothar Hummel) are German nationals resident in Germany. The third plaintiff (Stefan Müller) is an Austrian national resident in Austria. The defendant, Swiss Life (Liechtenstein) AG, is a company registered in Liechtenstein. It holds a licence to provide life assurance.

33. During 2004, the plaintiffs, independently and by way of three different brokers, submitted applications for "unit-linked life assurance" to the defendant, which accepted the applications and, as a result, the life assurance agreements came into effect.

34. Beatrix Koch submitted her application for life assurance on 4 November 2004. It was accepted by the defendant on 22 December 2004 and the policy commenced on 1 December 2004 ("the first contract").

35. Lothar Hummel submitted his application for life assurance on 23 December 2004. It was accepted by the defendant on 30 December 2004 and the policy commenced on 1 December 2004 ("the second contract").

36. Stefan Müller submitted a first application for life assurance on 18 February 2004. This was accepted by the defendant on 5 April 2004 and the policy commenced on 1 March 2004 ("the third contract").

37. He also submitted a second application for life assurance on 14 September 2004. This was accepted by the defendant on 1 December 2004 and the policy commenced on 1 October 2004 ("the fourth contract").

38. It was stated on the application form for life assurance that a form of investment had been agreed in each case "as per the attached investment strategy". The investment strategy forms, signed in each case by the relevant plaintiff, recorded, inter alia, the following information: "Allocation of initial investment: Swiss Select Garantie (Euro Medium Term Notes)".

39. Some of the investment strategies were amended by other documents, signed by the plaintiffs, to read: "Note Swiss Select Garantie 3 or ff WKN XS0247561060".

40. The plaintiffs subsequently paid assurance premiums to the defendant which invested the amounts as cover funds, in accordance with the investment strategies.

41. The plaintiffs have brought a claim for damages against the defendant on the basis that the amounts that they paid to the latter as assurance premiums have been reduced to almost nothing. They assert that the loss of capital was already predetermined when the contracts were concluded. It was impossible for them to determine the level of risk involved in the investment, and the structure of the products was not transparent. Excessive commissions and fees were taken by the defendant and the capital was therefore exhausted within a very short period of time.

42. The defendant contends that the claims for damages should be dismissed. It argues that that the investments were effected in accordance with the investment strategy forms signed by the plaintiffs.

43. The WKN (*Wertpapierkennnummer*, or securities investment number) is a combination of numbers and letters used in Germany to identify transferable securities (financial instruments). Relevant information can be found on the Internet by entering the WKN into a search engine.

44. The defendant does not claim that it informed the plaintiffs about the relevant investment products, but asserts that the plaintiffs themselves requested these investment strategies.

45. On 31 October 2012, the Princely Court decided to seek an Advisory Opinion from the Court. It noted that Directive 2002/83 does not define "unit-linked life assurance". Moreover, in the view of the Princely Court, in particular following the judgment of the European Court of Justice ("ECJ") in Case C-166/11 *Ángel Lorenzo González Alonso* (judgment of 1 March 2012, not yet reported), which the Princely Court considers to contradict the wording of Article 25 of Directive 2002/83, it is unclear whether the duties established by Directive 2002/83 to inform a policy holder before the contract is concluded also apply in relation to assets not included in a UCITS.

46. Moreover, in light of the judgment of the ECJ in Case C-38/00 *Axa Royale Belge* [2002] ECR I-2209, the national court seeks clarification on the scope of the duties to inform the policy holder before the contract is concluded, the role of insurance intermediaries and whether EFTA States are required to establish a civil law right for a policy holder to claim damages from the assurance undertaking in the event of a breach of the obligation to provide information.

47. The referring court also notes that in a judgment of 10 February 2012 the Supreme Court of the Principality of Liechtenstein interpreted the national legislation which implements Directive 2002/83. It held in that case, in relation to facts comparable to those of the present proceedings, that the defendant, contrary to the "clear statutory requirement", did not "provide advice to the plaintiffs, and in particular did not provide advice about the products …No more did it forward the necessary information to the insurance brokers who were selling life assurance …".

48. The Princely Court consequently stayed the proceedings and referred the following questions to the Court:

> **1. Does the term unit-linked policies, within the meaning of Annex III(A) a11 and a12 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, refer exclusively to units ("Common Funds") within the meaning of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) or does Annex III(A) a(11) and a(12) also apply**

for example where payments from a life assurance contract are linked to a share index or other reference value?

2. **If Question 1 is answered by the Court to the effect that Annex III(A) a11 and a12 of Directive 2002/83/EC does not restrict "unit-linked policies" to investment companies ("Common Funds") within the meaning of Directive 85/611/EEC:**

   2.1 **Does Directive 2002/83/EC oblige assurance undertakings to provide policy holders with advice or simply to notify them of the details set out in Annex III of the said Directive?**

   2.2 **Is the duty to communicate information under Annex III(A) a11 of Directive 2002/83/EC sufficiently complied with if the assurance undertaking supplies the securities identification number (WKN), or, how else is "definition of the units" to be understood in order to fulfil the requirement to communicate information? It must be borne in mind that the Member State of the commitment does not require any additional information from the assurance undertaking within the meaning of Art. 36(3) of Directive 2002/83/EC.**

   2.3 **Is the duty to communicate information under Annex III(A) a12 of Directive 2002/83/EC sufficiently complied with if the assurance undertaking supplies the securities identification number (WKN) or should more detailed information be provided? It must be borne in mind that the Member State of the commitment does not require any additional information from the assurance undertaking within the meaning of Art. 36(3) of Directive 2002/83/EC.**

3. **Does Art. 36(1) of Directive 2002/83/EC make it mandatory for the assurance undertaking to provide the details set out in Annex III(A) or is it sufficient if this information is given to the [policy-holder]* by a third party, for example by an insurance intermediary within the meaning of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation?**

4. **Does Directive 2002/83/EC require that Art. 36 be implemented into national law by the Member States in such a way that policy holders acquire a civil law right against the assurance undertaking to be notified of the details pursuant to Annex III or is it sufficient for the implementation into national law if a breach of the duties to provide information under Annex III of the Directive is only**

* Corr.

subject to sanction by a regulatory body such as by the imposition of a fine, withdrawal of license or other similar measure?

IV Written observations

49. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the plaintiffs, represented by Dr Hans-Jörg Vogl, Advocate;
- the defendant, represented by Dr Peter Nägele and Thomas Nägele, Advocates;
- the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, EEA Coordination Unit, and Frédérique Lambrecht, Senior Legal Officer, EEA Coordination Unit, acting as Agents;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, Maria Moustakali and Clémence Perrin, Officers, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Karl-Philipp Wojcik, Legal Advisor, and Nicola Yerrell, Member of its Legal Service, acting as Agents.

V Summary of the arguments submitted

The first question

Government of the Principality of Liechtenstein

50. The Liechtenstein Government observes that the purpose of Directive 2002/83 is to facilitate the taking-up and pursuit of the business of life assurance and, at the same time, to ensure adequate protection for policy holders and beneficiaries. The Directive aims at protecting consumers through choice based on information.[7]

51. It notes that Article 36 of Directive 2002/83 specifies that certain minimum information must be communicated to the policy holder before the assurance contract is concluded and throughout the term of the contract. This information is defined in Annex III to the Directive.

52. Given the purpose of Directive 2002/83, that is to protect consumers through choice based on information, the Liechtenstein Government contends that the term unit-linked policies in Annex III(A), points a(11) and a(12), does

[7] Reference is made to Case E-1/05 *ESA* v *Norway* [2005] EFTA Ct. Rep. 236, paragraph 42.

not refer exclusively to units ("Investment Funds") within the meaning of Directive 85/611/EEC. In its view, the information requirements of Annex III(A), points a(11) and a(12), also apply where payments from a life assurance contract are linked to a share index or other reference value. The information mentioned in Annex III A, points a(11) and a(12), should be stated not only in relation to unit-linked policies, as expressly set out in those provisions, but also in relation to all other investment-linked or reference-linked insurance policies.

53. According to the Liechtenstein Government, it appears compatible with the purpose of Directive 2002/83 that consumers should be provided with information which is as complete as possible in order to choose the insurance product which will most closely suit their individual needs.

54. It contends that the information should inform consumers on where and how their premiums are invested and, where appropriate, to which share index or other reference value the performance of the policy is linked. In its view, this information gives consumers the possibility to identify and assess the risk that is entailed in the transaction of the insurance product (regardless whether unit-linked or linked to a share index or other reference value).

55. The Government of the Principality of Liechtenstein proposes that the Court should answer the first question as follows:

> *The term unit-linked policies, within the meaning of Annex III(A), points a(11) and a(12), does not refer exclusively to units ("Investment Funds") within the meaning of Directive 85/611/EEC but Annex III(A), points a(11) and a(12), also applies for example where payments from a life assurance contract are linked to a share index or other reference value.*

EFTA Surveillance Authority

56. ESA notes that Directive 2002/83 is applicable to the first, second and fourth contracts. The third contract falls under Directive 92/96. However, the material provisions remain identical under the two directives.

57. At the outset, ESA states that a "unit-linked" life assurance policy is a life assurance policy linked to a fund which is divided into units of equal value. The value, or price, of each unit depends on the value of the assets in which the unit-linked fund has invested. The fund can directly hold specific assets, such as company shares or property. Alternatively, it can hold assets by investing in a collective investment scheme, such as UCITS. UCITS are therefore an underlying investment of certain unit-linked life assurance products.

58. ESA observes that Directive 2002/83 does not define the term "unit-linked" policy. However, Article 23 of Directive 2002/83 lists the categories of assets which an EEA State may authorise undertakings to use in their technical

provisions. This list includes, *inter alia*, "units in UCITS and other investment funds".

59. It notes that Article 25 of Directive 2002/83 on contracts linked to UCITS or a share index refers to benefits in contracts "linked to the value of units in UCITS or to the value of assets contained in an internal fund held by the insurance company, usually divided into units".

60. In ESA's view, this indicates that the concept of "unit-linked" policy is not limited exclusively to units in UCITS but can also extend to any other form of investment fund or reference value. Consequently, "unit-linked" insurance should be interpreted as assurance contracts linked to investment funds.[8] This would be consistent with one of the aims of Directive 2002/83 which is to protect policy holders and ensure that they are provided with the information necessary to be able to select the life assurance contract best suited to their requirements.

61. ESA submits that the term "unit-linked" policy in Annex III(A) should extend to life assurance contracts linked to other reference values, such as a share index as defined in Article 25(2) of Directive 2002/83. ESA considers such a conclusion more convincing and more in line with the aims of Directive 2002/83. In its view, a restrictive interpretation of the notion "unit-linked" policy would entail an artificial distinction between Article 25(1) and Article 25(2) of Directive 2002/83, which is hardly justifiable given that Article 25(2) of the Directive specifically provides for benefits that are represented by "units" deemed to represent the reference value.

62. ESA proposes that the Court should answer the first question as follows:

> *The term "unit-linked" policy, within the meaning of Annex III(A) points a(11) and a(12) of Directive 2002/83, does not refer exclusively to units within the meaning of Directive 85/611 but also applies to life assurance contracts linked to a share index or other reference value.*

The Commission

63. The Commission notes that Directive 2002/83 is applicable to the first, second and fourth contracts. The third contract falls under Directive 92/96. However, the material provisions remain identical under the two directives.

64. The Commission observes that some assistance may be found in the articles of Directive 2002/83 on technical provisions. Article 23(1) clearly refers to UCITS "and other investment funds", whilst Article 24(3) draws a distinction between UCITS "not coordinated within the meaning of Directive 85/611/EEC"

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[8] Reference is made to Case C-166/11 *Angel Lorenzo Gonzalez Alonso*, judgment of 1 March 2012, not yet reported, paragraph 26.

and “other investment funds”, on the one hand, and UCITS “coordinated within the meaning of Directive 85/611/EEC”, on the other.

65. In the Commission’s view, this suggests that for the purpose of Directive 2002/83 UCITS are simply a sub-group of “investment funds” and that in the context of that directive UCITS may refer to UCITS covered by Directive 85/611 or to those falling outside its scope.

66. The Commission observes that Article 25(1) of Directive 2002/83 refers to life assurance policies linked to the value of units in a UCITS (whether or not covered by Directive 85/611) or to the value of assets in an internal fund held by the insurer “usually divided into units”. Consequently, the Commission concludes, the key element for this form of investment is either the link to the value of units or a share in underlying assets held in an internal fund. By way of contrast, it notes that Article 25(2) of Directive 2002/83 refers to life assurance policies where the benefits are linked to a share index or some other reference value. Both cases clearly constitute life assurance linked to “investment funds” within the meaning of Directive 2002/83.

67. The Commission finds itself obliged to conclude, having regard to the scheme of Directive 2002/83, that the term “unit-linked policies” in Annex III(A) to Directive 2002/83 refers only to the policies described in Article 25(1), and not those mentioned in Article 25(2). In its view, the legislative history to Article 36 on the provision of information and Annex III(A) on the detailed information requirements provides no further explanation for such a distinction. Both provisions originate from Directive 92/96, in which it was noted in recital 23 in the preamble thereto simply that the consumer should be provided with “whatever information is necessary to enable him to choose the contract best suited to his needs”, and in particular “to receive clear and accurate information on the essential characteristics of the product proposed”.[9]

68. The Commission surmises that the distinction arose as it was more important to require detailed information of what were considered to be less transparent investment funds (unit-linked policies). On the other hand, in the case of policies linked to a share index or other reference value, these reference values were more likely to be publicly available.

69. The Commission recognises the consequences of this approach, namely, that in the case of life assurance policies where the benefits are linked to a share index or other reference value the information specified in points a(11) and a(12) of Annex III(A) to Directive 2002/83 does not need to be provided to policy holders. It observes, however, that in respect of such policies the requirement to provide the other information specified in points a(4) to a(16) evidently continues to apply.

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[9] Reference is made to *Axa Royale Belge*, cited above, paragraph 20.

70. The Commission proposes that the Court should answer the first question as follows:

> *The notion of "unit-linked policies" within the meaning of Annex III(A) of Directive 2002/83 is broader than that of investment funds covered by the UCITS Directive 85/611 but does not extend to policies linked to a share index or reference value.*

The second question

The plaintiffs

71. The plaintiffs assert that the assurance product at issue before the national court is a bundle of different financial instruments. The product consists of three elements: Loan: providing leverage for the investment; Security: investment fund; Assurance: life assurance.

72. The plaintiffs emphasise that the defendant must fulfil all the obligations to inform the consumer under the relevant national law applicable to the product in question.[10]

The defendant

73. The defendant notes that the judgment of the Liechtenstein Supreme Court of 10 February 2012, to which the national court refers in the request for an advisory opinion, has been set aside by a judgment of 10 December 2012 of the Constitutional Court of the Principality of Liechtenstein (*Staatsgerichtshof des Fürstentums Liechtenstein*) and the case sent back to the Supreme Court for a new assessment.

Government of the Principality of Liechtenstein

74. As regards Question 2.1, the Liechtenstein Government contends that it follows from the wording of Directive 2002/83 that it entails only a duty to inform. Recital 52 in the preamble to Directive 2002/83 refers only to providing information to the policy holder. Moreover, Annex III to Directive 2002/83 lists information which is to be communicated to the policy holder before the contract is concluded or during the term of the contract. Unlike Article 12 of Directive

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[10] Reference is made to the following national provisions: Liechtenstein: Versicherungsvertragsgesetz (VersVG), Versicherungsaufsichtsgesetz (VersAG), Wertpapierprospektgesetz (WPPG), Finanzkonglomeratsgesetz (FKG), Konsumkreditgesetz (KKG), Wohlverhalten der Finanzmarktaufsicht (FMA); Austria: Versicherungsvertragsgesetz (VersAG), Versicherungsaufsichtsgesetz (VAG), Kapitalmarktgesetz (KMG), Wertpapieraufsichtsgesetz (WAG), Verbraucherkreditgesetz (VKrG), Bankwesengesetz (BWG), Wohlverhaltensregeln der Finanzmarktaufsicht (FMA); and Germany: Versicherungsvertragsgesetz (VVG), Versicherungsaufsichtsgesetz (VAG), Wertpapierprospektgesetz (WpPG), Wertpapierhandelsgesetz (WpHG), Verbraucherkreditgesetz (VerbrKrG), Kreditwesengesetz (KWG), Wohlverhaltensregeln der Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin).

2002/92, which explicitly entails a duty to advise, the wording of Directive 2002/83 does not permit the conclusion that the latter directive entails a duty to advise.

75. According to the Liechtenstein Government, when interpreting Directive 2002/83, it is the average consumer, i.e. a consumer who is reasonably well informed and reasonably observant and circumspect, who is to be taken into consideration. Clear information to consumers is important in life assurance contracts.[11] Therefore, Directive 2002/83 does not entail a duty to advise, unlike Article 12 of Directive 2002/92.

76. As regards Questions 2.2 and 2.3, the Liechtenstein Government considers that these questions could be reformulated as follows: does the securities identification number (WKN) provide the average consumer, i.e. a consumer who is reasonably well informed and reasonably observant and circumspect the necessary information for a proper understanding of the essential elements of the commitment and does this WKN enable him/her to choose the contract best suited to his/her needs?

77. In its view, the purpose of the WKN is to ensure the uniform and unique identification of a security. The WKN makes it possible for an average consumer to determine, amongst other things, the degree of risk involved in the investment and the structure of the product. Based on this identification number, a consumer who is reasonably observant and circumspect will be capable of unambiguously identifying whether the contract is suited to his/her needs and of making an informed choice.

78. As regards the differing language versions, the Liechtenstein Government contends that the text has to be assessed in the light of the purpose of the directive in question.[12]

79. The Government of the Principality of Liechtenstein proposes that the Court should answer the second question as follows:

> *Directive 2002/83/EC does not entail a duty to advise but only a duty to inform, and this duty to inform can be sufficiently complied with if the assurance undertaking supplies the securities identification number (WKN).*

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[11] Reference is made to *ESA* v *Norway*, cited above, paragraphs 41 and 42.

[12] Reference is made to Case E-18/11 *Irish Bank Resolution Corporation*, judgment of 28 September 2012, not yet reported.

EFTA Surveillance Authority

80. ESA notes that Directive 2002/83 is applicable to the first, second and fourth contracts. The third contract falls under Directive 92/96. However, the material provisions remain identical under the two directives.

81. ESA interprets the duty to provide information as an obligation imposed on assurance undertakings to ensure that policy holders are provided with the information which is listed in Annex III to Directive 2002/83 either before the conclusion of the life assurance contract or during its term. However, such a duty does not extend to an obligation for assurance undertakings to advise policy holders. In its view, such interpretation is also confirmed by the case law of the EFTA Court.[13]

82. In the light of the wording of recital 52 in the preamble and Article 36(3) of Directive 2002/83 and the case law of the EFTA Court, ESA submits that the duty imposed on assurance undertakings under Directive 2002/83 should be limited to the provision of the information listed in Annex III thereto, which affords an acceptable degree of consumer protection.

83. In ESA's view, it is for the national court to assess whether the provision of the securities identification number (WKN) on the investment form is sufficient to fulfil the duty to provide information imposed on assurance undertakings under Annex III(A), points a(11) and a(12).

84. According to ESA, when interpreting Directive 2002/83, the average consumer must be defined as a consumer who is "reasonably well informed and reasonably observant and circumspect".[14] Consequently, in its view, the national court should use such benchmark to assess whether the provision of the securities identification number suffices to meet the requirements listed in Annex III(A), points a(11) and a(12), and, ultimately, ensure that the policy holder is in a position to make an informed choice.

85. ESA proposes that the Court should answer the second question as follows:

> *Directive 2002/83 does not oblige assurance undertakings to advise policy holders but solely to make available to them the details set out in Annex III of the directive.*
>
> *The duty to communicate information under Annex III(A), points a(11) and a(12), of Directive 2002/83 is complied with if the assurance undertaking supplies sufficient information to ensure an appropriate level of consumer protection, allowing a reasonably well informed and*

[13] Reference is made to *ESA* v *Norway*, cited above, paragraphs 41 and 42.

[14] Ibid., paragraph 41.

reasonably observant and circumspect consumer to make an informed choice. It is for the national court to assess whether the mere provision of the securities identification number (WKN) fulfils such a requirement.

The Commission

86. The Commission notes that Directive 2002/83 is applicable to the first, second and fourth contracts. The third contract falls under Directive 92/96. However, the material provisions remain identical under the two directives.

87. As regards Question 2.1, the Commission takes the view that Directive 2002/83 clearly requires the provision of "information", not advice. Article 36 of the directive is expressly entitled "information for policy holders", whilst Article 36(1) requires the "information listed in Annex III(A)" to be "communicated" to the policy holder. At no point does Directive 2002/83 refer to the provision of advice, with its implication of greater in-depth analysis.

88. In relation to Questions 2.2 and 2.3, the Commission notes that points a(11) and a(12) of Annex III(A) to Directive 2002/83 only require the "definition of the units to which the benefits are linked" and an "indication of the nature of the underlying assets" to be communicated to the policy holder.

89. Consequently, according to the Commission, provision of the securities identification number (WKN) could in principle satisfy this obligation, but this will depend on the circumstances of a particular case and is a matter for the national court. In making its assessment, the national court should take into account the central purpose of the information requirements (as described above), that is, to protect consumers through choice based on information. In this regard, the Commission notes that it is "a consumer who is reasonably well-informed and reasonably observant and circumspect" who must be taken into consideration when interpreting Directive 2002/83.[15]

90. The Commission proposes that the Court should answer the second question as follows:

Article 36 of Directive 2002/83 requires the information set out in Annex III(A) to be communicated to policyholders but contains no obligation to provide advice. The nature of the information to be communicated will depend upon the circumstances of a particular case and is a matter for the assessment of the national court.

[15] Ibid.

The third question

The plaintiffs

91. The plaintiffs assert that the defendant has conceded that it did not have any contact with the plaintiffs before the assurance contracts were concluded. They point out that the defendant does not have any sale staff of its own and that the mediation of the assurance contracts took place through Swiss Select Asset Management and their sub-intermediaries. The plaintiffs contend that this "sales organisation" had no knowledge whatsoever about the regulatory framework concerning insurance, financial instruments, supervision and consumer protection.

92. The plaintiffs claim further that the defendant has used the services of a third party to discharge its duty to inform. In this regard, they assert, it is irrelevant whether this was an independent or tied insurance intermediary. Such a transfer does not exonerate the defendant from its duties to inform the consumer. In their view, the general principle under national law that the intermediary as an ally ("*Bundesgenosse*") must protect the interests of the policy holder cannot be applicable in such a situation. Consequently, the insurance undertaking must bear the responsibility for any wrongdoing in this regard.

93. The plaintiffs assert further that this result is unavoidable given the logic of the protection provided by the legislation and its purpose. Any other conclusion would make it possible for the defendant to outsource the risk to external sales organisations which normally do not belong to a liability fund.

Government of the Principality of Liechtenstein

94. The Liechtenstein Government observes that Directive 2002/83 and Directive 2002/92 each have different a scope of application. The duty to inform and the duty to advise provided for in Article 12 of Directive 2002/92 apply only to insurance intermediaries and not to insurance undertakings. However, the duty to inform in Directive 2002/83 places the obligation on the insurance undertaking which is required, in the first place, to communicate this information to (prospective) policy holders.

95. In its view, this follows also from the express wording of Article 36 of Directive 2002/83.

96. However, according to the Liechtenstein Government, Directive 2002/83 does not preclude the communication of this information to (prospective) policy holders by a third party, for example, by an insurance broker within the meaning of Directive 2002/92. In its view, insurance intermediaries can only fulfil their duty to advise if they provide the consumer not only with the information listed in Article 12 of Directive 2002/92, but also with the information listed in Annex III to Directive 2002/83.

97. The Government of the Principality of Liechtenstein proposes that the Court should answer the third question as follows:

> *Article 36(1) of Directive 2002/83 makes it mandatory for the assurance undertaking to provide the details set out in Annex III(A). However, this information can be given to the policy holder by a third party, for example by an insurance broker within the meaning of Directive 2002/92.*

EFTA Surveillance Authority

98. ESA notes that Directive 2002/92 was not applicable in the EEA at the material time. Consequently, it observes that the question must be read in the light of Directive 77/92, which was applicable.

99. According to ESA, depending on the terms of the contractual relationship between the assurance undertaking and the broker or agent, the latter may presumably be instructed and mandated by the former to communicate to potential policy holders the necessary information, before the contract is concluded. This should cover at least the information in Annex III(A) to Directive 2002/83.

100. ESA observes that Article 36 of Directive 2002/83 does not contain any indications as to how the obligation to provide the necessary information to the policy holder resting on the life assurance undertaking should be fulfilled in practice. In that regard, it notes that one of the principal characteristics of directives is that they intend to achieve a specific result while leaving it to the EEA States and their national authorities how to achieve this objective. What is clear, however, is the general obligation on the EEA States to ensure that the provisions of a directive are fully effective.[16]

101. In the present case, ESA contends that Directive 2002/83 imposes an obligation of result in the sense that the life assurance undertaking is required to communicate to the policy holder certain information listed in Annex III(A) to that directive before the assurance contract is concluded.

102. According to ESA, the insurance intermediary will in any case need certain information regarding the policies available in order to undertake the necessary preparatory work for the conclusion of the contract. The life assurance undertaking is the best placed entity to provide that information to the insurance intermediary. Thus, the former may possibly impose a contractual obligation on the latter to communicate this information (and at least the information referred to in Article 36 of Directive 2002/83 and Annex III thereto[17]) subsequently to the policy holders instead of doing so directly itself. This would not amount to an

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[16] Reference is made to Case E-16/11 *ESA* v *Iceland*, judgment of 28 January 2013, not yet reported, paragraph 120.

[17] Ibid.

extra obligation on the life assurance undertaking as it is mandatory under Directive 2002/83 to provide this information to policy holders.

103. In ESA's view, Directive 2002/83 allows for discretion on the part of the life assurance undertaking either to communicate this information to the policy holder directly or to impose this obligation contractually on the insurance intermediary. Both options are compatible with the provisions of Directive 2002/83 provided that the mandatory result pursued is achieved, i.e. the policy holder receives the necessary information before the contract is concluded.

104. ESA contends that under Directive 2002/92 the conclusion is identical.

105. ESA proposes that the Court should answer the third question as follows:

> *Article 31 and Annex II of Directive 92/96, as subsequently replaced by Article 36 and Annex III respectively of Directive 2002/83 on life assurance, makes it mandatory for the life assurance undertaking to provide the details laid down in the aforementioned provisions of the directives; however it is sufficient that these details are communicated to the policy holder by a third party, for example by an insurance broker within the meaning of Directive 77/92 (subsequently replaced by Directive 2002/92/EC on insurance mediation).*

The Commission

106. In the Commission's view, in accordance with the consumer protection objectives set out in recital 52 in the preamble to Directive 2002/83, what is crucial is that the result required by Article 36(1) is achieved and the consumer protected.

107. Since life assurance policies are designed and set up by assurance undertakings, the Commission continues, they must logically retain primary responsibility for provision of the relevant information. If an assurance undertaking concludes a life assurance policy directly with a consumer, the consumer must receive the information directly from that undertaking. If, instead, an assurance undertaking concludes a life assurance contract indirectly through an intermediary, it must guarantee none the less that the relevant information is supplied, albeit through the intermediary. The responsibility for ensuring that the requirements of Article 36(1) of Directive 2002/83 are met remains with the insurer even if it chooses to delegate the actual implementation to a third party such as an insurance intermediary.

108. The Commission proposes that the Court should answer the third question as follows:

> *Assurance undertakings are required to provide the information listed in Annex III(A) although it may be communicated to the policy holder by a third party such as an insurance intermediary.*

The fourth question

The plaintiffs

109. The plaintiffs assert that, under national law, a violation of the obligation to inform the consumer carries not only regulatory consequences, but it can also lead to civil liability (damages). The duty to inform is intended to protect investors, borrowers and insurance policy holders in order to ensure that they receive sufficient information and advice. In their view, civil liability must be a direct consequence of such a violation. It is of no consequence whether the national legislation is of an administrative regulatory nature. Regulatory consequences are secondary in nature. The protection of investors, borrowers and insurance policy holders is important. Civil liability is the logical consequence of a violation of the obligation to inform.

Government of the Principality of Liechtenstein

110. According to the Liechtenstein Government, this question should be assessed in the light of Directive 2002/83, the purpose of which is to complete the internal market in direct life assurance and to guarantee adequate protection to clients of assurance undertakings. In that regard, it draws attention to the wording of recital 44 in the preamble to Directive 2002/83, which states "the harmonisation of assurance contract law is not a prior condition for the achievement of the internal market in assurance. Therefore, the opportunity afforded to the Member States of imposing the application of their law to assurance contracts covering commitments within their territories is likely to provide adequate safeguards for policy holders."

111. In its view, Directive 2002/83 does not directly address the issue of insurance contract law and leaves it to the EEA States to regulate the manner in which insurance contracts are concluded and to regulate the legal consequences of the non-observance of the duty to inform.

112. The Liechtenstein Government notes that, unlike Article 8 of Directive 2002/92, Directive 2002/83 does not make any provision for the sanctions to be applied if an insurance undertaking does not comply with the national legal provisions.

113. However, it observes that under Article 47 of the Insurance Supervision Act, for the purposes of exercising its supervisory and control tasks, the Financial Market Authority ("FMA") is authorised to take the necessary measures, including, in the event of an insurance undertaking not complying with its obligation to inform, an order to the insurance undertaking to fulfil its duty to inform in accordance with the legal requirements. Should the insurance undertaking not comply with this order of the FMA, Article 64 of the Insurance Supervision Act provides for the possibility of a fine to a maximum of CHF 50 000.

114. The Liechtenstein Government stresses that such provision must be distinguished from a possible claim for damages that a consumer may have against the insurance undertaking for causing loss and damage due to a breach of the insurance undertaking's duty to inform. This claim will fall under the general law of obligations which is applied by the civil courts.

115. The Government of the Principality of Liechtenstein proposes that the Court should answer the fourth question as follows:

> *Directive 2002/83 does not require Article 36 to be implemented into national law of the Member State in such a way that policy holders acquire a civil law right against the assurance undertaking to notify the details pursuant to Annex III. Directive 2002/83 leaves it up to the EEA States to regulate the legal consequences of the non-observance of the duty to inform.*

EFTA Surveillance Authority

116. In ESA's view, the referring court appears to pose the question whether a civil law action for breach of Directive 2002/83 can be maintained if the national implementing measures establish an administrative system of supervision.

117. In this regard, ESA emphasises that Article 3 EEA requires the EEA States to take all measures necessary to guarantee the application and effectiveness of European law. This is so even where a directive does not specifically provide for a penalty for an infringement. The EFTA Court has stated that while the choice of penalties remains within the discretion of the EEA States, "they must ensure that infringements of European law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive … . These considerations are equally valid in the context of the EEA Agreement".[18]

118. ESA observes that Directive 2002/83 specifies neither the most appropriate means of implementation into domestic legislation nor the possible sanction(s) on a life assurance undertaking in the event of a failure to provide information. Instead, Directive 2002/83 imposes merely an obligation on the EEA States to ensure that appropriate and sufficient remedies are put in place such that life assurance undertakings comply with their obligation to provide information.

119. In support of this argument, ESA relies on recital 44 in the preamble to Directive 2002/83 which reads: "… The harmonisation of assurance contract law

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[18] Reference is made to Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 234, paragraphs 46 to 47, and case law cited.

is not a prior condition for the achievement of the internal market in assurance. Therefore, the opportunity afforded to the Member States of imposing the application of their law to assurance contract covering commitments within their territories is likely to provide adequate safeguards for policy holders. …" In other words, the national contract law applicable to an assurance contract will supplement the protection afforded by Directive 2002/83 in the territory of each EEA State.

120. Moreover, ESA adds, in accordance with settled case law, in the absence of EEA rules in the field, it is for the domestic legal system of each EEA State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EEA law.

121. First, such rules should not be less favourable than those pursuant to which the national legal order protects similar rights under purely domestic legislation (principle of equivalence).[19] ESA emphasises that this principle requires that the national rule which implements the provision of a directive is applied without distinction, whether the infringement alleged is of EEA law or national law, where the purpose and cause of action are similar.[20]

122. Second, such rules must not render it in practice impossible or excessively difficult to exercise rights conferred by EEA law (principle of effectiveness).[21] ESA continues, when the question arises whether a national procedural provision makes the application of EEA law impossible or excessively difficult, it must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole.[22]

123. ESA contends that it is for the national court to establish whether a legal remedy complies with the principles of equivalence and effectiveness. For this purpose, it needs to examine the role of such remedy in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. Furthermore, account must be taken of the basic principles of the domestic judicial system, such as protection of the rights of defence, the principle of legal certainty and the proper conduct of procedure.[23]

124. In ESA's view, in the case at hand, in order to establish that these principles have not been compromised, the national court, which has direct knowledge of the procedural rules governing actions in the field of life assurance

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[19] Reference is made to Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* [2010] ECR I-13849, paragraph 28.

[20] Reference is made to Case C-246/09 *Susanne Bulicke* [2010] ECR I-7003, paragraph 26.

[21] Reference is made to *Susanne Bulicke*, cited above, paragraph 25, and the case law cited.

[22] Reference is made to Case C-40/08 *Asturcom Telecommunicaciones SL* [2009] ECR I-9579, paragraph 39.

[23] Reference is made to *Susanne Bulicke*, cited above, paragraphs 29 and 35.

and of contracts in general, has to consider both the purpose and the essential characteristics of supposedly similar rules under national law.

125. In particular, ESA asserts, if the domestic legislation provides solely for an administrative sanction for the failure of a life assurance undertaking to provide the relevant information, a policy holder who suffers loss and damage as a result will lack any adequate means of recourse against the life assurance undertaking and, thus, no possibility to obtain compensation for the loss incurred.[24]

126. In the case at hand, given the lack of direct effect, ESA contends that domestic legislation should provide for a legal remedy in favour of the party suffering losses as a result of its counterparty's failure to provide information. It notes that this was the approach taken by the Liechtenstein Supreme Court in its judgment of 10 February 2012 in case number 01 CG.2009.62 referred to by the Princely Court. ESA indicates that this remedy may be provided in general contract law or in a special provision of domestic legislation implementing the Directive in accordance with the principles of equivalence and effectiveness.

127. ESA proposes that the Court should answer the fourth question as follows:

> *Article 36 of Directive 2002/83 or Article 31 of Directive 92/96 allows the EEA States to choose the means to implement them in their national legal order as long as the principles of equivalence and effectiveness of EEA law are respected. In the present case, the principle of effectiveness requires that policy holders are granted a civil law right to seek compensation for loss incurred in case the assurance undertaking has failed to comply with its obligation to provide information under those directives. The principle of equivalence requires that the civil law right exercised by the policy holder in the circumstances of this case is exercised under conditions that are similar to analogous actions brought for breaches of national law.*

The Commission

128. The Commission observes that Directive 2002/83 is silent on the matter of remedies. However, as a matter of general principle, it continues, the sanctions regime applied by each State should be effective, proportionate and dissuasive in order to achieve the key objective of consumer protection.[25]

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[24] Reference is made to Case C-12/11 *Denise McDonagh*, judgment of 31 January 2013, not yet reported, paragraphs 23 to 24.

[25] Reference is made to Article 3 EEA which provides that EEA States shall take "all appropriate measures" to ensure fulfilment of the obligations arising out of the Agreement.

129. The Commission proposes that the Court should answer the fourth question as follows:

> *The sanctions regime laid down by national law for a breach of Article 36 of Directive 2002/83 must be effective, proportionate and dissuasive in order to achieve the key objective of consumer protection.*

Páll Hreinsson
Judge-Rapporteur