JUDGMENT OF THE COURT

15 July 2021*

(*Directive 2004/39/EC – Directive 2006/73/EC – Notion of "essential terms" – Sufficient disclosure of information to clients – Notion of "summary form" – Admissibility*)

In Case E-14/20,

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 Supreme Court of the Principality of Liechtenstein (*Fürstlicher Oberster Gerichtshof*), in the case between

Liti-Link AG

and

LGT Bank AG,

concerning the interpretation of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive,

THE COURT,

composed of: Páll Hreinsson, President, Per Christiansen (Judge-Rapporteur), and Bernd Hammermann, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

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* Language of the request: German. Translations of national provisions are unofficial and based on those contained in the documents of the case.

– Liti-Link AG (“Liti-Link”), represented by Dr Helmut Schwärzler and Dr Alexander Amann, advocates;

– LGT Bank AG (“LGT”), represented by Dr Patrick Roth, advocate;

– the Liechtenstein Government, represented by Dr Andrea Entner-Koch, Dr Claudia Bösch and Christoph Büchel, acting as Agents;

– the Norwegian Government, represented by Janne Tysnes Kaasin and Ane Sydnes Egeland, acting as Agents;

– the EFTA Surveillance Authority (“ESA”), represented by Romina Schobel, Claire Simpson and Carsten Zatschler, acting as Agents; and

– the European Commission (“the Commission”), represented by Tibor Scharf, Albert Nijenhuis, Markéta Šimerdová and Joan Rius Riu, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Liti-Link, represented by Dr Helmut Schwärzler and Martin Hermann; LGT, represented by Dr Patrick Roth, Daniela Manneh-Hasler and Clemens Kerle; the Liechtenstein Government, represented by Dr Andrea Entner-Koch, Dr Claudia Bösch and Christoph Büchel; ESA, represented by Carsten Zatschler, Claire Simpson and Romina Schobel; and the Commission, represented by Tibor Scharf, Albert Nijenhuis, Joan Rius Riu and Markéta Šimerdová; at the remote hearing on 25 February 2021,

gives the following

Judgment

I Legal background

EEA law

1 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1) (“MiFID I”) was incorporated into the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) by Decision of the EEA Joint Committee No 65/2005 of 29 April 2005 (OJ 2005 L 239, p. 50), which inserted it as point 30ca of Annex IX (Financial Services) to the EEA

Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway, and fulfilled on 8 June 2007. The decision entered into force on 1 August 2007. MiFID I was repealed from 3 December 2019.

2 Recital 2 of MiFID I read:

> *In recent years more investors have become active in the financial markets and are offered an even more complex wide-ranging set of services and instruments. In view of these developments the legal framework of the Community should encompass the full range of investor-oriented activities. To this end, it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Community, being a Single Market, on the basis of home country supervision. In view of the preceding, Directive 93/22/EEC should be replaced by a new Directive.*

3 Recital 5 of MiFID I read:

> *It is necessary to establish a comprehensive regulatory regime governing the execution of transactions in financial instruments irrespective of the trading methods used to conclude those transactions so as to ensure a high quality of execution of investor transactions and to uphold the integrity and overall efficiency of the financial system. A coherent and risk-sensitive framework for regulating the main types of order-execution arrangement currently active in the European financial marketplace should be provided for. It is necessary to recognise the emergence of a new generation of organised trading systems alongside regulated markets which should be subjected to obligations designed to preserve the efficient and orderly functioning of financial markets. With a view to establishing a proportionate regulatory framework provision should be made for the inclusion of a new investment service which relates to the operation of an MTF.*

4 Recital 23 of MiFID I read:

> *An investment firm authorised in its home Member State should be entitled to provide investment services or perform investment activities throughout the Community without the need to seek a separate authorisation from the competent authority in the Member State in which it wishes to provide such services or perform such activities.*

5 Recital 29 of MiFID I read:

> *The expanding range of activities that many investment firms undertake simultaneously has increased potential for conflicts of interest between those different activities and the interests of their clients. It is therefore necessary to provide for rules to ensure that such conflicts do not adversely affect the interests of their clients.*

6 Recital 30 of MiFID I read:

> *A service should be considered to be provided at the initiative of a client unless the client demands it in response to a personalised communication from or on behalf of the firm to that particular client, which contains an invitation or is intended to influence the client in respect of a specific financial instrument or specific transaction. A service can be considered to be provided at the initiative of the client notwithstanding that the client demands it on the basis of any communication containing a promotion or offer of financial instruments made by any means that by its very nature is general and addressed to the public or a larger group or category of clients or potential clients.*

7 Recital 31 of MiFID I read:

> *One of the objectives of this Directive is to protect investors. Measures to protect investors should be adapted to the particularities of each category of investors (retail, professional and counterparties).*

8 Article 4(1) of MiFID I, entitled "Definitions", read, in extract:

> *For the purposes of this Directive, the following definitions shall apply:*
>
> *...*
>
> *2) "Investment services and activities" means any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I;*
>
> *...*
>
> *3) "Ancillary service" means any of the services listed in Section B of Annex I;*
>
> *...*
>
> *11) "Professional client" means a client meeting the criteria laid down in Annex II;*

12) "Retail client" means a client who is not a professional client;

...

9 Article 19 of MiFID I, entitled "Conduct of business obligations when providing investments services to clients", read, in extract:

1. Member States shall require that, when providing investment services and/or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in paragraphs 2 to 8.

2. All information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.

3. Appropriate information shall be provided in a comprehensible form to clients or potential clients about:

- *the investment firm and its services,*
- *financial instruments and proposed investment strategies; this should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies,*
- *execution venues, and*
- *costs and associated charges*

so that they are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis. This information may be provided in a standardised format.

...

10 Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ 2006 L 241, p. 26) ("the Implementing Directive") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 21/2007 of 27 April 2007 (OJ 2007 L 209, p. 38), which inserted it as point 30cab of Annex IX (Financial Services) to the EEA Agreement. Constitutional requirements were

indicated by Iceland and Norway, and fulfilled on 18 April 2008. The decision entered into force on 1 June 2008.

11 Recital 5 of the Implementing Directive reads:

> *The rules for the implementation of the regime governing operating conditions for the performance of investment and ancillary services and investment activities should reflect the aim underlying that regime. That is to say, they should be designed to ensure a high level of investor protection to be applied in a uniform manner through the introduction of clear standards and requirements governing the relationship between an investment firm and its client. On the other hand, as regards investor protection, and in particular the provision of investors with information or the seeking of information from investors, the retail or professional nature of the client or potential client concerned should be taken into account.*

12 Recital 7 of the Implementing Directive reads:

> *In order to ensure the uniform application of the various provisions of Directive 2004/39/EC, it is necessary to establish a harmonised set of organisational requirements and operating conditions for investment firms. Consequently, Member States and competent authorities should not add supplementary binding rules when transposing and applying the rules specified in this Directive, save where this Directive makes express provision to this effect.*

13 Recital 39 of the Implementing Directive reads:

> *For the purposes of the provisions of this Directive concerning inducements, the receipt by an investment firm of a commission in connection with investment advice or general recommendations, in circumstances where the advice or recommendations are not biased as a result of the receipt of commission, should be considered as designed to enhance the quality of the investment advice to the client.*

14 Recital 40 of the Implementing Directive reads:

> *This Directive permits investment firms to give or receive certain inducements only subject to specific conditions, and provided they are disclosed to the client, or are given to or by the client or a person on behalf of the client.*

15 Article 26 of the Implementing Directive, entitled “Inducements”, reads:

> *Member States shall ensure that investment firms are not regarded as acting honestly, fairly and professionally in accordance with the best interests of a client if, in relation to the provision of an investment or ancillary service to the client,*

they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit, other than the following:

(a) a fee, commission or non-monetary benefit paid or provided to or by the client or a person on behalf of the client;

(b) a fee, commission or non-monetary benefit paid or provided to or by a third party or a person acting on behalf of a third party, where the following conditions are satisfied;

(i) the existence, nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained, the method of calculating that amount, must be clearly disclosed to the client, in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment or ancillary service;

(ii) the payment of the fee or commission, or the provision of the non-monetary benefit must be designed to enhance the quality of the relevant service to the client and not impair compliance with the firm's duty to act in the best interests of the client;

(c) proper fees which enable or are necessary for the provision of investment services, such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and which, by their nature, cannot give rise to conflicts with the firm's duties to act honestly, fairly and professionally in accordance with the best interests of its clients.

Member States shall permit an investment firm, for the purposes of point (b)(i), to disclose the essential terms of the arrangements relating to the fee, commission or non-monetary benefit in summary form, provided that it undertakes to disclose further details at the request of the client and provided that it honours that undertaking.

16 Article 51(1) of the Implementing Directive, entitled "Retention of records", reads:

Member States shall require investment firms to retain all the records required under Directive 2004/39/EC and its implementing measures for a period of at least five years.

Additionally, records which set out the respective rights and obligations of the investment firm and the client under an agreement to provide services, or the terms on which the firm provides services to the client, shall be retained for at least the duration of the relationship with the client.

However, competent authorities may, in exceptional circumstances, require investment firms to retain any or all of those records for such longer period as is justified by the nature of the instrument or transaction, if that is necessary to enable the authority to exercise its supervisory functions under Directive 2004/39/EC.

Following the termination of the authorisation of an investment firm, Member States or competent authorities may require the firm to retain records for the outstanding term of the five year period required under the first subparagraph.

17 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349) ("MiFID II") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 78/2019 of 29 March 2019 (OJ 2019 L 279, p. 143). Constitutional requirements were indicated by Iceland, Liechtenstein and Norway and fulfilled on 25 June 2019. MiFID II entered into force in the EEA on 3 December 2019.

National law

18 The Liechtenstein Banking Act (*Bankengesetz*), the Banking Ordinance (*Bankenverordnung*), and the Civil Code (*Allgemeines bürgerliches Gesetzbuch*), inter alia, implemented MiFID I and the Implementing Directive into Liechtenstein law. According to the referring court, the applicable version of the relevant national laws read as follows:

19 Article 8h(2) and (3) of the Banking Act read:

(2) Banks and investment firms may provide or accept fees, commissions, and non-monetary benefits offered in connection with the provision of investment services and ancillary services (benefits) only in accordance with the conditions set out by ordinance.

(3) Banks and investment firms must disclose the benefits in accordance with the ordinance. The disclosure of benefits may be in summary form and general in content, e.g. as part of the general or other pre-formulated terms and conditions. Banks and investment firms are required to disclose further details if requested by the client.

20 Paragraphs 1 and 5 of Section III "Benefits" in Annex 7.1. to the Banking Ordinance read:

> *(1) The granting or acceptance of fees or commissions or non-monetary benefits ("benefits") within the meaning of Article 8h of the Banking Act is permitted if*
>
> *(a) these constitute fees which enable or are necessary for the provision of services, such as, for example, custody costs, commissions for the purchase and sale of securities, settlement and exchange fees, regulatory levies or legal fees, which, by their nature, cannot give rise to conflicts with the obligation of the bank or investment firm to act honestly, fairly and professionally in accordance with the best interests of its clients; or*
>
> *(b) this constitutes a benefit paid or provided to or by the client or a person on behalf of the client;*
>
> *(c) this constitutes a benefit from or to third parties or a person acting on their behalf, who are not covered by point (b), provided that*
>
> *(aa) the existence, nature and amount of the benefit, or, where the amount cannot be ascertained, the method of calculating that amount, is clearly disclosed to the client, in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment or ancillary service; and*
>
> *(bb) the benefit is designed to enhance the quality of the relevant service to the client and does not impair compliance with the obligation of the bank or investment firm to act in the best interests of the client.*
>
> *(5) The disclosure pursuant to point (c)(aa) of paragraph 1 may in accordance with Article 8h of the Banking Act be in summary form and general in content.*

21 Section 1009 of the Civil Code reads:

> *The agent is obliged, in accordance with his promise and the authority received, to procure the transaction diligently and honestly and to cede to the principal all benefits resulting from the transaction. He is entitled, even if he has a limited authority, to use all means that are necessarily connected with the nature of the transaction or in accordance with the expressed intention of the principal. If, however, he exceeds the limits of the authority, he shall be liable for the consequences.*

22 Section 1009a of the Civil Code reads:

> *(1) If the agent is a bank, an investment firm or an asset management company, it may assume that the principal has waived in relation to it the recovery of any fees, commissions or non-monetary benefits received or still to be received from third parties (benefits) and the assertion of civil law claims for compensation in relation to these benefits provided that*
>
> *(a) prior to the procurement of the transaction the agent has correctly fulfilled its obligations of disclosure; and*
>
> *(b) following the disclosure the principal has the transaction executed.*
>
> *(2) The agent is obliged to notify the principal of the legal consequences provided for in paragraph 1 for example in the general or other pre-formulated terms and conditions.*

23 Section 864a of the Civil Code reads:

> *Unusual terms used by one of the parties to a contract in its pre-formulated terms and conditions shall not form part of the agreement if they result in a considerable imbalance in contractual rights and duties and, including in the light of the circumstances, in particular their objective appearance, could not be expected by the other party, unless the former specifically drew the attention of the latter to those terms.*

24 Section 879(3) of the Civil Code reads:

> *A term in pre-formulated terms and conditions which does not govern a fundamental obligation of one of the parties shall be regarded as void if, in the light of all of the circumstances, it results, to the detriment of one party, in a serious imbalance in contractual obligations and duties.*

II Facts and procedure

25 Liti-Link is a public limited company registered in the commercial register of the Canton of St. Gallen, Switzerland. Its activities comprise financing legal disputes and purchase and collection of debts. LGT is a public limited company registered in Liechtenstein and a bank offering, inter alia, investment services.

26 On 19 May 2018, one of LGT's clients ("the Client") assigned all claims arising from his business relationship with LGT to Liti-Link for collection.

27 On 25 May 2018, Liti-Link brought an action by stages seeking that LGT should provide information on all advantages with a monetary value (commissions, portfolio management commissions, kickbacks, finder's fees, distribution expenses, discounts, disagios, payments in kind, etc.) that it received in connection with the business relationship with the Client. This included LGT's role as an investment adviser, as mere custodian bank executing the Client's orders in the framework of the (custody) account relationship (commission business, execution-only) or in another capacity, in particular in connection with one portfolio. Liti-Link further sought an order that LGT should provide supporting documents and the legal and contractual bases for the receipt of these advantages with a monetary value.

28 The business relationship between the Client and LGT began on 12 August 1999, when the Client applied to open an account/custody account with LGT. On the same day, he also applied to open a discretionary account and for correspondence to be retained by the bank. LGT's General Terms and Conditions ("the General Conditions") were made the basis for that agreement and were issued to the Client. It was set out in Section 4 of the 1990 version of the General Conditions that the bank reserves the right at any time to amend the general terms and conditions. Amendments were to be notified to customers by means of circular or other appropriate means. If not objected to within a period of one month, these are regarded as approved.

29 The first business relationship, which began in 1999, ended on 7 September 2009. The Client's account balance was then transferred to the second business relationship, which commenced on 17 August 2009. According to the request, LGT contends that the second business relationship remains in existence today. In October 2014, the Client and LGT entered into a new investment advice agreement that was intended to apply only for the period from 1 October 2014 to 31 December 2014. From 1 January 2015 the previous terms and conditions were intended to apply once again.

30 Save for the period 1 October 2014 to 31 December 2014, it is disputed between the parties to the main proceedings whether the business relationship consisted of an investment advice mandate or was purely "execution-only".

31 On the amendment of the General Conditions in September 2004, a new Section 15 was introduced, worded as follows:

> *The bank reserves in principle the right to grant third parties a kick-back commission on the commissions and fees charged to the client and to pay remuneration to third parties on the basis of the volume of assets under management. Disclosure of such payments to the client is not a matter for the bank but exclusively for the respective recipients.*

The client accepts that any remuneration and compensation such as, for example, commissions and trail commissions, which are paid by third parties to the bank, may be retained by the latter and regarded as additional remuneration.

32 The General Conditions were amended again with effect from 1 May 2010 and in place of Section 15, Section 17 was introduced, worded, in extract, as follows:

The banking client acknowledges and accepts that the bank may be granted benefits, as a rule in the form of trail commissions, by third parties (including LGT group companies) in connection with the supply of clients, the purchase/marketing of collective investments, certificates, notes etc. (hereinafter referred to as 'products'; this also includes those managed and/or issued by an LGT group company). The level of such benefits differs according to the product and the product provider. Trail commissions are calculated as a rule in accordance with the volume of a product or product group held by the bank. Their level usually corresponds to a percentage of the management charges applied to the product concerned which are paid periodically during the holding period. In addition, marketing commissions from securities issuers may be paid also in the form of discounts on the issue price (percentage discount) or in the form of one-off payments that correspond to a percentage of the issue price. Unless another rule applies, the banking client may request from the bank at any time before or after the service is provided (purchase of the product) further details of the agreements made with third parties concerning such benefits. The right to obtain further details in relation to transactions already executed is however limited to the 12 months prior to the request. The banking client expressly waives a more extensive right to information. If a banking client does not request further details before the service is provided or makes use of the service after obtaining further information, he waives any right to recovery within the meaning of section 1009 of the Civil Code.

33 Following a request by the Client, LGT provided the Client with further information concerning the period from October 2016 to September 2017.

34 The Princely Court (*Fürstliches Landgericht*) dismissed the action brought by Liti-Link in its entirety on 21 February 2019. On 14 November 2019, the Princely Court of Appeal (*Fürstliches Obergericht*) granted in part Liti-Link's appeal, revising the judgment dismissing the claim for information to allow it in part.

35 Both Liti-Link and LGT have brought an appeal against the decision of the Princely Court of Appeal.

36 Against this background, on 4 September 2020, the Supreme Court of the Principality of Liechtenstein decided to stay the proceedings and refer the case to the Court. The Case was registered at the Court on 16 September 2020. The following questions were referred:

> *1. Must the final paragraph of Article 26 of Implementing Directive 2006/73/EC according to which the essential terms of the arrangements relating to the fee, commission or non-monetary benefit may be disclosed in summary form, be interpreted as meaning that the disclosure of benefits can be in summary form and general in content?*
>
> *If the Court answers the first question in the affirmative, the following supplementary question is asked:*
>
> *1.1. Must the final paragraph of Article 26 of Implementing Directive 2006/73/EC according to which the essential terms of the arrangements relating to the fee, commission or non-monetary benefit may be disclosed in summary form be interpreted as meaning that the disclosure of benefits can be in summary form and general in content, for example, in general or other pre-formulated terms and conditions of business or must the disclosure be made individually for each client or each category of clients?*
>
> *In addition, the following further questions are referred:*
>
> *2. Is there a correct disclosure within the meaning of point (b)(i) of Article 26 of Implementing Directive 2006/73/EC if the investment firm merely notifies the client that benefits may be provided to it by third parties or must the investment firm clearly indicate whether and when such benefits are provided?*
>
> *3. Is there a correct disclosure within the meaning of point (b)(i) of Article 26 of Implementing Directive 2006/73/EC if the investment firm notifies the client that the amount of the benefit provided by the third party depends on the product and consists of a percentage of the management fees charged for the product concerned, a percentage discount on the issue price or a percentage of the issue price or must the investment firm prior to the provision of the investment or ancillary service concerned disclose to the client at least bands concerning the fees, commissions and benefits received by it?*
>
> *4. Are the conditions laid down in Article 26 of Implementing Directive 2006/73/EC for a disclosure of benefits in summary form, namely that the investment firm undertakes to disclose further details at the request of the client and that it honours that undertaking, fulfilled if, in relation to transactions already*

made, the investment firm undertakes merely to disclose to the client further details for the twelve months preceding the request?

5. Must a Member State, pursuant to the EEA Agreement, accord horizontal direct effect to an implementing directive that is not correctly transposed, specifically, Implementing Directive 2006/73/EC?

6. Must Article 26 of Implementing Directive 2006/73/EC be interpreted in such a way that rights of banking clients against a bank may be derived from it?

37 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments by the parties are mentioned or discussed hereinafter only insofar as it is necessary for the reasoning of the Court.

III Answer of the Court

Admissibility

38 LGT contends that the Court does not have jurisdiction to give an advisory opinion as the questions posed by the referring court are hypothetical and, further, that the Court cannot interpret national law. In its view, the case should therefore be dismissed as inadmissible.

39 The purpose of Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice is to establish cooperation between the Court and national courts or tribunals. This is intended to ensure the homogenous interpretation of EEA law, by assisting national courts and tribunals in the EFTA States when they have to apply provisions of EEA law in cases before them (see Case E-5/19 *Criminal proceedings against F and G*, judgment of 4 February 2020, paragraph 79 and case law cited).

40 It is settled case law that questions on the interpretation of EEA law referred by national courts and tribunals enjoy a presumption of relevance. It is for the referring court to determine the factual and legal context of the case before it, and thus to decide which questions to refer to the Court. Accordingly, the Court may only refuse to rule on a question referred by a national court where it is obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have the factual or legal material before it necessary to answer the questions submitted to it in a useful manner (see *Criminal proceedings against F and G*, cited above, paragraph 80 and case law cited).

41 The relevant directives at issue in the present case have been incorporated into the EEA Agreement and EEA law requires that Liechtenstein implements those directives into its national law. The referring court requests guidance on the interpretation of Article 26 of the Implementing Directive. Any assessment of national law is for the referring court.

42 Accordingly, LGT's submission that the Court has no jurisdiction must be rejected and the case must be held to be admissible.

Preliminary remarks

43 MiFID I established a regulatory regime governing the execution of transactions in financial instruments. It also follows from recital 5 of MiFID I that the aim of the directive was to ensure a high quality of execution of investor transactions and to uphold the integrity and overall efficiency of the financial system. Further, as set out in recitals 29 to 31, MiFID I aims at establishing a common, robust regulatory framework that protects investors, including retail investors, and provides for rules to ensure that conflicts of interest faced by investment firms do not adversely affect the interests of their clients. As mentioned in recital 2, MiFID I was adopted as a result of a growing number of investors having become active in the financial markets and being offered more complex and wide-ranging services and instruments. In addition, as mentioned in recital 23, an investment firm authorised in an EEA State should be entitled to provide investment services or perform investment activities throughout the internal market without the need to seek a separate authorisation from the competent authority in the EEA State in which it wishes to provide such services or perform such activities.

44 MiFID I was supplemented by the Implementing Directive, which lays down detailed rules for the implementation of the provisions of MiFID I and includes operating conditions for investment services. As mentioned in recitals 5 and 7 of the Implementing Directive, the provisions are designed to ensure investor protection, applicable in a uniform manner, by introducing clear standards and requirements governing the relationship between an investment firm and its clients. The provisions in MiFID I and the Implementing Directive must thus be read in conjunction with each other.

45 On 3 December 2019, MiFID II entered into force in the EEA and MiFID I was repealed. However, the dispute in the present case relates to the period before MiFID II entered into force in the EEA and the questions referred only concern MiFID I and the Implementing Directive.

Questions 1 and 1.1

46 By Question 1, the referring court in essence asks whether the disclosure of inducements in accordance with Article 26 of the Implementing Directive can be made in summary form and be general in content. If Question 1 is answered in the affirmative, a

supplementary question is asked on whether such disclosure can be made in general or other pre-formulated terms and conditions of business, or whether such disclosure must be made individually for each client or each category of clients.

47 The questions concern the final paragraph of Article 26 of the Implementing Directive, which must be read in conjunction with the first paragraph of that provision and Article 19 of MiFID I, which Article 26 of the Implementing Directive is intended to implement. It is clear from the scheme of MiFID I, in particular the title of Section 2 of Chapter II of Title II of that directive, "Provisions to ensure investor protection", which contains Article 19, that Article 19 forms part of a set of measures aimed at guaranteeing investor protection which, as stated in recitals 2 and 31 of MiFID I, is one of MiFID I's objectives (compare the judgment in *Genil 48 and Comercial Hostelera de Grandes Vinos*, C-604/11, EU:C:2013:344, paragraph 39).

48 Article 19 of MiFID I sets out obligations governing the conduct of business when an investment firm provides investment services to clients. It follows from Article 19(1) that an investment firm must act honestly, fairly and professionally in the best interests of its clients when providing investment services. In particular, the investment firm must comply with the principles set out in Article 19(2) to (8).

49 Article 19(2) and (3) of MiFID I requires that all information provided to clients or potential clients must be fair, clear and not misleading. Furthermore, appropriate information must be provided in a comprehensible form. The aim of these provisions is to provide relevant information placing the client in a position to understand the nature and risks of the investment service in question and thus make informed investment decisions.

50 Article 26 of the Implementing Directive concerns inducements, which include fees, commissions and non-monetary benefits. In the context of the present case such inducements are advantages with monetary value (commissions, kick-back commissions, portfolio management commissions, kickbacks, finder's fees, distribution expenses, discounts, disagios, payments in kind, etc.) that LGT may have received in connection with the business relationship with the Client. Such inducements are permissible only under the conditions specified in Article 26 of the Implementing Directive.

51 It follows from the first paragraph of Article 26 of the Implementing Directive that investment firms are not regarded as acting honestly, fairly and professionally in the best interest of the client if, in relation to the provision of investment services to the client, investment firms pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit, other than the inducements explicitly authorised in Article 26. If such inducements do not comply with the requirements of Article 26, the inducements will be contrary to the investment firm's obligation under Article 19 of MiFID I. Thus, such inducements must be deemed a breach of the requirements of that provision. As

submitted by the Commission in its written observations, Article 26 of the Implementing Directive contains an obligation of result rather than of means.

52 According to point (b) of the first paragraph of Article 26 of the Implementing Directive, an investment firm may only be paid or provided inducements by or to a third party, in relation to the provision of an investment or ancillary service to the client, where the cumulative conditions of points (b)(i) and (b)(ii) are satisfied. Point (b)(i) requires that the existence, nature and amount of the fee, commission or benefit must be clearly disclosed to the client in a comprehensive, accurate and understandable manner and prior to the provision of the relevant investment or ancillary service. It follows from point (b)(i) that the information must be provided prior to the provision of an "investment or ancillary service". Thus, the information must be provided for the individual service before or at the time the service is offered to the client. Where the amount cannot be ascertained, the method of calculating that amount must be disclosed. According to point (b)(ii) of the same provision, the payment of the fee or commission, or the provision of the non-monetary benefit must be designed to enhance the quality of the relevant service to the client and not impair compliance with the investment firm's duty to act in the best interests of the client. The client will only be in a position to assess for themselves the investment firm's interest in a transaction and to recognise the possible consequences of such an interest in inducements when these conditions are fulfilled.

53 The final paragraph of Article 26 of the Implementing Directive sets out a conditional derogation by which the essential terms of the arrangements relating to the inducements may be disclosed to the client in summary form. However, for the disclosure of such summary information to suffice, the investment firm must undertake to disclose "further details" at the request of the client and also honour that undertaking. The provision does not specify what such "further details" entail, but they must be seen in the context of the "essential terms", which relate to the existence, nature and the amount of the inducements. As submitted by the Commission in its written observations, the client must be in a position to identify which further details it may request. If not, this provision would risk being devoid of practical purpose. As such, the summary form must contain the essential terms of the arrangements relating to any fee, commission or non-monetary benefit and go beyond mere general information.

54 Moreover, the final paragraph of Article 26 of the Implementing Directive refers to point (b)(i) of the first paragraph of that article, which explicitly requires disclosure of the existence, nature and amount of any benefits involving a third party. Therefore, where information about benefits is provided in summary form, the client must be placed in a position to understand the existence and characteristics of those benefits. Such a disclosure will only be in compliance with Article 26 if the information provided allows the client to identify and request the additional information about the existence, nature and amount of the inducements, and receive that information in a comprehensive, accurate and understandable manner.

55 The referring court has asked whether the disclosure of information in accordance with the final paragraph of Article 26 of the Implementing Directive may also be general in content. The Court notes that the term "general in content" is not part of the wording of Article 26, but, according to the request, follows from national law transposing that article. However, the inclusion of the words "general in content" in a national measure cannot add or subtract from the assessment under Article 26.

56 With regard to supplementary Question 1.1, it is possible that disclosure in summary form may be made in general or pre-formulated terms and conditions of business. However, disclosure may be made in general and pre-formulated terms and conditions only if it is ensured that individual clients are given the information related to the specific investment service and that the information gives the client a sufficient basis to make an informed investment decision in compliance with Article 26 of the Implementing Directive. It is not necessary for an investment firm to make an individual disclosure for each client or category of clients as long as each individual client receives the information related to the specific investment service in accordance with Article 26.

57 Consequently, the Court finds that the answer to Question 1 must be that the final paragraph of Article 26 of the Implementing Directive must be interpreted as meaning that an investment firm may disclose the essential terms of the arrangements relating to the fee, commission or non-monetary benefit in summary form provided that the investment firm has clearly disclosed to the client prior to the provision of an investment or ancillary service that such inducements are paid to or received from a third party; has undertaken to disclose further details at the client's request; and honours this undertaking. It is possible that disclosure in accordance with Article 26 of the Implementing Directive in summary form may be made in general or pre-formulated terms and conditions provided that each individual client receives the information related to the specific investment service and that the information gives the client a sufficient basis on which to make informed investment decisions.

Question 2

58 By Question 2, the referring court in essence asks whether a correct disclosure in accordance with point (b)(i) of the first paragraph of Article 26 of the Implementing Directive is made where the client is merely notified that inducements may be provided by third parties, or whether, instead, the investment firm must indicate clearly whether and, if so, when such inducements are provided.

59 Point (b)(i) of the first paragraph of Article 26 of the Implementing Directive requires that the existence, nature and amount of the fee, commission or benefit, or where the amount cannot be ascertained, the method for calculating that amount, must be clearly disclosed to the client in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment or ancillary service.

60 The information is therefore insufficient if the investment firm merely discloses to the client that it may receive an inducement from a third party. A generic disclosure which merely refers to the possibility that an investment firm might receive a benefit from a third party cannot be sufficient for the purposes of Article 26 of the Implementing Directive. Consequently, a disclosure in accordance with that provision must indicate clearly whether and, if so, when such inducements are provided. If it cannot be clarified in advance whether a benefit will be paid, disclosure of the conditions determining the payment of a potential benefit, including the method of calculating the amount, is required.

61 In the light of the foregoing, the answer to Question 2 must be that a disclosure in accordance with the final paragraph of Article 26 of the Implementing Directive entails an obligation on the investment firm to indicate clearly whether and, if so, when a fee, commission or non-monetary benefit is provided in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment or ancillary service. A generic disclosure which merely refers to the possibility that an investment firm might receive a fee, commission or non-monetary benefit from a third party is not sufficient for the purposes of Article 26.

Question 3

62 By Question 3, the referring court asks whether a correct disclosure in accordance with point (b)(i) of the first paragraph of Article 26 of the Implementing Directive is made where the investment firm notifies the client that the amount of the inducements depends on the product and consists of a percentage of the management fees, a percentage discount on the issue price or a percentage of the issue price; or whether, instead, it must disclose at least bands concerning the inducements received by the investment firm.

63 It follows from Article 26 of the Implementing Directive that the amounts of the inducements received by the investment firm must be disclosed whenever possible. If the amount cannot be ascertained, the method of calculating the amount must be disclosed to the client in a manner that is comprehensive, accurate and understandable. Irrespective of whether a percentage or percentage bands are specified, it must be clear to what basis the percentage is applied and how the calculation is made to allow the client to draw an informed conclusion. Furthermore, it will be necessary to specify the exact percentage, or if the exact percentage cannot be ascertained, at least bands, which clearly specify the relevant ranges of percentages. It will not be sufficient to merely state generally that a benefit may be received or that a benefit will be based on a percentage without specifying any definite number or a range of numbers in that regard.

64 The purpose of such disclosure is to place the client in a position to calculate the amounts of the inducements involved. The disclosure will be insufficient if the information provided is too general, for example that the amount will depend on the product and

consists of a percentage of the management fees charged for the specific product, a percentage discount on the issue price or a percentage of the issue price. Absence of specific and accessible information will not enable the client to take an informed decision. Whether the client is in a position to take such a decision must be determined on a case-by-case basis taking into account the information required pursuant to Article 26 of the Implementing Directive as set out in the answer to Question 1.

65 Accordingly, the answer to Question 3 must be that if the amount of the fees or commissions cannot be ascertained, a correct disclosure in accordance with point (b)(i) of the first paragraph of Article 26 of the Implementing Directive must place the client in a position to calculate the amount of the fees or commissions provided to the investment firm by a third party so that the client is enabled to make an informed decision on an investment.

Question 4

66 By Question 4, the referring court in essence asks whether the requirements pursuant to Article 26 of the Implementing Directive for disclosing information in summary form are fulfilled if, in relation to transactions already made, the investment firm undertakes to disclose to the client further details merely for the twelve months preceding the request.

67 It follows from the final paragraph of Article 26 of the Implementing Directive that an investment firm is permitted to disclose the essential terms of the inducements in summary form, provided that it undertakes to give "further details" upon the client's request. That provision does not place any temporal limits on making a request for further details. Furthermore, the derogation is made conditional on the investment firm actually honouring its undertaking to disclose further details at the request of the client. Article 26 aims at increased transparency, investor protection and to prevent or reduce conflicts of interest. In this regard, it must be recalled that, as a rule, pursuant to point (b)(i) of the first paragraph of that article, disclosure must be made prior to the provision of the relevant investment or ancillary service. Having regard to the objective of investor protection pursued by Article 26, the authorisation to disclose information in summary form contained in the final paragraph of Article 26 cannot result in placing the client in a worse position than if the disclosure had been made under point (b)(i) of the first paragraph. Accordingly, and as pointed out by ESA and the Commission, such a derogation must be interpreted narrowly (compare the judgment in *Kapper*, C-476/01, EU:C:2004:261, paragraph 72).

68 It follows from Article 13(6) of MiFID I that an investment firm must retain records of all services and transactions undertaken by it to enable the competent authority to monitor compliance with the requirements under MiFID I and to ascertain whether the investment firm has complied with its obligations towards its clients.

69 According to Article 51(1) of the Implementing Directive, such records must be retained for at least five years. Records which set out the respective rights and obligations of the investment firm and the client under an agreement to provide services, or the terms on which the firm provides services to the client, must be retained for at least the duration of the relationship with the client. Thus, as submitted by the Commission in its written observations, the investment firm must be in a position to disclose to the client information going back, at least, to the start of the contractual relationship with the investment firm; the point in time from which the investment firm was bound to act in the best interests of the client. Accordingly, the client's right to request further details must correspond at least to this retention period or as long as the records are actually retained. Moreover, competent authorities may, in exceptional circumstances, require investment firms to retain any or all of those records for such longer period as is justified by the nature of the instrument or transaction, if that is necessary to enable the authority to exercise its supervisory functions under MiFID I.

70 Therefore, the answer to Question 4 must be that the conditions laid down in the final paragraph of Article 26 of the Implementing Directive for a disclosure of fees, commissions or non-monetary benefits in summary form are not fulfilled if the investment firm undertakes to disclose to the client further details merely for a period of twelve months preceding the request.

Questions 5 and 6

71 By Questions 5 and 6, the referring court in essence asks whether a directive that is not correctly transposed into national law must have horizontal direct effect and if Article 26 of the Implementing Directive must be interpreted in a way that banking clients may derive rights from it. The Court finds it appropriate to answer these questions together.

72 It is well established that there is no recognition of direct effect under the EEA Agreement. Therefore, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts. In order for individuals to be able to invoke an EEA provision in domestic proceedings, that provision must be, or have been made, part of domestic law in the EEA States in accordance with their constitutional and legal traditions (see Case E-6/17 *Fjarskipti hf.* [2018] EFTA Ct. Rep. 78, paragraph 24 and case law cited).

73 In the case of conflict between national law and non-implemented EEA law, the EEA States may decide whether, under their national legal order, national administrative and judicial organs can apply the relevant EEA rule directly, and thereby avoid violation of EEA law in a particular case. The EEA States may also decide on which administrative and judicial organs they confer such a power (see Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 41).

74 Notwithstanding those principles, an EEA State's obligations arising from a directive to achieve its result and from Article 3 EEA to take all appropriate measures, whether general or particular, are binding on all the authorities of EEA States, including courts, for matters within their competence. It is therefore the responsibility of national courts in particular to provide the legal protection individuals derive from the EEA Agreement and to ensure that those rules are fully effective. The national court must presume that the EEA State had the intention of fulfilling entirely the obligations arising from the directives concerned (see Case E-28/13 *LBI hf.* [2014] EFTA Ct. Rep. 970, paragraphs 40 and 41).

75 Moreover, it is inherent in the objectives of the EEA Agreement that when a national court applies domestic law, whether adopted before or after the directive, it is bound to interpret national law within its competence in conformity with EEA law. The Court has therefore consistently held that a national court must apply the interpretative methods recognised by national law, as far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive, favouring the interpretation of the national rules which is the most consistent with that purpose (see *LBI hf.*, cited above, paragraph 42).

76 In this regard, it is for the referring court to ascertain what the national rules applicable to the dispute before it are and to do whatever lies within its jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that Article 26 of the Implementing Directive is fully effective and achieving an outcome consistent with the objective pursued by it (see Case E-25/13 *Gunnar V. Engilbertsson* [2014] EFTA Ct. Rep. 524, paragraph 163).

77 In the light of the foregoing, the answer to Questions 5 and 6 must be that EEA law does not require any direct effect of EEA law provisions not correctly transposed into national law. The national court is nevertheless obliged, as far as possible, to ensure the result sought by EEA law through the interpretation of national law in conformity with EEA law.

IV Costs

78 The costs incurred by the Liechtenstein Government, the Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Supreme Court of the Principality of Liechtenstein gives the following Advisory Opinion:

1. **The final paragraph of Article 26 of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive must be interpreted as meaning that an investment firm may disclose the essential terms of the arrangements relating to the fee, commission or non-monetary benefit in summary form provided that the investment firm has clearly disclosed to the client prior to the provision of an investment or ancillary service that such inducements are paid to or received from a third party; has undertaken to disclose further details at the client's request; and honours this undertaking.**

   Disclosure in accordance with Article 26 in summary form may be made in general or pre-formulated terms and conditions provided that each individual client receives the information related to the specific investment service and that the information gives the client a sufficient basis on which to make informed investment decisions.

2. **A disclosure in accordance with the final paragraph of Article 26 of Directive 2006/73/EC entails an obligation on the investment firm to indicate clearly whether and when a fee, commission or non-monetary benefit is provided in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment or ancillary service. A generic disclosure which merely refers to the possibility that an investment firm might receive a fee, commission or non-monetary benefit from a third party is not sufficient for the purposes of Article 26 of that directive.**

3. **If the amount of the fees or commissions cannot be ascertained, a correct disclosure in accordance with point (b)(i) of the first paragraph of Article 26 of Directive 2006/73/EC must place the client in a position to calculate the amount of the fees or commissions provided to the investment firm by a third party so that the client is enabled to make an informed decision on an investment.**

4. **The conditions laid down in the final paragraph of Article 26 of Directive 2006/73/EC for a disclosure of fees, commissions or non-monetary benefits in summary form are not fulfilled if the investment firm undertakes to disclose to the client further details merely for a period of twelve months preceding the request.**

5. **EEA law does not require any direct effect of EEA law provisions not correctly transposed into national law. The national court is nevertheless obliged, as far as possible, to ensure the result sought by EEA law through the interpretation of national law in conformity with EEA law.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 15 July 2021.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President