E-14/20-21

REPORT FOR THE HEARING

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.

I Introduction

1. By letter of 4 September 2020, registered at the Court on 16 September 2020, the Supreme Court of the Principality of Liechtenstein requested an Advisory Opinion in the case pending before it between Liti-Link AG (or "the Applicant") and LGT Bank AG (or "the Defendant").

2. The case before the Supreme Court of the Principality of Liechtenstein concerns a request for information on advantages with a monetary value paid to LGT Bank AG in connection with account management for a client.

II Legal background

EEA law

3. 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 EEA Agreement 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.

4. Recital 1 of MiFID I read, in extract:

> *Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field sought to establish the conditions under which authorised investment firms and banks could provide specified services or establish branches in other Member States on the basis of home country authorisation and supervision.*
>
> *...*

5. Recital 4 of MiFID I read:

> *It is appropriate to include in the list of financial instruments certain commodity derivatives and others which are constituted and traded in such a manner as to give rise to regulatory issues comparable to traditional financial instruments.*

6. Recital 25 of MiFID I read:

> *Since the scope of prudential regulation should be limited to those entities which, by virtue of running a trading book on a professional basis, represent a source of counterparty risk to other market participants, entities which deal on own account in financial instruments, including those commodity derivatives covered by this Directive, as well as those that provide investment services in commodity derivatives to the clients of their main business on an ancillary basis to their main business when considered on a group basis, provided that this main business is not the provision of investment services within the meaning of this Directive, should be excluded from the scope of this Directive.*

7. Article 4 of MiFID I, entitled "Definitions", read, in extract:

> *1. 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;

...

8. 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.

...

9. 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.

10. Recital 5 of the Implementing Directive reads, in extract:

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. ...

11. 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.

12. 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.

13. 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.

14. Article 26 of the Implementing Directive 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.

15. MiFID I has since been repealed and replaced by 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"). 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), which added it as points 13b and 31ba of Annex IX (Financial Services) to the EEA Agreement.

National law

16. Article 8h(2) and (3) of the Liechtenstein Banking Act (*Bankengesetz*) in the applicable version, 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.*

17. Paragraphs 1 and 5 of Section III "Benefits" in Annex 7.1. to the Liechtenstein Banking Ordinance (*Bankenverordnung*) in the applicable version 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.

18. Section 1009 of the Liechtenstein Civil Code (*Allgemeines bürgerliches Gesetzbuch*) 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.

19. Section 1009a of the Civil Code in the applicable version 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.

20. 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.

21. 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.*

III Facts and procedure

22. The Applicant is a joint stock company registered in the commercial register of the Canton of St. Gallen, Switzerland. Its activities comprise the financing of legal disputes and the purchase and collection of debts. The Defendant is a joint stock company registered in Liechtenstein.

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

24. On 25 May 2018 Liti-Link AG sought an order that LGT Bank AG 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, whether as 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. The action sought further an order that LGT Bank AG should provide Liti-Link AG with the relevant documents and the legal and contractual bases for the receipt of these advantages with a monetary value.

25. The business relationship between the Client and LGT Bank AG began in 1999. On 12 August 1999, the Client applied to open an account/custody account with LGT Bank AG. On the same day, he applied in addition to open a discretionary account and for correspondence to be retained by the bank, and, at the same time, LGT Bank AG's General Terms and Conditions ("GTC") were made the basis for the agreement and issued to the Client. It was set out in Section 4 of the 1990 version of the GTC that the bank reserves the right at any time to amend the general terms and conditions. Amendments are 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.

26. The first business relationship began in 1999 and ended on 7 September 2009, after the Client's account balance had been transferred to the second business relationship, which commenced on 17 August 2009, and which, according to LGT Bank AG, remains in existence today. In October 2014 the Client and LGT Bank AG concluded a new investment advice agreement that was intended to apply only from 1 October 2014 to 31

December 2014. From 1 January 2015 the previous terms and conditions were intended to apply once again.

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

28. On the amendment of the GTC 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.*

29. The GTC were amended again with effect from 1 May 2010 and in place of Section 15, Section 17 was newly introduced, worded as follows, in extract:

> *…*
>
> *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.

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

31. The Court of Justice of the Principality of Liechtenstein (*Fürstliches Landgericht*) dismissed the action brought by Liti-Link AG in its entirety, while the Princely Court of Appeal (*Fürstliches Obergericht*) granted in part Liti-Link AG's appeal, revising the order dismissing the claim for information to allow it in part.

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

33. Against this background, the Supreme Court of the Principality of Liechtenstein decided to stay the proceedings and refer the following questions to the Court:

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?

IV Written observations

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

- Liti-Link AG, represented by Dr Helmut Schwärzler and Dr Alexander Amann, advocates;

- LGT Bank AG, 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, Marketa Simerdova and Joan Rius, acting as Agents.

V Proposed answers submitted

Liti-Link AG

35. Liti-Link AG proposes that the questions referred be answered as follows:

Question 1:

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, can be interpreted as meaning that the disclosure of benefits may be in summary form and general in content, as long as the information provided is sufficient to enable the client to make an autonomous and informed investment decision. In any case, the information must be provided prior to the relevant investment or ancillary service; it must be clear, comprehensive and understandable; and it must include all the essential terms of the arrangement regarding the existence, nature and amount of the benefits, or, where it is not possible to ascertain the amount, the method of calculating that amount.

Question 1.1:

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, can be interpreted as meaning that the disclosure of benefits may be in summary form and general in content, for example, in general or other pre-formulated terms and conditions of business, since the latter expression does not necessarily exclude the client from being able to relate the disclosure to the particular service provided to him and from receiving all the essential terms of the arrangement, i.e. regarding the existence, nature and amount of the fee, commission or benefit, prior to the relevant investment or ancillary service so as to be able to make an informed investment decision.

Question 2:

There is no 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, without disclosing all the essential terms of the arrangement regarding the existence, nature and amount of the benefits, or, where it is not possible to ascertain the amount, the method of calculating that amount.

Question 3:

There is no correct disclosure within the meaning of point (b) (i) of Article 26 of Implementing Directive 2006/73/EC if the investment firm only 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 since in order to be meaningful, the disclosure must at least include concrete numbers or bandwidths of third party benefits so that the client is able to make an informed investment decision.

Question 4:

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, is not 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.

Questions 5 and 6:

Liechtenstein courts must, by using all the methods recognized by Liechtenstein law, interpret Liechtenstein law harmoniously with Directive 2006/73/EC so that a result is achieved that is in line with the Directive and its principles.

LGT Bank AG

36. LGT Bank AG submits that the Court should dismiss the request as inadmissible due to lack of relevance for the national proceedings and correspondingly the lack of jurisdiction of the EFTA Court.

37. In the alternative, and in the event that the Court decides not to dismiss the questions as inadmissible, LGT Bank AG respectfully submits that the questions posed by the referring court should be answered as follows:

Question 1:

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, must be interpreted as

meaning that the disclosure of benefits can be in summary form and general in content.

Question 1.1:

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, must 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. The final paragraph of Article 26 of Implementing Directive 2006/73/EC does not require that the disclosure is made individually for each client or each category of clients.

Question 2:

There is 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. Point (b)(i) of Article 26 of Implementing Directive 2006/73/EC does not require that the investment firm clearly indicates whether and when such benefits are provided.

Question 3:

There is 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. Point (b)(i) of Article 26 of Implementing Directive 2006/73/EC does not require that the investment firm prior to the provision of the investment or ancillary service concerned discloses to the client at least bands concerning the fees, commissions and benefits received by it.

Question 4:

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, do not prevent investments firms from entering into contractual arrangements with their clients regarding these or similar disclosure obligations. It is for the internal legal order of each Member

State to determine which limitations of these disclosure obligations can be lawfully made in contractual arrangements between individuals.

Question 5:

A Member State, pursuant to the EEA Agreement, does not have to accord horizontal direct effect to an implementing Directive that is not correctly transposed, including implementing Directive 2006/73/EC.

Question 6:

Article 26 of Implementing Directive 2006/73/EC is not to be interpreted in such a way that rights of banking clients against a bank may be derived from it.

The Liechtenstein Government

38. The Liechtenstein Government proposes that the Court answer the questions of the referring court as follows:

1. *Directive 2006/73/EC must be interpreted as meaning that the disclosure of inducements can be made in standardized, summary or general form and content, and can also be included in general terms and conditions of business, provided that the investment firm is subject to and honours the duty to disclose further details on inducements paid or received at the request of the client prior to the acceptance of investment services and of specific types of financial instruments with the consequence that the client is in a position to receive all information necessary to be appropriately informed and take investment decisions on an informed basis.*

2. *At a point in time when investment decisions of the client are not pending, not imminent or still unspecific, it suffices if the client receives standardised information (not related to individual investment services or financial instruments) and is unalienably assured that detailed information will be provided upon request of the client prior to investment decisions.*

3. *Article 26 of Directive 2006/73/EC does not require that an investment firm, having provided standardised information on inducements according to the Implementing Directive in framework or other general agreements to its client and, in the same context, having undertaken the covenant to provide detailed information on inducements to the client upon request prior to the provision of the relevant investment or ancillary service, to provide on its own initiative, i.e. without request of the client, such detailed information prior to the provision of the relevant investment or ancillary service.*

4. *Article 26(2) Directive 2006/73/EC does not preclude limitations in terms of time with respect to the duty to provide the client upon request with detailed information on inducements after the investment decision has been taken and/or executed.*

5. *EEA law does not require that a provision of a directive that has been made part of the EEA Agreement is directly applicable or is accorded horizontal direct effect.*

6. *Article 26 of the Directive 2006/73/EC cannot be interpreted in a way that rights of banking clients against a bank may be derived from it.*

The Norwegian Government

39. The Norwegian Government proposes that Questions 5 and 6 be answered jointly as follows:

> *It follows from Article 7 EEA and Protocol 35 to the EEA Agreement that EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts. This applies irrespective of whether an EEA provision, such as Article 26 of Directive 2006/73, can be interpreted to the effect that individual rights may be derived from it.*

ESA

40. ESA submits that the Court should answer the questions referred as follows:

1. *Article 26 of 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 is to be interpreted to the effect that the disclosure of inducements required by that provision may in principle be general in content and made in general terms and conditions, provided that it imparts specific information concerning their existence, nature and amount regarding the specific investment service provided to the client on an individual basis.*

2. *It is not compatible with Article 26 of Directive 2006/73 if an investment firm merely notifies the client that inducements may be paid by or to it, without clearly indicating whether and when such inducements are paid.*

3. *Article 26 of Directive 2006/73 is to be interpreted as requiring the amounts of inducements to be stated where these can be ascertained. To the extent*

that the amounts cannot be ascertained at the time that the information is to be provided, disclosure of the method of their calculation must encompass all information which is ascertainable at that time.

4. *Article 26 of Directive 2006/73 is to be interpreted as precluding the imposition of a contractual provision on clients whereby the disclosure of inducements received is limited to the twelve months preceding the request.*

5. *While provisions such as Article 26 of the MiFiD Implementing Directive are not accorded direct effect pursuant to EEA law as such, and thus cannot be usefully relied upon in the EEA against a private party in the absence of transposition into the national legal order, the principle of interpretation in conformity with EEA law requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that those provisions are fully effective.*

The Commission

41. The Commission respectfully submits that the questions of the referring Court should be answered as follows:

Question 1:

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, cannot be interpreted as meaning that the disclosure of benefits can be in summary form and general in content, unless it is ensured in an individual case that the individual client is provided with specific information concerning the existence, nature and amount regarding the particular investment service provided to it.

Question 2:

It is not 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.

Question 3:

Whether there is a correct disclosure within the meaning of point (b)(i) of Article 26 of Implementing Directive 2006/73/EC will depend on whether those disclosures contain, prior to the provision of the investment or ancillary service concerned, the essential terms of those benefits so as to allow clients to make an informed decision

whether to proceed with the investment or ancillary service. This will generally require disclosure of the amounts of the inducements. Whether this is the case needs to be determined on a case by case basis.

Question 4:

The conditions laid down in Article 26 of Implementing Directive 2006/73/EC for a disclosure of benefits in summary form are not 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.

Question 5 and 6:

The referring Court should, in view of the requirement of conform interpretation, interpret the national law to the largest extent possible in line with Article 26 of Implementing Directive 2006/73/EC. The EEA law does not require that individuals and economic operators can rely directly on Article 26 of the Implementing Directive 2006/73/EC before national courts, irrespective of whether this provision has to be interpreted in such a way that rights of banking clients against a bank may be derived from it.

Per Christiansen
Judge-Rapporteur