



REPORT FOR THE HEARING
in Joined Cases E-15/15 and E-16/15

REQUESTS to the Court pursuant to 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 cases pending before it between

Franz-Josef Hagedorn

and

Vienna-Life Lebensversicherung AG Vienna Life Insurance Group

and

Rainer Armbruster

and

Swiss Life (Liechtenstein) AG

concerning the interpretation of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance.

I Introduction

1. By a letter of 6 July 2015, registered at the Court as Case E-15/15 on 9 July 2015, the Supreme Court of the Principality of Liechtenstein (“the national court”) made a request for an Advisory Opinion in a case pending before it between Franz-Josef Hagedorn (“the applicant”) and Vienna-Life Lebensversicherung AG Vienna Life Insurance Group (“the defendant” or “Vienna Life”). By a separate letter of 6 July 2015, registered at the Court as Case E-16/15 on 9 July 2015, the Supreme Court of the Principality of Liechtenstein made a request for an Advisory Opinion in a case pending before it between Rainer Armbruster (“the applicant”) and Swiss Life (Liechtenstein) AG (“the defendant” or “Swiss Life”).

2. In each of its two requests, the national court refers three main questions, essentially similar in both cases, although in Case E-15/15 the second question is subdivided into three sub-questions.

3. The cases before the national court concern disputes between the applicants, as life assurance policy holders, and the defendants, as assurance undertakings, concerning each applicant's life assurance contract. The applicants assert that the defendants failed to discharge the obligation to provide them with certain information included in Annex III to Directive 2002/83/EC ("the Directive" or "the Life Assurance Directive")¹ and that this failure caused them financial loss. In contrast, the defendants maintain that, since these were second-hand life assurance contracts acquired by the applicants from previous policy holders on a secondary market, the acquisition of the policies did not trigger the obligation under the Directive to provide the information specified in Annex III.

4. The national court seeks in essence to establish whether Article 36(2) of the Directive entails an obligation on assurance undertakings to provide information in cases where a person acquires a unit-linked life assurance contract from an existing policy holder with the consent of the assurer through the transfer of the contract ("second-hand policies"), and, if that is not the case, whether certain information must nevertheless be given to the transferee. Finally, the national court asks whether certain provisions of the Directive have been transposed effectively into national law in Liechtenstein.

II Legal background

Directive 2002/83/EC

5. The Life Assurance Directive was incorporated into the Agreement on the European Economic Area ("the EEA Agreement") at point 11 of Annex IX to the Agreement by EEA Joint Committee Decision No 60/2004 of 26 April 2004.² The decision entered into force on 27 April 2004.

6. Recital 5 in the preamble to the Directive reads as follows:

This Directive therefore represents an important step in the merging of national markets into an integrated market and that stage must be supplemented by other Community instruments with a view to enabling all policy holders to have recourse to any assurer with a head office in the Community who carries on business there, under the right of establishment or the freedom to provide services, while guaranteeing them adequate protection.

7. Recital 44 in the preamble to the Directive reads as follows:

The provisions in force in the Member States regarding contract law applicable to the activities referred to in this Directive differ. The

¹ OJ 2002 L 345, p. 1.

² EEA Supplement 2004 No 43, p. 156.

harmonisation of assurance contract law is not a prior condition for the achievement of the internal market in assurance. Therefore, the opportunity afforded to the Member States of imposing the application of their law to assurance contracts covering commitments within their territories is likely to provide adequate safeguards for policy holders. The freedom to choose, as the law applicable to the contract, a law other than that of the State of the commitment may be granted in certain cases, in accordance with rules which take into account specific circumstances.

8. Recital 52 in the preamble to the Directive reads as follows:

In an internal market for assurance the consumer will have a wider and more varied choice of contracts. If he/she is to profit fully from this diversity and from increased competition, he/she must be provided with whatever information is necessary to enable him/her to choose the contract best suited to his/her needs. This information requirement is all the more important as the duration of commitments can be very long. The minimum provisions must therefore be coordinated in order for the consumer to receive clear and accurate information on the essential characteristics of the products proposed to him/her as well as the particulars of the bodies to which any complaints of policy holders, assured persons or beneficiaries of contracts may be addressed.

9. Article 32(1) of the Directive, which is headed “Law applicable”, reads as follows:

1. The law applicable to contracts relating to the activities referred to in this Directive shall be the law of the Member State of the commitment. However, where the law of that State so allows, the parties may choose the law of another country.

10. Article 35(1) of the Directive, which is headed “Cancellation period”, reads as follows:

1. Each Member State shall prescribe that a policy holder who concludes an individual life-assurance contract shall have a period of between 14 and 30 days from the time when he/she was informed that the contract had been concluded within which to cancel the contract.

The giving of notice of cancellation by the policy holder shall have the effect of releasing him/her from any future obligation arising from the contract.

The other legal effects and the conditions of cancellation shall be determined by the law applicable to the contract as defined in Article 32, notably as regards the arrangements for informing the policy holder that the contract has been concluded.

11. Article 36 of the Directive, which is headed “Information for policy holders”, reads as follows:

- 1. Before the assurance contract is concluded, at least the information listed in Annex III(A) shall be communicated to the policy holder.*
- 2. The policy-holder shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B).*
- 3. The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex III only if it is necessary for a proper understanding by the policy holder of the essential elements of the commitment.*
- 4. The detailed rules for implementing this Article and Annex III shall be laid down by the Member State of the commitment.*

12. Annex III to the Directive, which is headed “Information for policy holders”, reads as follows:

The following information, which is to be communicated to the policy holder before the contract is concluded (A) or during the term of the contract (B), must be provided in a clear and accurate manner, in writing, in an official language of the Member State of the commitment.

However, such information may be in another language if the policy holder so requests and the law of the Member State so permits or the policy holder is free to choose the law applicable.

A. Before concluding the contract

Information about the assurance undertaking

(a)1 The name of the undertaking and its legal form

(a)2 The name of the Member State in which the head office and, where appropriate, the agency or branch concluding the contract is situated

(a)3 The address of the head office and, where appropriate, of the agency or branch concluding the contract

Information about the commitment

(a)4 Definition of each benefit and each option

(a)5 Term of the contract

(a)6 Means of terminating the contract

- (a)7 Means of payment of premiums and duration of payments*
- (a)8 Means of calculation and distribution of bonuses*
- (a)9 Indication of surrender and paid-up values and the extent to which they are guaranteed*
- (a)10 Information on the premiums for each benefit, both main benefits and supplementary benefits, where appropriate*
- (a)11 For unit-linked policies, definition of the units to which the benefits are linked*
- (a)12 Indication of the nature of the underlying assets for unit-linked policies*
- (a)13 Arrangements for application of the cooling-off period*
- (a)14 General information on the tax arrangements applicable to the type of policy*
- (a)15 The arrangements for handling complaints concerning contracts by policy holders, lives assured or beneficiaries under contracts including, where appropriate, the existence of a complaints body, without prejudice to the right to take legal proceedings*
- (a)16 Law applicable to the contract where the parties do not have a free choice or, where the parties are free to choose the law applicable, the law the assurer proposes to choose*

B. During the term of the contract

In addition to the policy conditions, both general and special, the policyholder must receive the following information throughout the term of the contract.

Information about the assurance undertaking

- (b)1 Any change in the name of the undertaking, its legal form or the address of its head office and, where appropriate, of the agency or branch which concluded the contract*

Information about the commitment

- (b)2 All the information listed in points (a)(4) to (a)(12) of A in the event of a change in the policy conditions or amendment of the law applicable to the contract*

(b)3 Every year, information on the state of bonuses

National law

13. Liechtenstein has implemented the Life Assurance Directive by way of the Insurance Supervision Act (“VersAG”), LR 961.01, the Insurance Supervision Regulation (“VersAV”), LR 961.011, the Insurance Contracts Act (“VersVG”), LR 215.229.1, the International Private Law Act (“IPRG”), LR 290, and the International Insurance Contracts Act (“IVersVG”), LR 291.

14. Article 45 of the VersAG reads as follows:

Duties to inform policy holders

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

15. Annex 4 to the VersAG reads as follows:

Duties to inform policy holders under Articles 45 and 49

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

Section I

1. Information required for all classes of insurance:

(a) name, address, legal form and registered office of the insurance undertaking and, where appropriate, any branch through which the contract is to be concluded;

(b) the general insurance conditions applicable to the insurance relationship, including the terms concerning scales of premiums, and indication of the law applicable to the contract;

(c) information on the nature, scope and maturity of the insurance undertaking benefits, where no general insurance conditions or where no terms concerning scales of premiums are applied;

(d) information on the term of the insurance relationship;

(e) information on the amount of the premiums, which should be identified individually if the insurance relationship is to include several autonomous insurance contracts, and on the method of payment of premiums, as well as information on any additional fees or costs, with an indication of the total amount to be paid;

(f) information on the period for which the applicant is to be bound by the application;

(g) instructions concerning the right of cancellation or withdrawal;

(h) address of the competent supervisory authority which the policy holder may contact in the event of complaints about the insurance undertaking.

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

(a) information on the calculation principles and criteria used for profit determination and profit participation;

(b) indication of surrender values;

(c) information on the minimum sum insured for conversion into a fully paid-up insurance policy and on the benefits from a fully paid-up insurance policy;

(d) information on the extent to which the benefits under (b) and (c) are guaranteed;

(e) for unit-linked insurance policies, information on the unit underlying the insurance policy and the nature of the assets contained therein;

(f) general information on the tax rules applicable to this type of insurance policy.

Section II

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

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

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

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

III Facts and procedure

16. The cases before the national court concern the question whether, and if so, to what extent, a life assurance undertaking has an obligation to provide information to a person that acquires a life assurance policy from an existing policy holder (“second-hand life assurance policy”).

17. The defendants, Swiss Life and Vienna Life, are registered in Liechtenstein and have a licence to provide life assurance.

18. With regard to the life assurance contract in each case, a Liechtenstein-based asset management firm, Swiss Select Asset Management AG (“SSAM”), was responsible for the asset management of the premium reserve funds on behalf of the defendants.

19. In Case E-15/15, a unit-linked life assurance policy was concluded on 30 December 2004 between Vienna Life, as the assurer, and Gold Bank Finance Ltd, as the policy holder. On 28 November 2006, the applicant, Mr Hagedorn, acquired this unit-linked life assurance policy. The policy transfer took place on 19 December 2006. An intermediary, Mass & Partner Kapitalmanagement GmbH, working on behalf of SSAM, brokered the sale of the life assurance policy from the original policy holder to Mr Hagedorn.

20. The purchase price and the total investment of Mr Hagedorn was EUR 500 000, an amount calculated by SSAM, and which became due upon the transfer of the original policy. At the time of acquisition, no premiums had been paid to Vienna Life.

21. In Case E-16/15, a unit-linked life assurance policy was concluded in 2003 between the defendant Swiss Life, as the assurer, and Werner Finzel and Ute Finzel-Heidinger, as the policy holders. The applicant, Mr Armbruster, acquired this unit-linked life insurance policy from the original policy holders through a purchase agreement dated 17 and 21 May 2007. The policy transfer took place on 9 July 2007. An intermediary, SSAM, brokered the sale of the life assurance policy from the original policy holders to Mr Armbruster.

22. The purchase price was EUR 243 000, an amount calculated by SSAM, and which became due upon the transfer of the original policy. The purchase price was paid to “the community of heirs of Werner Lorenz Finzel” on 4 June 2007. The total investment of Mr Armbruster amounted to EUR 750 000, of which EUR 250 000 was obtained by credit financing arranged through SSAM, with the Liechtensteinische Landesbank as the lender.

23. A document permitting a change of policy holder was signed by Ute Finzel-Heidinger, Mr Armbruster, a representative of SSAM and an authorised representative of Swiss Life. The document also includes the following passage:

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

24. Both applicants suffered substantial losses on their investments. The cases before the national court concern the defendants' liability for damages on the basis that they failed to fulfil their obligations to provide sufficient information, as provided for in Article 36 of the Directive and detailed in Annex III thereto.

25. The defendants, in contrast, submit that the duty to provide information is only applicable with regard to the original policy holder. Furthermore, the defendants claim that no new assurance relationship was created and that the transfer of the policies to new policy holders was not contingent on the defendants' consent.

26. By an order of 3 July 2015, the national court sought two advisory opinions: first, in the proceedings between Franz-Josef Hagedorn and Vienna Life, and, second, in the proceedings between Rainer Armbruster and Swiss Life. Both requests were received at the Court Registry on 9 July 2015.

27. By a decision of 5 November 2015, the Court, pursuant to Article 39 of the Rules of Procedure ("RoP") and after having received observations from the parties, joined the two cases for the purposes of the oral procedure and final judgment.

IV Questions

28. The following questions were referred to the Court in Case E-15/15:

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

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

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

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

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

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

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

Furthermore, the following additional question is asked:

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

29. In Case E-16/15, the first question referred is substantively the same as the first question in Case E-15/15, with the only difference being that the referring court writes “has acquired” instead of “acquires”. The third question in Case E-16/15 is identical to the third question in Case E-15/15. Finally, the second question in Case E-16/15, which is asked in the event that the Court answers the first question in the affirmative, is substantively similar to Question 2(a) in Case E-15/15 and is worded as follows:

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

V Written observations

30. Pursuant to Article 20 of the Statute of the Court and Article 97 of the RoP, written observations have been received in Case E-15/15 from:

- the applicant, represented by Helmut Schwärzler and Matthias Niedermüller, advocates;
- the defendant, represented by Moritz Blasy and Simon Ott, advocates.

31. Pursuant to the same provisions, written observations have been received in Case E-16/15 from:

- the applicant, represented by Helmut Schwärzler and Matthias Niedermüller, advocates;
- the defendant, represented by Peter Nägele and Thomas Nägele, advocates.

32. Similarly, pursuant also to the same provisions, written observations have been received in both cases from:

- the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, EEA Coordination Unit, and Monika Zelger-Jarnig, Senior Legal Officer, EEA Coordination Unit, acting as Agents;

- the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler, Director, Maria Moustakali and Clémence Perrin, Senior Officers, and Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Joan Rius Riu and Karl-Philipp Wojcik, Members of its Legal Service, acting as Agents.

VI Summary of the arguments submitted and proposed answers

Admissibility

33. Vienna Life argues that the request for an advisory opinion in Case E-15/15 is inadmissible. It submits that even if an assurance undertaking has a duty to provide information to the purchaser of a second-hand policy, which Vienna Life denies, violation of such duty could never be regarded as causal for damage resulting from the acquisition of the assurance policy. Therefore, Question 1 is purely hypothetical. According to Vienna Life, the same applies to Question 2(c) since a waiver by a primary policy holder of the right to be provided with the information stipulated in Annex III to the Directive has not been granted in the case. Finally, Vienna Life argues that Question 3 is also purely hypothetical since the transfer of the beneficial rights arising under a life assurance policy cannot be regarded as a change in the conditions of the life assurance policy at issue.

The questions referred to the Court

The first questions in Cases E-15/15 and E-16/15

The applicants

34. First, the applicants submit, with regard to the scope of Article 36 of the Directive, that paragraphs 1 and 2 of that provision refer simply to a “policy holder” without distinguishing between the original policy holder and its legal successor. According to the applicants, it is therefore clear that the term “policy holder” used in Article 36(1) and (2) must also include any natural or legal person who by virtue of a legal transaction acquires an existing policy. A different conclusion would not only be incomprehensible, but also weaken the Directive as an instrument of consumer protection.

35. Second, although the referring court mentions only Article 36(2) in its first question, the applicants submit that it is only reasonable that the assurer provide its prospective contractual partner also with the information referred to in Article 36(1), which is listed in Annex III(A) to the Directive. The reason for this is that Article 36(1) imposes certain obligations on the assurer before the assurance contract is concluded. Since the new policy holder could also be said to conclude an assurance contract, the wording of Article 36(1) applies to the new policy holder

as well. The applicants maintain that the spirit and purpose of the Directive, in particular as evidenced in recital 52 of the Directive, also support the interpretation advanced here.

36. With regard to the application of Article 36(1) of the Directive to the present case, the applicants observe that the case law of the Court confirms that life assurance contracts are generally of a complex nature, the details of which may be difficult to understand for the average consumer.³ In addition, the legal transfer of the assurance contract requires the approval of the assurer. Thus, another contractual partner cannot be imposed on the assurer contrary to its will.

37. In the event that the Court does not share the applicants' views concerning the application of Article 36(1) of the Directive, they submit that Article 36(2) applies all the same. According to that provision, a policy holder shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B) to the Directive. That annex provides that if a change in the policy conditions or an amendment of the applicable law takes place, all the information listed in points a(4) to a(12) in Annex III(A) must be provided to the policy holder. The applicants argue that both of these conditions cover the acquisition of an existing assurance policy by a new policy holder through the legal transfer of an assurance contract. In any case, they maintain that there are cases – such as the change of policy holder – where the assurer must realise that its new contractual partner is in need of comprehensive information.

38. The applicants both propose that the Court should provide the following answer to the first question:

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

In eventu:

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

³ Reference is made to Case E-11/12 *Beatrix Koch, Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein)* AG [2013] EFTA Ct. Rep. 272, paragraph 63.

contract ('second-hand policies'). The transfer of the assurance contract constitutes a "change in policy conditions" and "amendment of the law applicable to the contract" according to Annex III(B)(b)(2). Ultimately, however, all the information listed in points (a)(4) to (a)(12) are also to be given where the assurer or its subordinates realise or should realise with due attention that the policy holder is in need of or is mistaken about any such information or where such information is itself subject to change.

The defendants

39. In the event that the Court does not view the first question in Case E-15/15 as purely hypothetical, and thereby inadmissible, Vienna Life argues that it would hamper the secondary market for life assurance policies if assurance undertakings were obliged to provide the purchasers with the information specified in Annex III to the Directive. In addition, such an obligation would necessarily require contact between the assurance undertaking and the future purchaser prior to the acquisition of the policy. In contrast, Vienna Life submits that there can be no duty on an assurance undertaking to provide the purchaser of a second-hand life assurance policy with information on the policy in advance of the purchase since this is a mere two-party transaction to which the assurance undertaking is not a party.

40. Vienna Life submits further that the brokerage of second-hand life assurance policies only results in the transfer of existing rights and does not create a new assurance relationship. In fact, such brokerage should be regarded as an investment advisory service, which means that it falls to the brokers on the secondary market to inform and advise the purchaser in accordance with 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).

41. Vienna Life therefore proposes that the first question in Case E-15/15 be answered in the negative.

42. Swiss Life's arguments with regard to the first question in Case E-16/15 are substantively the same as those of Vienna Life. In addition, Swiss Life contends that, having regard to Liechtenstein law in general, a transfer of a contract entails that one party to the contract is replaced by a third party. The new party fully replaces the previous one, so that the latter completely withdraws from the contractual relationship. This means that the complete contractual legal status is transferred to an unrelated third party, the transferee of the contract, without any change of content or legal identity of the present contract. This entails that no new assurance relationship is established. Rather, the claims from an existing unchanged contract are transferred against payment.

43. Swiss Life proposes that the first question in Case E-16/15 be answered in the negative.

Government of the Principality of Liechtenstein

44. The Liechtenstein Government submits that the Directive does not address legal transactions such as those in which a unit-linked life assurance policy is transferred via a purchase agreement from one person to another. In fact, it follows from Article 36(4) of the Directive that it is for the EEA State of commitment to lay down the detailed rules for implementing Article 36 and Annex III.

45. According to the Liechtenstein Government, it follows from Article 32 of the Directive that legal transactions concerning contracts falling within the Directive's scope are subject to the law of the respective EEA State. The Liechtenstein Government argues that this view is further supported by recital 44 of the Directive and case law of the Court.⁴

46. The Liechtenstein Government therefore concludes that it is for the referring court to assess all the facts of the case and determine according to the national law applicable to contracts relating to the activities of the Directive whether information duties exist and, if so, what they entail in the case of a transfer of a unit-linked life assurance policy via a purchase agreement.

47. In the event that the Court adopts a different interpretation, the Liechtenstein Government submits that the transfer of a unit-linked life assurance policy by a legal transaction does not constitute a change in the policy conditions. A change in the policy conditions means an additional or altered contract, in other words a "new" contract, as is the case, for example, where an additional risk is covered. This interpretation of the phrase "policy conditions", as used in Annex III(B)(b)(2), is strengthened by the German-language version of the Annex, which refers to a "Zusatzvertrag", which literally means "accessory contract". In any event, the transfer of a unit-linked assurance policy cannot be interpreted as constituting a "change of policy conditions" since the existing policy is not being changed or supplemented.

48. The Liechtenstein Government proposes that the Court should provide the following answer to the first question:

The answer to the first question of the referring Court should be that it is for the referring Court to assess all the facts of the case and to determine according to the national law applicable to contracts relating to the activities referred to in Directive 2002/83/EC whether or which information duties have to be fulfilled in case of a transfer of a unit-linked life assurance policy via a purchase agreement from one person to another.

⁴ Ibid., paragraphs 113 and 114.

ESA

49. ESA argues that the referring court is mistaken in focusing its first question in each case on Article 36(2) of the Directive, concerning information to be provided “throughout the term of the contract”. Rather, ESA contends, the referring court should have focused on Article 36(1) of the Directive, concerning information to be provided “[b]efore the assurance contract is concluded”.

50. In order to answer the referring court’s first question, ESA submits that the starting point should be the rationale underlying Article 36 of the Directive, which is the protection of policy holders. That entails that Article 36(1) must be examined from the point of view of policy holders.⁵ In this regard, ESA adds that there is no difference from the point of view of the policy holder between the conclusion of a new contract and the acquisition of an existing one. Thus, the person acquiring the second-hand life assurance policy should be considered a new policy holder for the purposes of the obligation to provide information under the Directive and be entitled to the same information as any other new policy holder. With that in mind, ESA suggests that the Court should answer the questions referred on the basis of Article 36 as a whole and not simply on the basis of Article 36(2).

51. Furthermore, ESA argues that the information to be provided during the term of the contract is only effective and relevant if the policy holder has received the relevant information pursuant to Annex III(A) before the conclusion of the contract. If the policy holder has not first been provided with the information required under Article 36(1) of the Directive, he will not be in a position to fully understand the changes occurring to the life assurance product throughout its term. ESA further argues that the interpretation of the principles of national contract law, in particular those applying to the legal transaction that took place between the original and the second-hand policy holder, must be interpreted in a way which does not affect the effectiveness of the Directive.

52. ESA maintains that the transfer of the life assurance policy is undertaken with the consent of the assurer and that the assurance undertaking is thus made aware of the identity of the new potential policy holder before the transfer of the assurance policy takes place. The assurance undertaking is therefore in a position to communicate the information listed in Annex III(A) before the contract is transferred. In addition, in order to be effective, such information should be updated and reflect the situation as it stands at the time of the actual transfer. To take a different approach would run counter to the rationale and effectiveness of the Directive.⁶

⁵ Reference is made to recital 52 of the Directive, *Beatrix Koch, Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein) AG*, cited above, paragraph 62, and Case E-1/05 *ESA v Kingdom of Norway* [2005] EFTA Ct. Rep. 234, paragraph 42.

⁶ Reference is made to *ESA v Kingdom of Norway*, cited above, paragraph 43.

53. ESA proposes that the Court should provide the following answer to the first question referred:

Article 36(1) of Directive 2002/83/EC concerning life assurance is to be interpreted as meaning that the duty to provide information referred to therein and in Annex III(A), including (a)(11) and (a)(12) for unit-linked life assurance policies, must also be fulfilled in the case where a person acquires by a legal transaction a unit-linked life assurance policy from another person with the consent of the assurer through the transfer of the contract. As such transaction amounts to the conclusion of a new contract for the purposes of the duty to provide information, Article 36(2) of the Directive is not applicable.

The Commission

54. The Commission's arguments, with regard to the first question in each case, are substantively the same as those of ESA. In addition, the Commission argues that, although neither Article 36(1) and (2) of the Directive nor Annex III to the Directive deal explicitly in their wording with the situation of a transfer of a unit-linked life assurance policy from one person to another with the consent of the assurer, the objective of the Directive should nevertheless lead to an interpretation whereby the pre-contractual information requirements and the information requirements during the duration of the contract also apply to such situations.

55. The Commission concedes that, when the second-hand buyer acquires the assurance policy from the original purchaser, an assurance contract already exists. However, this does not preclude the possibility that the acquisition of the insurance policy can be regarded as the conclusion of another assurance contract distinct from the initial one. Moreover, this interpretation is supported by recital 5 of the Directive. Furthermore, in the Commission's view, the transfer of an assurance contract requires the consent of the assurance undertaking as this is a contract of mutual obligations.

56. Finally, the Commission maintains that if its interpretation of the Directive is not accepted, that might entail a risk that the information requirements set out therein are circumvented.

57. The Commission proposes that the Court should provide the following answer to the first question:

The Directive is to be interpreted in such a way that Article 36(1) and (2) of the Directive in connection with Annex III, and in particular Annex III(A)(a)(11)(12) and (B)(b)(2) for unit-linked life assurance policies are applicable to cases where a person, by a legal transaction, acquires a unit-linked life assurance policy from another person with the consent of the assurer through the transfer of the contract ('second-hand policies').

The second questions in Cases E-15/15 and E-16/15

58. If the Court answers the first question in the affirmative, the referring court then asks Question 2(a) in Case E-15/15 and Question 2 in Case E-16/15. In addition, in Case E-15/15, if Question 2(a) is answered in the negative, then Question 2(b) is asked. If this is also answered in the negative, finally Question 2(c) is asked.

The applicants

59. With regard to Question 2(a) in Case E-15/15, Mr Hagedorn submits that the wording of Annex III(B)(b)(2) unmistakably requires the assurer also to provide information concerning the assurance product to be acquired. In this regard, Mr Hagedorn reiterates that it is the purpose of the Directive to ensure that the consumer receives clear and accurate information on the essential characteristics of the assurance product offered to him to be able to choose the insurance product best suited to his needs.⁷

60. Mr Hagedorn maintains that, although the Court made it clear in *Beatrix Koch, Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein) AG* that the Directive does not impose any obligation on the assurer to provide advice, there is no reason for subjecting consumers to entirely different standards of protection depending on whether they purchase a direct investment product, falling under the MiFID Directive,⁸ or purchase the very same product contained within an assurance policy.

61. With regard to Question 2(b) in Case E-15/15, Mr Hagedorn submits that the assurer is obliged to provide the new policy holder with comprehensive information irrespective of whether the transferee is an undertaking or a natural person. However, Mr Hagedorn also observes that the possibilities for natural persons to obtain information are generally not comparable to those of undertakings.

62. With regard to Question 2(c) in Case E-15/15, Mr Hagedorn submits that the assurer's duties to inform the original policy holder and its duties to inform the new policy holder have nothing to do with each other. The assurer's duty to inform the new policy holder is separate and has to be distinguished from the duty to inform the original policy holder. Moreover, the Directive does not provide for the possibility to dispense with providing the information.

⁷ Reference is made to recital 52 of the Directive and to *Beatrix Koch, Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein) AG*, cited above, paragraph 64.

⁸ Reference is made to Directive 2004/39/EC and 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).

63. Mr Hagedorn proposes that the Court should provide the following answers to the second question in Case E-15/15:

- 2(a) *Article 36(2) of Directive 2002/83/EC concerning life assurance is to be interpreted as meaning that in the event that a unit-linked life assurance policy is acquired by a legal transaction, not only general information must be provided to the new policy holder, but all information listed in points (a)(4) to (a)(12) in Annex III(B)(b)(2) of Directive 2002/83/EC including information specifically regarding the assurance product to be acquired by him, in particular regarding any differences between the investor or risk profiles of the existing policy holder and of the transferee.*
- 2(b) *In the event that a unit-linked life assurance policy is acquired by a natural person or consumer from an undertaking, the assurer has to provide to the natural person or consumer all information listed in points (a)(4) to (a)(12) in Annex III(B)(b)(2) of Directive 2002/83/EC including information specifically regarding the assurance product and in particular also regarding any differences between the investor or risk profiles of the existing policy holder and of the transferee.*
- 2(c) *Directive 2002/83/EC does not provide for the possibility of dispensation with information regarding the assurance product. Therefore, no assurer can rely on dispensation of information given by the policy holder.*

In event:

The transferee's right to be informed about the assurance product shall, in no way, be affected by any dispensation of information given to the assurer by the transferor.

64. With regard to the second question in Case E-16/15, Mr Armbruster's arguments are substantively the same as those of Mr Hagedorn in relation to Question 2(a) in Case E-15/15.

65. Mr Armbruster proposes that the Court should provide the following answer to the second question in Case E-16/15:

Article 36(2) of Directive 2002/83/EC concerning life assurance is to be interpreted as meaning that in the event that a unit-linked life assurance policy is acquired by a legal transaction, not only general information must be provided to the new policy holder, but all information listed in points (a)(4) to (a)(12) in Annex III(B)(b)(2) of Directive 2002/83/EC including information specifically regarding the assurance product to be acquired by

him, in particular regarding any differences between risk profiles of the existing policy holder and of the transferee.

The defendants

66. With regard to Question 2(a) in Case E-15/15, Vienna Life submits that this question reveals that the referring court has understood neither the Directive nor the judgment of the Court in *Beatrix Koch, Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein) AG*. According to that judgment, the Directive only provides for a duty to provide information and is not to be interpreted as requiring an assurance undertaking to provide advice to the policy holder. The purely factual information to be given under the Directive is not in any way affected by the risk profile or the investor profile of the individual policy holder.

67. Vienna Life therefore proposes that the Court should answer Question 2(a) in Case E-15/15 by stating that the issue cannot be resolved by an interpretation of the Directive, but must be answered in accordance with Liechtenstein contract law.

68. With regard to Question 2(b) in Case E-15/15, Vienna Life submits that, according to the Directive, it does not make any difference with regard to the obligation to provide the policy holder with information whether the policy holder is a legal entity or a natural person. The information specified in Annex III to the Directive is regarded by the European legislative bodies as sufficient to protect consumers.

69. Vienna Life therefore proposes that the Court should answer Question 2(b) in Case E-15/15 by stating that it does not make any difference with regard to the obligation to provide the policy holder with information whether the policy holder is a legal entity or a natural person.

70. In the event that the Court does not view Question 2(c) in Case E-15/15 as purely hypothetical, and thereby inadmissible, Vienna Life maintains that although the primary policy holder waived its right to receive advice from the broker it did not waive its right to be provided with the information specified in Annex III to the Directive.

71. According to Vienna Life, the question whether a waiver by the primary policy holder of the right to receive advice has any consequences for the purchaser of the second-hand policy has already been answered in its observations on Question 2(a), where it argued that, according to the Directive itself and the case law of the Court, the Directive does not impose any obligation to provide advice to policy holders.

72. Swiss Life submits with regard to the second question in Case E-16/15 that the assurance undertaking is required only to provide written information and not counselling. In support of this argument, Swiss Life cites *Beatrix Koch, Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein) AG*.

73. Swiss Life therefore proposes that the Court should answer the second question in Case E-16/15 by stating that the Court has already provided an answer to the question in *Beatrix Koch, Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein) AG*.

Government of the Principality of Liechtenstein

74. With regard to Questions 2(a), 2(b) and 2(c) in Case E-15/15, the Liechtenstein Government refers to its answer to the first question, where it contends that the first question should not be answered in the affirmative.

75. In the event that the Court adopts a different interpretation, the Liechtenstein Government submits in relation to Question 2(a) that the Directive has to be interpreted as meaning that an assurance undertaking has to communicate to a policy holder at least the information listed in Annex III(A) when a new contract is concluded or the information listed in Annex III(B) during the term of the contract. The Directive does not specify any further information duties in such cases or establish that the assurance undertaking has to provide any advice.⁹ Moreover, it does not address the issue of a legal transfer of a contract for a unit-linked life assurance policy.

76. With regard to Question 2(b) in Case E-15/15, the Liechtenstein Government submits that the term “consumer” is not used in the Directive except in recital 52. It contends that the scope of the Directive is not specifically consumer protection but protection of policy holders to the extent that they may be able to make their choice based on information.

77. The Liechtenstein Government also reiterates that the Directive does not specify any further information duties in such cases or establish that the assurance undertaking has to provide any advice. In its view, the fact that the existing policy holder is an undertaking, while the transferee of the contract is a natural person or a consumer, does not change this legal assessment.

78. With regard to Question 2(c) in Case E-15/15, the Liechtenstein Government refers to case law of the Court, arguing that it establishes that even though assurance contracts are in general of a complex nature, the details of which may be difficult to understand for the average consumer, the Directive only requires the information listed to be communicated to the policy holder. The Directive does not impose any obligation on the assurance undertaking to provide advice.¹⁰

79. Furthermore, the Liechtenstein Government maintains that the Directive does not address the issue whether specific information is to be given to the

⁹ Reference is made to *Beatrix Koch, Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein) AG*, cited above, paragraphs 65, 68 and 69.

¹⁰ *Ibid.*, paragraph 69.

transferee of a contract regarding the assurance product acquired by him where the transferor of the policy dispensed with information regarding the assurance product in question.

80. The Liechtenstein Government proposes that the Court should provide the following answers to the second question in Case E-15/15:

2. *In light of the proposed answer to the first of the referring questions, it is no longer necessary to consider the second questions.*
- 2(a) *In event, the answer to question 2 (a) should be that Article 36(2) of Directive 2002/83/EC is not to be interpreted as imposing an obligation for the assurance undertaking to provide the new policy holder in the event of the legal transfer of the contract for a unit-linked life assurance policy with general information or information specifically regarding the assurance product to be acquired by him, and in particular regarding any differences between the risk profiles of the existing policy holder and the transferee.*
- 2(b) *In event, the answer to question 2 (b) should be that Directive 2002/83/EC does not impose an obligation to give specific information to the transferee of the contract regarding the assurance product to be acquired by him where the existing policy holder is an undertaking, while the transferee of the contract is a natural person or a consumer.*
- 2(c) *In event, the answer to question 2 (c) should be that Directive 2002/83/EC does not stipulate that specific information is to be given to the transferee of the contract regarding the assurance product to be acquired by him where the transferor of the policy dispensed with information regarding the assurance product in question, for example because he did not disclose to the assurance company the information necessary in order to assess his own risk or investor profile.*

81. The Liechtenstein Government's arguments with regard to the second question in Case E-16/15 are substantively the same as those it submitted on Question 2(a) in Case E-15/15.

82. The Liechtenstein Government proposes that the Court should provide the following answer to the second question in Case E-16/15:

2. *In light of the proposed answer to the first of the referring questions, it is no longer necessary to consider the second question.*
- In event, the answer to the second question should be that Article 36(2) of Directive 2002/83/EC is not to be interpreted as imposing an obligation for the assurance undertaking to provide the new policy*

holder in the event of the legal transfer of the contract for a unit-linked life assurance policy with general information or information specifically regarding the assurance product to be acquired by him, and in particular regarding any differences between the risk profiles of the existing policy holder and the transferee.

ESA

83. With regard to Question 2(a) in Case E-15/15, ESA submits that it understands the phrase “general information” as referring to the information listed in Annex III(A) to the Directive and “specific information” as referring to information based on the investment and risk profile of the second-hand policy buyer. In its view, the latter information goes beyond the scope of the Directive. However, with regard to “general information”, ESA maintains that the obligation imposed on the assurance undertaking under the Directive should be limited to the provision of the information listed in Annex III(A) of the Directive. It adds, however, that the Directive does not preclude national legislation establishing an obligation to provide specific information concerning the unit-linked life assurance to the second-hand buyer, provided that this does not affect the effectiveness of the Directive and as long as the additional information is necessary, clear and accurate.¹¹

84. As in ESA’s view Question 2(a) in Case E-15/15 should be answered in the affirmative, it does not consider it necessary to answer Questions 2(b) and 2(c). Instead, it reiterates its arguments on Question 2(a).

85. ESA’s arguments with regard to the second question in Case E-16/15 are substantively the same as those it submitted in relation to Question 2(a) in Case E-15/15.

86. ESA proposes that the Court should provide the following answer to the second questions in Cases E-15/15 and E-16/15:

Article 36(1) of Directive 2002/83/EC concerning life assurance is to be interpreted as meaning that in the event that a unit-linked life assurance policy is acquired by a legal transaction, only the information listed in Annex III(A) must be communicated to the new policy holder. The Directive does not however preclude national legislation establishing an obligation to provide specific information concerning the unit-linked life assurance to the “second hand” buyer provided that this does not affect the effectiveness of the Directive and as long as the additional information is necessary, clear and accurate.

¹¹ Reference is made to *Beatrix Koch, Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein) AG*, cited above, paragraph 77, and for comparison to Case C-51/13 *Nationale-Nederlanden*, judgment of 29 April 2015, reported electronically, paragraphs 22 and 24.

The Commission

87. With regard to the second question in each case, the Commission argues that it follows from its reply to the first question, namely that Article 36 and Annex III of the Directive apply irrespective of whether technically there is a new policy or the transfer of an existing policy with the consent of the assurance undertaking, that the prospective policy holder will need to receive all the relevant information set out in Annex III pre-contractually and during the term of the contract. For this reason, the Commission does not consider it warranted to distinguish between general information and product-specific information.

88. The Commission proposes that the Court should provide the following answer to the second questions in Cases E-15/15 and E-16/15:

Article 36(1) and (2) of the Directive in connection with Annex III are to be interpreted in such a way that, irrespective of whether technically there is a new policy or the transfer of an existing policy with the consent of the insurance undertaking, the prospective policy holder will need to receive all the relevant information pre-contractually and during the term of the contract which are set out in Annex III.

The third questions in Cases E-15/15 and E-16/16

The applicants

89. Both applicants argue that the Liechtenstein Government has implemented the Directive too narrowly in national law and propose that the Court should provide the following answer to the third question:

The provisions concerning the assurer's obligations under Annex III(B)(b)(2) of Directive 2002/83/EC concerning life assurance are not effectively implemented into national law if national law provides, in Annex 4(II)(2) of the ASA, in the case of unit-linked life assurance policies, that during the term of an assurance contract information must be provided on the units underlying the assurance policy and the nature of the assets contained therein only where the changes in the information provided stem from 'amendments of the law' but not also 'in the event of a change in policy conditions' (Annex III(B)(b)(2) to Directive 2002/83/EC). Moreover, the said provisions are not effectively implemented into national law if national law provides, in Annex 4(II)(2) of the VersAG, that during the term of an assurance contract only changes of information listed in points I(1)(c) to (e) and (2)(a) to (e) are to be given in the event of amendments of the law, but not all information listed in points I(1)(c) to (e) and (2)(a) to (e).

The defendants

90. Vienna Life submits that the third question is purely hypothetical and need not be answered.

91. Swiss Life argues that due to its lack of relevance, the Court does not have to answer the third question.

Government of the Principality of Liechtenstein

92. The Liechtenstein Government submits that it is not for the Court to assess under the advisory opinion procedure whether national law is compatible with EEA law. Therefore, the third question is for the referring court to decide.

93. The Liechtenstein Government proposes that the Court should provide the following answer to the third question:

The answer to the third question should be that it is for the referring Court to decide on whether or not the provisions concerning the assurer's obligations under Annex III(B)(b)(2) of Directive 2002/83/EC are effectively transposed into national law.

ESA

94. ESA argues that it is for the national court to assess whether it is possible in the present case to interpret the national provisions transposing Article 36(2) of the Directive into the Liechtenstein legal order in a manner harmonious with the actual meaning of the Directive, i.e. that the policy holders shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B).

95. ESA proposes that the Court should provide the following answer to the third question:

While the EEA Agreement does not require that a provision of a directive that has been made part of the EEA Agreement, such as that of Annex III(B)(b)(2) of Directive 2002/83/EC, is directly applicable and takes precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law, such as that of Annex 4(II)(2) of the Versicherungsaufsichtsgesetz, the national court is obliged, as far as possible, to ensure that the result sought by the Directive at issue is achieved through the conforming interpretation of the national law with the EEA law provision.

The Commission

96. The Commission submits that any transposition of Annex III(B)(b)(2) of the Directive needs to ensure the necessary information requirements in two distinct cases, i.e. when there is, first, a change in the policy conditions, and, second, an amendment of the law applicable to the contract. Whether Liechtenstein legislation can be interpreted in a way that reflects the requirements of the Directive is a matter for the national court to establish.

97. The Commission proposes that the Court should provide the following answer to the third question:

Annex III(B)(b)(2) of the Directive is to be interpreted in such a way that the information set out there is to be provided in two distinct events, i.e. when there is (i) a change in the policy conditions, and (ii) an amendment of the law applicable to the contract.

Páll Hreinsson
Judge-Rapporteur