Principality of Liechtenstein
Fürstlicher
Oberster Gerichtshof

08 CG.2021.120-ON 88

ORDER

The Princely Supreme Court (*Fürstlicher Oberster Gerichtshof*), as appellate court, through its First Senate, composed of the First Vice-President, Dr Ingrid Brandstätter, deputising as presiding judge, and Supreme Court Judges, Dr Wolfram Purtscheller, Dr Marie-Theres Frick, Dr Valentina Hirsiger and lic. iur. HSG Nicole Kaiser-Bose, as additional members of the Senate, in addition, in the presence of court clerk Astrid Wanger, in the proceedings between the applicant Rainer **Silbernagl**, [XXX], represented by Advocatur Seeger, Frick & Partner AG, 9494 Schaan, and the defendant **Universität Liechtenstein (University of Liechtenstein)**, [XXX], represented by Advocatur Dr Paul Meier AG, 9490 Vaduz, for a declaration (value of the action for costs purposes: CHF [XXX] (ON 10, p. 2)), in the alternative for payment of CHF [XXX] including interest thereon, in the appeal on a point of law by the applicant against the judgment of the Princely Court of Appeal (*Fürstliches Obergericht*) of 14 December 2023, 08 CG.2021.120, ON 64, by which the applicant's appeal against the judgment of the Princely Court (*Fürstliches Landgericht*) of 19 July 2023, 08 CG.2021.120, ON 55, was dismissed, following the setting

aside of the judgment of the Princely Supreme Court of 3 May 2024, 08 CG.2021.120, ON 76, by the Constitutional Court (*Staatsgerichtshof*) by its judgment of 2 September 2024, StGH 2024/056, in closed session, has ordered:

I. The following questions are referred to the **EFTA Court** for an advisory opinion:

First question:

Must the second sentence of Article 38(3) of the GDPR be interpreted as meaning that it precludes a national provision such as, in the present case, Article 7(4) of the Data Protection Act, according to which a data protection officer employed by a public body may only be dismissed by the public body with just cause, in particular, where circumstances exist in the presence of which continuation of the employment relationship can, on good faith grounds, no longer be reasonably expected, even if the data protection officer precisely does not perform his function or does not perform it correctly?

Second question:

Must the second sentence of Article 38(3) of the GDPR as worded in German be interpreted as meaning that the term "dismissed" [in German "abberufen"] includes also an (ordinary) termination of the employment contract by the employer of the data protection officer if, as a result, the employment contract basis and thus

the factual possibility of exercising the activity of data protection officer ceases to exist?

Third question:

Does the protective purpose of the second sentence of Article 38(3) of the GDPR, that is to say, safeguarding the functional independence of the data protection officer, require an interpretation of this provision and corresponding national rules serving the same protective purpose, such as Article 7(3) and (4) of the Data Protection Act, to mean that a dismissal which is effected contrary to these rules entails that the dismissal is void and that the employment relationship between the employer and data protection officer as such remains intact?

II. The appeal proceedings before the Princely Supreme Court in case 08 CG.2021.120 (OGH.2024.101) are stayed pending receipt of the advisory opinion and following receipt of such will be resumed of the Court's own motion.

Grounds:

1. Facts and procedure to date

1.1. The defendant is an independent public law foundation, with its seat in Vaduz.

By way of an employment contract of 15 October 2019, the applicant was employed as data protection officer for an indefinite duration with a work volume of 50%. According to the employment contract, the employment relationship could be terminated by either party to the contract on giving a period of four months' notice. It was also recorded in the contract that more detailed rules are set out in the Rules on Employment and Remuneration (*Dienst- und Besoldungsordnung*) and in the implementing provisions adopted in that connection.

Pursuant to a supplementary agreement of 16 October 2019, the applicant was employed as a postdoctoral researcher for a professorial chair of the defendant's with a work volume of 30% for a fixed term until 30 June 2021. In this connection the parties determined that the stipulations under the main contract of 15 October 2019 and the provisions of the Rules on Employment and Remuneration are applicable *mutatis mutandis*.

On 15 December 2020, the Rules on Employment and Remuneration of 7 December 2020 entered into force, incorporating rules on incompatibility. They include, inter alia, the following provisions:

"Article 53(10): Employment as a postdoctoral researcher cannot be combined with any other university employment.

"Article 53a(9): Employment as a research assistant cannot be combined with any other university employment."

The new Rules on Employment and Remuneration and the rules on incompatibility contained therein were not established because of the applicant but for other reasons, namely, to encourage early-career researchers and on account of ongoing organisational changes.

On 27 January 2021 the applicant was handed the following letter of the same date:

"Termination of the employment relationship

Dear Dr Silbernagl,

We regret to inform you that the University of Liechtenstein hereby terminates the employment relationship with you which takes effect on 31 May 2021 in accordance with the agreed notice period."

Subsequently, the applicant requested written grounds for the termination. Thereupon, the defendant sent the applicant a letter of 5 February 2021 with the following content:

"Your inquiry concerning the reason for the termination of the employment relationship

Dear Dr Silbernagl,

By letter of 27 January 2021 we had to inform you that we are terminating the employment relationship on 31 May 2021 in accordance with the applicable notice period. In your mail of 29 January 2021 you request written grounds for the termination.

We are pleased to satisfy your request by way of this letter.

The University of Liechtenstein entered into an employment contract with you on 15 October 2019 in which it is agreed

that you will be employed as data protection officer with a work volume of 50%. On 16 October 2019 a supplementary agreement to this employment contract was concluded with you. In this it was agreed that for the period 1 December 2019 to 30 June 2021 you should undertake academic additional tasks at the Propter Homines Chair for Banking and Financial Markets Law. For these purposes, your work volume was increased by 30%. Since then you have been recognised, first, as the University's data protection officer and, second, as a research assistant / postdoctoral researcher at the professorial chair for banking and financial markets law.

Under the Rules on Employment and Remuneration (Dienst- und Besoldungsordnung (DBO)) applicable since 15 December 2020, employment as a research assistant or postdoctoral researcher furthers additional academic qualification as part of the academic career path. Pursuant to Article 53(10) and Article 54a(9) of the Rules on Employment and Remuneration, such qualification positions cannot be combined with any other employment at the University. For academic qualification positions special employment conditions established in the Rules on Employment and Remuneration apply which are often not compatible with those of other positions. For that reason, concurrent employment as a research assistant or postdoctoral researcher and as data protection officer, as in your case, should not be possible.

Further reasons for the termination do not exist."

The applicant did nothing wrong before the termination, neither as data protection officer nor as a

research assistant. The people who had dealings with the applicant in his employment with the defendant had no complaints concerning the applicant. His conduct during the period in which the employment relationship was in force was faultless and did not constitute a reason for the termination.

1.2. By his claim of 11 May 2021, the *applicant* requested the following form of order:

"The Princely Court shall

1. a) declare that the existing contractual relationship of 15 October 2019 between the applicant and defendant concerning a 50% appointment as data protection officer remains in force;

alternatively

b) declare that the position and function of the applicant as data protection officer is maintained;

alternatively

c) order the defendant to pay to the applicant compensation of CHF [XXX] *together with 5 % interest p.a. from the lodging of the application, such payment to be made within four weeks to the applicant's representative on penalty of enforcement."*

In support, the applicant argued in summary that, pursuant to Article 38 of the GDPR and Article 7(4) of the Data Protection Act (*Datenschutzgesetz*; DSG), the contractual relationship with the data protection officer can only be terminated (dismissal) where just cause is stated in writing. A termination within the meaning of Article 24 of the Act on the Employment Relationship of State

Employees (*Gesetz über das Dienstverhältnis des Staatspersonals*) (State Employee Act (*Staatspersonalgesetz*; StPG)) can be mutually agreed between the parties or otherwise must be effected by order. The data protection officer must be dismissed with just cause and only thereafter can a termination be effected. A reason constituting just cause was not asserted by the defendant. Moreover, the activity as a postdoctoral researcher is time limited until 30 June 2021, such that the constructed incompatibility would cease to exist at the latest on that date. The applicant has not been asked to relinquish this time-limited appointment in order to eliminate the self-constructed incompatibility. The termination effected by the defendant was not with just cause and is thus null and void. For that reason, the applicant's employment relationship as data protection officer remains in force. In the event that the court does not consider the termination effected void or a nullity, the applicant is entitled to compensation for dismissal without reason, wrongful termination (termination by way of revenge) and infringement of personal rights and to compensation within the meaning of Article 44 of the Data Protection Act.

1.3. The *defendant* rejected the claim, arguing in summary that the ordinary termination was effected because of the incompatibility present. This was unconnected with the performance of the applicant's tasks as data protection officer. The GDPR and the Data Protection Act do not establish any dismissal protection under employment law. Dismissal for operational reasons is permitted. If a data protection officer is dismissed for

performing his tasks, just cause must exist. A dismissal of the data protection officer which is unconnected with the performance of his tasks is permitted both under the GDPR and under the Data Protection Act. The dismissal was effected on account of an organisational/operational change. By reason of this dismissal, no employment relationship can remain in force. The principle of freedom to dismiss applies. The defendant did not attempt to circumvent the rights of the data protection officer. No termination by way of revenge was carried out. Following the dismissal, the applicant was free to reapply for the position of a data protection officer. However, he would have had to decide which career path he wished to follow, that is to say, either a further activity as a research assistant or as part of the administration in the function of data protection officer.

1.4. By judgment of 19 July 2023, the *Princely Court* dismissed all the claims.

1.5. By judgment of 14 December 2023, the *Princely Court of Appeal* rejected the applicant's appeal against the first-instance decision.

1.6. By judgment of 3 May 2024 in the applicant's appeal on a point of law, the *Princely Supreme Court* amended the rulings of the lower courts such as to read:

"It is declared that the existing contractual relationship of 15 October 2019 between the applicant and defendant concerning a 50% appointment as data protection officer remains in force."

It was reasoned, in summary, that the defendant is an independent public law foundation which is subject to Article 6 of the Data Protection Act (*Datenschutzgesetz*; DSG). The General Data Protection Regulation (GDPR) has been applicable in the EU since 25 May 2018. By reason of the decision of 20 July 2018 incorporating the Regulation in the EEA, it has also become effective in Liechtenstein.

Pursuant to the second sentence of Article 38(3) of the GDPR and the final sentence of Article 7(3) of the Data Protection Act (*Datenschutzgesetz*; DSG), the data protection officer may not be dismissed or penalised by the controller or the processor and/or public body for performing his tasks. Under Article 7(4) of the Data Protection Act, the dismissal of the data protection officer shall be permitted only in accordance with the *mutatis mutandis* application of Article 24 of the State Employee Act (*Staatspersonalgesetz*; StPG) and thus with just cause. Just cause is defined, in particular, as any circumstance in the presence of which continuation of the employment relationship can, on good faith grounds, no longer be reasonably expected.

The purpose of the second sentence of Article 38(3) of the GDPR is in essence to safeguard the functional independence of the data protection officer and thus to ensure the effectiveness of the GDPR's provisions. As the termination of the employment relationship with applicant necessarily comprises the ending of his activity as data protection officer and thus ultimately his dismissal as such, Article 7(4) of the Data Protection Act must be understood as meaning that the dismissal of the data protection officer

unconnected to the performance of his tasks is permitted only in accordance with the *mutatis mutandis* application of Article 24 of the State Employee Act. A reason of that kind was not asserted by the defendant. A dismissal of the data protection officer which does not meet the criteria of the statutory provisions mentioned is void and thus does not result in the termination of the legal relationship between the data protection officer and the public body. This rule, too, serves to ensure the functional independence of the data protection officer recognisably laid down in the second sentence of Article 38(3) of the GDPR. This is only ensured if a dismissal which does not meet the statutory criteria remains void. Otherwise it would be open to the public body to terminate its legal relationship with the data protection officer even in the absence of the statutory requirements (that is to say, for example, without just cause) and thus to rid itself of a data protection officer whom it considers undesirable. Although as a consequence the data protection officer could assert claims for compensation, as the applicant does in the alternative in the present case, it cannot be precluded that in particular circumstances a public body accepts a financial commitment of that kind in order at least to end the collaboration with a data protection officer from whom the public body, for whatever reason, wishes to free itself. In this way, the tasks of the data protection officer could be seriously undermined.

1.7. By its judgment of 2 September 2024 in the individual application brought by the defendant, the Constitutional Court set aside the judgment of the Princely Supreme Court of 3 May 2024 and remitted the case to the

appellate court for a new decision under the obligation to be bound by the legal opinion of the Constitutional Court.

According to the Constitutional Court, the wording "for performing his tasks" in the final sentence of Article 7(3) of the Data Protection Act can logically only refer to the correct exercise of the function of the data protection officer. It cannot apply also to the (grossly) flawed exercise of this function. Namely, although it obviously makes sense that a data protection officer should be protected against dismissal notwithstanding his correct exercise of his function, it cannot be the case that he cannot be dismissed even for severe failings in the exercise of these tasks. Accordingly, in conformity with the GDPR, the final sentence of Article 7(3) of the Data Protection Act must be interpreted to mean that the absolute protection against dismissal applies as a rule where the dismissal is effected solely by reason of the correct exercise of the data protection function. In other words, this protection against dismissal applies where the data protection officer carries out his function correctly and a dismissal is effected precisely because the function is correctly exercised. However, the line between correct and incorrect exercise of this function is fluid. Accordingly, it is a sensible supplement to the protection of the data protection officer if he cannot be dismissed for every exercise of his function as data protection officer considered by the employer to be incorrect. It is entirely sensible to permit a dismissal of that kind only in accordance with the requirements for the termination of the employment relationship without notice and thus only with just cause. Article 7(4) of the Data Protection Act can also be easily interpreted in this sense,

according to which the "dismissal" of the data protection officer is permitted only with just cause. On the basis of the preceding considerations it also makes sense that in Article 6 (intended: Article 7), paragraph 4, of the Data Protection Act, unlike in the final sentence of paragraph 3, the wording "for performing his tasks" is missing. Namely, at issue here is not a dismissal for correctly performing the tasks of the data protection officer but the situation where the latter specifically does not (correctly) perform his tasks.

The final sentence of Article 7(3) and Article 7(4) of the Data Protection Act govern questions in connection with the dismissal of the data protection officer. The question of termination of the employment relationship with the data protection officer is not governed by those provisions. That means that a termination of the employment relationship not connected with the exercise of the function of data protection officer may be effected, in accordance with the legal situation in Liechtenstein (unlike under the legal situation in Germany), in accordance with the usual requirements of the law on employment contracts also without just cause, as was done in the case at hand by way of ordinary termination with a notice period but without just cause.

Moreover, contrary to the view taken by the Princely Supreme Court, from the perspective of Liechtenstein law, it would be wholly disproportionate for a termination of the employment relationship with a data protection officer, effected contrary to the law, to be considered void. This would entail, namely, that the data

protection officer's protection against dismissal would apply at best for years, ultimately for an indefinite duration. Such indefinite protection against dismissal, in particular, is entirely alien to the Liechtenstein law on employment contracts which derives from Swiss law. It is obvious that the Liechtenstein legislature gave not the slightest consideration to the possibility of treating the data protection officer in a similar manner to a permanent civil servant, as advocated, in essence, by the Supreme Court.

2. On the basis of the legal view taken, which gave due consideration to EEA law aspects and which is reproduced above in point 1.6., no requirement existed for the Princely Supreme Court at that stage to initiate an advisory opinion procedure. Now, however, having given due regard to the submissions of the parties, it considers itself compelled and obliged to refer this case to the EFTA Court for an advisory opinion on the questions asked at the outset.

The EFTA Court (Court) has jurisdiction to give an advisory opinion on any question of EEA law, including one which relates to the interpretation of the SCA, referred to it by a national court or tribunal pursuant to the first paragraph of Article 34 SCA. Questions concerning the interpretation of EEA law referred by a national court enjoy a presumption of relevance (EFTA Court, E-10/23 *Finanzmarktaufsicht*, paragraph 38). In accordance with Article 3 EEA, it is the responsibility of national courts and tribunals, in particular, to provide the legal protection individuals derive from the EEA Agreement and to ensure that those rules are fully effective. It is inherent in Protocol 35 EEA that a national court or tribunal must give full

effect to Article 28 of the EEA Agreement and disregard any national rule or case law maintaining the legal effects of legislation that infringes Article 28 of the EEA Agreement, as such a limitation is not compatible with EEA law (compare E-10/23, paragraph 46, with reference to *RS*, E-11/22, paragraphs 44 and 50). Thus, a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot prevent a national court, where appropriate, from using its discretion to request an advisory opinion from the Court. Thus a national court or tribunal is permitted (and, if the relevant conditions as set out below are satisfied, *required* – remark added by the referring Senate) under Article 34 SCA to request an advisory opinion from the Court, although a legal question, which is the subject of the request for an advisory opinion, has already been answered in an earlier set of proceedings by a higher-ranking national court with binding effect in accordance with national procedural law (E-10/23, paragraphs 47 and 48).

3.1 European legal framework

The General Data Protection Regulation (GDPR) has been applicable in the EU since 25 May 2018. By reason of the decision of 20 July 2018 incorporating the Regulation in the EEA, it has also become effective in Liechtenstein and incorporated as part of Liechtenstein law; it applies in Liechtenstein without an implementing act.

Article 38(3) of the GDPR is worded:

The controller and processor shall ensure that the data protection officer does not receive any instructions

regarding the exercise of those tasks. He or she shall not be dismissed or penalised by the controller or the processor for performing his tasks. The data protection officer shall directly report to the highest management level of the controller or the processor.

3.2. National legal framework

Data Protection Act (Datenschutzgesetz; DSG)

Article 6

(1) Public bodies shall designate a data protection officer.

.....

(4) The data protection officer may be a staff member of the public body, or fulfil the tasks on the basis of a service contract.

Article 7

(3)

The public body shall ensure that the data protection officer does not receive any instructions regarding the exercise of those tasks. The data protection officer shall directly report to the management of the public body. The data protection officer shall not be dismissed or penalised by the public body for performing the data protection officer's tasks.

(4) The dismissal of the data protection officer shall be permitted only by applying Article 24 of the State Employee Act *mutatis mutandis*.

State Employee Act (Staatspersonalgesetz; StPG)

Article 24

(1)

The employment relationship may at any time be terminated by either party to the contract with just cause; such termination shall be effected in writing, stating the reasons for the termination. Termination by the Government shall be effected by way of an order.

(2)

Just cause shall be defined, in particular, as any circumstance in the presence of which continuation of the employment relationship can, on good faith grounds, no longer be reasonably expected.

(3)

If the termination without notice proves to be wrongful or without justification, then the person concerned shall be entitled to compensation for what they would have earned if the employment relationship had been terminated with due notice. If reinstatement is not effected, then compensation in accordance with Article 23(1) shall be paid.

4. The questions referred

4.1. The first question

The laying down of rules on protection against the dismissal of a data protection officer employed by a controller or by a processor falls within the scope of the protection of natural persons with regard to the processing of personal data solely inasmuch as such rules are intended to preserve the functional independence of the latter, in accordance with the second sentence of Article 38(3) of the GDPR. It follows that each Member State is free, in the exercise of its retained competence, to lay down more

protective specific provisions on the dismissal of the data protection officer, in so far as those provisions are compatible with EU law and, in particular, with the provisions of the GDPR, particularly the second sentence of Article 38(3) thereof. In particular, such increased protection cannot undermine the achievement of the objectives of the GDPR. That would be the case if it prevented any dismissal, by a controller or by a processor, of a data protection officer who no longer possesses the professional qualities required to perform his or her tasks, in accordance with Article 37(5) of the GDPR, or who does not fulfil those tasks in accordance with the provisions of that regulation. Thus, increased protection for the data protection officer which would prevent the dismissal of the data protection officer in the event that he or she is not, or is no longer, in a position to carry out his or her tasks in an independent manner on account of there being a conflict of interests would undermine the achievement of that objective. It is for the national court to satisfy itself that more protective specific Member State provisions on the dismissal of the data protection officer are compatible with EU law and, in particular, with the provisions of the GDPR. Therefore, the second sentence of Article 38(3) of the GDPR must be interpreted as not precluding national legislation which provides that a controller or a processor may dismiss a data protection officer who is a member of staff of that controller or processor solely where there is just cause (as Article 7(4) of the Data Protection Act in conjunction with Article 24 of the State Employee Act provide (note added by the referring Senate)), even if the dismissal is not related to the performance of that data

protection officer's tasks, in so far as such legislation does not undermine the achievement of the objectives of the GDPR (ECJ, C-453/21 *X-FAB Dresden GmbH & Co KG*, paragraphs 30 to 36; C-560/21 *KISA*, paragraphs 25 to 31).

In its decision in Case StGH 2024/056 (point 2.5.2 of the reasoning), the Constitutional Court held, as mentioned, that the final sentence of Article 7(3) of the Data Protection Act must be interpreted in conformity with the GDPR to mean that the absolute protection against dismissal applies as a rule where the dismissal is effected solely by reason of the correct exercise of the data protection function. In other words, this protection against dismissal applies where the data protection officer exercises his function correctly and a dismissal is effected precisely because the function is correctly exercised. However, the line between correct and incorrect exercise of this function is fluid. Accordingly, it is a sensible supplement to the protection of the data protection officer if he cannot be dismissed for every exercise of his function as data protection officer considered by the employer to be incorrect. It is entirely sensible to permit a dismissal of that kind only in accordance with the requirements for the termination of the employment relationship without notice and thus only with just cause. Article 7(4) of the Data Protection Act can also be easily interpreted in this sense, according to which the "dismissal" of the data protection officer is permitted only with just cause. On the basis of the preceding considerations it also makes sense that in Article 6 (intended: Article 7), paragraph 4, of the Data Protection Act, unlike in the final sentence of paragraph 3, the wording "for performing his tasks" is missing. Namely,

at issue here is not a dismissal for correctly performing the tasks of the data protection officer but the situation where the latter precisely does not (correctly) perform his tasks.

Although according to this interpretation of the provisions applicable here the dismissal of a data protection officer who does not perform his tasks in accordance with the GDPR is not prohibited, as a result of the increased protection linked to the dismissal in Article 7(4) of the Data Protection Act achievement of the objectives of the GDPR is undermined. A data protection officer who does not fulfil his tasks correctly already jeopardises the implementation of the objectives of the GDPR when he exercises his tasks in a manner which is flawed in any way and not simply when seriously flawed. Accordingly, the ECJ refers generally to whether the data protection officer still has the professional qualities required or does not fulfil his tasks in accordance with the provision of the GDPR (C-560/21, paragraph 27, and C-453/21, paragraph 32) without differentiating between a performance which is seriously flawed and one which is flawed but not seriously. Consequently, the Princely Supreme Court considers it necessary to refer to the Court the first question formulated above.

4.2. The second question

In his proposal that an advisory opinion procedure should be initiated, the applicant emphasises that he has never been dismissed by the defendant.

In its decision in Case StGH 2024/056, the Constitutional Court differentiated between the dismissal of the data protection officer in accordance with the final

sentence of Article 7(3) and 7(4) of the Data Protection Act, on the one hand, and the termination of the employment relationship with the defendant. It held that the latter may be effected in accordance with the usual requirements of the law on employment contracts also without just cause, as was done in the case at hand by way of ordinary termination with a notice period but without just cause (StGH 2024/056, point 2.5.3 of the reasoning; compare also points 2.9 and 3.3.2). It is thereby clarified that just cause for the termination of the employment relationship did not exist and the defendant effected an ordinary termination (the same was stated by the defendant in its pleading of 19 December 2024, points 10, 11.1 and 11.5).

The second sentence of Article 38(3) of the GDPR uses, in the wording of the German version, the term "dismissed" [in German "abberufen"]. This is also used in the final sentence of Article 7(3) and Article 7(4) of the Data Protection Act. The term is not defined in the GDPR (C-560/21, paragraph 16 amongst others).

The English version of Article 38(3) of the GDPR uses in this connection, in contrast, the introductory wording "He or she shall not be dismissed ...". Translated into the German language the term "dismissed" means "gekündigt" and/or "entlassen". From this, part of the German and Austrian legal literature deduces that in this particular legal area the data protection officer is accorded dismissal protection (compare G. König in R. Knyrim (ed.), *Praxiskommentar zum Datenschutzrecht*, Article 38, footnote 49 with further references; J. Warter, "Kündigung eines Datenschutzbeauftragten" case note on ECJ judgment

of 22 June 2022, C-534/20, *Das Recht der Arbeit* 2023/1, with reference to L. Feiler and B. Horn, *EU-DSGVO* 36).

The above observations, according to which it is for the national court to satisfy itself that the specific national provisions applicable here are compatible with the European law framework and, in particular, with the provisions of the GDPR, suggest also that the terms used in the final sentence of Article 7(3) and Article 7(4) of the Data Protection Act "abberufen" ("dismissed") and "Abberufung" ("dismissal"), respectively, "kündigen" ("dismiss") and "Kündigung" ("dismissal"), must be used synonymously and interpreted in accordance with the understanding of the second sentence of Article 38(3) of the GDPR. That may be significant, above all, against the background that, to preserve the functional independence of the data protection officer, he is to be protected, in accordance with the second sentence of Article 38(3) of the GDPR, against any decision terminating his duties, by which he would be placed at a disadvantage or which would constitute a penalty. A dismissal measure in respect of a data protection officer taken by his employer and resulting in the data protection officer being dismissed by the controller or its processor is capable of constituting such a decision (C-560/21, paragraphs 16, 17 and 22; C-453/21, paragraphs 21, 22 and 27; compare C-534/20, paragraphs 21, 22 and 28). In the final authority cited, the ECJ held, in addition, that the second sentence of Article 38(3) of the GDPR is not intended to govern the overall employment relationship between a controller or a processor and staff members who are likely to be affected only incidentally, to

the extent strictly necessary for the achievement of those objectives.

Thus the question arises whether the ordinary termination as was effected in the case at hand and which, in the view of the defendant and the Constitutional Court, resulted in the termination of the employment relationship corresponds to a dismissal of the applicant as data protection officer since by way of this decision his duties were de facto terminated, given that he can no longer exercise these without a basis in employment law. That means that the decision here is one by which his duties were terminated or at any rate were "affected incidentally" (compare C-534/20, paragraphs 21 and 28). Because of these uncertainties, the Princely Supreme Court addresses the second question to the Court.

4.3. The third question

In the view of the Princely Supreme Court, the functional independence of the data protection officer, which by way of the second sentence of Article 38(3) of the GDPR and by the final sentence of Article 7(3) and 7(4) of the Data Protection Act is to be protected, is only ensured if a dismissal which does not satisfy the statutory criteria remains void (as was concluded by the German Federal Labour Court (Case 9 AZR 621/19, point 5 c) of the reasoning, the case underlying the decision in Case C-560/21 *KISA*) in connection with the dismissal (not termination) of a data protection officer pursuant to the second sentence of Article 38(3) and the third sentence of Section 6(3) of the German Federal Data Protection Act and thus the basis from which the final sentence of Article 7(3)

of the Data Protection Act derives (and thus where, to that extent, the legal situation under European law and national law is practically identical – Case StGH 2024/056, points 2.2 and 2.3 of the reasoning)) and does not terminate the legal relationship between the data protection officer and the public body. Otherwise it would be open to the public body to terminate its legal relationship with the data protection officer even in the absence of the statutory requirements (that is to say, for example, "for performing his tasks" or without just cause) and thus to rid itself of a data protection officer whom it considers undesirable. Although as a consequence the data protection officer could potentially assert claims for compensation, it cannot be precluded that in particular circumstances a public body accepts a financial commitment of that kind in order at least to end the collaboration with a data protection officer from whom the public body, for whatever reason, wishes to free itself, especially given that in the event of an infringement of that kind, in accordance with Article 40(7) of the Data Protection Act, no fines shall be imposed on public bodies. In this way, the tasks of the data protection officer, consisting in particular in the monitoring of compliance with data protection provisions and of the strategies of the public body for the protection of personal data, could be seriously undermined.

It must be mentioned in passing that the present case is not comparable with that mentioned by way of example in the decision of the Federal Labour Court of 25 August 2022 in Case 2 AZR 225/20 (point 3a of the reasoning), cited by the Constitutional Court, in which an ordinary dismissal is precluded, entailing that the employer

must continue to remunerate the employee for years without any corresponding performance of work. Namely, according to the legal position advanced by the applicant, and not contested with detailed argument, he remained willing to work as data protection officer. The post was re-advertised and, even according to the defendant's position, the applicant could have reapplied for the post. Finally, the incompatibility would have ended at the latest on 30 June 2021, thus only one month after the end of the notice period, and could also have been removed earlier by ending the activity as postdoctoral researcher. Consequently, no just cause for the termination actually existed, as was concluded also by the Constitutional Court (above point 1.7.)

However, as mentioned, in Case StGH 2024/056 (point 3.2 et seq of the reasoning), the Constitutional Court took the position that, from the perspective of Liechtenstein law, it would be wholly disproportionate for a termination of the employment relationship with a data protection officer, effected contrary to the law, to be considered void. This would entail, namely, that the data protection officer's protection against dismissal would apply at best for years, ultimately for an indefinite duration. It considered such indefinite protection against dismissal to be entirely alien to the Liechtenstein law on employment contracts, which derives from Swiss law. According to the Constitutional Court, the Liechtenstein legislature obviously gave not the slightest consideration to the possibility of treating the data protection officer in a similar manner to a permanent civil servant, as was advocated, in essence, by the Princely

Supreme Court. At any rate, that question was never addressed at any point in the legislative procedure.

Whereas the Constitutional Court referred in this connection only to Liechtenstein law on employment contracts and the basis in Swiss law from which it derives, it is for the national court to satisfy itself that specific national provisions for increased protection of the achievement of the objectives of the GDPR are at all compatible with its provisions and the European legal framework, for which reason the relevant national provisions must also be interpreted in accordance with the understanding of the second sentence of Article 38(3) of the GDPR. As it is also the responsibility of national courts and tribunals to provide the legal protection individuals derive from provisions of European law and these courts and tribunals must ensure that those rules are fully effective and must, where appropriate, disregard any national rule or case law infringing such rules, the Princely Supreme Court considers it expedient also to refer the third question to the Court.

5. By pleading of 2 December 2024, the applicant proposed that this case be referred to the EFTA Court. By pleading of 19 December 2024, the defendant responded to the proposal, ensuring a right to a fair hearing for both sides.

It is open to the parties to civil proceedings conducted in the Principality of Liechtenstein to propose the initiation of an advisory opinion procedure and to make proposals concerning the form and content of the questions.

However, they do not have a right of request nor a right to a substantive decision on that request.

The advisory opinion procedure is intended to contribute to the existence and smooth functioning of the EEA. This requirement is only fulfilled if national courts can decide on the need to initiate an advisory opinion procedure and both the form and content of the questions to be asked unrestricted by party requests. If national courts were bound by party requests, they could only grant these or, where the requirements for the question are not met, (partially) reject or dismiss requests, but not freely decide on requirements, form and content (Princely Supreme Court, 4 February 2022, Case 08 CG.2018.269, point 11.1).

For the abovementioned reasons the Princely Supreme Court considered it necessary to formulate the questions to be referred at variance from the applicant's proposals.

6. The pending appeal on a point of law had to be stayed, applying by analogy Section 190 of the Code of Civil Procedure (*Zivilprozessordnung*). Following receipt of the advisory opinion from the EFTA Court, proceedings will be continued of the Court's own motion.

7. The costs of the advisory opinion procedure shall be determined in the final national decision.

Princely Supreme Court,

First Senate

Vaduz, 4 April 2025

First Vice-President

Dr Ingrid Brandstätter