Principality of Liechtenstein
Fürstlicher
Oberster Gerichtshof

08 CG.2022.207
OGH.2025.9
ON 109

ORDER

The Princely Supreme Court (*Fürstlicher Oberster Gerichtshof*), as appellate court, through its First Senate, composed of the President University Professor (retired) Dr Hubertus Schumacher and Supreme Court Judges Dr Wolfram Purtscheller, Dr Marie-Theres Frick, lic. iur. Stefan Zünd and Dr Thomas Risch, as additional members of the Senate, in addition, in the presence of court clerk Carmen Semmler, in the proceedings between the applicant **Peter Ploerer**, XXX, represented by Dr Alexander Amann LL.M., Rechtsanwalt, Industriegasse 16, 9487 Gamprin-Bendern, Principality of Liechtenstein, and the defendant **LGT Bank AG**, Herrengasse 12, 9490 Vaduz, represented by Roth + Partner Rechtsanwälte AG, Landstrasse 40, 9495 Triesen, Principality of Liechtenstein, concerning a claim for (correctly) CHF XXX with interest thereupon and (most recently) interest, in the appeal on a point of law by the applicant against the judgment of the Princely Court of Appeal (*Fürstliches Obergericht*) of 25 April 2023, 08 CG.2022.207, ON 63, corrected by order of (correctly) 16 January 2024, 08 CG.2022.207, ON 88, by which, as a

result of the appeal by the defendant, the final judgment of the Princely Court (*Fürstliches Landgericht*) of 23 November 2022, 08 CG.2022.207, ON 53, was upheld in the main action and amended in part in relation to the award of interest, following the setting aside of the judgment of the Princely Supreme Court of 1 March 2024, 08 CG.2022.207, ON 90, by the Constitutional Court (*Staatsgerichtshof*) by its judgment of 2 December 2024, StGH 2024/035, in closed session, has ordered:

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

First Question:

Must Article 15(1) of the Second Directive 90/619/EEC, Article 35(1) of Directive 2002/83/EC and Article 186(1) of Directive 2009/138/EC and the principle handed down in that connection that these provisions do not preclude national legislation providing for a limitation period of 3 years for the exercise of the right to remuneration interest, associated with the repayment of sums due to unjust enrichment, requested by a policyholder who has exercised his or her right of cancellation, provided that establishment of such a period does not undermine the effectiveness of that policyholder's right of cancellation be applied also in a case in which, following the declaration of invalidity of a term in accordance with the provisions of MiFID I, a non-professional client of an investment service provider is entitled to remuneration interest on the sums of

money withheld due to the invalidity of the term (benefits from third parties such as fees or commissions in relation to the provision of an investment or ancillary service within the meaning of Article 26(b)(i) of the Implementing Directive), subject to the proviso that, in place of possibly undermining the right to cancel the insurance contract, the undermining of the right to assert his claim to recover the benefits or an undermining of a different kind applies if he does not also receive interest for a period of up to 30 years?

If the first question is answered in the negative, the referring court asks the following

Second Question:

Must Article 19 of MiFID I and Article 26 of the Implementing Directive 2006/73/EC, where necessary in conjunction with Article 6(1) and Article 7(1) of Directive 93/13, and having regard to the principles of effectiveness and equivalence, be interpreted as meaning that they preclude a national provision and consistent case law in that connection according to which, following the declaration of invalidity of a term in accordance with the provisions of MiFID I, the remuneration interest to which a non-professional client is entitled on the sums of money withheld due to the invalidity of the term (benefits from third parties such as fees or commissions in relation to the provision of an investment or ancillary service within the meaning of Article 26(b)(i) of the Implementing Directive) is subject to a limitation period for which the starting point

is the date on which it becomes objectively possible to bring an action for the interest whereas subjective individual impediments such as an error on the part of the person entitled or total lack of awareness of the right do not affect the starting point of the limitation period and this results in a de facto limitation on the right to remuneration interest for the loss of use of the sums withheld to the last three years before lodging the action?

II. The appeal proceedings before the Princely Supreme Court in case 08 CG.2022.207 (OGH.2025.9) 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 a joint-stock company established under Liechtenstein law with its seat in Vaduz, which, as a bank, offers, inter alia, investment services. It has a Liechtenstein banking licence and is supervised by the Liechtenstein Financial Market Authority (*Finanzmarktaufsicht*).

From 22 September 2004 to 31 January 2012, the applicant, resident in Austria, had, as a non-professional client, a business relationship with the defendant. At the

start of the business relationship, an agreement was entered into for the operation of an account and custody account. In the context of the termination of the same, all of the applicant's assets were transferred from the defendant to LGT Bank (Österreich) AG.

The business relationship which existed until that time was governed by the General Terms and Conditions ("GTC") described as "Version 09/2004" which entered into force on 1 September 2004. Section 15 of the same was worded:

"15. Special remuneration

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

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

By judgment of the Princely Supreme Court of 4 September 2020 in case 02 CG.2019.58, according to which the case had to be determined in accordance with the substantive law of Liechtenstein, this term was held to be too indeterminate and therefore invalid. According to that ruling of the Princely Supreme Court, the General Terms and Conditions in the versions of 11/2007 and 5/2010 which

the defendant later brought into use did not form part of the contractual relationship agreed between the parties. Rather, the GTC 2004 continued to be applicable.

In connection with its business relationship with the applicant, the defendant received, in relation to the product LGT CF GIM II held on the custody account, from the start of the relationship until 31 December 2008 kick-back commissions of CHF XXX and in the period 1 January 2009 to 7 February 2012 of CHF XXX. Consequently, by reason of its business relationship with the applicant, the defendant received benefits from third parties totalling CHF XXX.

By his action (in stages) posted on 8 February 2019, received by the first instance court on 11 February 2019 and served on the defendant on 25 February 2019, the applicant brought an (information) claim for account in this connection directed against the defendant. By a partial judgment of the Princely Court of Appeal of 12 May 2020 (ON 31), which can no longer be appealed, that claim, to the extent relevant here, was upheld.

1.2. By its final judgment of 23 November 2022 (ON 53), the *Princely Court* awarded the applicant CHF XXX in the main action together with (in part still contested) interest for different phases.

1.3. In the defendant's appeal, by judgment of 25 April 2023 (ON 63), which is now contested, the *Princely Court of Appeal* upheld the award in the main action and amended the first instance decision ON 53 in relation to the award of interest such as to award the applicant 5 per cent

interest on CHF XXX from 25 February 2019 (date on which the action was served). The claim for additional interest, the only issue which remained contested between the parties, was rejected by the Princely Court of Appeal (ON 63, corrected by order ON 88). Following the defendant's withdrawal of its appeal on a point of law, the award in the main action together with 5 per cent interest thereon from 25 February 2019 became final. In rejecting the interest claim it was reasoned that although as such the applicant's statutory claim for recovery pursuant to Section 1009 of the Civil Code (*Allgemeines bürgerliches Gesetzbuch*) arises on the defendant's receipt of the benefits, the applicant is only due the interest payable thereupon from the date on which payment of the kick-backs at issue was demanded. In this connection, quantification of the compensation sought in the claim asserted originally by way of an action in stages is not decisive, since only in the second stage does this have to be stated in sufficiently precise terms, whereas the dispute, including the claim for recovery, is already regarded as pending before the court on, or following, the lodging of the action.

1.4. In the appeal on a point of law by the applicant, by judgment of 1 March 2024 (ON 90), the *Princely Supreme Court* amended the corrected decision of the Princely Court of Appeal in its award of interest, taking account of the claims awarded by the previous instances, no longer open to appeal, such that the award to the applicant was now worded in full:

"The defendant is to pay to the applicant's representatives within four weeks CHF XXX together with 5 % interest p.a. on CHF XXX from 1 January 2006, on CHF XXX from 1 January 2007, on CHF XXX from 1 January 2008, on CHF XXX from 1 January 2009, on CHF XXX from 1 January 2010, on CHF XXX from 1 January 2011 and on CHF XXX from 1 January 2012."

It was reasoned, in summary, that the claim of CHF XXX awarded to the applicant is based on Section 1009a of the Civil Code and on accompanying banking law provisions in connection with the transposition of the so-called Second Investment Services Directive (2004/39/EC; MiFID), that is to say, therefore, largely in EEA law. As the amount of the main claim was unduly withheld from the applicant, he is entitled to the payment of remuneration interest for the entire withholding period. This results from the so-called principles of equivalence and effectiveness. According to these principles, the detailed rules for the payment of interest should not lead to the person concerned being deprived of adequate compensation for the loss sustained. This presupposes, inter alia, that the interest paid to that person covers the entire period running from the date on which the sum of money in question should have been paid and the date on which this amount is refunded to that person. In that connection, regard must be had to the fact that prior to the defendant's disclosure of the benefits occasioned by the applicant's action, the applicant could not have been aware of the nature and extent of the benefits received by the defendant. Having regard to the complexity of the case, which has become more evident through the

present proceedings, and the applicant's dependence for the purpose of enforcing his rights on the information provided by the defendant concerning the benefits that it received, it would infringe the principle of effectiveness to apply a limitation period of, for example, three, five or ten years. As, pursuant to Section 1479 of the Civil Code, the right to recovery becomes time-barred after 30 years, this provision must be interpreted to mean that also the claim to interest thereupon, contrary to the rule of Section 1480 of the Civil Code, by reason of the undue withholding (and undue withholding of the right to recovery), becomes time-barred after 30 years and not after only three years. In any event, on account of the principle of effectiveness, Section 1480 of the Civil Code must not be applied as this would no longer ensure the applicant's justified claim. Thus, the applicant is entitled to interest from the dates on which the defendant withheld from the applicant the sums now claimed.

1.5. By its judgment of 2 December 2024 in the individual application brought by the defendant, the Constitutional Court set aside the judgment of the Princely Supreme Court of 1 March 2024 in its entirety (that is to say, also those parts including the final award of the amount claimed in the main action and 5% interest on CHF XXX from 25 February 2019) 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.

It was reasoned, in summary, by the Constitutional Court that the appellate court had not considered the relevant ruling of the ECJ of 19 December 2019 in Joined

Cases C-355/18 to C-357/18 and C-479/18 *Rust-Hackner and Others*. Although the ruling mentioned concerned the Life Assurance Directive and not the Unfair Contract Terms Directive or MiFID, in that ruling the ECJ held that the provisions of the relevant directives must be interpreted as not precluding national legislation providing for a limitation period of 3 years for the exercise of the right to remuneration interest, associated with the repayment of sums due to unjust enrichment, requested by a policyholder who has exercised his or her right of cancellation, provided that establishment of such a period does not undermine the effectiveness of that policyholder's right of cancellation, such a matter being for the referring court to verify. As a result of that case law, the Austrian Supreme Court (*Oberster Gerichtshof*) has held in several rulings, given in cases which gave rise to the reference to the ECJ, that, also in a restitution claim for unjust enrichment following the late cancellation of a life assurance contract, remuneration interest becomes time-barred after three years calculated from the date on which it becomes objectively possible to exercise the right. At the same time the Austrian Supreme Court has emphasised the need for a concrete and individual examination and not excluded the possibility that in (concrete) individual cases, in which the contract does not meet the needs of the applicant, and he was impeded in cancellation by the limitation of time, the three-year limitation period is not to be applied. The reasoning of the Princely Supreme Court set out above contradicts this case law. To this extent also the reasoning of the judgment is flawed. Rather, having regard to the case law cited, the

Princely Supreme Court should have reasoned why the client would be dissuaded from enforcing his right to recover the kick-backs or otherwise impeded if he does not also receive interest for a period of up to 30 years. The statement by the appellate court that the detailed rules for the payment of interest should not lead to the person concerned being deprived of adequate compensation for the loss sustained does not demonstrate that in the concrete individual case this was necessary by way of exception.

Moreover, pursuant to Section 1000(1) of the Civil Code, the statutory interest amounts to 5%. The limitation period of 30 years assumed by the appellate court could, in certain circumstances, result in a return which, under the known financial market conditions of recent years, would not have been realistically achievable for an investor not particularly open to risk such that it would be advantageous for the applicant to speculate on the complainant acting contrary to Union law. This is a result which the ECJ in *Rust-Hackner and Others* firmly wished to avoid.

With regard to the Princely Supreme Court's application by analogy of Section 1479 of the Civil Code, reference must be had to the Constitutional Court's case law on interpretation in conformity with EEA law, according to which the Constitutional Court regards it as impermissible to interpret a provision in conformity with the constitution where the interpretation is not only contrary to the provision's wording but also contrary to the historic will of the legislator. The same must apply for an interpretation in conformity with EEA law. Consequently, in the past, the Constitutional Court has set aside, as

contrary to the constitution, provisions which contradicted EEA law. The Constitutional Court does not see any reason to depart from this practice. As regards the statement by the Princely Supreme Court in its response that, in order to achieve conformity with a directive, the national court may apply the principle of primacy, that must be countered with the observation that the assumption that Section 1480 of the Civil Code is incompatible with EEA law is, for the reasons set out, not sufficiently substantiated.

2. By its submission of 31 January 2024, the **applicant** requested that this case be referred to the EFTA Court with specifically formulated questions.

3. The **defendant** opposed the referral of this case to the EFTA Court.

4. 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).

However, it remains open to the appellate court to treat the applicant's request – for the reasons to be set out – as a legitimate suggestion to obtain an advisory opinion from the EFTA Court to the extent it concerns (notwithstanding the wider decision of the Constitutional Court to set the judgment aside) the part of the claim for interest which remains the only issue contested between the parties.

5. On the basis of the legal view taken, which, in its view, gave due consideration to EEA law aspects, no requirement existed, on reaching its decision of 1 March 2024 ON 90, for the Princely Supreme Court to initiate an advisory opinion procedure. Now, however, having given due regard to the submissions of the parties, it considers itself obliged to refer this case to the EFTA Court for an advisory opinion on the questions asked at the outset.

The EFTA Court (hereinafter: 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 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).

6. Legal background

6.1. EEA law

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) (hereinafter:

MiFID I) was incorporated as point 30ca of Annex IX (Financial services) to the Agreement on the European Economic Area (hereinafter: EEA Agreement) by Decision of the EEA Joint Committee No 65/2005 of 29 April 2005 (OJ 2005 L 239, p. 50). Constitutional requirements were indicated by Iceland, Liechtenstein and Norway, which were fulfilled on 8 June 2007. The decision entered into force on 1 August 2007. MiFID I was repealed with effect from 3 December 2019.

Recital 2 of MiFID I was worded:

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

Recital 29 of MiFID I was worded:

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

Recital 31 of MiFID I was worded:

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

Article 19 of MiFID I, headed "Conduct of business obligations when providing investment services to clients", was worded, in extract:

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

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

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

- *the investment firm and its services,*
- *financial instruments and proposed investment strategies; this should include appropriate guidance on and warnings of the risks associated with investments*

in those instruments or in respect of particular investment strategies,

- *execution venues, and*
- *costs and associated charges*

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

...

Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ 2006 L 241, p. 26) (hereinafter: Implementing Directive) was incorporated into the EEA Agreement as point 30cab of Annex IX (Financial services) by Decision of the EEA Joint Committee No 21/2007 of 27 April 2007 (OJ 2007 L 209, p. 38). Constitutional requirements were indicated by Iceland and Norway, which were fulfilled on 18 April 2008. The decision entered into force on 1 June 2008.

Recital 5 of the Implementing Directive is worded:

The rules for the implementation of the regime governing operating conditions for the performance of investment and ancillary services and investment activities should reflect the aim underlying that regime. That is to say, they should

be designed to ensure a high level of investor protection to be applied in a uniform manner through the introduction of clear standards and requirements governing the relationship between an investment firm and its client. On the other hand, as regards investor protection, and in particular the provision of investors with information or the seeking of information from investors, the retail or professional nature of the client or potential client concerned should be taken into account.

Recital 39 of the Implementing Directive is worded:

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

Article 26 of the Implementing Directive, headed "Inducements", is worded:

Member States shall ensure that investment firms are not regarded as acting honestly, fairly and professionally in accordance with the best interests of a client if, in relation to the provision of an investment or ancillary service to the client, they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit, other than the following:

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

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

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

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

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

Member States shall permit an investment firm, for the purposes of point (b)(i), to disclose the essential terms of the arrangements relating to the fee, commission or

non-monetary benefit in summary form, provided that it undertakes to disclose further details at the request of the client and provided that it honours that undertaking.

Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) is worded:

Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) is worded:

Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

Article 15(1) of Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC (OJ 1990 L 330, p. 50), as amended by Council Directive 92/96/EEC of 10 November 1992 (OJ 1992 L 360, p. 1) (hereinafter: Directive 90/619), repealed by Directive 2002/83, was worded:

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

Article 35(1) ("Cancellation period") of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1) was worded:

Each Member State shall prescribe that a policyholder 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.

Article 186(1) ("Cancellation period") of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ 2009 L 335, p. 1) is worded:

Member States shall provide for policyholders who conclude individual life insurance contracts to have a period of between 14 and 30 days from the time when they were informed that the contract had been concluded within which to cancel the contract.

The giving of notice of cancellation by the policy holders shall have the effect of releasing them 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, notably as regards the arrangements for informing the policy holder that the contract has been concluded.

6.2. **National law**

MiFID I and the Implementing Directive were transposed into Liechtenstein law, inter alia, in the Banking Act (*Bankengesetz*), in the Banking Ordinance (*Bankenverordnung*) and in the Civil Code (*Allgemeines bürgerliches Gesetzbuch (ABGB)*) The relevant provisions are worded:

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

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

(3) Banks and investment firms must disclose the benefits in accordance with the ordinance. The disclosure of benefits may be in summary form and general in

content, e.g. as part of the general or other pre-formulated terms and conditions. Banks and investment firms are required to disclose further details if requested by the client.

Paragraphs 1 and 5 of Section III ("Benefits") in Annex 7.1 to the Banking Ordinance are worded:

(1) The provision or acceptance of fees or commissions or non-monetary benefits ("benefits") within the meaning of Article 8h of the Banking Act is permitted if

(a) these constitute fees which enable or are necessary for the provision of services, such as, for example, custody costs, commissions for the purchase and sale of securities, settlement and exchange fees, regulatory levies or legal fees, which, by their nature, cannot give rise to conflicts with the obligation of the bank or investment firm to act honestly, fairly and professionally in accordance with the best interests of its clients; or

(b) this constitutes a benefit paid or provided to or by the client or a person on behalf of the client;

(c) this constitutes a benefit from or to third parties or a person acting on their behalf, who are not covered by point (b), provided that

(aa) the existence, nature and amount of the benefit, or, where the amount cannot be ascertained, the method of calculating that amount, is clearly disclosed to the client, in a manner that is comprehensive, accurate

and understandable, prior to the provision of the relevant investment or ancillary service; and

(bb) the benefit is designed to enhance the quality of the relevant service to the client and does not impair compliance with the obligation of the bank or investment firm to act in the best interests of the client.

(5) The disclosure pursuant to point (c)(aa) of paragraph 1 may in accordance with Article 8h of the Banking Act be in summary form and general in content.

Section 877 of the Civil Code is worded:

Any person who demands the avoidance of a contract for lack of consent must return everything that he has received to his advantage in consequence of such contract.

Section 879(1) of the Civil Code is worded:

A contract which is contrary to a legal prohibition or accepted principles of morality is null and void.

Section 1009 of the Civil Code is worded:

The agent is obliged to procure the transaction diligently and honestly in accordance with his promise and the power of attorney received and to give up all benefits arising out of the transaction to the principal. Even if he has only a limited power of attorney, he is authorised to use all means that are necessarily connected with the nature of the transaction and in accordance with the declared intention of the principal. However, the agent is liable for any consequences if he exceeds the limits of his authority.

Section 1009a of the Civil Code is worded:

(1) If the agent is a bank, an investment firm or an asset management company, it may assume, except in the case of investment advice provided on an independent basis or in the case of portfolio management, that the principal has waived in relation to it the recovery of any fees, commissions or non-monetary benefits received or still to be received from third parties (benefits) and the assertion of civil law claims for compensation in relation to these benefits provided that

(a) prior to the procurement of the transaction the agent has correctly fulfilled its obligations of disclosure; and

(b) following the disclosure the principal has the transaction executed.

(2) The agent is obliged to notify the principal of the legal consequences provided for in paragraph 1 for example in the general or other pre-formulated terms and conditions.

(3) Minor non-monetary benefits that are capable of enhancing the quality of service provided to a client and are of a scale and nature such that they could not be judged to impair compliance with the duty of the bank, investment firm or asset management company to act in the best interest of the client may in any event be retained by the agent if they were clearly disclosed to the client.

Section 1431 of the Civil Code is worded:

If someone has received a thing or a service which was not due by mistake, even if an error of law, in the first case, as

a rule, the thing can be reclaimed, in the second case remuneration which is reasonable in relation to the benefit conferred can be claimed.

Section 1437 of the Civil Code is worded:

The payee of a non-existent debt is considered a bona fide or mala fide possessor depending on whether or not he knew or should have known from the circumstances of the payer's mistake.

Section 1478 of the Civil Code is worded:

To the extent that every usucaption includes a limitation both are completed in the same period by satisfying the conditions required. However, for the limitation itself the mere non-use during thirty years of a right which otherwise could have been used is sufficient.

Section 1479 of the Civil Code is worded:

Accordingly, all rights against a third party, whether or not entered in the public register, are extinguished generally by non-use for thirty years or observed silence for such period.

Section 1480 of the Civil Code is worded:

Claims in relation to outstanding annual payments, in particular, interest, pensions, maintenance, farmer's life interest, as well as annuities agreed for the repayment of principal are extinguished in three years. The right itself becomes time-barred after non-use for thirty years.

Section 1489 of the Civil Code is worded:

All actions for damages become time-barred after three years from the date when the damaged party became aware of the damage and the identity of the person who caused it or the person who is liable to compensate, irrespective of whether the damage was caused by breach of a contractual obligation or without reference to a contract. If the damaged party does not become aware of the damage or of the identity of the person who caused the damage or who is liable to compensate or the damage arises from a crime, the right to bring an action is extinguished only after thirty years.

Section 1489a of the Civil Code, according to which *all actions for damages against a financial intermediary authorised by the FMA are time-barred after a defined period*, is not applicable here.

Section 1497 of the Civil Code is worded:

Usucaption and limitation are interrupted if the party who seeks to rely on such has, before the expiry of the time of limitation, either expressly or impliedly acknowledged the right of the other party or if an action has been commenced and duly pursued against him by the party entitled. However, if the action has been declared inadmissible by final ruling, the limitation is considered to be uninterrupted.

7. **The questions referred**

7.1. **The first question**

In Joined Cases C-355/18 to C-357/18 and C-479/18 *Rust-Hackner*, preliminary ruling proceedings

initiated by an Austrian court, the European Court of Justice (ECJ) held that the answer to the fifth question is "that Article 15(1) of Directive 90/619, as amended by Directive 92/96, Article 35(1) of Directive 2002/83 and Article 186(1) of Directive 2009/138 must be interpreted as not precluding national legislation providing for a limitation period of 3 years for the exercise of the right to remuneration interest, associated with the repayment of sums due to unjust enrichment, requested by a policyholder who has exercised his or her right of cancellation, provided that establishment of such a period does not undermine the effectiveness of that policyholder's right of cancellation", such a matter being for the referring court to verify.

The ECJ reasoned that, by providing that the policyholder of an individual life assurance contract has a period of between 14 and 30 days from the time when he or she is informed that the contract is concluded to cancel that contract, those EU law provisions grant the policyholder a right of cancellation. Thus, the policyholder acquires the right to cancel the life assurance contract simply by virtue of having concluded that contract. The communication by the assurance undertaking to the policyholder of the detailed rules for exercising that right has the sole effect of triggering the cancellation period. It follows from the documents submitted to the ECJ in Case C-479/18 that, in order to determine the effects of cancellation in accordance with those EU law provisions, the Austrian law applicable to the contracts at issue in the main proceedings provides, first, that the exercise of the right of cancellation entails an obligation to refund the payments that have been made and,

second, that remuneration interest is to be paid on the sums to be refunded. In addition, the right to receive such interest is time-barred after 3 years, which is the general time limit provided for by the Allgemeines bürgerliches Gesetzbuch (Civil Code) (note added by the Senate: in Liechtenstein as in Austria) in respect of claims for backdated annual benefits.

However, since that time limit concerns only remuneration interest, it does not directly affect the policyholder's right to cancel his or her contract. However, it is for the referring court to determine whether the application of a limitation period in respect of the exercise of the right to remuneration interest is capable of undermining the effectiveness of the right of cancellation itself, such a right being granted to the policyholder under EU law. In that respect, it should be found, first, that, as the ECJ has previously pointed out, insurance contracts are legally complex financial products which are capable of differing considerably depending on the insurer offering those products and of involving significant and potentially very long-term financial commitments. If, in such circumstances, the fact that claims for interest due for more than 3 years are time-barred should lead the policyholder to refrain from exercising his or her right of cancellation, even though the contract does not suit his or her needs, such a period would be capable of impairing that right, in particular where the policyholder has not been correctly informed of the conditions for the exercise of that right.

Second, it should be noted that the needs of the policyholder must be assessed at the time when the contract

is concluded, without taking into account the advantages that he or she could derive from late cancellation, where the purpose of late cancellation is not to protect the policyholder's freedom of choice, but rather to allow him or her to yield more from that contract or even to speculate on the difference between what can actually be gained under the contract and the rates of remuneration interest (C-355/18 and others, paragraphs 112 to 121).

These principles of law were incorporated by the Austrian Supreme Court into its case law on Section 1480 of the Austrian Civil Code, from which the Liechtenstein provision derives. The Austrian Supreme Court derived from these principles that the three-year limitation period is not to be applied only if in the concrete individual case the contract did not meet the applicant's needs and the limitation period impeded his cancellation. Lack of awareness of the right generally does not prevent the limitation period from starting to run. Where, for example, a person demands the return of sums of money paid by mistake (even under an error of law) but not due, although that person is not in a position to demand interest on the principal paid but not due until the defect in consent is discovered, that does not prevent the three-year limitation period pursuant to Section 1480 of the Austrian Civil Code (which corresponds to Section 1480 of the Civil Code) from running, because the starting point for the limitation period is based, as a rule, apart from exceptions such as Section 1489 of the Austrian Civil Code (which corresponds to Section 1489 of the Civil Code), on the objective possibility of exercising the right. The possibility to bring

an action must be understood in an objective sense; subjective individual impediments such as an error on the part of the person entitled or total lack of awareness of the right do not, as a rule, affect the starting point of the limitation period (Austrian Supreme Court 7 Ob 192/20s, paragraph 19; RIS-Justiz RS 0133108).

Referring to the ECJ ruling in *Rust-Hackner* (C-355/18 and others) and the case law of the Austrian Supreme Court cited immediately above, the Constitutional Court held in its decision to set aside of 2 December 2024 in case StGH 2024/035 that a limitation period of more than three years is possible only in exceptional cases on account of which the Princely Supreme Court should have reasoned why the client (applicant) has been dissuaded from asserting his right to recover the kick-backs or otherwise impeded if he does not also receive interest for a period of up to 30 years.

However, the Princely Supreme Court referred to the case law cited immediately above as only illustrative of the point that a specific provision of national law (Section 1480 of the Civil Code) is not to be applied if it would infringe the principle of effectiveness. This and the principle of equivalence (see below) were the actual basis for the appellate court decision. The case law of the ECJ and the Austrian Supreme Court cited immediately above is, however, specially tailored to the rights of a policyholder connected with a contract for life assurance, who in specific circumstances can exercise a right of cancellation and assert rights in this connection. At issue is a possible impairment of the effectiveness of the right of

cancellation which is granted to the policyholder under EU law. This may not allow the policyholder to yield more from the contract or even to speculate on the difference between what can actually be gained under the contract and the rates of remuneration interest. In this connection, it must be determined in an individual case whether the application of a limitation period on the exercise of the right to remuneration interest is capable of undermining the effectiveness of the right of cancellation itself, such a right being granted to the policyholder under EU law, in particular, because insurance contracts are legally complex financial products which are capable of differing considerably depending on the insurer offering those products and of involving significant and potentially very long-term financial commitments.

However, these legal principles are – at any rate, not without more – applicable to the present fact situation which concerns not the cancellation of a life assurance contract and the resulting legal and economic consequences but the fact that a specific term originally agreed between the applicant and defendant must be regarded as invalid as a result of which the applicant has been awarded the right to recover corresponding benefits (kick-backs) by a judgment no longer open to appeal. That means that the question whether the application of a three-year limitation period in respect of the right to interest on these claims is capable of undermining the applicant's right of cancellation, a right which is non-existent, therefore does not arise. In the present case, the applicant is also not entitled to a yield from a life insurance contract which, in

accordance with its level, could in one case provide the basis for not exercising but in another the basis for indeed exercising the right of cancellation in respect of the contract depending on whether or not the level of the yield exceeds the level of the remuneration interest payable in the case of exercising the right of cancellation. At issue here is simply the right to recover certain benefits paid by third parties to the defendant, the amount of which is clearly ascertainable, and remuneration interest thereon to which the applicant is entitled for a certain – in this case, contested – period for the withholding of the benefits to be paid to the applicant. According to the case law cited, the three-year limitation period would in this case only not be applicable (in the view of the Constitutional Court, thus, by way of exception) if in the concrete individual case the contract of life assurance did not suit the needs of the policyholder and as a result of the three-year limitation period he was impeded in exercising his right of cancellation. As the amount of the benefits paid by third parties to the defendant to be paid to the applicant in this case is irrevocably fixed and cannot be the subject-matter of a speculative yield, the applicant has the right in any event to remuneration interest for a certain period, whose duration is at issue in this case. The interest rate of 5 % is the rate specified by law. The defendant does not have to pay interest if it acts in accordance with the law and thus such interest does not form the basis (contrary to law) for financial speculation.

The legal view taken by the Constitutional Court was not addressed hitherto by the parties and the ordinary

courts in this case so that the applicant was noticeably surprised in his legal position by this opinion. Therefore, in the civil action, where the subject-matter of the action is determined by the parties – should the Court answer the question specified in the affirmative – the case must be remitted to the lower instances so that the questions touched upon can be explored with the parties and they have the opportunity to assert and demonstrate facts in support of their position (compare, amongst others, Austrian Supreme Court 7 Ob 192/20s, point 5.3 of the reasoning; and 7 Ob 177/20k, points 6.1 and 6.2 of the reasoning).

In any event, in light of the uncertainties shown, it is appropriate to refer a corresponding question to the Court.

7.2. **The second question**

7.2.1. If the principles of the ECJ ruling in Case C-355/18 and others *Rust-Hackner* are not applicable in this case, the second question to be addressed to the Court arises.

7.2.2. Section 1480 of the Austrian Civil Code, the provision from which Section 1480 of the Civil Code derives, has been interpreted by the Austrian Supreme Court, as mentioned, as entailing that lack of awareness of the right does not, as a rule, prevent the limitation period from starting to run. Where, for example, a person demands the return of sums of money paid by mistake (even under an error of law) but not due, although that person is not in a position to demand interest on the principal paid but not due until the defect in consent is discovered, that does not

prevent the three-year limitation period pursuant to Section 1480 of the Austrian Civil Code from running, because the starting point for the limitation period is based, as a rule, apart from exceptions such as Section 1489 of the Austrian Civil Code (which corresponds to Section 1489 of the Civil Code), on the objective possibility of exercising the right. The possibility to bring an action must be understood, therefore, in an objective sense; subjective individual impediments such as an error on the part of the person entitled or total lack of awareness of the right do not, as a rule, affect the starting point of the limitation period. According to the Austrian Supreme Court, this case law applies – as set out above – also in a restitution claim for unjust enrichment following the (late) cancellation of a life assurance contract by the policyholder (amongst others, 7 Ob 192/20s, point 5.1. of the reasoning). This approach is also taken generally with regard to Section 1480 of the Austrian Civil Code, the provision from which the Liechtenstein provision derives (RIS-Justiz RS0043297; RS0033829; RS0034337).

7.2.3. In contrast, the ECJ has held, inter alia, on 25 January 2024 in Joined Cases C-810/21 to C-813/21 (*Caixabank SA*) in connection with Directive 93/13/EEC and/or unfair terms in consumer contracts in relation to the starting point for the limitation period for the right to reimbursement, inter alia, as follows:

As regards the application of a limitation period to a claim brought by a consumer for repayment of sums paid but not due, based on the unfair nature of a contractual term, for the purposes of Directive 93/13, it should be noted

that the ECJ has previously held that Article 6(1) and Article 7(1) of that directive do not preclude national legislation which, while providing that an action for a declaration of nullity of an unfair term in a contract concluded between a seller or supplier and a consumer is not subject to a time limit, subjects the action to enforce the restitutory effects of that finding to a limitation period, provided that the principles of equivalence and effectiveness are observed. It must therefore be held that the imposition of a limitation period on claims for restitution brought by consumers with a view to enforcing rights which they derive from Directive 93/13 is not, in itself, contrary to the principle of effectiveness, provided that its application does not make it in practice impossible or excessively difficult to exercise the rights conferred by that directive.

As regards, in particular, the principle of effectiveness, it should be noted that each case which raises the question whether a national procedural provision renders the application of EU law impossible or excessively difficult must be analysed in the light of the place of that provision in the proceedings as whole, the way in which they are conducted and their particular features, before the various national authorities. In that context, it is appropriate to take into consideration, where appropriate, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.

As regards the analysis of the characteristics of the limitation period at issue in the main proceedings in that case, the ECJ stated that that analysis must cover the duration of the limitation period and the detailed rules for its application, including the mechanism adopted to start the period running. In that respect, in order to be regarded as being compatible with the principle of effectiveness, a limitation period must be sufficient in practical terms to enable a consumer to prepare and bring an effective action in order to enforce the rights that he or she derives from Directive 93/13, in the form, inter alia, of a claim for restitution based on the unfairness of a contractual term.

Thus, as regards the starting point of a limitation period, such a period may be compatible with the principle of effectiveness only if the consumer has had the opportunity to become aware of his or her rights before that period begins to run or expires. In that case, the ECJ presupposed that the judicial interpretation of the national rules of procedure applicable in the main proceedings in that case does not require the consumer, apart from being aware of those facts, also has knowledge of the legal assessment of those facts, which entails that that consumer is also aware of the rights which he or she derives from Directive 93/13. However, in order for the detailed rules for the application of a limitation period to comply with the principle of effectiveness, it is not sufficient for those rules to provide that the consumer must be aware of the facts constituting the unfair nature of a contractual term, without having regard, first, to that consumer's knowledge of the rights he or she derives from Directive 93/13 and, second,

to the fact that that consumer has sufficient time to be able effectively to prepare and bring an action in order to assert those rights.

It was concluded that a limitation period such as the limitation period for the action for restitution of the mortgage charges at issue in the main proceedings in that case is not consistent with the principle of effectiveness where the detailed rules for its application do not take those two factors into consideration. As regards the question whether the consumer must be aware of the unfair nature of a contractual term and of his or her rights under Directive 93/13, it is possible that a national rule under which a limitation period cannot begin to run until a consumer is aware of the unfair nature of a contractual term and of the rights which he or she derives from Directive 93/13, which appears a priori to be consistent with the principle of effectiveness, may nevertheless infringe that principle if the length of that period is not sufficient in practical terms to enable the consumer to prepare and bring an effective action to assert his or her rights under that directive. Thus what is decisive is whether the consumer is aware of the legal assessment of the relevant facts.

The system of protection introduced by Directive 93/13 is based on the premiss that the consumer is in a position of weakness vis-à-vis the seller or supplier as regards both his or her bargaining power and level of knowledge, a situation that leads to that consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms. The seller or supplier's privileged position as regards the

level of information available to it continues to prevail after the contract has been concluded. Thus, where the unfair nature of certain standard terms has been established by settled national case law, banking institutions may be expected to be informed of this and to act accordingly. However, it cannot be presumed that a consumer's level of information, which is lower than that of the seller or supplier, includes knowledge of national case law on consumer law, even if that case law is well established. Although sellers or suppliers may be required to keep themselves informed of legal matters relating to the terms which they take the initiative to insert in contracts which they conclude with consumers in the course of ordinary commercial activity, in particular in the light of national case law relating to such terms, a similar attitude cannot be expected of consumers, given the occasional, or even exceptional, nature of the conclusion of a contract containing such a term (ECJ, C-810/21 to C-813/21).

7.2.4. In its ruling of 10 [June] 2021 in Joined Cases C-776/19 to C-782/19 *BNP Paribas Personal Finance SA*, the ECJ concluded, in light of its case law that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer, that the determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he or she would have been in had that term not existed. As a result, the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in

principle, a corresponding restitutory effect in respect of those same amounts. According to that ruling, the application of a limitation period to claims for restitution is not, in itself, contrary to the principle of effectiveness, provided that its application does not make it in practice impossible or excessively difficult to exercise the rights conferred by the relevant directive in that case. However, a limitation period may be compatible with the principle of effectiveness only if the person concerned has had the opportunity to become aware of his or her rights before that period begins to run or expires. On that basis, for example, a five-year limitation period may improperly impede the exercise of rights (compare C-776/19 to C-782/19, paragraphs 46 and 47; Supreme Court, 1 March 2024 in case CG.2022.207, point 14.4.1. of the reasoning). The ECJ also held similarly in Joined Cases C-295/04 to C-298/04 *Manfredi* and in Joined Cases C-415/20, C-419/20 and C-427/20 *Gräfendorfer*, paragraphs 52 and 53.

7.2.5. In the Austrian legal literature on the Austrian provision from which the Liechtenstein provision derives the view is taken that it is not so crucial to which period the limitation applies but rather the objective starting point for that period, even if it only lasts three years. Extensions to the limitation period are, however, not as such called for, in particular, as what is at issue is the awareness of the right and whether it is made more difficult to assert. In that connection, it will, however, also have to be determined what level of "awareness" the consumer must have. However, the ECJ has also held, inter alia, in Joined Cases C-224/19 and C-259/19 (paragraph 82) that consumer

protection is not absolute and that, in the interests of legal certainty, it is compatible with EU law to lay down reasonable time limits for bringing proceedings (compare Thomas Rabl, "Unbewusst – höchster Frust: Wie etwas verjährt, was man nicht kennt, und was der EuGH dazu sagt", *ecolex* 2021/68).

Martina Eliskases, ZFR 2020/240, 559, also takes the view in light of the ECJ ruling in C-698/18 and C-699/18 that the exercise of the rights conferred by the Unfair Contract Terms Directive may not be made in practice impossible or excessively difficult (principle of effectiveness). Member States must ensure adequate and effective means to achieve the objective of the Unfair Contract Terms Directive – that is to say, to prevent the continued use of unfair terms in consumer contracts. Therefore, also claims resulting from the use of unfair terms, in relation to which the consumer was not, or could not have been, aware of their invalidity, are subject to the application of a limitation period. A rule of that kind does not ensure effective consumer protection. Also the conclusion by way of analogy under Austrian law which limits the repayment of loan interest overpaid to a period of three years starting with the date on which the overpayment phase begins is in potential conflict with the requirement set out in the ruling mentioned immediately above as, here too, according to the dominant view, the limitation period starts to run independently of the consumer's awareness of the existence of the right to recovery. In recent years, the ECJ has demonstrated in numerous rulings its absolute determination to accord

consumers unconditional protection under the Unfair Contract Terms Directive (also at the expense of businesses). Based on this finding, it is highly probable, according to Eliskases, that the ECJ will also hold the Austrian three-year limitation period for the repayment of loan interest overpaid, applicable irrespective of the consumer's awareness, to be contrary to EU law (compare also Leupold and Gelbmann, commentary on the ECJ judgment of 16 July 2020, C-224/19, VbR 2020/139).

7.2.6. It should be mentioned that the principle of effectiveness, referred to many times above, has been recognised also by the EFTA Court at any rate in connection with the limitation periods for damages claims (compare E-10/17).

7.2.7. As the applicant correctly observed in his submission of 31 January 2025, received by the first instance court on 3 February 2025, treated as a suggestion to refer this case to the EFTA Court (pp. 9 and 10, paragraph 29), he has based his claim to recovery of kick-backs unlawfully withheld primarily on legal bases resulting from European law, namely an infringement of the obligation of transparency provided for in Article 8(3) of the Consumer Protection Act (*Konsumentenschutzgesetz*) (Article 3(1) and Articles 4 and 5 of Directive 93/13/EEC on unfair terms in consumer contracts) and the prohibition, as a rule, on the provision of benefits in connection with Article 19(1) of MiFID I and Article 26 of the Implementing Directive 2006/73/EC (compare also the appeal on a point of law of 30 May 2023, paragraph 14).

The legal position of the applicant vis-à-vis that of the defendant is comparable to that of a consumer, according to the facts of the ECJ ruling in C-810/21 to C-813/21 *Caixabank SA*. Namely, it is characterised by the fact that the applicant as a non-professional client faced the defendant in its capacity as investment firm. That entailed a weakness as regards bargaining power and level of knowledge, a situation that led to the applicant agreeing to terms drawn up in advance by the investment firm without being able to influence the content of those terms. This privileged position continued to prevail after the contract had been concluded. Unlike a non-professional client, it can be expected of the investment firm that it researches – for which, as a rule, it has the structures – whether the terms it uses are in accordance with the legal framework, which is not easily possible for a non-professional client. In addition, the applicant could not, by himself, specify the details of his claim due to lack of information but had to first, by way of an action in stages, bring an (information) action for account and commence a complex procedure which resulted, first, in the defendant providing him with the necessary information to enforce his right. This means that only as a result of this civil action was he able to learn the necessary facts and also of rights under MiFID I suitable for asserting his claim so that the view can be sustained, within the meaning of the case law cited immediately above, that Section 1480 of the Civil Code must be interpreted as meaning that only by reason of these subjective conditions being met did the three-year limitation period begin to run. This interpretation is also

entirely in conformity with the wording of the provision, which also does not indicate a contrary intention on the part of the historic legislator.

7.2.8. Fundamental objectives of MiFID I and the national provisions following the directive are the upholding and thus the protection of the interests of investors. That is to be ensured, inter alia, by the fact that investment firms must act "*honestly, fairly and professionally in accordance with the best interests of clients*". Member States must ensure this. On this point, too, the legal situation is comparable to that under consumer protection rules which require in the event of infringements of protective provisions penalties which are effective, proportionate and dissuasive (on the last point compare, inter alia, ECJ, C-565/12 *LCL Le Crédit Lyonnais SA*, paragraphs 43 to 45).

7.2.9. The right to the payment of interest on a sum paid but not due (and thus seemingly also on a sum unduly withheld) constitutes the expression of a general principle of recovery of sums paid but not due, intended to compensate for the unavailability of that sum (compare ECJ, Joined Cases C-415/20, C-419/20 and C-427/20 *Gräfendorfer*, paragraphs 52 and 53). Such a breach may concern any rule of EU law, whether it be a provision of primary or secondary law. The rights to repayment and to the payment of interest are the expression of a general principle, the application of which is not limited to certain breaches of EU law or excluded where there are other breaches. It follows that those rights may be relied on not only where a national authority has imposed the payment of

a sum of money, such as a levy or tax, on a person on the basis of an EU act which proves to be vitiated by illegality, but also in other situations (C-415/20 and others, *Gräfendorfer*, paragraphs 62 and 63). The right to the payment of interest on sums to be repaid constitutes the expression of a general principle of recovery of sums paid but not due (and therefore also of sums unduly withheld) (compare ECJ, C-322/22 *Dyrektor Izby Administracji Skarbowej we Wrocławiu*, paragraph 32).

7.2.10. With respect to the principles of equivalence and effectiveness it has already been mentioned that the detailed rules for the payment of interest should not lead to the person concerned being deprived of adequate compensation for the loss sustained, which presupposes, inter alia, that interest paid to that person covers the entire period running from the date on which the person paid the sum of money in question (or the date from which it was withheld from the person) to the date on which that sum is refunded to that person. It follows that EU law (EEA law) precludes a national legal mechanism which does not meet that requirement and which consequently does not allow for the effective exercise of the rights to a refund and to the payment of interest guaranteed by EU law (EEA law). That was held in particular in connection also with the principle of recovery of sums paid but not due (ECJ, C-322/22, paragraphs 32 and 38 to 41) and seemingly must also apply in the case of sums of money unduly withheld.

7.2.11. Also the general principles of law developed by the ECJ concerning directly effective

Community law take precedence over national law; it is not necessary for the national court to request or to await the prior setting aside of corresponding provisions by legislative or other constitutional means (RIS-Justiz RS0109951), as proposed, in essence, in the defendant's submission. Thus a national court must alter established case law, where necessary, if that is based on an interpretation of national law that is incompatible with EU law (EEA law) (compare, inter alia, ECJ, C-614/14, *Atanas Ognyanov*, paragraphs 34 and 35). According to the ECJ's latest case law, in order to fulfil this obligation, establish the full effect of EU law (EEA law) and ensure legal protection also between private parties *also in relation to rights derived from directives* (emphasis added by the Senate), national courts are no longer merely limited to interpreting national law in conformity with a directive but are also entitled to apply the principle of primacy (ECJ (Grand Chamber), 20 February 2024, C-715/20, *K.L.* v *X sp. z o.o.*; compare also RIS-Justiz RS0109951(T3 and T6); and RS0075866 (T4)).

7.2.12. The applicant's claim against the defendant for CHF XXX in the main action awarded by final judgment is based on Section 1009a of the Civil Code and on accompanying banking law provisions in connection with the transposition of MiFID I, thus in EEA law. In national law the claim is based on Sections 877, 879(1), 1431 and 1437 of the Civil Code and as a restitution claim of that kind is comparable with those claims to which a party is entitled, in accordance with the cited case law of the ECJ, for a sum unduly withheld or of which the party was unduly

deprived and in relation to which it has the right – because of the withholding of this sum of money – to payment of remuneration interest for the entire withholding period.

7.2.13. In light of these considerations, the Princely Supreme Court considers it necessary to refer the second question to the Court in the event that the first question is answered in the negative.

8. 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.

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

Princely Supreme Court

First Senate

Vaduz, 27 May 2025

The President

University Professor (retired) Dr Hubertus Schumacher

The accuracy of this copy is confirmed by

Carmen Semmler

Method of appeal:

No appeal may be brought against this order.