

EFTA Court
1, Rue du Fort Thüngen
L-1499 Luxemburg-Kirchberg

Vaduz, 24 September 2025

To the President and Members of the EFTA Court

Written Observations

submitted pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court by the

Government of the Principality of Liechtenstein

represented by Dr. Andrea Entner-Koch, Director of the EEA Coordination Unit (*Leiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein*), Dr. Claudia Bösch, Deputy Director of the EEA Coordination Unit (*Stellvertretende Leiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein*) and by Hansjörg Lingg, from BATLINER WANGER BATLINER Attorneys-at-Law Ltd, acting as agents of the Government of the Principality of Liechtenstein,

in the Case E-9/25

Peter Ploerer

v

LGT Bank AG

in which the Supreme Court of the Principality of Liechtenstein (*Fürstlicher Oberster Gerichtshof*), hereinafter referred to as the "Supreme Court" or "the referring court", has requested the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States and the Establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as "ESA/Court Agreement") regarding the interpretation of 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 (hereinafter referred to also as "Directive 2004/39" or "MiFID I") and of other Directives referred to in the Supreme Court's request.

The Government of the Principality of Liechtenstein (hereinafter referred to as the "Liechtenstein Government") has the honour to submit the following observations:

I. Facts and Procedure

¹ The claimant in the national proceedings, Peter Ploerer (hereinafter referred to as "Ploerer" or "the claimant"), maintained a business relationship from 22 September 2004 to 31 January 2012 as a non-professional banking customer with the defendant in the national proceedings, LGT Bank AG (hereinafter referred to as "LGT" or "defendant"), a bank registered in the Liechtenstein commercial register which, among other things, offers investment services.

² The business relationship between Ploerer and LGT was based on the General Terms and Conditions, edition 09/2004, which came into force on 1 September 2004 (hereinafter referred to as "GTC"). Clause 15 of the GTC dealt with special remuneration such as commissions, portfolio payments, etc. (hereinafter referred to as "remuneration" or "kickbacks"). LGT thus granted itself the right, on the one hand, to make remuneration payments to third parties based on the amount of assets managed by the bank customer and, on the other hand, to receive remuneration payments from third parties and to retain them as additional remuneration. The aforementioned GTC clause was deemed invalid

in court proceedings preceding the national proceedings.

- ³ During its business relationship with Ploerer, LGT received kickbacks and thus remuneration payments within the meaning of the GTC and retained them for itself.
- ⁴ On 8 February 2019, Ploerer filed a lawsuit (action in stages) against LGT at the Liechtenstein Court of Justice (*Fürstliches Landgericht*, hereinafter referred to as "Court of Justice"), which was served on LGT on 25 February 2019. Ploerer claimed for accounting/information with regard to the kickbacks received and retained by LGT. This claim was granted by the Court of Appeal (*Fürstliches Obergericht*, hereinafter referred to as "the Court of Appeal") with legal effect.
- ⁵ The subsequent request by Ploerer for the recovery of the kickbacks received and retained by LGT was successful. LGT was obliged to surrender the kickbacks received from third parties and wrongfully withheld from Ploerer. The decision on the main issue (recovery of the kickbacks) is final. This legally settled claim for recovery is no longer the subject of the national proceedings.
- ⁶ The subject matter of the national proceedings is now solely the claimant's claim for interest on remuneration. The claimant is claiming interest on the kickbacks wrongfully withheld from him by LGT, starting from the dates on which LGT withheld these amounts from him. The Court of Justice awarded him interest at a rate of 5% from 25 February 2019, i.e. from the date of service of the claimant's action in stages (which did not yet specify a concrete amount) on LGT.
- ⁷ In contrast to the Court of Appeal, the referring court awarded the claimant interest at a rate of 5% from the dates on which LGT had wrongfully withheld the kickbacks. It justified this decision on the basis of the MiFID I Directive and the principles of equivalence and effectiveness. The principal amount had been withheld from the claimant without legal justification, which is why he was entitled to payment of interest for the entire period of withholding, otherwise he would be denied adequate compensation for the losses suffered. The referring

court did not apply Section 1480 of the Civil Code (ABGB), which provides for a three-year limitation period for interest, on the basis of the overriding principle of effectiveness under EEA law.

- ⁸ The Constitutional Court of the Principality of Liechtenstein (*Staatsgerichtshof des Fürstentums Liechtenstein*, hereinafter referred to as "the Constitutional Court") overturned the judgment of the referring court, which had awarded Ploerer his claim for interest for the entire period of withholding, on the grounds of a lack of reasoning and thus a violation of constitutionally guaranteed rights (Judgment of 2 December 2024, StGH 2024/035, available at www.gerichtsentscheidungen.li). The Constitutional Court objected that the referring court had not addressed the decision of the European Court of Justice (hereinafter "ECJ") in the *Rust-Hackner* case (joined cases C-355/18 to C-357/18 and C-479/18; detailed below) in its decision. The referring court had to examine whether the national rules on the limitation period for interest on remuneration affected the effectiveness of the principal claim within the meaning of the principle of effectiveness. The Austrian Supreme Court has consistently ruled that, in the case of the rescission of a life insurance contract under the law of unjust enrichment as a result of late withdrawal, interest on remuneration generally becomes time-barred within three years of the date on which it became objectively possible to exercise the right, although this principle may be deviated from in specific individual cases where the person concerned has been prevented from cancelling the contract due to the limitation period. The referring court did not address this case law from the life insurance sector and its application to the national proceedings.
- ⁹ The Constitutional Court also justified its decision on the grounds that the application of the default interest rate of 5% could, under certain circumstances, result in interest that, given the known conditions on the financial market, could not realistically have been achieved by an investor who was not particularly risk-averse. In the *Rust-Hackner* case, the ECJ had expressly stated that such false incentives for speculation should be avoided.
- ¹⁰ Finally, the Constitutional Court pointed out to the referring court that it had

interpreted Section 1480 of the Civil Code contrary to its wording and contrary to the intention of the historical legislator. This was inadmissible.

- ¹¹ In the second phase of the national proceedings, the referring court is required to give a new ruling in accordance with the legal opinion of the Constitutional Court. It has initially decided to seek an opinion from the EFTA Court. In its request, the referring court confirms that the national proceedings now concern only the claimant's claim for additional interest, while the underlying principal claim, namely the recovery of wrongfully withheld kickbacks, has been decided with legal effect in favour of the claimant.

II. The Questions referred to the EFTA Court

- ¹² The Supreme Court has stayed its proceedings in order to refer the following questions to the EFTA court:

- ¹³ *"1. 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?"*

- ¹⁴ 2. *If the first question is answered in the negative, the referring court asks the following: 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?"*

III. Applicable Law

1. EEA and Union Law

- ¹⁵ In its request for an opinion, the referring court specifically cited the directives whose interpretation it seeks (namely Directives 2004/39 [MiFID I], 2006/73/EC [Implementing Directive], 93/13/EEC [hereinafter "Unfair Terms Directive"], 90/619/EEC, 2002/83/EC and 2009/138/EC) and reproduced verbatim the provisions which it considers relevant. It is therefore not necessary to reproduce the provisions of those directives verbatim.

2. National Law

- ¹⁶ In its request for an opinion, the referring court also reproduced verbatim the

sources of Liechtenstein law which it considers relevant. Here too, it is not necessary to repeat the verbatim reproduction of individual provisions.

¹⁷ However, the Liechtenstein Government would like to point out that on 1 February 2025, a law on the provision of investment services and the exercise of investment activities (Investment Services Act; WPDG) was enacted and came into force, whereby the MiFID II rules of conduct for banks, insofar as they provide investment services and/or investment activities, and investment firms, which were previously implemented in the Banking Act and the Banking Ordinance, were removed from these regulations and transferred to the new WPDG and the associated ordinance (WPDV). The provisions of the Banking Act (Art. 8h (2) and (3)) and the Banking Ordinance (Annex 7.1, Chapter III, (1) and (5)), which were reproduced verbatim by the referring court, were repealed.

¹⁸ The European requirements regarding the basic conditions for granting or accepting benefits have now been implemented in the Investment Services Act (WPDG) and the Investment Services Ordinance (WPDV). The relevant provisions are as follows:

¹⁹ Art. 10 WPDG:

"Granting and acceptance of benefits"

1) A bank or investment firm offering independent investment advice or portfolio management is prohibited from accepting and retaining fees, commissions or other monetary or non-monetary benefits (inducements) from a third party or a person acting on behalf of a third party for the provision of services to its customers (). Minor non-monetary benefits which may improve the quality of service for the customer and which, by their nature and scope, do not suggest that they compromise the bank's or investment firm's duty to act in the best interests of its customers, must be disclosed in an unambiguous manner and are not covered by this paragraph.

2) A bank or investment firm does not act honestly, honestly and professionally in the best interests of its clients in accordance with Article 6(1) and does not fulfil the obligation under Article 5 if it grants or receives inducements in connection with the provision of an investment service or ancillary service to or from a party other than

the client or a person acting on behalf of the client.

3) The granting or acceptance of inducements pursuant to paragraph 2 is permissible if:

a) the inducements:

- 1. are intended to improve the quality of the respective service for the client;*
- 2. do not compromise the obligation of the bank or investment firm to act in the best interests of its clients; and*
- 3. the existence, nature and amount of the benefit, or, where the amount cannot be ascertained, the manner in which that amount is calculated, are disclosed to the client in a comprehensive, accurate and understandable manner before the provision of the relevant investment or ancillary service; where applicable, the bank or investment firm must inform the client of the mechanism for passing on to the client the inducements it has received in connection with the provision of the investment service and ancillary service; or*

b) the inducements enable or are necessary for the provision of investment services, such as custody fees, settlement and trading venue fees, administrative charges or statutory fees, and by their nature cannot give rise to conflicts with the obligation of the bank or investment firm to act honestly, fairly and professionally in the best interests of its customers.

4) The government shall regulate the details of the granting and acceptance of benefits by ordinance."

20

Art. 5 WPDV:

"B. Granting and acceptance of benefits

Principle

1) Banks and investment firms that pay or receive a fee or commission or grant or receive a non-monetary benefit in connection with the provision of an investment or ancillary service to clients shall ensure that all conditions under Art. 10 of the Investment Services Act and under paragraphs 2 to 8 are met at all times.

2) Fees, commissions or non-monetary benefits shall be deemed to be intended to improve the quality of the respective service for the client if the following conditions are met:

a) They are justified by the provision of an additional or higher-level service to the respective customer, which is proportionate to the scope of the incentives received, in particular:

- 1. the provision of non-independent investment advice and access to a wide range of suitable financial instruments, including an appropriate number of instruments from third-party product providers without close links to the bank or investment firm concerned;*
- 2. the provision of non-independent investment advice either in combination with an offer to the customer to assess at least once a year whether the financial instruments in which the customer has invested are still suitable, or in combination with another ongoing service likely to be of value to the customer, such as advice on the proposed optimal portfolio structure for the customer;*
- 3. granting access at a competitive price to a wide range of financial instruments that are suitable for meeting the client's needs, including an appropriate number of instruments from third-party product providers that do not have close links to the bank or investment firm in question; either in combination with the provision of instruments that add value, such as objective information tools that help the customer in question to make investment decisions or enable them to monitor, model and adjust the range of financial instruments in which they have invested, or in combination with the provision of periodic reports on the performance and costs and fees of the financial instruments; or*
- 4. where access to investment advice is facilitated by the on-site availability of qualified advisers who are able to provide clients with personalised investment services and advice.*

b) They do not directly benefit the recipient bank or investment firm, its shareholders or employees, without material benefit to the client concerned.

c) They are justified by the provision of an ongoing benefit to the client concerned in relation to an ongoing incentive.

3) Fees, commissions or non-monetary benefits are not considered permissible if the provision of the relevant services to the customer is biased or distorted as a result of the fee, commission or non-monetary benefit.

4) Banks and investment firms must continuously comply with the conditions set out in paragraphs 2 and 3 for as long as they receive or pay the fee, commission or non-monetary benefit.

5) Banks and investment firms must keep evidence that any fees, commissions or non-monetary benefits they pay or grant or receive are intended to improve the quality of the relevant service to the customer by:

a) maintaining an internal list of all fees, commissions and non-monetary benefits received by the bank or investment firm from a third party in connection with the provision of investment or ancillary services; and

b) recording how the fees, commissions and non-monetary benefits paid or granted or received or intended to be paid or granted by the bank or investment firm improve the quality of the services provided to the clients concerned and what steps have been taken to ensure that the bank's or investment firm's duty to act honestly, fairly and professionally in the best interests of its clients is not compromised.

6) With regard to payments or benefits received from or paid or granted to third parties, banks and investment firms must disclose the following information to the customer:

a) Before providing the relevant investment or ancillary service, the bank or investment firm shall disclose to the customer information about the relevant payment or benefit in accordance with Art. 10 para. 3 lit. a no. 3 of the Investment Services Act. Minor non-monetary benefits may be described in general terms. Other non-monetary benefits received or granted by the bank or investment firm in connection with the investment service provided to a client shall be priced and disclosed separately.

b) If a bank or investment firm was unable to determine in advance the amount of a payment received or made or of a benefit received or granted and instead disclosed to the customer the manner in which that amount would be calculated, it shall subsequently inform the customer of the exact amount of the payment it received or made or of the benefit it received or granted.

c) As long as the bank or investment firm receives (ongoing) incentives in connection with the investment services provided to the clients concerned, it shall inform its clients individually at least once a year of the actual amount of payments or benefits received or granted. Minor non-monetary benefits may be described in general terms.

7) When implementing the requirements under paragraph 6, banks and investment firms shall take into account the provisions on costs and fees under Article 9(1)(e) of the Investment Services Act and Article 50 of Delegated Regulation (EU) 2017/5654.

8) If several banks and/or several investment firms are involved in a distribution

channel, each bank or investment firm providing an investment or ancillary service shall fulfil its disclosure obligations under para. 6 towards its clients.

²¹ Art. 6 WPDV:

"Incentives for independent investment advice and portfolio management

1) Banks and investment firms providing independent investment advice or portfolio management must:

a) return to the customer, as soon as reasonably practicable after receipt, any fees, commissions or other monetary benefits paid or granted by a third party or a person acting on behalf of a third party in connection with the services provided to a customer. All fees, commissions or monetary benefits received from third parties in connection with the provision of independent investment advice and portfolio management must be passed on to the client in full;

b) introduce and implement principles that ensure that any fees, commissions or other monetary benefits paid or granted in connection with independent investment advice or portfolio management by a third party or a person acting on behalf of a third party are allocated to and passed on to each individual customer;

c) inform their clients about the fees, commissions or other monetary benefits passed on to them, in particular in their regular reports to the client.

2) Banks and investment firms providing independent investment advice or portfolio management may not accept non-monetary benefits unless they are insignificant. The following benefits are permissible as insignificant non-monetary benefits:

a) information or documentation on a financial instrument or investment service that is generic in nature or tailored to the situation of a specific client;

b) Written material from a third party that is commissioned and paid for by an issuer or potential issuer from the corporate sector to promote a new issue by that company, or where the third-party firm is contractually obliged by the issuer and remunerated to produce such material on an ongoing basis, provided that the relationship is clearly disclosed in the material concerned and the material is made available simultaneously to all banks and investment firms interested in it or to the public;

c) Participation in conferences, seminars and other educational events on the ad-

vantages and characteristics of a particular financial instrument or investment service;

d) hospitality of a reasonable and insignificant value, such as hospitality during business meetings or the conferences, seminars and other educational events referred to in point c); and

e) other minor non-monetary benefits that may improve the quality of the service provided to the client, taking into account the total amount of benefits granted by a single company or a single group of companies, and which are of such a nature and scope that they are unlikely to impair a bank's or investment firm's duty to act in the best interests of the client.

3) Permissible minor non-monetary benefits must be reasonable and proportionate and of a scale that is unlikely to influence the behaviour of the bank or investment firm in a way that is detrimental to the interests of the client concerned.

4) Minor non-monetary benefits must be disclosed before the relevant investment or ancillary services are provided to clients. Minor non-monetary benefits may be described generically in accordance with Art. 5(6)(a).

IV. Observations

A. Admissibility of the request

²² Pursuant to Article 34 of the ESA/Court Agreement, the EFTA Court shall give opinions on the interpretation of the EEA Agreement where a national court considers such an opinion necessary for the decision in the national proceedings. The purpose of the referral procedure is therefore to ensure the uniform interpretation of EEA law (see EFTA Court judgment in Case E-14/20, para. 39; on the preliminary ruling procedure before the ECJ, see, for example, ECJ judgment of 5 July 2016, Case C-614/14, *Atanas Ognyanov*, para. 16). Conversely, this means that the EFTA Court is not competent to interpret national law. Rather, it must confine itself to interpreting EEA law.

²³ According to the established case law of the EFTA Court (see the aforementioned Case E-14/20) and the ECJ (see ECJ judgment of 27 March 2014, Case C-565/12, *LCL Le Crédit Lyonnais SA*, para. 37), there is a presumption that the questions referred

by the national court are relevant to the decision. Requests from national courts are only rejected as inadmissible if (a) the interpretation of European law sought is manifestly unrelated to the facts or subject matter of the main proceedings, (b) the problem is hypothetical, or if c) the court seized does not have the factual and legal information necessary to give a useful answer to the questions referred to it.

²⁴ However, limitation periods in general and the limitation period for interest on remuneration in particular are not regulated by EEA law, but are exclusively governed by national law. Nor is there any provision in EEA law on the limitation period for interest on remuneration. Neither the directives on which the referring court relies nor other sources of EEA law contain any provisions on limitation periods in general or limitation periods relating to interest. Consequently, the EFTA Court has not yet dealt with the issue of limitation periods for interest.

²⁵ In the national proceedings, the referring court must interpret a national statute of limitations provision, now bound by the legal opinion of the Constitutional Court (see StGH 2024/035, loc. cit., second ruling). It is clear from the questions referred and the detailed request for an opinion that, in the absence of an EEA provision, the referring court wishes the EFTA Court to interpret a provision of national law (Section 1480 of the Civil Code). The obviousness of this intention is apparent from the original text of the request in German. There (on p. 55), the request is summarized with the following heading:

"Obtaining an opinion from the EFTA Court on the interpretation of Section 1480 ABGB in the context of EEA law."

²⁶ The assessment of national law is not the responsibility of the EFTA Court, but of the national courts. The need asserted by the referring court for the EFTA Court to interpret the provisions of the directives cited is in fact a poorly concealed desire for the EFTA Court to deal with a national limitation provision.

²⁷ The case law of the EFTA Court and the ECJ on the principles of equivalence and effectiveness states that the (procedural) rules of the domestic legal system must comply with the aforementioned principles so that the exercise of rights arising from European law is not made practically impossible or excessively difficult.

- ²⁸ The national proceedings in which the claimant successfully asserted his claim for recovery based, inter alia, on EEA legislation (the Unfair Terms Directive and MiFID I) demonstrate that the purpose arising from the MiFID I Directive (investor protection) is guaranteed and that these provisions are effective in practice. This proves the effectiveness of the rights granted under EEA law. The national limitation provisions, according to which interest on successfully claimed kickbacks becomes time-barred after three years, did not constitute any obstacle or hindrance for the claimant.
- ²⁹ The referring court requests an opinion from the EFTA Court on the application of the principles of equivalence and effectiveness to a national statute of limitations on interest. The referring court implicitly acknowledges (e.g. p. 34 of the request) that there is no EEA legislation on the limitation period for interest (on remuneration). It therefore wishes to know from the EFTA Court whether the principles of equivalence and effectiveness developed by the case law of the ECJ preclude the national provision of Section 1480 of the Civil Code. According to the referring court, these principles cannot be readily applied to the facts of the national proceedings. The referring court finds that there are ambiguities.
- ³⁰ The Liechtenstein Government cannot see to what extent there is any lack of clarity with regard to the aforementioned principles of EEA law. The case law is clear: In the absence of relevant European law, national (procedural) legal provisions must not undermine or replace the objectives of EEA law. National (procedural) provisions intended to ensure the protection of individuals on the basis of European law must not render the exercise of these rights practically impossible or excessively difficult (for the relevant case law, see below in margin note 36 f.).
- ³¹ It is equally clear, as both the EFTA Court and the ECJ have consistently ruled, that it is precisely the task of the national court to examine in the national proceedings whether a national provision makes it practically impossible or excessively difficult to assert rights granted to individuals by European law. In other words, it is for the national court to examine the compatibility of the national provision applicable in the national proceedings with the principles of equivalence and effectiveness (see,

among many others, ECJ judgment cases C-295/04 to C-298/04, *Manfredi*, para. 82; EFTA Court judgment E-3/15, *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz*, para. 82).

- ³² For all the reasons stated above, the Liechtenstein Government considers that the request for an Advisory Opinion should be rejected as inadmissible. Only in the event that the EFTA Court does not share this view does the Liechtenstein Government submit the following in response to the request of the referring court.

B. Preliminary comments

- ³³ The Liechtenstein Government would like to begin by reiterating that the subject matter of the national proceedings is solely the claimant's claim for interest and its possible limitation period. The decision of the Liechtenstein courts on the main issue has already become final. This decision was made not least against the background of the EFTA Court's judgment of 15 July 2021 in Case E-14/20 (*Liti-Link AG v LGT Bank AG*). It is undisputed between the parties that interest of 5% is payable. However, it is disputed from when the interest is payable as an ancillary benefit to the recovery of the kickbacks and whether the claim to interest is already time-barred.

- ³⁴ Based on the limited subject matter of the national proceedings referred to above, the Liechtenstein Government, after introductory general remarks on the principles of equivalence and effectiveness and on the relevant national provisions (interest on remuneration and the limitation period for such interest), the Liechtenstein Government discusses in detail the case law of the ECJ cited by the referring court and the application of the principles developed by the ECJ to the specific facts of the case.

1. Principles of equivalence and effectiveness

- ³⁵ The ECJ and the EFTA Court describe the principles of equivalence and effectiveness in their established case law as follows:

- ³⁶ In the absence of European law provisions, it is a matter of the domestic legal system of each Member State, in accordance with the principle of procedural autonomy, to regulate the national provisions (e.g. procedural rules for legal actions) which are intended to ensure the protection of the rights of individuals under European law, whereby these national provisions must not a) be less favourable than those governing similar situations under domestic law (= principle of equivalence), and b) render the exercise of rights conferred by European law practically impossible or excessively difficult (= principle of effectiveness) (see, for example, as part of the extensive case law: ECJ judgment of 25 January 2024, cases C-810/21 to C-813/21, *Caixabank*, para. 42; ECJ judgment of 10 June 2021, cases C-776/19 to C-782/19, *BNP Paribas*, para. 27; ECJ judgment of 22 June 2022, case C-267/20, *Volvo*, para. 50; ECJ judgment of 13 July 2006, cases C-295/04 to C-298/04, *Manfredi*, para. 62; Judgment of the EFTA Court of 17 September 2018, case E-10/17, *Nye Kystlink AS v Color Group AS and Color Line AS*, para. 33 et seq. and 110 et seq.; Judgment of the EFTA Court of 2 October 2015, case E-3/15, *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz*, para. 63; Judgment of the EFTA Court of 29 August 2014, case E-24/13, *Casino Admiral AG v Wolfgang Egger*, para. 72).
- ³⁷ With regard to the principle of effectiveness, which is of particular interest in the present case, the relevant case law states that any case in which the question arises as to whether a national procedural rule renders the application of European law impossible or excessively difficult must be examined taking into account (a) the position of that rule in the overall procedure, b) the course of the proceedings and c) the specific features of the proceedings before the various national authorities, taking into account, where appropriate, the principles underlying the national system of legal protection, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (see ECJ judgment *Caixabank*, para. 45; ECJ judgment *BNP Paribas*, para. 28; EFTA Court E-24/13, para. 73).
- ³⁸ It is for the national court to examine whether the national provisions in question comply with the principles of equivalence and effectiveness (see EFTA Court judgment of 30 May 2018, case E-6/17, *Fjarskipti hf. v Siminn hf.*, para. 31, and ECJ judgment of 19 September 2020, Cases C-392/04 and C-422/04, *i-21 Germany GmbH*,

para. 57).

³⁹ The case law cited has in common that the application of the principle of equivalence and the principle of effectiveness requires that European law grants rights to individuals. The guarantee of these rights must not be undermined by national law (e.g. national procedural rules). Consequently, they must not be rendered impossible or excessively difficult in a discriminatory manner by national procedural rules.

⁴⁰ The principles of equivalence and effectiveness thus aim to ensure the non-discriminatory (equivalent) and effective application of European law in the Member States or Contracting Parties, while at the same time taking into account their respective specific characteristics. This addresses the principles of subsidiarity and proportionality (see also Michael Potacs, *Effet utile als Auslegungsgrundsatz*, EUR, issue 4, 2009, p. 480 f.). The courts are required to apply these principles when assessing the conformity of national (procedural) provisions with European law in the context of weighing up goods and interests.

2. Interest on remuneration

⁴¹ Due to the complexity of the national proceedings, the Liechtenstein Government emphasises the relevant legal framework with regard to interest on remuneration. As mentioned at the outset, the only issue currently still in dispute or not yet decided with legal force in the national proceedings is from when LGT owes the claimant interest on the kickbacks successfully claimed in court and whether the claim for interest is already time-barred.

⁴² The subject of dispute in the national proceedings is what is known as interest on remuneration (*Vergütungszinsen*). Interest on remuneration is interest on existing debts due to unjust enrichment. Liechtenstein law does not contain any provisions on interest on remuneration; rather, it has been developed by case law. Liechtenstein law only recognizes interest on arrears, i.e., interest that a defaulting debtor owes to the creditor either on the basis of a contractual provision or by operation of law as compensation for the delayed use of his money (see Dominik Schindl, *Vergütungszinsen*, § 1480 ABGB und Effektivitätsgrundsatz, in: ÖBA 2025, 22, issue 1 of January 15, 2025).

⁴³ In terms of the facts of the case, it should be noted at this point that it is undisputed in the national proceedings that the plaintiff is entitled to interest on remuneration at a rate of 5%.

3. Limitation of interest on remuneration

⁴⁴ As has been explained above, the subject matter of the national proceedings is solely the claimant's claim for interest and its possible limitation period. Provisions concerning the limitation period of interest on remuneration are part of civil law and thus not covered by the scope of the EEA Agreement. Accordingly, EEA Law, in particular the directives mentioned in question 1, does not stipulate any rules concerning this matter.

⁴⁵ Hence, it is for the national legislator to decide on national rules concerning the limitation period of interest on remuneration. Consequently, it is for the national courts to decide in specific cases. Both the EFTA Court as well as the ECJ have held in numerous cases that in the absence of harmonised rules, the EEA States retain the right to apply procedural rules provided for under their national legal system (see the EFTA Court in Cases E-11/12, *Swiss Life*, para. 76, and E-10/17, *Nye Kystlink AS and Color Group AS*, para. 73; and the ECJ in Case C-360/18, *Hauptzollamt Krefeld*, para. 46).

⁴⁶ In Liechtenstein, according to Section 1480 of the Civil Code, claims for outstanding annual payments, in particular interest, expire after three years. Austrian case law consistently applies the three-year limitation period of Section 1480 ABGB to interest on remuneration as well (see the case law references in Schindl, loc. cit., para. 2.1). In view of the identical legal situation in Liechtenstein, this case law is noteworthy.

⁴⁷ The established case law in Austria on the commencement of the limitation period in general and on the commencement of the limitation period for interest on remuneration in particular states in principle that the limitation period begins to run when it first becomes objectively possible to assert the claim.

⁴⁸ In the national proceedings, the Court of Appeal awarded the interest owed from the date of the claiming the wrongfully withheld kickbacks, or specifically from the date of service of the claim (action in stages) on the defendant (i.e. from 25 February 2019).

⁴⁹ This decision is in line with established case law in Austria, according to which the limitation period for interest on remuneration begins with the objective possibility of assertion.

⁵⁰ In the national proceedings, the referring court did not apply Section 1480 of the Civil Code on the grounds that it was allegedly contrary to EEA law and upheld its (later overturned by the Constitutional Court) decision to award the claimant interest on remuneration from the dates on which the kickbacks were withheld (and thus staggered from 1 January 2006) based instead on Section 1479 of the Civil Code, which provides for a general limitation period of 30 years.

⁵¹ For the sake of completeness, the Liechtenstein Government adds that it was not disputed in the national proceedings that the limitation period applies to the individual claims themselves and not to the right to claim for interest in principle (see Schindl, loc. cit., para. 2.2.3, for the distinction). The Court of Appeal therefore awarded the claimant interest from the date of claiming the recovery of the kickbacks and "only" rejected the additional interest claim for the period prior to that date. This is in line with the wording of Section 1480 of the Civil Code, according to which "*the right itself [...] becomes time-barred after 30 years of non-use.*"

A. Question 1

1. Relevance of cited case law

⁵² In support of the first question referred, the referring court cites the ECJ judgment of 19 December 2019, *Rust-Hackner*, cases C-355/18 to C-357/18. In the national proceedings, the referring court took the view that Section 1480 of the Civil Code violated the principle of effectiveness and was therefore not applicable. After examining the ECJ judgment in *Rust-Hackner*, the referring court is unclear as to

whether and, if so, how the principles described in that judgment can be applied to the facts of the case before it.

⁵³ First of all, the Liechtenstein Government emphasizes that the principle of interpreting national law in accordance with EEA law is subject to certain restrictions. For example, the obligation of national courts to refer to the content of EEA law when interpreting and applying the relevant provisions of national law is limited by general principles of law and may not serve as a basis for an interpretation contrary to the wording of national law (*contra legem*) (ECJ judgment of 9 April 2024, *Profi Credit Polska*, case C-582/21, para. 63 = EuZW, 599). Consequently, in the national proceedings, the Constitutional Court overturned the relevant decision of the referring court on the grounds of a violation of the constitutionally guaranteed right to a statement of reasons (StGH 2024/035, loc. cit., para. 3.7).

⁵⁴ The ECJ decision *in Rust-Hackner* deals with the right to cancel a life insurance contract and thus serves to interpret various European directives that provide for such rights of cancellation. It primarily concerns questions of time in connection with the exercise of the right of cancellation (cancellation periods). The ECJ states in its introduction that Member States must take into account the principle of effectiveness when implementing the directives concerned into national law and thus when determining the modalities for exercising the right of cancellation. The purpose of the directive, namely to ensure that the policyholder can effectively exercise his right of cancellation, must be guaranteed (para. 62ff.). Consequently, the ECJ answered in the negative the question referred by the national court as to whether a national provision under which a policyholder is only reimbursed the surrender value when cancelling a life insurance contract is compatible with the relevant European directives (para. 99 ff.). The ECJ took the view that this provision of national law impermissibly undermines the practical effectiveness of the right of cancellation. There was no incentive for a policyholder to cancel a life insurance contract because it did not meet his needs, precisely because the legal consequences of cancelling the contract would be the same as those of terminating the contract, in which case the policyholder would have a contract that met his needs but would terminate it for other reasons. In the opinion of the ECJ, the contested national provision thus deprives the right of cancellation provided for under European law of any practical

effect (para. 106 et seq.).

- ⁵⁵ Finally, the ECJ had to assess the question of the conformity with European law of a national provision according to which interest on remuneration for amounts reclaimed on the grounds of unjust enrichment is subject to a limitation period of three years (para. 112 et seq.). This national provision refers to Section 1480 of the Austrian Civil Code, which is identical to the Liechtenstein version. The ECJ initially noted that this national limitation provision only concerned interest on remuneration, but did not directly affect the policyholder's right to cancel the contract (para. 116). The referring court itself had to examine whether such a limitation provision was capable of affecting the effectiveness of the policyholder's right of cancellation under European law (para. 117). In making this assessment, the legal complexity of insurance contracts and the considerable financial obligations that may exist over a potentially very long period of time had to be taken into account. If, taking such circumstances into account, it appears that a policyholder does not exercise the right of cancellation granted to him under European law, even though the contract does not meet his needs, such a national limitation provision could be suitable for impairing the right of cancellation (para. 118 f.). However, any advantages that the policyholder might derive from a delayed withdrawal should be disregarded in order to avoid speculative gains (para. 120).
- ⁵⁶ The Liechtenstein Government notes that the *Rust-Hackner* case was based on a different financial product (life insurance contract) than the case at issue in the relevant national proceedings (securities investment). However, the facts of the case here and there are based on the same national provision, namely Section 1480 of the Civil Code (the wording of which is identical in Austria and in Liechtenstein). In both underlying factual constellations, the question of limitation arises with regard to interest on remuneration due to unjust enrichment.
- ⁵⁷ What the ECJ stated in the *Rust-Hackner* case can therefore be readily applied to the constellation at issue here. The Liechtenstein government cannot understand the ambiguities and uncertainties expressed by the referring court in this regard. The ECJ was called upon to assess the conformity with European law of a national provision under which interest on remuneration is subject to a limitation period of

three years. The context (life insurance vs. securities investment) is slightly different, but not in a decisive way. The decisive factors are the same underlying national limitation provision and the reference to interest on remuneration. In both cases, the principles of equivalence and effectiveness dictate that the national provision must not undermine the rights of policyholders or investors to reimbursement of wrongfully paid premiums or the recovery of wrongfully withheld kickbacks. The transferability of the ECJ's considerations in *Rust-Hackner* to the present case is evident.

⁵⁸ In *Rust-Hackner*, the ECJ clearly states that the national statute of limitations (Section 1480 of the Civil Code) does not directly affect the right of a life insurance policyholder to cancel the contract, insofar as the limitation period only applies to interest on remuneration, in contrast to limitation provisions that relate to the main claim itself. Time limits that directly affect the exercise of the right of cancellation relate to the principal claim, i.e. the right to cancel a contract and reclaim insurance premiums paid without legal basis. Without further circumstances, a limitation provision for interest on remuneration such as that in Section 1480 of the Civil Code does not affect the policyholder's right to withdraw and reclaim premiums.

⁵⁹ The assessment criteria formulated by the ECJ are clear: It must be examined whether the national provision on the limitation period for interest on remuneration has such an impact on the principal right granted under EEA law (in this case: the right to the recovery of wrongfully withheld kickbacks) that it makes the exercise of that right practically impossible or excessively difficult.

⁶⁰ It is apparent that the limitation provision in question does not have this effect, since the claimant in the national proceedings was able to successfully assert and enforce his claim for recovery of the kickbacks withheld from him. It is not apparent to what extent he could have been influenced by the limitation provision for remuneration interest when deciding to assert his claim for recovery, let alone that the exercise of his right would have been made impossible or excessively difficult. On the contrary, the successful assertion of his main claim proves the opposite (see also Schindl, loc. cit., para. 3.3 f.).

- ⁶¹ The Liechtenstein Government would also like to note that in the *Rust-Hackner* case, the policyholders concerned actually and actively paid insurance premiums. The ECJ explicitly referred to the economic consequences of paying premiums, according to which life insurance contracts can entail considerable financial obligations over a potentially very long period of time (para. 118). In contrast, the claimant in the present national proceedings did not pay any premiums or make any financial (advance) payments. He is not claiming the return of paid premiums, fees or similar, but rather the recovery of the kickbacks withheld from him. The interest on remuneration at issue here is intended to compensate to a certain extent for unjust enrichment or his impoverishment.
- ⁶² When assessing the appropriateness of the compensation, it makes a difference whether the compensation relates to premiums actually paid or to withheld kickbacks. This consideration must be taken into account when weighing up the interests involved. The ECJ explicitly alludes to this in *Rust-Hackner* by describing the prevention of speculative incentives as a circumstance worthy of consideration (para. 120). The Constitutional Court refers to this consideration in the cited decision (StGH 2024/035, loc. cit., para. 3.7).
- ⁶³ In *Rust-Hackner*, the ECJ made it unmistakably clear that it is the task of the referring court to carry out the necessary weighing of interests. It is therefore also incumbent on the referring court in this case to examine, in the context of the national proceedings, whether the national limitation period for interest on remuneration (Section 1480 of the Civil Code) is, in the absence of an EEA provision, capable of undermining the effectiveness of the claimant's right to investor protection under EEA law when purchasing investment services (specifically: the recovery of wrongfully withheld kickbacks). In particular, it will have to take into account that the claimant was able to successfully assert his claim for the recovery of withheld kickbacks, that the limitation provision in question (Section 1480 of the Civil Code) does not differentiate between domestic and non-domestic circumstances, and that it is embedded in a comprehensive limitation system that guarantees principles such as equality before the law and legal certainty.

2. Answer to question 1

- ⁶⁴ Should the EFTA Court declare the request for a preliminary ruling admissible and allow the questions referred, the Liechtenstein Government requests that the EFTA Court answer Question 1 based on its own case law (Cases E-10/17, E-3/15 and E-24/13) and the relevant case law of the ECJ (in particular Cases C-355/18 to C-357/18 and C-479/18, *Rust-Hackner*, but also Cases C-295/04 to C-298/04, *Manfredi*; C-810/21 to C-813/21, *Caixabank*), according to which the directives mentioned in question 1 do not preclude a national three-year limitation period for interest on remuneration, as contained in Section 1480 of the Civil Code, in the affirmative.

B. Question 2

1. Relevance of cited case law

- ⁶⁵ The Liechtenstein Government would first like to note that the reasoning given by the referring court for the second question referred (concerns about the applicability of the principles from the ECJ decision *in Rust-Hackner*) is not understandable. If the EFTA Court affirms the admissibility of the questions referred, it will have to find that EEA law does not contain any provision on the limitation period for interest on remuneration. Against this background, the EFTA Court will have no choice but to answer the first question referred as proposed by the Liechtenstein Government. The principles mentioned by the referring court from the ECJ decision *in Rust-Hackner* (the principle of equivalence on the one hand and the principle of effectiveness on the other) will inevitably be defined by the EFTA Court as a test, so that the referring court itself will have to assess whether the national limitation provision at issue (Section 1480 of the Civil Code) complies with the principles mentioned. A non-application of these principles, as suggested by the referring court, seems inconceivable in view of the fundamental nature of the principle reiterated in the ECJ decision *Rust-Hackner* and consistently applied by the ECJ and the EFTA Court, namely that national (procedural) rules must not undermine the rights of individuals under EEA law.

- ⁶⁶ Nevertheless, the Liechtenstein Government will address the other case law cited by the referring court, some of which is in line with the ECJ's *Rust-Hackner* ruling. The referring court cites this case law primarily in relation to the principles of equivalence and effectiveness, which is why it is possible to begin by referring to the comments on *the Rust-Hackner* case.
- ⁶⁷ The ECJ ruling on the *Caixabank* case (C-810/21 to C-813/21) deals with the unfairness of contractual terms and the relevant Unfair Terms Directive. It is not relevant to the national proceedings at issue here. It does not offer any guidance on interpretation beyond the principles and explanations mentioned in the *Rust-Hackner* case. In particular, it does not address the issue of the limitation period for interest. Rather, the ECJ's statements refer to limitation periods for asserting the main claim (reimbursement of amounts paid without legal basis due to an unfair contract term). This decision therefore does not provide any additional insight.
- ⁶⁸ The same applies to the ECJ decision in *BNP Paribas* (C-776/19 to C-782/19). Here, too, the ECJ was called upon to interpret the Unfair Terms Directive. And here, too, the ECJ dealt with the question of the limitation period for the main claim (reimbursement of amounts paid without legal basis due to unfair contract terms) in the light of the principle of effectiveness, but not with the question of the limitation period for interest (on remuneration), so that ultimately this decision does not provide any additional guidance on interpretation either (see also Schindl, loc. cit., para. 3.2).
- ⁶⁹ In the *Manfredi* case (C-295/04 to C-298/04), the ECJ was called upon to interpret a competition law provision of primary EC law. In this case, the ECJ reiterated the formulas developed in the 1990s for the principle of equivalence and the principle of effectiveness (para. 62), according to which, in the absence of relevant Community legislation, the aforementioned principles must be observed when designing legal remedy procedures for the protection of the rights of individuals arising from the direct effect of Community law. There, too, the ECJ made statements on limitation periods in relation to the assertion of claims for damages and thus to a (primary) claim arising from Community law and not to a (secondary) claim for interest. Consequently, this decision does not provide any additional guidance for the referring

court.

- ⁷⁰ For the sake of completeness, the Liechtenstein Government refers to the ECJ decision in Cases C-224/19 and C-259/19, *Caixabank*, cited by the referring court. Here, too, the ECJ was called upon to interpret the Unfair Terms Directive. The decision does not deal with the question of the limitation period for interest (on remuneration). Reference can therefore be made to the above comments.
- ⁷¹ Finally, the referring court refers to Case E-10/17 of the EFTA Court. Here, too, reference can be made to the above. That case concerned the interpretation of EEA primary law (competition law). In the absence of EEA secondary law on claims for damages and their limitation period in the event of competition infringements, the EFTA Court recalls the competence of the individual Contracting Parties to lay down the respective procedural modalities at national level, whereby the principles of equivalence and effectiveness must be respected. The limitation period for interest (on remuneration) was not the subject of this preliminary ruling procedure. It therefore does not provide any additional insight.
- ⁷² The referring court concludes by citing two ECJ decisions (Cases C-415/20, C-419/20 and C-427/20, *Gräfendorfer*, and C-322/22, *Dyrektor Izby*) and asserts that the claim for payment of interest on an amount paid without legal basis is an expression of the general principle of recovery of amounts paid without legal basis.
- ⁷³ The Liechtenstein Government notes in this regard that neither decision is relevant. Both decisions were based on the Customs Code of the European Union. This is not a matter of EEA law. Furthermore, the ECJ deals with the interpretation of the Treaty on European Union (TEU), which is equally irrelevant to the interpretation of EEA law. It should also be noted that the subject matter of the ECJ's interpretation in these two cases is claims against Member States (levies, customs duties, fees, taxes, fines), which differs fundamentally from the constellation at issue in the present case (claims between private individuals). These decisions are therefore not relevant to the present case.
- ⁷⁴ For the sake of completeness, it should be mentioned that in the *Gräfendorfer* case, the ECJ states in any event that, in the absence of Union rules, interest payment

arrangements are to be regulated at national level by the Member States, whereby the principles of equivalence and effectiveness must be observed (para. 74 ff.). For this reason, too, this case law is not suitable for bringing to light anything new that would provide the referring court with support for its decision in the national proceedings (see also Schindl, loc. cit., para. 3.2).

2. Primacy of EEA Law

⁷⁵ Finally, the referring court invokes the legal principle of the primacy of directly applicable Community law over national law, citing the decisions of the ECJ in cases C-614/14, *Atanas Ognyanov*, and C-715/20, *K.L.* In this regard, the Liechtenstein Government notes that these decisions are not relevant for the following reasons.

⁷⁶ The principle of interpreting national law in conformity with EEA law finds its limits in interpretation *contra legem*, as already stated (ECJ decision in Case C-582/21, *Profi Credit Polska*, para. 63). Furthermore, the application of the two ECJ decisions cited by the referring court fails due to the stipulated requirement that a national provision must violate provisions of EEA law. In the absence of an EEA provision on the limitation period for interest on remuneration, such a violation is out of the question in the present case.

⁷⁷ The ECJ case law cited by the referring court on the primacy of European law is therefore not relevant to the answers to the questions referred.

3. Answer to question 2

⁷⁸ Should the EFTA Court declare the request for a preliminary ruling admissible and allow the questions referred, the Liechtenstein Government requests that the EFTA Court consider that, in view of the answer to question 1, it is not necessary to answer question 2.

V. Conclusion

⁷⁸ For the reasons discussed above, the Liechtenstein Government considers that the questions referred by the Supreme Court of the Principality of Liechtenstein should be answered in the following sense:

⁷⁹ "1. The first question must be answered in the affirmative.

⁸⁰ 2. In light of the answer to the first question, the Liechtenstein Government does not consider it necessary for the EFTA Court to answer the second question."

On behalf of the Liechtenstein Government

  

Dr. Andrea Entner-Koch Dr. Claudia Bösch
Director Deputy Director
EEA Coordination Unit EEA Coordination Unit



Hansjörg Lingg
Attorney at Law
BWB Attorneys-at-Law Ltd.