EUROPEAN COMMISSION

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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

OBSERVATIONS

submitted pursuant to Article 20 of the Statute of the EFTA Court by the

EUROPEAN COMMISSION

represented by: Lorna ARMATI and Camille AUVRET, Members of the Legal Service acting as agents, with an address for service at: *Service Juridique, Greffe contentieux, BERL 1/093, 1049 Bruxelles* and consenting to service by e-EFTA,

in Case E-9/25

Peter Ploerer v LGT Bank AG

in which the *Fürstlicher Oberster Gerichtshof* (Princely Supreme Court), Liechtenstein, refers two questions to the EFTA Court for an advisory opinion, concerning the application of the principles deriving from the judgment of the Court of Justice of the European Union in joined cases C-355/18 - C-357/18, *Barbara Rust-Hackner a.o. v Nürnberger Versicherung Aktiengesellschaft Österreich AG* in an action for interest on payments made in the context of a declaration of nullity of a contract term in an agreement for investment services, governed by Directive 2004/39/EC of the European Parliament and 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 the Council and repealing Council Directive 93/22/EEC (OJ L 145 of 30.4.2004, p. 1), incorporated as point 30ca of Annex IX (Financial services) to the Agreement on the European Economic Area by Decision of the EEA Joint Committee No 65/2005 of 29 April 2005 (OJ L 239 of 15.9.2005, p. 50).

I. INTRODUCTION

1. This request for an Advisory Opinion has been sent to the EFTA Court by the *Fürstlicher Oberster Gerichtshof* (Princely Supreme Court, or Supreme Court) in response to a direction from the *Staatsgerichtshof* (Constitutional Court) of Liechtenstein, to consider, in the national proceedings pending before it, the judgment of the CJEU in joined cases C-355/18 to C-357/18 *Rust-Hackner and others*.

2. With a view to distilling the debate and facilitating the identification of the issues of EEA law at stake, the Commission finds it useful to summarise the background to the case set out in the request for an Advisory Opinion.

II. BACKGROUND TO THE CASE AND THE QUESTIONS ASKED

3. The defendant in the main proceedings is a bank, operating under a Liechtenstein banking licence and offering investment services. The applicant was a customer of that bank. An agreement for the operation of certain accounts was entered into between those two parties. That agreement was governed by the September 2004 version of the General Terms & Conditions (GTCs) of the bank.

4. By a judgment that has since become final, one of the terms (contained in those GTCs) has been declared invalid. In a separate action, the applicant claimed, on the basis of the provisions in the Civil Code on unjust enrichment, the disbursement of the third-party payments unduly received by the defendant over the years. This claim was essentially upheld and has also become final. As a result, the applicant is entitled to payment in the amount of the so-called kick-back commissions. The question that remains outstanding is how much interest is due on those payments.

5. In setting aside a first judgment by the Princely Supreme Court, the Constitutional Court found that the reasoning of the Supreme Court contradicted the case law of the CJEU. It was of the view that, having regard to the judgment of the CJEU in *Rust-Hackner*, the Supreme Court should have carried out an individual assessment designed to ascertain whether the client would have been "*dissuaded from enforcing his right to recover the kick-backs*" if those sums did not come with interest for the

entire period such that an exception to the limitation period of three years contained in section 1480 of the Civil Code should be made. ([1])

6. In those circumstances and having to give judgment once again, the Supreme Court referred two questions to the EFTA Court for an Advisory Opinion:

   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?*

   2. *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*

([1]) Order referring the case to the EFTA Court, page 11 of the English version.

to remuneration interest for the loss of use of the sums withheld to the last three years before lodging the action?

III. LEGAL FRAMEWORK

7. The Commission does not find it necessary to reproduce here the provisions of EEA law contained in the order referring the case to the EFTA Court. The relevant acts have all been incorporated into the EEA Agreement.

8. However, the Commission finds it useful to indicate here the wording in English used in the judgments of the CJEU when discussing the corresponding section of the Austrian Civil Code, which appears from the description by the referring court to be identical to that in the Liechtenstein Civil Code:

> "*claims for backdated annual benefits, in particular for interest, pensions, food contributions, benefits for ascendents and for amortisation of capital of agreed annuities, shall lapse after three years; the right itself shall be time-barred for non-use after 30 years*".

9. For the sake of completeness, the Commission notes that Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (MiFID II), which repeals MiFID I, introduces stricter rules on inducements. In particular, Article 24(9) of MiFID II requires that investment firms ensure that any fee or commission, non-monetary benefit paid or received in connection with the provision of an investment service or an ancillary service is designed to enhance the quality of the relevant service to the client ('quality enhancement test') and does not impair compliance with the investment firm's duty to act honestly, fairly and professionally in accordance with the best interest of its clients. Furthermore, any fee 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.

IV. ANALYSIS

10. By its first question, the referring court asks, in essence, whether the findings of the CJEU in the *Rust-Hackner* case must also be applied in a case in which, following the declaration of invalidity of a term in accordance with the provisions of MiFID I, there is an entitlement to so-called remuneration interest on the sums of money received pursuant to the invalid term, and if so, whether only in a situation in which the right to assert the claim would otherwise be undermined.

11. By its second question, which is asked only in the event that the first question is answered in the negative, the referring court asks, in essence, whether an interpretation of national law that limits a claim for remuneration interest due following a declaration of invalidity of a contract term to a period the starting point for which is the date on which it becomes objectively possible to bring that claim is contrary to EEA law, in particular the MiFID I rules and the Unfair Contract Terms Directive.

12. The Commission notes the unusual formulation of the first question, which is more appropriately understood as an inquiry as to whether EEA law must be interpreted as precluding national law that limits remuneration interest on sums of money received pursuant to a contractual term declared invalid because in breach of MiFID I, except when such a limitation would undermine the right to assert the claim, and if not, then whether EEA law must be interpreted as precluding national law that defines the starting point for the limitation as the date on which it becomes objectively possible to bring that claim (even if that may lead to a situation in which a claim lapses before the client is aware of the right to make such a claim).

13. The Commission is of the view that it is helpful to analyse both questions together. What is more, before turning to the questions in detail it appears useful, in light of the context in which the referring court has been asked to consider the issue, to recall the ruling of the CJEU in *Rust-Hackner*.

14. Having done so, the Commission will then consider the nature of the right stemming from MiFID I and the relevant implementing rules in order to consider whether the findings in the *Rust-Hackner* judgment can be transposed to the present case. On the basis that it is of the view that that judgment is not decisive in the circumstances of

the case at hand, and in order to put before the Court all the elements that may be helpful in providing a useful answer to the referring court, the Commission will then set out the principles of EEA law that govern the assessment of a national procedural rule such as section 1480 of the Civil Code.

IV.1. The *Rust-Hackner* judgment

15. The referring courts in those cases wished to know, in essence, whether the relevant provisions of the various Life Assurance Directives, together with the Solvency II Directive ([2]), must be interpreted as meaning that the period for exercising the right to cancel a life assurance contract begins to run from the moment the policyholder is informed that the contract is concluded.

16. The questions were asked in a context in which those acts all provided for a period of between 14 and 30 days from the time the policyholder is informed that the contract has been concluded to cancel the contract, with such cancellation having the effect of releasing the policyholder from any future obligation arising from the contract, and with the other legal effects and the conditions of cancellation being determined by the law applicable to the contract, in particular as regards the detailed rules on how the policyholder is to be informed that the contract has been concluded.

17. On the facts of those cases, the information provided by the assurance undertaking to the policyholder either failed to specify that the national law applicable to the contract does not provide for any formal requirements for the exercise of that right of cancellation, or indicated formal requirements that were in reality not required by the national law applicable to that contract.

18. Having established that a national provision by virtue of which the policyholder's right to cancel the contract can lapse at a time when it has not yet been informed of the existence of the right runs counter to the relevant directives, the CJEU turned to the question of remuneration interest, associated with the sums that were not payable. It held that "*the policyholder acquires the right to cancel the life assurance contract simply by virtue of having concluded that contract and the communication*

([2]) References to these acts can be found in the first question referred for an Advisory Opinion.

by the assurance undertaking to the policyholder of the detailed rules for exercising that right has the sole effect of triggering the cancellation period". ([3]) It also noted that, in order to determine the effects of cancellation, regard had to be had to the national law applicable to the contract (Austrian law, in the cases pending before it). Austrian law provided, 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, but that the right to receive such interest lapses after 3 years.

19. In those circumstances, the Court held that it was necessary "*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*". ([4])

20. In other words, in a situation in which a national rule limits what may be claimed following the exercise of a right deriving from Union law, such a rule can only be applied to the extent that it does not undermine the effectiveness of the right.

IV.2. Basis for the invalidity of the contractual term

21. Next, the Commission considers that it is important to clarify whether there exists, in the present case, a right deriving from EEA law, and the nature of that right.

22. The referring court appears to suggest that the relevant right is the right to claim the amounts received by the bank. And yet, that right does not derive directly from MiFID I, but rather from national law on unjust enrichment.

23. The applicable provisions of secondary law grant a different right, namely the right for the client to receive information on inducements paid or received by the investment firm (here, the bank) and the obligation for the investment firm to act in the best interests of its clients. The right to assert the invalidity of the contract terms

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([3]) Judgment of 19 December 2019 in *Barbara Rust-Hackner a.o. v Nürnberger Versicherung Aktiengesellschaft Österreich AG*, C-355/18 – C-357/18, EU:C:2019:1123, para 114.

([4]) *Ibid*., para 117.

allowing the bank to receive inducements without appropriate disclosure to the client derives from general principles of EEA law.

24. Indeed, the starting point is Article 19 MiFID I and Article 26 of the corresponding implementing rules.

25. MiFID I was adopted with the specific objective, inter alia, to ensure a high level of protection for investors (see recitals 2 and 29 in particular). Harmonised rules relating to the conduct of investment firms when providing investment services to clients serve that objective; Article 19 MiFID I sets out a number of obligations in that respect. It requires, in particular, Member States to require that investment firms act "*honestly, fairly and professionally in accordance with the best interests of [their] clients*". It also empowers the Commission to adopt the implementing measures "*to ensure that investment firms comply with the principles set out therein when providing investment or ancillary services to their clients*" (Article 19(10)).

26. On that basis, the Commission adopted Directive 2006/73/EC (the Implementing Directive). Article 26, entitled 'Inducements' lays down the circumstances in which an investment firm is not to be regarded as acting "*honestly, fairly and professionally in accordance with the best interests of a client*" i.e. in breach of the requirement laid down in Article 19(1) MiFID I. In essence, that will be the case if an investment firm pays or is paid any fee or commission in relation to the investment services provided, unless the existence, nature and amount of the fee has been clearly disclosed to the client in advance (Article 26(b)(i) of the Implementing Directive).

27. It is not clear from the order referring the case to the EFTA Court for an Advisory Opinion whether clause 15 of the GTCs was declared invalid on the grounds that it breached those provisions. For the purposes of the following observations, and unless otherwise explicitly mentioned, the Commission will assume this to be the case.

28. Thus, a client that did not receive the required *ex ante* information in relation to fees is able, in principle, to rely on those provisions of EEA law to have a contractual term entitling the investment firm to retain such fees declared invalid. However, MiFID I does not regulate what happens next; in particular, it does not contain any

provision governing reparation of unjust enrichment resulting from the breach of one of its provisions. It is therefore for the national legal order to establish such rules. That said, in doing so, the EEA States must respect the principles of equivalence and effectiveness.

29. Indeed, even Council Directive 93/13/EEC (the "Unfair Contract Terms Directive"), also mentioned by the referring court, provides only that EEA States must lay down that unfair terms shall not be binding, but leaves it to the national order to determine the consequences that follow from that obligation. ([5]) Again, it is not clear from the order referring the case to the EFTA Court whether the national provisions transposing that directive into Liechtenstein law were engaged in the proceedings underlying the case at hand.

IV.3. Transposition of the conclusion in *Rust-Hackner* to the present case

30. The relevant national law appears to provide that the monies that were improperly gained (the kick-back commissions) must be repaid, and that reasonable remuneration on those sums is due (section 1431 of the Civil Code). The general rule on prescription appears to provide that the right to make such a claim is extinguished after 30 years (section 1479 of the Civil Code). However, in relation to what are called "*backdated annual benefits*", the claim lapses after three years (section 1480 of the Civil Code).

31. It would appear that the Princely Supreme Court declined to apply section 1480 to the case before it, holding that, in accordance with the principles of equivalence and effectiveness, "*the detailed rules for the payment of interest should not lead to the person concerned being deprived of adequate compensation for the loss*

([5]) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95 of 21.4.1993, p. 29. For the sake of completeness, the Commission notes that the Court has held that while it is for Member States to set out, through their national legal systems, the rules governing how unfair terms are identified and the legal effects of such findings, this must be done in a way that: (i) enables the consumer's legal and factual position to be restored to what it would have been without the unfair term, and (ii) ensures that the level of consumer protection envisaged by the Unfair Contract Terms Directive is fully upheld (see, to that effect, judgment of 29 April 2021 in *Bank BPH*, C-19/20, EU:C:2021:341, paras 84 and 88).

sustained". ([6]) The order referring the case to the EFTA Court suggests that, according to the Constitutional Court, this approach was contrary to the principles set out by the CJEU in *Rust-Hackner*.

32. It emerges from the description of that judgment set out above (section IV.1) that the CJEU confirmed that the provisions assessed – which include neither MiFID I nor the Unfair Contract Terms Directive – do not preclude national legislation providing for a limitation period of three years for the exercise of the right to remuneration interest, associated with the repayment of sums that were not payable, requested by a policyholder who has exercised his or her right of cancellation in respect of a life assurance policy, provided that establishment of such a period does not undermine the effectiveness of that policyholder's right of cancellation.

33. The first question referred for an Advisory Opinion appears designed to ascertain whether the national court is obliged to reach the same conclusion in the circumstances of the present case, or whether it may consider, for the purposes of calculating interest due on sums to be paid pursuant to a claim for unjust enrichment, the entire period of the contractual arrangement that has since been declared invalid.

34. First, it must be underlined that the interpretation retained by the CJEU in *Rust-Hackner* does nothing more than describe the circumstances in which the national rule under examination (i.e. a limitation of the period in respect of which remuneration interest can be claimed) is not precluded – that is, when it does not undermine the effectiveness of the right deriving from Union law. It certainly does not require, as a matter of Union law, national courts to limit to three years any national rules governing remuneration interest; it is for the national court alone to determine the content of national rules, and it must do so bearing in mind the primacy of EEA law and the corresponding principle of conforming interpretation. ([7])

([6]) Order referring the case to the EFTA Court, page 8 of the English version.

([7]) The Commission notes in this respect that the application of section 1480 of the Civil Code to claims in relation to statutory interest on monies due in respect of other claims does not follow directly from

35. Second, as underlined also by the referring court, the claim for unjust enrichment in the present case does not arise from the exercise of a right by the investor, but rather as a result of a breach, by the investment firm, of a provision transposing MiFID I. That breach led to the annulment of a contract term and the "enrichment" that forms the basis for the main claim.

36. The Commission is therefore of the view that the conclusion in *Rust-Hackner* cannot simply be transposed to the circumstances of the present case. The question must therefore be assessed anew.

IV.4. Principles of equivalence and effectiveness

37. As noted above, it is for the national legal order of each EEA State to establish rules governing claims for unjust enrichment flowing from a breach of one of the provisions of MiFID I. It is a matter of well-settled case law of the CJEU that when it is for the national legal order of each Member State to establish such rules, in accordance with the principles of procedural autonomy, they must not be less favourable than those governing similar domestic situations (principle of equivalence) and they must not make it excessively difficult or impossible in practice to exercise the rights conferred by Union law (principle of effectiveness). ([8]) The referring court notes that these same principles prevail also in the EEA EFTA States.

38. No question in relation to the principle of equivalence emerges from the order referring the case to the EFTA Court; this issue will not be considered further.

39. As regards the principle of effectiveness, the CJEU has held that each case in which the question arises as to 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 a 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

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the wording of the provision but appears, in Austria at least, to be the consequence of judicial interpretation of the equivalent rule.

([8]) Judgment of 20 September 2018 in *EOS KSI Slovensko*, C-448/17, EU:C:2018:745, para 36.

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. ([9])

40. By way of preliminary observation, the Commission therefore finds it useful to recall that the general rule in the Civil Code is that a right is extinguished after 30 years, and that the limitation pursuant to which certain claims lapse after three years is a specific rule the purpose of which appears to be rooted in a concern to ensure legal certainty.

IV.4.1. Time-limits for bringing proceedings

41. The CJEU has stated on many occasions that it is compatible with Union law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty, ([10]) and while the rule in section 1480 of the Civil Code does not appear to be a limitation period, strictly speaking, it does appear to have the effect of limiting any claim to a rolling period of three years. ([11])

42. And yet, it is not clear that the statutory interest due on the sums to be repaid in the case at hand responds to the same logic as "*annual benefits*" within the meaning of section 1480 of the Civil Code.

43. While a specific rule providing for a short period of time at the end of which a claim lapses may indeed serve a desire to ensure legal certainty in relation to recurring annual benefits in that it encourages beneficiaries to act promptly or risk losing the right to claim such amounts, the same cannot be said in relation to statutory interest due on sums payable pursuant to claims based on a separate right.

44. On the basis that the referring court itself appears to characterise the rule as a limitation period, and to the extent that it may in any event provide a useful frame of reference, the Commission will make a number of observations in that respect.

([9]) Judgment of 25 January 2024 in *Caixabank*, C-810/21 - C-813/21, EU:C:2024:81, para 45.

([10]) Judgment of 28 January 2015 in *Starjakob*, C-417/13, EU:C:2015:38, para 62.

([11]) The Commission understands the national provision in this sense, that the right to annual benefits exists for 30 years, but that the claim to the benefit due in year *n* lapses in year *n+3*.

45. Turning then to the analysis of the characteristics of a limitation period, the CJEU has 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. ([12])

46. The referring court has noted that lack of awareness of the right does not, as a rule, prevent what it refers to as "the limitation period" from starting to run, the starting point being based, as a rule, on the objective possibility of exercising the right.

47. And yet, as the referring court itself notes, 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 EEA law. ([13]) 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. ([14])

48. It is for the national court to verify the extent to which the foregoing considerations can be transposed to the case at hand. As noted above, section 1480 of the Civil Code does appear to operate much like a limitation period in that each year, the claim to interest due four years previously lapses.

IV.4.2. Considerations related to financial speculation

49. On the basis that the CJEU in *Rust-Hackner* commented on the need to avoid financial speculation, the Constitutional Court appears to attach importance to the need to avoid that investors "*speculate on the [bank] acting contrary to Union law*".

50. However, once again, the different nature of the EEA law right at issue appears decisive.

([12]) Judgment of 25 January 2024 in *Caixabank*, C-810/21 - C-813/21, EU:C:2024:81, para 46.

([13]) *Ibid*. para 47.

([14]) *Ibid*. para 48.

51. The grant of a period of time within which a policyholder may "change its mind" as regards a life assurance policy must be viewed in the context of contracts that 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*". ([15]) In other words, the right of cancellation examined by the CJEU in *Rust-Hackner* serves the purpose of allowing the policyholder the time to assure themselves that the decision to conclude a particular insurance contract was the correct one. It is a right granted to the policyholder simply by virtue of the fact of having concluded a contract, and whether to exercise it or not depends entirely on the policyholder – the behaviour of the insurer can impact only the moment at which the cancellation period starts running – and is not subject to any conditions other than the fixed period of time within which the right must be exercised. If the policyholder decides to exercise its right, then any sums already paid to the insurer must be reimbursed, in accordance with national law.

52. The right deriving from MiFID I, on the other hand, is a right to *ex ante* information concerning inducements that the investment firm may pay or receive in relation to the investments made by the client. The provision of the required information is entirely in the hands of the investment firm, such that if it behaves in accordance with the directive, no right to reimburse will ever arise. The Commission is of the view that this element changes the picture fundamentally and distinguishes the circumstances of the present case from the concern, expressed by the CJEU in *Rust-Hackner*, to avoid a situation of financial speculation.

IV.4.3. Restitution v deterrent effect

53. Indeed, in the closely-related context of the Unfair Contract Terms Directive – considered by the referring court to be relevant to the debate at hand – the CJEU has held that "*in accordance with the principle* nemo auditur propriam turpitudinem allegans *(no one may rely on his or her own wrongdoing), a party cannot be*

([15]) Judgment of 19 December 2019 in *Barbara Rust-Hackner a.o. v Nürnberger Versicherung Aktiengesellschaft Österreich AG*, C-355/18 – C-357/18, EU:C:2019:1123, para 118.

allowed to derive economic advantages from his, her or its unlawful conduct". ([16]) Indeed, as the Court found in that case, the granting of a benefit to a party that has used unfair terms would run counter to the need to preserve the deterrent effect of the prohibition of such terms laid down in that Directive.

54. Indeed, it is clear from Article 7(1) that the Unfair Contract Terms Directive obliges the EEA States to provide for adequate and effective means "*to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers*". Therefore, the determination by a court that a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he would have been in if that term had not existed. ([17]) It follows that 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. ([18]) There is no reason to suppose that a different approach would prevail when the emphasis is on the deterrent effect rather than the need to ensure that the consumer is not 'out of pocket'; indeed, the obligation to re-establish the legal and factual situation that would have prevailed had the unfair term not existed is closely connected to the dissuasive effect that Article 6(1) of the Unfair Contract Terms Directive, read in conjunction with Article 7(1) of that directive, is designed to attach to a finding of unfairness.

55. Thus, while it is true that the national rules at hand appear to provide for a sufficiently lengthy period for bringing the proceedings in question, it is for the national court to verify whether limiting the interest that can be due on the principal sums to be paid to the client is such as to call into question the effectiveness of the invalidity of terms that breach MiFID I, including the deterrent effect of having such rules in the first place.

([16]) Judgment of 15 June 2023 in *Bank M.*, C-520/21, EU:C:2023:478, para 81.

([17]) Judgment of 21 December 2016 in *Gutiérrez Naranjo*, C-154/15 and C-307/15, EU:C:2016:980, para 61. See also judgment of 14 June 2023 in *Axfina Hungary*, C-705/21, EU:C:2023:352, para 39.

([18]) Judgment of 21 December 2016 in *Gutiérrez Naranjo*, C-154/15 and C-307/15, EU:C:2016:980, para 62.

56. Against this background, the question of the point in time from which a limitation period runs is subsequent to the question whether, and if so which, limitation period is at all appropriate. However, by analogy with the settled case-law in relation to the Unfair Contract Terms Directive, it appears clear that 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. Indeed, to hold otherwise would have the effect of making it excessively difficult or impossible to exercise that right to its full extent.

IV.4.4. Conclusions for the proposed answers to the questions referred

57. In light of all of the foregoing considerations, it must be permissible, in order to preserve the effectiveness of the obligation to provide information on inducements laid down in MiFID I, for a national court to conclude, in the context of such a verification, that the entire withholding period should be taken into account when calculating interest due on sums that are to be paid following a claim for unjust enrichment.

58. The conclusions that follow from the above considerations are not in contradiction to the judgment in *Rust-Hackner*. In ruling in that case, the CJEU did not exclude that a limitation, such as the one at hand in those cases, could, depending on the circumstances, undermine the right to cancellation granted by the Life Assurance Directives.

59. Indeed, in holding that Union law did not preclude a national rule limiting a right to receive remuneration interest provided that such a limitation does not undermine the Union law right in question, the CJEU imposed, in essence, a duty on the national judge to disapply such a rule when that is required in order to preserve the effectiveness of rights deriving from Union law. This conclusion is entirely in line with the principle of procedural autonomy and should, in that sense, by applied by the referring court.

60. In determining the content of national law and in assessing whether the application of a national procedural rule would be contrary to the principle of effectiveness, the national court must have regard to the place of that provision in the proceedings as a whole, the way in which they are conducted and their particular features; it must

ensure that that provision does not make it excessively difficult or impossible in practice to exercise the rights conferred by EEA law, having regard to the need to ensure an appropriate deterrent effect in respect of breaches of those rights.

V. CONCLUSION

61. In the light of the foregoing, the Commission considers that the questions referred to the EFTA Court by the *Fürstlicher Oberster Gerichtshof* should be taken together and answered as follows:

> **The principle of effectiveness must be interpreted to preclude a national procedural rule that makes it excessively difficult or impossible in practice to exercise the rights conferred by EEA law, having regard to the need to ensure an appropriate deterrent effect in respect of breaches of those rights. In assessing whether this is the case, the national court must have regard to the place of that provision in the proceedings as a whole, the way in which they are conducted and their particular features.**

Lorna ARMATI Camille AUVRET

Agents for the Commission