REPORT FOR THE HEARING
in Case E-1/07[1]

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Fürstliches Landgericht (Princely Court of Justice), Liechtenstein, in criminal proceedings against

A

concerning the interpretation of the rules on the freedom to provide services in the EEA, and in particular Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

I Introduction

1. By a letter dated 31 January 2007, registered at the Court on 7 February 2007, Fürstliches Landgericht made a request for an Advisory Opinion in a criminal case pending before it against A (hereinafter the "Defendant").

II Facts and legal background

2. The case concerns criminal proceedings brought by the Public Prosecutor in Liechtenstein against the Defendant, who is a Liechtenstein national. The Defendant was charged on 19 December 2006 with a series of criminal offences in breach of the Liechtenstein Criminal Code (*Liechtenstein Strafgesetzbuch*), namely the inflicting of bodily harm to Thomas Widenbauer (a German national resident in Austria), causing damage to his property, permanent removal of his property and suppression of documents that belonged to him.

[1] Revised October 2007.

3. According to Section 32 of the Liechtenstein Code of Criminal Procedure (*Liechtenstein Strafprozessordnung*), any person who sustains damage to his rights, owing to a crime or an offence that must compulsorily be prosecuted, may associate himself with the criminal proceedings by virtue of his claims under private law as a private intervener (*Privatbeteiligter)*. Under Section 34 of the Code of Criminal Procedure, a private intervener may either conduct his own case or use an agent. The Code of Criminal Procedure does not include provisions to the effect that only lawyers can act as agents for a private intervener.

4. Thomas Widenbauer, who according to the charges laid by the Liechtenstein Public Prosecutor's office was the victim of the offences the Defendant is alleged to have committed, made a request to be associated with the criminal proceedings as a private intervener, claiming damages to the sum of 500.00 EUR. This request was made on his behalf by Dr Stefan Denifl, an Austrian lawyer practising from Austria and registered with the Committee of Vorarlberg Bar as a "Rechtsanwalt". Dr Denifl was listed in neither the register of Liechtenstein lawyers, nor the register of European lawyers established in Liechtenstein. Moreover, he has not taken an aptitude test pursuant to Article 54 et seq. of the Liechtenstein Lawyers Act (*Liechtenstein Rechtsanwaltsgesetz*).

5. Article 55 of the Liechtenstein Lawyers Act lays down the basic principle that EEA nationals who are entitled to act professionally as lawyers in their State of origin are temporarily permitted to practice their profession in Liechtenstein on a cross-border basis. However, Article 57a of the Liechtenstein Lawyers Act requires a European lawyer providing services in Liechtenstein to act in conjunction with a local lawyer under certain circumstances. The provision reads as follows:

> *In proceedings in which the party is represented by a lawyer, or a defending counsel must be engaged, the European lawyer providing services shall act in conjunction with a local lawyer pursuant to Article 49 of the Liechtenstein Lawyers Act. This requirement shall not apply if the European lawyer providing services has passed the aptitude test (Articles 54 et seq.)*

6. Since Dr Denifl had neither taken an aptitude test nor appointed a local lawyer to act in conjunction with him before Fürstliches Landgericht, that court has to make a decision whether or not to require him under Article 57a of the Liechtenstein Lawyers Act to appoint a local lawyer to act in conjunction with him. Failure by the lawyer to comply with this requirement would be failing to comply with a professional obligation, which might constitute disciplinary offence under Article 31(1) of the Liechtenstein Lawyers Act. Moreover, he would not be entitled to remuneration under the Legal Agents Remuneration Scale Act (*Gesetz*

über den Tarif für Rechtsanwälte und Rechtsagenten) as he would, according to paragraph 2 of Article 49 of the Liechtenstein Lawyers Act be deemed not to be acting as a lawyer.

7. Article 49 of the Liechtenstein Lawyers Act reads as follows:

> *1) In proceedings in which the party is represented by a lawyer or in which a defending counsel must be engaged, the established European lawyer may act as the representative or defending counsel of a party only in conjunction with a lawyer included in the register of lawyers (a lawyer acting in conjunction). (…)*
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> *2) (…)Procedural acts for which evidence of the conjunction situation has not been furnished at the time when they are performed shall be deemed not to have been performed by a lawyer. (…)*

8. In view of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, and the judgment of Court of Justice in Case 427/85 *Commission* v *Germany*[2], the Fürstliches Landgericht decided that it was necessary to request an advisory opinion from the EFTA Court in order for the proceedings pending before it to be continued. This was held to be necessary specifically for the purposes of deciding whether the lawyer providing services must call in a local lawyer to act in conjunction with him.

9. Should the EFTA Court conclude in its advisory opinion that the Liechtenstein Lawyers Act is not compatible with Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, the Fürstliches Landgericht states that the question arises whether directives, in so far as they have been transposed into national law, must be applied directly and call for the conflicting provision to be set aside, in fact, ex officio. The national court refers to Case 103/88 *Fratelli*[3] and Case C-312/93 *Peterbroeck*[4] in this respect.

III Questions

10. The following questions have been referred to the Court:

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[2] Case 427/85 *Commission* v *Germany* [1988] ECR 1123.

[3] Case 103/88 *Fratelli* [1989] ECR 1839.

[4] Case C-312/93 *Peterbroeck* [1995] ECR I-4599.

1. **Is a provision such as that of Article 57a of the Liechtenstein Lawyers Act (Rechtsanwaltsgesetz), according to which, in proceedings in which a party is represented by a lawyer or a defending counsel must be engaged, the European lawyer providing services must call in a local lawyer to act in conjunction with pursuant to Article 49 of the Liechtenstein Lawyers Act, compatible with the provisions of the EEA Agreement relating to the freedom to provide services (Article 36(1) of the EEA Agreement), and in particular with Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, and specifically with the second indent of Article 5 thereof?**

2. **In case the EFTA Court answers the first question in the negative: may a provision of national law such as that of Article 57a of the Liechtenstein Lawyers Act which fails appropriately to transpose into national law a directive adopted in pursuance of Article 7 litra b of the EEA Agreement, such as the directive mentioned in Question 1, nevertheless be applied in a State which is a Contracting Party to the EEA Agreement?**

IV EEA law

11. Protocol 35 to the EEA Agreement on the implementation of EEA rules reads:

> *Whereas this Agreement aims at achieving a homogeneous European Economic Area, based on common rules, without requiring any Contracting Party to transfer legislative powers to any institution of the European Economic Area; and*
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> *Whereas this consequently will have to be achieved through national procedures;*
>
> ***Sole Article***
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> *For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.*

12. Article 3 EEA reads:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

Moreover, they shall facilitate cooperation within the framework of this Agreement.

13. Article 7 EEA reads:

Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows :

(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;

(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.

14. Article 36(1) EEA reads:

Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

15. According to Article 37(1)(d) EEA, the notion of "services" includes the "activities of the professions".

16. Article 37(2) EEA states that without prejudice to the provisions of Chapter 2 (right of establishment), "the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals."

17. According to Article 39 EEA, the provisions of *inter alia* Article 30 EEA shall apply to the matters covered by Chapter 3 (services) of the Agreement. According to Article 30 EEA, the Contracting Parties shall take the necessary measures, contained in Annex VII to the Agreement in order to make it easier for persons to take up and pursue activities as workers and self-employed persons.

18. According to Article 1 of Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (hereinafter "Directive 77/249", OJ 1977 L 78, p. 17), referred to at point 2 of Annex VII EEA on mutual recognition of professional qualifications, the Directive applies to the activities of lawyers pursued by way of provision of services.

19. A "lawyer" is defined in Article 1(2) of Directive 77/249 as any person entitled to pursue his professional activities under certain national designations, which, in the case of Austria, includes the designation of "Rechtsanwalt".

20. According to Article 2 of Directive 77/249, each Contracting Party shall recognise as a lawyer for the purpose of pursuing services any person listed in Article 1(2) of the Directive.

21. Article 4(1) of Directive 77/249 provides that activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host State under the conditions laid down for lawyers established in that State, with the exception of any condition requiring residence, or registration with a professional organisation, in that State.

22. Pursuant to Article 4(2) of Directive 77/249 the rules of the professional conduct of the host State must be observed, without prejudice to the lawyer's obligations in his home State.

23. Article 5 of Directive 77/249 reads:

> *For the pursuit of activities relating to the representation of a client in legal proceedings, a Member State may require lawyers to whom Article 1 applies:*
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> *- …;*
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> *- to work in conjunction with a lawyer who practices before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an "avoué" or "procuratore" practising before it.*

V Written Observations

24. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the Government of Iceland, represented by Sesselja Sigurðardóttir, First Secretary and Legal Officer, Ministry for Foreign Affairs, acting as Agent;

- the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director of the EEA Coordination Unit, acting as Agent;

- the Government of Norway, represented by Pål Wennerås, advocate, Office of the Attorney General (Civil Affairs) and Ivar Alvik, senior adviser, Ministry of Foreign Affairs, acting as Agents;

- the EFTA Surveillance Authority, represented by Lorna Young, Officer, and Per Andreas Bjørgan, Senior Officer, Legal and Executive Affairs, acting as Agents; and

- the Commission of the European Communities, represented by Hans Christian Stovlbaek and Nicola Yerrell, members of its Legal Service, acting as Agents.

The Government of Iceland

25. The Government of Iceland only addresses the second question, which in its view essentially deals with the issue whether a national legal rule which fails to implement an EEA directive correctly can nevertheless be applied in an EEA State.

26. The Government of Iceland states that the EEA Agreement does not provide for any transfer of sovereign rights to its institutions. The EC law principles of direct effect and supremacy were not made a part of the EEA Agreement, but instead Article 7 and Protocol 35 were introduced into the Agreement.

27. The Government of Iceland contends that Article 7 EEA is based on the principle that legal rules of the EEA Agreement cannot have legal impact against individuals and legal entities until they have been implemented into national law

as is constitutionally required in each State. Therefore, they do not under any circumstances have direct effect in the meaning of Community law.

28. In the view of the Government of Iceland, Protocol 35 EEA tackles both the issue of primacy and, in some way, direct effect. It follows from Protocol 35 EEA that EEA rules are to be accorded priority over national rules, if the EEA rules have been implemented into their national legal order. Therefore, the issue of primacy only becomes relevant after an EEA rule has been made part of the national legislation. Moreover, an EEA rule only has priority under Protocol 35 if the rule is unconditional and sufficiently precise.[5]

29. In the view of the Government of Iceland, the EC law principle of direct effect cannot be made part of the EEA Agreement without putting the fundamental principles of the EEA Agreement at risk and changing its foundation of respect for State sovereignty and independence, cf. paragraph 16 of the preamble to the Agreement. The Government emphasises that since the EFTA institutions were not given the supranational powers of the institutions of the EC, the competence of the EFTA Court is not comparable to that of the Court of Justice of the European Communities (hereinafter, "ECJ") regarding introduction of general principles which cannot be found in the Agreement itself.

30. The Government of Iceland submits that the national rule of the Liechtenstein Lawyers Act prevails in any possible situation of the case, with the only exception that Article 5 of Directive 77/249 has been implemented into national law through other means and therefore prevails with reference to Protocol 35. This, it states, is an issue for the national court to evaluate. Since EEA legal rules do not become effective unless implemented into the national legal system, an EEA rule lacking such internal procedure can never overrule a correctly enacted national rule. The correct procedures to contest a national rule would rather be through infringement procedures lodged by the EFTA Surveillance Authority, or by lodging a case before national courts where compensation is claimed for loss so suffered.[6]

31. In light of the above, the Government of Iceland proposes that the answer to the second question should be the following:

> *A national rule which fails appropriately to transpose into national law a directive should nevertheless be applied in a State which is a Contracting Party to the EEA Agreement.*

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5 On the interpretation of Protocol 35, the Government refers to ECJ's Opinion 1/91 of 14.12.1991 [1991] ECR I-6079, at paragraph 27; Case E-1/94 *Restamark*, at paragraph 77; Case E-1/01 *Einarsson*, at paragraph 52; and to Case E-4/01 *Karlsson*, at paragraph 28.

6 Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Court Report 95.

The Government of Liechtenstein

32. As concerns the first question, the Government of Liechtenstein submits, with reference to Article 6 EEA and Case 427/85 *Commission* v *Germany*[7] and Case C-294/89 *Commission* v *France*,[8] that a lawyer providing services cannot be obliged by the Liechtenstein legislation to work in conjunction with a lawyer practicing before the relevant judicial authority in proceedings for which that legislation does not make representation by a lawyer mandatory.

33. By the second question, in the view of the Government of Liechtenstein, the national court is essentially asking whether under EEA law a provision of a directive referred to in an Annex of the EEA Agreement is to prevail over conflicting provisions of national law and hence is to be considered to be directly effective. In that regard, it notes at the outset that the EFTA Court is not to interpret provisions of national legislation in an advisory opinion procedure.[9]

34. The Government of Liechtenstein submits that the EC law principles of direct effect and supremacy are not part of EEA law. In its view, it follows from Article 7 EEA and Protocol 35 to the EEA Agreement that EEA law does not entail transfer of legislative powers, and that homogeneity of the EEA will have to be achieved through national procedures.[10]

35. Referring to the case law of the Court on Protocol 35, the Government of Liechtenstein states that in cases of conflict between implemented EEA rules and national statutory provision, individuals and economic operators must be entitled to invoke and to claim at the national level any rights that could be derived from provisions of the EEA Agreement, as being or having been made part of the respective national legal order, if they are unconditional and sufficiently precise.[11] Such EEA rules shall prevail over conflicting national rules.[12]

36. The Government of Liechtenstein stresses that obligations under Protocol 35 EEA only relate to EEA provisions that have already been implemented in national law.[13] It states that it is for the national court to assess whether that is the case. In this context, the Government notes that the national court has the duty to

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7 The Government refers to Case 427/85 *Commission* v *Germany*, *at* paragraphs 10, 13 and 15.

8 Case C-294/89 *Commission* v *France* [1991] ECR I-3591, at *inter alia* paragraph 19.

9 Case E-1/01 *Einarsson* [2002] EFTA Court Report 1, at paragraph 48.

10 Case E-9/97 *Sveinbjörnsdóttir*, at paragraph 63; Case E-1/01 *Einarsson*, at paragraph 52; Case E-4/01 *Karlsson* [2002] EFTA Court Report 240, at paragraph 28.

11 Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15, at paragraph 77.

12 Case E-1/01 *Einarsson*, at paragraph 55.

13 The Government refers in that regard to Case E-4/01 *Karlsson*, at paragraph 28.

consider any relevant elements of EEA law, whether implemented or not, when interpreting national law.[14]

37. The Government of Liechtenstein furthermore observes that Protocol 35 can only relate to those EEA provisions which are framed in a manner capable of creating rights that individuals and economic operators may invoke before national courts. In that regard, the Government submits that a provision such as Article 5 (2) of Directive 77/249 does not fulfil the conditions of being unconditional and sufficiently precise because it leaves discretion to the State as how it would give effect to that provision.

38. The Government of Liechtenstein proposes, in light of the above, that the answer to the questions should be as follows:

> 1. *Directive 77/249/EEC and Article 36 EEA (Freedom to provide services) must be interpreted insofar that Liechtenstein may require a lawyer providing services to act in conjunction with a local lawyer only in proceedings for which under Liechtenstein law there is a requirement of representation by a lawyer. Taking account of the legislative materials, it is for the national court to assess if this is the case with regard to Article 57a of the Liechtenstein Lawyers Act.*
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> 2. *According to Protocol 35 to the EEA Agreement, provisions of EEA law, which have been made part of national law, shall prevail when the provision in question is unconditional and sufficiently precise. It is for the national court to assess if the relevant provision of EEA law has been made part of national law and therefore a situation arises which is governed by Protocol 35.*
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> 3. *A provision like in Article 5 second indent of Directive 77/249 does not fulfil the criteria of being unconditional and sufficiently precise.*

The Government of Norway

39. At the outset, the Government of Norway explains that its observations are confined to the second question, since Norwegian legislation concerning representation by lawyers is substantially different from that of Liechtenstein. The Government understands the second question as raising two issues: First, whether a directive which has not been implemented requires direct effect under the EEA Agreement. Second, whether insofar as the directive has been implemented in national law, it takes precedence over conflicting national rules.

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[14] Case E-4/01 *Karlsson*, at paragraph 28.

40. In the view of the Government of Norway, it follows from Article 7 EEA and Protocol 35 to the EEA Agreement, as well as settled case law, that EEA law does not entail transfer of legislative powers.[15] Therefore, Protocol 35 to the EEA Agreement applies only to conflicts between implemented EEA rules and other domestic statutory provisions, and EEA law does not require that individuals and economic operators be able to rely directly on non-implemented EEA rules before national courts.[16]

41. According to the Government of Norway, it follows from the above that a national court is only obliged to set aside a national provision conflicting with a directive to the extent that that act has been implemented in national law, and if necessary, that a statutory provision to the effect that EEA rules prevail in these cases has been enacted. It is for the national court to assess these matters of national law.[17] Furthermore, Protocol 35 to the EEA Agreement only concerns provisions that are framed in a manner capable of creating rights that individuals may invoke before the national courts, i.e. provisions that are unconditional and sufficiently clear.[18]

42. Without prejudice to the EFTA Court's assessment of the relevance of Case 427/95 *Commission* v *Germany* to which the Fürstliches Landgericht draws the Court's attention, the Government of Norway emphasises as a matter of principle the distinction between two questions: whether a directive can be made operational in the context of infringement proceedings, and whether a provision is capable of creating rights that individuals may invoke before national courts.[19]

43. Finally, the Government of Norway states that if the conditions in Protocol 35 to the EEA Agreement are not fulfilled, the national courts must nevertheless consider any relevant element of EEA law, whether implemented or not, when interpreting national law.[20]

44. Based on the above, the Government of Norway proposes that the second question should be answered as follows:

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15 The Government refers *inter alia* to Case E-9/97 *Sveinbjörnsdóttir*, at paragraph 63; and Case E-4/01 *Karlsson*, at paragraph 28.

16 Case E-4/01 *Karlsson*, at paragraph 28.

17 On the issue of the role of the EFTA Court and the national courts under advisory opinion procedure, the Government refers *inter alia* to Case E-1/94 *Restamark*, at paragraph 78; and Case E-1/01 *Einarsson*, paragraph 48 and 50.

18 Case E-1/94 *Restamark*, at paragraph 77; and E-1/01 *Einarsson*, at paragraph 52.

19 The Government refers in this respect to Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, at paragraph 26.

20 Case E-4/01 *Karlsson*, at paragraph 28.

EEA law does not require a provision of national law to be set aside if it conflicts with a directive which has not been implemented in the legal order of a Contracting Party to the EEA Agreement. Conversely, if the directive has been implemented, and, if necessary, a statutory provision to the effect that implemented EEA rules prevail over statutory provisions in cases of conflict has been adopted, and the relevant provisions of the directive are sufficiently precise and unconditional so as to confer rights on individuals, a provision of national law which conflicts with the relevant provisions of that directive may not be applied in a State which is a Contracting Party to the Agreement. It is for the national court to assess whether the relevant directive has been implemented in the national legal order.

The EFTA Surveillance Authority

45. Addressing the first question, the EFTA Surveillance Authority (hereinafter "ESA") refers to case law of the ECJ on freedom to provide services and Directive 77/249.[21] As concerns the Directive, ESA points out that in Case 427/85 *Commission* v *Germany* the ECJ noted that the terms of Article 5 of Directive 77/249 do not draw a distinction between areas of activity in which legal representation is mandatory and those in which it is not. However, the ECJ emphasised that the Directive must be placed in its proper context, i.e. the general provisions on freedom to provide services and the limited circumstances in which that freedom may be restricted.[22] ESA further points out that the ECJ concluded in the said case that in the circumstances in which the national legislation does not make representation by a lawyer mandatory, there is no consideration relating to the public interest which can justify requiring a lawyer providing cross-border services in a professional capacity to work in conjunction with a local lawyer.[23]

46. In ESA's view, the case law of the ECJ shows that the right to provide cross-border services as a lawyer is enshrined in Articles 36 and 37 EEA and that Article 5 of Directive 77/249 simply provides an exception to the general rule of Article 37 EEA that a person may provide a service in a State other than his own under the same conditions as are imposed by that State on its own nationals. ESA points out that as is usual in EEA law, the general principle must be given a broad interpretation but the exception a strict interpretation. Article 5 of Directive 77/249 must in ESA's view be interpreted as covering only those situations in which a

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[21] ESA refers *inter alia* to Case 279/80 *Webb* [1981] ECR 3305, at paragraph 13; Case 427/85 *Commission* v *Germany*, at paragraphs 11, 12, 14 and 15; and Case C-294/89 *Commission* v *France*, at *inter alia* paragraph 17.

[22] Case 427/85 *Commission* v *Germany*, at paragraph 12.

[23] Case 427/85 *Commission* v *Germany*, at paragraph 14.

restriction to the freedom to provide services may be envisaged, i.e. where a public justification exists.

47. In ESA's opinion, the referring court may be understood as suggesting two possible avenues of justification for the national provision requiring a European lawyer providing services to work in conjunction with a local lawyer: first, professional obligations under the Liechtenstein Lawyers Act; second remuneration according to the Remuneration Scale Act. ESA submits that neither possibility can serve as justification. As concerns the first point, it refers to Article 4(2) of Directive 77/249 according to which a European lawyer providing services relating to the representation of a client in legal proceedings shall observe the rules of professional conduct of the host State. In ESA's view, this provision ensures that the public interests are safeguarded. As concerns the second point, ESA refers to Article 4(1) of the Directive, according to which activities relating to the representation of a client in legal proceedings shall be pursued under the conditions laid down for lawyers established in the host State. This means that European lawyers providing services must be compared to local lawyers, not to lay persons able to appear in legal proceedings on behalf of another person.

48. In ESA's view, the referring court is by the second question asking in essence whether a national provision may/must be set aside and a directive directly applied by a judge in an EFTA State. However, since the answer to the first question means that the applicable EEA rule is not Article 5 of Directive 77/249 but Article 36 of the EEA Agreement, ESA proposes that in order to give a useful answer, the Court should consider the question of national provisions which conflict with the articles of the main agreement.

49. ESA refers to Protocol 35 to the EEA Agreement, which in its opinion makes it clear that the Agreement does not require any Contracting Party to transfer legislative powers to any institution of the EEA, and that the homogeneity within the EEA will have to be achieved through national procedures.[24]

50. ESA submits that the national court must first consider whether it is possible to construe the national provision in such a way as to give it the meaning most in line with EEA law.[25] That is *a fortiori* the case when the dispute before the national court concerns the application of domestic provisions enacted for the

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[24] ESA refers to Case E-1/01 *Einarsson*, at paragraph 52.

[25] ESA refers in this respect to Case E-4/01 *Karlsson*, at paragraph 28. In its view, guidance to the statement in Case E-4/01 *Karlsson* can be found in the case law of the ECJ regarding the obligation referred to as consistent or conforming interpretation. ESA refers *inter alia* to Case 14/83 *Von Colson* [1984] ECR 1891; joined cases C-270/97 and C-271/97 *Deutsche Post* [2000] ECR I-929, at paragraph 62; and joined cases C-397/01 to C-403/01 *Pfeiffer and others* [2004] ECR I-8835, at paragraph 110.

purpose of transposing a directive intended to confer rights on individuals. This obligation entails that the national court must presume that the State in question had the intention of fulfilling entirely the obligations arising from the directive concerned.[26] ESA submits that in the present case, this translates as an intention not to go beyond the confines of the specifically authorised restriction on the freedom of lawyers to provide cross-border services. Therefore, the national court is bound to use to the fullest extent interpretative methods recognised by national law in order to achieve the result sought by the relevant EEA law. In that context, a provision of domestic law may be construed in such a way as to avoid conflict with another rule of domestic law, or the scope of the provision restricted by applying it only in so far as it is compatible with the rule concerned.[27]

51. Should the national court come to the conclusion that it is not possible to construe the national provision under examination in such a manner that it reflects the terms of Directive 77/249, as interpreted by the case law of the ECJ, the corollary is the conclusion that such a provision infringes Article 36 EEA.

52. ESA states that pursuant to Protocol 35, an EEA State is obliged to ensure that implemented EEA rules prevail when these conflict with national provisions. ESA submits that the main body of the EEA Agreement, including Article 36, has been made part of national law. The obligation laid down in Protocol 35 therefore implies that when it is not possible to construe the national provision so that it reflects EEA law, the conflict between the rules will be resolved in favour of the freedom to provide services enshrined in Article 36 EEA.

53. However, the undertaking in Protocol 35 only applies to those provisions that are framed in a manner capable of creating rights that individuals and economic operators may invoke before national courts. This is the case of provisions which are unconditional and sufficiently precise.[28] ESA points out that the ECJ has held what is now Article 49 EC to fulfil these criteria[29] and submits that in light of the homogeneity objective, and in order to ensure equal treatment of individuals throughout the EEA, Article 36 EEA must also be held to do so.[30]

54. In light of the above, ESA proposes that the answers to the questions be:

> 1. *Article 36 EEA and Directive 77/249 preclude a national provision which requires that a lawyer established in another EEA State must work in*

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26 ESA refers *inter alia* to joined cases C-397/01 to C-403/01 *Pfeiffer and others*, at paragraph 112.

27 Joined cases C-397/01 to C-403/01 *Pfeiffer and others*, at paragraph 116.

28 See Case E-1/01 *Einarsson*, at paragraph 53.

29 ESA refers inter alia to Case 33/74 *van Binsbergen* [1974] ECR 1299, at paragraphs 23 and 24.

30 ESA refers to case E-1/01 *Einarsson*, at paragraph 54.

conjunction with a local lawyer if and to the extent that it applies in situations where, under national law, representation by a lawyer is not mandatory.

2. *Where a provision of national law is incompatible with Article 36 EEA, and that Article has been implemented into national law, the situation is governed by the undertaking in Protocol 35 to the EEA Agreement and the implemented EEA rule shall prevail.*

The Commission of the European Communities

55. Seen in light of the circumstances of the case, the Commission understands the first question referred by the national court to be essentially asking whether Article 57a of the Liechtenstein Lawyers Act is compatible with EEA law where a party is (as a matter of *fact*) represented by a lawyer but where there is no mandatory *requirement* for legal representation.

56. The Commission refers to Case C-427/85 *Commission* v *Germany* where the ECJ concluded that a requirement for a lawyer providing services to act in conjunction with a lawyer established on Germany territory, even where there was no corresponding requirement of representation by a lawyer under German law, was contrary to ex-Articles 59 and 60 of the EC Treaty and Directive 77/249. The Commission submits that the reasoning applied by the ECJ in that case equally applies to this case, and that the same conclusion must be drawn. [31]

57. As concerns the second question, the Commission states that the question essentially queries how such a finding should properly be taken into account by the national court if the EFTA Court were to reach a similar conclusion.

58. In the view of the Commission, the national court should interpret, as far as is possible, Article 57a of the Liechtenstein Lawyers Act in such a way as to ensure conformity with Directive 77/249 and the relevant ruling of the ECJ. [32]

59. In light of this the Commission proposes the questions should be answered in the following sense:

A provision such as Article 57a of the Liechtenstein Lawyers Act according to which, in proceedings in which a party is represented by a lawyer or a defending counsel must be engaged, an EEA national lawyer

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[31] Case C-427/85 *Commission* v *Germany* at paragraphs 11-15. The Commission also refers to Case C-294/89 *Commission* v *France*.

[32] The Commission refers *inter alia* to Case 14/83 *Von Colson* and Case C-403/01 *Pfeiffer*, Article 6 EEA and to Case E-4/01 *Karlsson.*

providing services must call in a local lawyer to act in conjunction, is compatible with Article 36(1) of the EEA Agreement relating to the freedom to provide services and Article 5 of Council Directive 77/249/EEC only insofar as it requires the appointment of a local lawyer in cases where representation by a lawyer is itself compulsory.

Thorgeir Örlygsson
Judge-Rapporteur