



BESCHWERDEKOMMISSION
FÜR VERWALTUNGSANGELEGENHEITEN
FÜRSTENTUM LIECHTENSTEIN

BOARD OF APPEAL FOR ADMINISTRATIVE MATTERS
PRINCIPALITY OF LIECHTENSTEIN

VBK 2024/064

ON 13

ORDER

At the closed sitting of 18 December 2024, the Board of Appeal for Administrative Matters of the Principality of Liechtenstein, Vaduz, at which the following were present:

President	Christine Reiff
Vice-President	Thomas Nigg
Members	Dr Georges Baur
	Harry Hasler
	Sonja Hersche

in the administrative matter brought by the

appellant: Valair AG
Poststrasse 1
9490 Vaduz

represented by:
Ospelt & Partner Rechtsanwälte AG
Landstrasse 99
9494 Schaan

authority whose decision
is challenged: Amt für Volkswirtschaft
Poststrasse 1
9494 Schaan

now: Amt für Hochbau und Raumplanung (AHR)
Giessenstrasse 3
9490 Vaduz

concerning: refusal to extend the operating licence (AOC
CH 3050) of Valair AG to fixed-wing aircraft

against: decision of the Amt für Volkswirtschaft (Office
of Economic Affairs) of 12 December 2023, file
number 364/2023-24024

ruled as follows:

The appeal proceedings in Case VBK 2024/64 are stayed and reference is made to the EFTA Court in Luxembourg pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA) with the following request for an advisory opinion:

- 1. Does it follow from Article 4 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community or any other EEA provision that the competent licensing authority of a Member State may not impose any further conditions?**
- 2. If the first question is answered with "no": Is a provision according to which air operator certificates (AOC) and operating licences for flights carrying passengers, cargo and/or mail for remuneration and/or hire are only issued or granted if the intended activities are actually also possible on the basis of the infrastructure existing in Liechtenstein precluded by the objective of establishing an internal aviation market and/or other principles of EEA law?**

- 3. If the second question is answered with “no”: Is Article 9(3) of the Liechtenstein Aviation Act which de facto excludes the issue or granting of air operator certificates (AOC) and operating licences for flights carrying passengers for remuneration and/or hire using fixed-wing aircraft due to the absence of an infrastructure in Liechtenstein, in the sense of airports or airfields, compatible with Article 36 of the EEA Agreement (freedom to provide services)?**

Grounds

1. Facts

- 1.1 On 11 January 2022, the appellant applied to the Office of Construction and Infrastructure (Amt für Bau und Infrastruktur (ABI); now the Office of Building Construction and Spatial Planning (Amt für Hochbau und Raumplanung (AHR))) to extend its existing operating licence for helicopters to fixed-wing aircraft. By decision of 10 February 2022, the application was rejected by the Office. This was principally on the grounds that the consent of the Liechtenstein authorities, in accordance with Section II of the Exchange of Notes between Switzerland and Liechtenstein on cooperation between the Swiss and Liechtenstein authorities in the field of civil aviation (*Notenaustausch zwischen der Schweiz und Liechtenstein betreffend die Zusammenarbeit der schweizerischen und der liechtensteinischen Behörden im Bereich der Zivilluftfahrt*) (LGBI. 2003 No 40), could not be given to authorise the application for the granting of an operating licence for fixed-wing aircraft. For that, the (Swiss) Federal Office of Civil Aviation (Bundesamt für Zivilluftfahrt (BAZL)) was competent.

- 1.2 On 3 March 2022, the appellant lodged an appeal against this decision of the Office of Construction and Infrastructure with the Office of Construction and Infrastructure and with the Government, in which it was claimed that, pursuant to Article 6 of the Act of 15 May 2002 on Aviation (*Gesetz vom 15.05.2002 über die Luftfahrt*) (LFG; LGBl. 2003 No 39), the Liechtenstein authorities were competent, in particular, inasmuch as the Aviation Act took precedence over the Exchange of Notes.
- 1.3 By decision of 20 September 2022, the Government rejected the appeal. On 6 October 2022, the appellant lodged an appeal against this Government decision with the Administrative Court (Verwaltungsgerichtshof (VGH)). It requested the Administrative Court to amend the Government decision under challenge such as to order the Office of Construction and Infrastructure to authorise the extension of the operating licence to fixed-wing aircraft.
- 1.4 By judgment of 3 March 2023, the Administrative Court granted the appeal and set aside without replacement both the Government decision of 20 September 2022 and the decision of the Office of Construction and Infrastructure of 10 February 2022. This was on the grounds that, pursuant to the applicable Aviation Act, operating licences had to be granted, not by the Federal Office of Civil Aviation but, by a Liechtenstein authority, specifically, the Office of Economic Affairs (Amt für Volkswirtschaft (AVW)). Accordingly, the Office of Economic Affairs was required to reach a decision on the appellant's application of 11 January 2022 for the extension of the operating licence to fixed-wing aircraft.
- 1.5 By letter of 28 April 2023, the appellant notified the Office of Economic Affairs of both the ruling of the Administrative Court and of the pending procedure with the Federal Office of Civil Aviation and again applied for the extension of the operating licence (AOC CH 3050) to fixed-wing aircraft.

- 1.6 By letter of 9 August 2023, the appellant thereupon brought a complaint to the Government for failure to act. In addition, it requested the Government to order the Office of Economic Affairs to approach the Federal Office of Civil Aviation within 14 days and to request the latter to assess the requirements in connection with the appellant's application and subsequently to grant an authorisation. In the alternative, it was requested that the Government itself approach the Federal Office of Civil Aviation requesting the latter to assess in substance the requirements in connection with the appellant's application and subsequently to grant an authorisation.
- 1.7 By decision of 10 October 2023, the Government upheld the complaint inasmuch as the present administrative matter was remitted to the Office of Economic Affairs for further consideration and resolution.
- 1.8 By decision of the Office of Economic Affairs of 12 December 2023, the appellant's applications of 11 January 2022 and 24 April 2023 were rejected to the extent that by those applications the extension to fixed-wing aircraft of the operating licence of 20 April 2018 granted by the Federal Office of Civil Aviation and/or the Air Operator Certificate of 20 April 2018 (AOC CH 3050) issued by the Federal Office of Civil Aviation was sought. In addition, the appellant's applications of 11 January 2022 and 24 April 2023 were rejected to the extent that by those applications the grant of an operating licence for fixed-wing aircraft was sought. The Office of Economic Affairs thereby also concluded that an assessment by the Federal Office of Civil Aviation of the requirements for such an (extended) operating licence was unnecessary.
- 1.9 In essence, the Office of Economic Affairs reasoned its decision as follows:
- 1.9.1 The requirements for the granting of operating licences are not laid down in the Aviation Act. Article 6(2) of the Aviation Act provides merely that the Office of Economic Affairs has the Federal Office of Civil Aviation

assess the requirements for the granting of an operating licence. Although the Office of Economic Affairs had requested the Federal Office of Civil Aviation to provide an initial appraisal on the possibility, under aviation rules, to authorise the requested extension of the operating licence (AOC CH 3050) to fixed-wing aircraft, it had not received any reply before the decision was issued.

- 1.9.2 On the basis of the legal analysis of the requested extension of the operating licence to fixed-wing aircraft, carried out in parallel, the Office of Economic Affairs concluded, however, that an assessment by the Federal Office of Civil Aviation of the requirements for such an (extended) operating licence was not necessary.
- 1.9.3 As followed from the ruling of the Administrative Court in case VGH 2022/074, the existing operating licence of 20 April 2018 had been granted improperly by the Federal Office of Civil Aviation and not by the Office of Economic Affairs. However, the appellant's applications sought only the extension of the existing operating licence from the Federal Office of Civil Aviation. The Office of Economic Affairs could not extend, however, a licence granted by a foreign authority. However, in the first set of legal proceedings, the Administrative Court had reinterpreted the application of 20 April 2018 to mean, in principle, that also the granting of an operating licence was sought.
- 1.9.4 Although the applicable Aviation Act does not define requirements for operating licences, it was obvious to the legislature, according to the Office of Economic Affairs, that operating licences for air carriers established in Liechtenstein can only be obtained subject to the requirement that the operations envisaged are actually also possible on the basis of the infrastructure existing on domestic territory. Although the legislature had omitted to lay down expressly in the legislation this fundamental requirement for the granting of an operating licence, this did

not mean that it did not apply in the assessment of the applications at issue.

- 1.9.5 First, the applicable principle of territoriality can be derived from public law. In addition, the connection to domestic territory necessary for official authorisations follows from the fundamental legal requirements for the introduction of an official authorisation. Its introduction serves the prevention of danger. A public interest for the introduction of an official authorisation for a commercial activity which takes place purely abroad is not evident. Consequently, these would be impermissible. As the applicant does not intend to operate fixed-wing aircraft in Liechtenstein, the type of operation intended by the applicant does not have the necessary domestic connection required on the basis of the principle of territoriality for the grant of an operating licence in accordance with the Aviation Act.
- 1.9.6 Further the Office of Economic Affairs takes the view that in the assessment of applications referred to in Article 5(1) of the Aviation Act also the provisions of the Swiss Aviation Act apply. By virtue of the Exchange of Notes between Switzerland and Liechtenstein of 27 January 2003 on cooperation between the Swiss and Liechtenstein authorities in the field of civil aviation (LGBI. 2003 No 40), Article 3 of the Aviation Act must be interpreted to mean that for the granting of operating licences under the Aviation Act in addition to EEA provisions also the Swiss Aviation Act must apply. For the granting of an operating licence, Article 27(2)(a) of the Swiss Aviation Act presupposes an airfield suitable for that purpose. Due to the topography of Liechtenstein territory, an airfield of that kind does not exist. Thus this essential requirement for the granting of an operating licence for fixed-wing aircraft in Liechtenstein is not fulfilled.

- 1.10. The appellant appealed against this decision of the Office of Economic Affairs of 12 December 2023 to the Government, challenging it in its entirety. In essence, it argued as follows.
 - 1.10.1 The appellant challenges an incorrect legal assessment inasmuch as, under the Liechtenstein Aviation Act (correctly it would seem: Liechtenstein aviation law), Council Regulation (EEC) No 2407/92 of 23 July 1992 on the licensing of air carriers (Regulation 2407/92) is directly applicable.
 - 1.10.2 In this regard, the Liechtenstein Aviation Act does not provide for a separate competence for the extension of the AOC, this results, however, directly from the logic of the Act and Regulation (EEC) No 2407/92. Pursuant to Article 6(1) of the Aviation Act, the Office of Economic Affairs is competent for the licensing procedure. Pursuant to Article 6(2), the latter has the Federal Office of Civil Aviation assess the requirements for the granting of the operating licence. This means, in turn, that the licensing authority for a Liechtenstein air carrier is always the Office of Economic Affairs which obtains simply the expert assessment of the Federal Office of Civil Aviation. It follows lastly also from Articles 9 and 10 of Regulation 2407/92 that the Member State which is competent for the operating licence is also competent for the issue of the AOC or amendments to the AOC.
 - 1.10.3 Pursuant to Article 3(2) of Regulation 2407/92, an undertaking meeting the requirements of this Regulation shall be entitled to receive an operating licence. In the appellant's case, all the requirements are fulfilled. Consequently, also an entitlement to the extension of the AOC to fixed-wing aircraft exists, as the appellant fulfils all the requirements, or it has, at any rate, an entitlement to a substantive procedure which assesses the fulfilment of the requirements.

- 1.10.4 The competence for the granting of the operating licence and/or extension of the AOC lies with the Member State in which the principal place of business of the undertaking and, if any, its registered office are located (Article 4(1)(a) of Regulation 2407/92). In the case of the appellant, this is the Principality of Liechtenstein as it is an undertaking registered in the Liechtenstein commercial register having its principal place of business at Balzers Heliport.
- 1.10.3 Also the requirement in that connection for an airfield on domestic territory is entirely misplaced as Regulation 2407/92 does not provide for such a requirement; on the contrary, both under EEA aviation law rules and under Swiss aviation law it is not even required that an air carrier must furnish proof of rights to use a runway. What is decisive is simply that the appellant has its principal place of business in Liechtenstein and not where it wishes to operate helicopters or fixed-wing aircraft.
- 1.11. Amendment to the legal bases and competences
- 1.11.1. The Aviation Act of 15 May 2002 was replaced by the new Aviation Act on 1 June 2024 (LGBl. 2024 No 224) (Article 24 of the Aviation Act).
- 1.11.2. Under earlier law, appeals against decisions of the Office of Economic Affairs had to be addressed to the Government. Latterly, appeals against decisions and orders of the Office of Building Construction and Spatial Planning, which is now competent, may be lodged with the Board of Appeal for Administrative Matters (Article 18(1) of the Aviation Act and Article 4(1)(y) of the Board of Appeal for Administrative Matters Act (*Beschwerdekommissionsgesetz*)).
- 1.11.3. Therefore, as the Office of Economic Affairs adopted its decision on 12 December 2023, for the case at hand, the question of the competence of the appeals body arises. Pursuant to Section II of the Act Amending the Board of Appeal for Administrative Matters Act (*Gesetz über die*

Abänderung des Beschwerdekommmissionsgesetzes) (LGBl. 2024 No 266), the Board of Appeal for Administrative Matters is competent for cases in which at the date on which this Act enters into force, that is to say on 10 July 2024, no Government decision subject to a right of appeal has been adopted. By 10 July 2024, the Government had, in fact, not adopted a decision subject to a right of appeal with regard to the appeal of 17 January 2024 against the decision of the Office of Economic Affairs, for which reason the Board of Appeal for Administrative Matters has been competent since 10 July 2024. Thus the appeal lodged with the Government had to be regarded as addressed to the Board of Appeal for Administrative Matters.

- 1.12. By order of 23 October 2024, the Board of Appeal for Administrative Matters notified the appellant that it intended to bring about a collegiate decision to the effect that the present appeal proceedings should be stayed and the questions specified in the order referred to the EFTA Court in Luxembourg for an advisory opinion.
- 1.13. Thereupon, the appellant submitted observations in which, in essence, it argued as follows:
 - 1.13.1 First, irregularities had occurred in the legislative procedure leading to the adoption of the amendments to the Board of Appeal for Administrative Matters Act (LGBl. 2024 No 266) and thus to the competence of the Board of Appeal for Administrative Matters in this case. At the present time, however, the appellant is not substantiating the corresponding suspicion and refers to an examination to be carried out by the Board of Appeal for Administrative Matters. The appellant leaves it to the Board of Appeal for Administrative Matters to decide, however, at what stage of the proceedings it wishes to examine the matter. The fact, by way of its observations, it is commenting on the questions to be referred to the EFTA Court in Luxembourg, does not mean that it recognises the competence of the Board of Appeal for Administrative Matters to deal with this case.

1.13.2 In substantive terms the appellant repeats, in essence, its earlier argument, and supplements this with the aspect concerning the infringement of the freedom to provide services pursuant to Article 36 EEA. In this respect, it argues, inter alia, that if Article 9(3) of the Aviation Act is to be applied or must be interpreted as meaning that obtaining (or extending) an operating licence together with an AOC in Liechtenstein is made practically impossible for commercial operators of flights using fixed-wing aircraft (by which it may not offer the service in EEA Member States), this directly affects access to the market in services in other EEA Member States. Thus, this restriction is capable of hindering access to intra-EEA trade in services. Admittedly, it is uncertain whether, as result of the distinction made here between commercial and non-commercial operators of flights using fixed-wing aircraft, Article 9(3) of the Aviation Act has inherently an indirectly discriminatory character. This remains to be examined, if necessary, by advisory opinion. However, from the appellant's perspective, there are, in any event, no overriding reasons in the public interest for the provision at issue. In the absence of this requirement, at the latest, an infringement of the freedom to provide services must consequently be affirmed.

1.13.3 Accordingly, the appellant suggests that the following additional question be referred to the EFTA Court:

3. If the second question is answered with "no": Is Article 9(3) of the Liechtenstein Aviation Act which de facto excludes the issue or granting of air operator certificates (AOC) and operating licences for flights carrying passengers for remuneration and/or hire using fixed-wing aircraft due to the absence of an infrastructure in Liechtenstein, in the sense of airports or airfields, compatible with Article 36 of the EEA Agreement (freedom to provide services)?

2. European law

Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3) has been applicable in EU Member States since 1 October 2008 and was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 90/2011. The latter has been in force since 20 July 2011.

3. National law

3.1 Pursuant to Article 1(1)(b)(1) of the Aviation Act (*Luftfahrtgesetz*) (LFG; LR 748.0 (available online in the latest consolidated version together with all other Liechtenstein legislation at www.gesetze.li; LR = Collection of Liechtenstein law)), the Aviation Act serves, inter alia, to implement Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community.

3.2 Pursuant to Article 1(1)(a), in conjunction with Article 2, of the Aviation Act, in the field of civil aviation, in addition, the following apply:

- (a) the provisions of the Exchange of Notes of 27 January 2003 between Switzerland and Liechtenstein on cooperation between the Swiss and Liechtenstein authorities in the field of civil aviation (LR 0.748.091.011) and the administrative agreements based on these;
- (b) the Swiss aviation legislation applicable on the basis of the Exchange of Notes.

4. The questions referred

It must be noted, first, that the suspicion of irregularities (see above 1.13.1) is not to be assessed in the present intermediate proceedings and for that reason is not to be addressed further here.

4.1 Question 1: Exhaustive enumeration of the conditions for the grant of an operating licence

Pursuant to Article 3(2), second subparagraph, of Regulation 1008/2008, an undertaking meeting the requirements of Chapter II shall be entitled to receive an operating licence. Further specification follows in Article 4, according to which an undertaking shall be granted an operating licence by the competent licensing authority of a Member State provided that:

- “(a) its principal place of business is located in that Member State;
- (b) it holds a valid AOC issued by a national authority of the same Member State whose competent licensing authority is responsible for granting, refusing, revoking or suspending the operating licence of the Community air carrier;
- (c) it has one or more aircraft at its disposal through ownership or a dry lease agreement;
- (d) its main occupation is to operate air services in isolation or combined with any other commercial operation of aircraft or the repair and maintenance of aircraft;
- (e) its company structure allows the competent licensing authority to implement the provisions of this Chapter;
- (f) Member States and/or nationals of Member States own more than 50 % of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the Community is a party;
- (g) it meets the financial conditions specified in Article 5;

- (h) it complies with the insurance requirements specified in Article 11 and in Regulation (EC) No 785/2004; and
- (i) it complies with the provisions on good repute as specified in Article 7.”

As a preliminary point, it should be noted that the system for the granting of an operating licence in Liechtenstein is based on a division of competences. For the assessment and monitoring of the requirements for the granting of an operating licence the (Swiss) Federal Office of Civil Aviation (BAZL) is competent (Section III of the Exchange of Notes in conjunction with Article 5(4) of the Aviation Act). Since 1 June 2024, operating licences are granted by the Office of Building Construction (AHR), prior to that by the Office of Economic Affairs (Article 9(1) of the Aviation Act). That is to say, before granting the operating licence, the latter has to request the Federal Office of Civil Aviation to assess whether the conditions specified in Article 4 of Regulation 1008/2008 are fulfilled. To this extent, with regard to Article 4(b), the Federal Office of Civil Aviation acts on behalf of the competent Liechtenstein authority. This appears to be covered by Article 1(1)(a) of Joint Committee Decision No 90/2011.

The Office of Economic Affairs bases its rejection of the application by the appellant, above all, on the argument “that operating licences for air carriers established in Liechtenstein can only obtain subject to the requirement that the operations envisaged are actually also possible on the basis of the infrastructure existing on domestic territory” (Decision of the Office of Economic Affairs of 12 December 2023, section 3.2). This addresses the fact that the topography of Liechtenstein territory does not permit the take-off and landing of fixed-wing aircraft and thus an “essential requirement for the granting of an operating licence for fixed-wing aircraft in Liechtenstein” is not fulfilled. This is explicitly laid down

in the (new) Aviation Act in Article 9(3): "Air operator certificates (AOC) and operating licences for flights carrying passengers, cargo and/or mail for remuneration and/or hire are only issued or granted if the intended activities are actually also possible on the basis of the infrastructure existing in Liechtenstein."

EU regulations incorporated into the EEA Agreement are directly applicable in Liechtenstein. Other than the adaptation concerning Article 4(f) of Regulation 1008/2008 mentioned above, an exception or adaptation in relation to Article 4 cannot be found. This is in contrast to Decision of the EEA Joint Committee No 69/2009 which, in relation to the incorporation of Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002 (OJ 2008 L 97, p. 72), expressly refers to "the specific situation of Liechtenstein resulting from the combined effect of a very small territory, a specific geographical structure as well as from the fact that the total amount of air traffic in Liechtenstein is very limited, that no international regular air services to or from Liechtenstein are available and that the civil aviation infrastructure in Liechtenstein consists of only one heliport" (recital 4). Consequently, Regulation 300/2008 does "not apply to the existing civil aviation infrastructure in the territory of Liechtenstein" (Article 1(1)(d) of Joint Committee Decision 69/2009).

The Board of Appeal for Administrative Matters questions, first, whether the conditions of Article 4 of Regulation 1008/2008 set out above are exhaustive or whether the national legislature or the competent licensing authority may impose additional conditions. "An act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties" (Article 7(a) EEA Agreement). Nonetheless, it follows from consistent case law that Member States "may adopt rules for the application of a regulation if they do not obstruct its direct applicability and do not conceal its Community nature, and if they specify that a

discretion granted to them by that regulation is being exercised, provided that they adhere to the parameters laid down under it (ECJ, *Danske Svineproducenter*, C-316/10, EU:C:2011:863, paragraph 41 and case law cited). However, in the view of the Board of Appeal for Administrative Matters, the condition set out in Article 9(3) of the Aviation Act does not constitute a specification, but an extension, of the conditions set out in Article 4 of Regulation 1008/2008.

On this question, reference must be made to the EFTA Court for an advisory opinion pursuant to Article 34 SCA.

4.2 Question 2: Frustration of the objective of an internal aviation market?

If Question 1 is answered with “no”, that is to say, further conditions for the granting of an operating licence, in addition to those listed in Article 4 of Regulation 1008/2008, are permissible, the Board of Appeal for Administrative Matters questions whether the specific condition set out in Article 9(3) of the Aviation Act, namely, that air operator certificates (AOC) and operating licences for flights carrying passengers, cargo and/or mail for remuneration and/or hire are only issued or granted if the intended activities are actually also possible on the basis of the infrastructure existing in Liechtenstein, is permissible.

According to recital 2 of Regulation 1008/2008, an aim of the Regulation is “to ensure a more efficient and consistent application of Community legislation for the internal aviation market”. In the view of the Board of Appeal for Administrative Matters, a provision such as that in Article 9(3) of the Aviation Act could result in the situation that an undertaking with a registered domicile in Liechtenstein, despite holding an operating licence for the air services possible on the basis of the existing infrastructure – in the present case, helicopter flights, cannot provide services of another kind from other EEA States – in the present case, air

services using fixed-wing aircraft – without opening a place of business there, for which then a different EEA licensing authority is competent.

On this question, reference must be made to the EFTA Court for an advisory opinion pursuant to Article 34 SCA.

4.3. Question 3: Infringement of the freedom to provide services under Article 36 EEA?

If Question 2 is answered with “no”, that is to say, further conditions for the granting of an operating licence, in addition to those listed in Article 4 of Regulation 1008/2008, are permissible, the Board of Appeal for Administrative Matters questions, in line with the argument advanced by the appellant, whether in the present case the freedom to provide services within the meaning of Article 36 EEA is infringed?

Indeed, the prohibition on restricting the freedom to provide services also concerns the freedom in the country of origin. For that reason, an undertaking may rely on the freedom to provide services against the State in which it is established if services are provided for recipients in another Member State (ECJ, *Alpine Investments*, C-384/93, EU:C:1995:126, paragraph 31). Even in the absence of a cross-border situation, it would seem that a restriction of the rights provided for in Chapter III of Directive 2006/123 is barely possible (ECJ, *Cad Mellano*, C-503/23, EU:C:2024:933, paragraph 50). The appellant has its registered domicile in Liechtenstein and plans to provide the service of the commercial transport of air passengers in fixed-wing aircraft on a cross-border basis in various EEA Member States. Hence, its offer is directed to service recipients in other Member States. If Article 9(3) of the Aviation Act is to be applied or must be interpreted as meaning that obtaining (or extending) an operating licence together with an AOC in Liechtenstein is made practically impossible for commercial operators of flights using fixed-wing aircraft (by which it may not offer the service in EEA Member

States), this directly affects access to the market for services in other EEA Member States. Thus, this restriction would be capable of hindering access to intra-EEA trade in services (compare ECJ, C-384/93, paragraph 33 et seq.).

The Liechtenstein Government justifies the restriction at issue on the basis that, due to Liechtenstein's topographic features, air services in the sense of commercial air operations would necessarily be provided outside of Liechtenstein within the EEA and the supervision of an extraterritorial economic activity of that kind would require the development of comprehensive administrative structures in Liechtenstein, which would, in any event, be disproportionate (BuA 2023/122, p. 22). As the appellant argues, no overriding reasons in the public interest can be derived from this. Considerations of a general nature or administrative difficulties do not suffice, as a rule, to justify a restriction. Also the absence of infrastructure, e.g. airports, is primarily a practical restriction and not an overriding public interest. Even if in the Government's argument an overriding public interest were, in principle, to be evident, this does not exist, at any rate, in the present case. Namely, the development of new administrative structures would, in fact, not be necessary. As a result of the bilateral agreement between Liechtenstein and Switzerland (Exchange of Notes between Switzerland and Liechtenstein on cooperation between the Swiss and Liechtenstein authorities in the field of civil aviation, LGBl. 2003 No 40), for Liechtenstein both the administrative and supervisory efforts in the field of civil aviation are greatly reduced.

Under the revised Aviation Act, the Swiss Federal Office of Civil Aviation (BAZL) has now been granted extremely extensive assessment and supervisory competences in this field (compare Article 5 of the Aviation Act). According to the Government, this is to avoid "the provision" by Liechtenstein "of extensive financial and staff resources in order to furnish an aviation authority of its own with the necessary expert staff" (BuA

(Bericht und Antrag der Regierung an den Landtag (Report and Motions of the Government to Parliament)) 2023/122, p. 30). By continuing the cooperation with Switzerland in the field of civil aviation, Liechtenstein can also continue to perform its functions efficiently and minimising resource use with the necessary expertise (ibid).

On this point, the appellant contends that it has its registered domicile in Liechtenstein and exercises its operative activity from there, for which sufficient supervision in the form of national authorities and the Federal Office of Civil Aviation already exists. The provision of air services in other EEA Member States by the appellant is an entirely separate question. Nor is it the task of the Liechtenstein authorities to monitor aviation safety. For that reason it is not evident why a “development of comprehensive administrative structures in Liechtenstein” (in any event not serving the overriding public interest) should be necessary when granting operating licences and AOCs to commercial providers of air services using fixed-wing aircraft.

In the view of the Board of Appeal for Administrative Matters, these arguments of the appellant merit consideration for which reason on this question, too, reference must be made to the EFTA Court for an advisory opinion pursuant to Article 34 SCA.

5. Pursuant to Article 34 SCA, courts, which in Liechtenstein includes boards of appeal (compare Ungerank, “Eine Beschwerdekommision ist [k]ein Gericht”, *Jus & News* 2010/2, 151; Case E-26/15 *B v Finanzmarktaufsicht*), may request the EFTA Court to give an advisory opinion. A question on the interpretation of EEA law must always be referred to the EFTA Court if the legal position is unclear and an answer to the legal question concerned is necessary to give judgment in the case (compare judgment of the State Court of 7 April 2014, case StGH 2013/172, published in LES 2014, 148). This is the case in the present proceedings. On the questions referred here, as far as it can be discerned,

no case law of the EFTA Court or the ECJ exists. Pursuant to Article 74(1) of the General Administrative Procedures Act, a stay of the present proceedings until the EFTA Court delivers its advisory opinion had to be ordered.

Board of Appeal for
Administrative Matters of the
Principality of Liechtenstein

President

Christine Reiff

Notice concerning rights of appeal:

No appeal may be brought against this order.