



JUDGMENT OF THE COURT

1 July 2005*

(Admissibility – security for costs before national courts – free movement of capital – freedom to provide services)

In Case E-10/04,

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 a case pending before it between

Paolo Piazza

and

Paul Schurte AG

concerning free movement of services and capital within the EEA,

THE COURT,

composed of: Carl Baudenbacher, President, Per Tresselt and Thorgeir Örlygsson, (Judge-Rapporteur), Judges,

Registrar: Henning Harborg,

* Language of the Request: German.

having considered the written observations submitted on behalf of:

- the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director of the EEA Coordination Unit, acting as Agent;
- the EFTA Surveillance Authority, represented by Elisabethann Wright and Per Andreas Bjørgan, Senior Officers, acting as Agents;
- the Commission of the European Communities, represented by John Forman and Enrico Traversa, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch; the EFTA Surveillance Authority, represented by Elisabethann Wright, and the Commission of the European Communities, represented by Enrico Traversa, at the hearing on 24 May 2005,

gives the following

Judgment

I Facts and procedure

- 1 By a reference dated 16 December 2004, registered at the Court on 31 December 2004, Fürstliches Landgericht made a request for an Advisory Opinion in a labour law dispute concerning a pecuniary claim from an Italian national, Paolo Piazza (the “Claimant”), resident in Switzerland, against his former employer, Paul Schurte AG (the “Defendant”), a joint-stock company incorporated under Liechtenstein law.
- 2 On 9 December 2004 the national court decided to instruct the Claimant to provide security for the costs of the Defendant and for the court proceedings (hereinafter referred to as “security” or “security for costs”). That decision, which did not specify the amount or the means of security, has according to the reference become final. The national court emphasises in its reference that it is not requesting an advisory opinion in this respect.
- 3 The amount and the means of the security will be subject to a separate decision of the national court pursuant to Section 56 of the Liechtenstein Zivilprozessordnung (Code of Civil Procedure, the “ZPO”). The parties to the main proceedings have not agreed on means of security, and they have neither offered nor requested any particular means of security.

- 4 The national court referred the following questions to the Court:
1. *Is a provision such as that contained in Section 56(2) of the Liechtenstein Zivilprozessordnung (Civil Procedure Code) compatible with EEA law, in particular with the freedom to provide services under Article 36 of the EEA Agreement and the freedom of movement of capital under Article 40 thereof?*
 2. *If such a provision is justifiable, is it also proportionate?*
- 5 By a communication dated 31 March 2005, the national court commented on the written observations of the Government of Liechtenstein.
- 6 By a letter dated 21 April 2005, and with reference to Article 96(4) of the Rules of Procedure, the Court requested the national court to clarify the procedural rules and factual circumstances on which its decision concerning means of security will be based, including the relationship between Section 56(1) ZPO and Section 56(2) ZPO. The national court replied by a letter dated 25 April 2005.

II Legal background

National Law

- 7 Section 56 of the ZPO reads as follows:
1. *Unless the parties agree otherwise, security to be provided pursuant to this Act shall be lodged by depositing with the court cash or securities that, in accordance with discretion of the court, provide sufficient cover. The securities may not be withdrawn from circulation and must have the current interest or dividend coupons and talons attached. Their value shall be calculated in accordance with the rate in effect on the date of deposit.*
 2. *At its discretion, the court may permit, inter alia, deposit books from a domestic savings bank (Sparkasse) or a domestic agricultural or other lending institution (Vorschusskasse) for the purpose of posting security. The judge may permit security to be provided by means of a mortgage on a plot of land in Liechtenstein providing a legal security or a guarantee issued by solvent guarantors resident in Liechtenstein, where the person required to provide security is unable to procure a different kind of security or can do so only with great difficulty.*
 3. *The deposit with the court shall establish a lien on the deposited object in respect of the claim in relation to which the security is provided.*

EEA Law

8 Article 4 of the EEA Agreement reads:

Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

9 Article 36(1) of the EEA Agreement 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.

10 Article 39 of the EEA Agreement reads:

The provisions of Article 30 and 32 to 34 shall apply to the matters covered by this Chapter.

11 Article 33 of the EEA Agreement reads:

The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

12 Article 40 of the EEA Agreement reads:

Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.

13 Article 1.1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the EC Treaty¹ (hereinafter “Directive 88/361”) reads:

1. Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.

¹ OJ 1988 L 178, p. 5; referred to in Point 1 of Annex XII to the EEA Agreement.

14 Article 4 of Directive 88/361 reads:

This Directive shall be without prejudice to the right of Member States to take all requisite measures to prevent infringements of their laws and regulations, inter alia in the field of taxation and prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information.

Application of those measures and procedures may not have the effect of impeding capital movements carried out in accordance with Community law.

15 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

III Findings of the Court

Admissibility of the questions

16 In its observations, the Government of Liechtenstein contests the admissibility of the questions referred to the Court by the national court.

17 First, the Government submits that the facts and legal circumstances of the case are not sufficiently explained in the request as required by Article 96(3) of the Rules of Procedure of the EFTA Court. In particular, it is not clear from the request whether the means of security were disputed before the national court, and if so, what form of security was actually disputed or how the national rules were to be applied within the national legal order.

18 On this point, the Court notes that the purpose of the requirement to explain the factual and legal circumstances of the case to the Court is, first, to enable the Court to arrive at an interpretation of EEA law which may be of use to the national court, and second, to give the governments of the Contracting Parties and other interested parties the opportunity to submit observations pursuant to Article 20 of the Statute of the Court (see, inter alia, Case C-67/96 *Albany v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, at paragraphs 39-40).

19 As regards the factual circumstances relevant to the questions referred, the national court has stated that it must determine the means of security to be provided by the Claimant in the case, and in that regard essentially seeks clarification of whether it is permissible under EEA law to restrict the permissible security to domestic security. The factual and legal description provided in the reference, together with the additional information provided by

the national court, make it possible for the Court to assess the relevance and scope of the questions referred. Moreover, the EFTA Surveillance Authority, the Commission, and indeed the Government of Liechtenstein, were able to submit written and oral observations on this issue.

- 20 Second, the Government of Liechtenstein submits that the questions referred are hypothetical, in particular because they are not at issue in the main proceedings.
- 21 In this regard, the Court recalls its settled case law on the procedure provided for by Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the “ESA/Court Agreement” or “SCA”), which is a specially established means of judicial co-operation between the Court and national courts, with the aim of providing the national courts with the necessary elements of EEA law to decide the cases before them. It is for the national court to determine, in light of the particular circumstances of the case, both the need for an advisory opinion in order to enable it to deliver judgment, and the relevance of the questions that it submits. Consequently, where the questions referred concern the interpretation of the EEA Agreement, the Court is in principle bound to give a ruling. However, the Court may not rule on a question, where it is quite obvious that the sought interpretation of EEA law bears no relation to the actual facts of the main action or its purpose, or where the issue is hypothetical (see, inter alia, Case E-1/95 *Samuelsson v Sweden* [1994-1995] EFTA Ct. Rep. 145, at paragraph 15; and, E-2/03 *Ásgeirsson and others* [2003] EFTA Ct. Rep. 185, at paragraph 21).
- 22 The Liechtenstein Government’s main line of argument is that the decision of the national court on security is not in conformity with Liechtenstein law as interpreted by *Fürstliches Obergericht* (Liechtenstein Court of Appeal), and that therefore, the question of security should not have been an issue in the main proceedings. In this respect the Court notes, that it is not within its competence to rule on national law or to determine, whether a decision given by a national court is in conformity with the precedent of a higher national court (see, inter alia, Case E-2/95 *Eidesund v Stavanger Catering* [1995-1996] EFTA Ct. Rep. 1, at paragraph 14).
- 23 According to the national court, the questions referred to the Court are relevant when deciding the means of security. The questions referred to the Court relate to this decision and questions of interpretation of EEA law raised thereby. In these circumstances, it lies within the discretion of the national court to determine whether an advisory opinion is necessary. In light of this, the questions cannot be regarded as hypothetical.
- 24 It follows from the foregoing that the questions referred by the national court are admissible.

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The questions

- 25 In its questions the national court refers to a provision of national law, and asks whether such a provision is in conformity with EEA law.
- 26 In light of the information provided by the national court in the request, it is the Court's understanding that the referring court is essentially asking whether a national provision that limits means of security for costs to various forms of security of domestic origin (inter alia: deposit books from domestic savings banks or other domestic lending institutions, mortgages on a plot of land in a contracting party or a legal security or a guarantee issued by solvent guarantors resident in the contracting party) is in conformity with EEA law.
- 27 In its questions the national court refers in particular to Article 36 EEA and Article 40 EEA. The written and oral observations of the EFTA Surveillance Authority are, however, based on Article 4 EEA. The Commission, on the other hand, bases its written and oral observations mainly on Articles 36 and 40 EEA and refers to Article 4 EEA only as a supplementary argument.
- 28 The EFTA Surveillance Authority and the Commission, referring to case law of the Court of Justice of the European Communities argue that Article 4 EEA is infringed because imposing an obligation to provide security for costs exclusively on non-resident claimants amounts to discrimination as regards access to justice.
- 29 Under the cooperation procedure provided in Article 34 SCA, it is, in principle, for the national judge to determine the subject matter of the proceedings before the Court by formulating the questions for which it deems an interpretation of EEA law necessary.
- 30 The national court, in its reference, expressly states that the decision to instruct the Claimant to provide security has become final, and that its questions do not relate to the obligation to provide security as such. Moreover, in its reference, the national court does not provide the Court with any information on the circumstances in which security must be provided. The Court respects the explicit limitation of the scope of the questions made by the national court, and will not deal with the general question of whether demanding security for costs only from non-resident claimants is in compliance with Article 4 EEA.
- 31 It could be argued, as the EFTA Surveillance Authority does, that Article 4 EEA is applicable since limiting means of security for costs to those of domestic origin may be mainly detrimental to non-residents, and that such a limitation may have a negative effect on non-residents' access to justice. However, in light of the facts and legal circumstances of the case before the national court, as they are described in the reference, it should be noted that Article 4 EEA applies independently only to situations governed by EEA law for which the EEA Agreement lays down no specific rules prohibiting discrimination (see, Case E-1/00 *State Debt Management Agency v Íslandsbanki-FBA* [2000-2001] EFTA Ct.

Rep. 8, at paragraph 40). Therefore, and with reference to the above, the Court finds it appropriate to examine the questions under Articles 36 and 40 EEA.

Article 40 EEA

- 32 Article 40 EEA prohibits restrictions between the Contracting Parties on the movement of capital belonging to persons resident in the EEA, and discrimination based on the nationality or the place of residence of natural or legal persons or on the place where such capital is invested. As stated by the Court in Case E-1/04 *Fokus Bank v The Norwegian State* [2004] EFTA Ct. Rep. 11, at paragraph 25, Article 40 EEA confers a right upon individuals and economic operators to market access.
- 33 As the Court stated in *Fokus Bank* at paragraph 23, the rules governing the free movement of capital in the EEA Agreement are essentially identical in substance to those in the EC Treaty (see also, Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, at paragraph 28). Consequently, the case law of the Court of Justice of the European Communities on Article 56 EC is relevant for the interpretation of Article 40 EEA to the extent provided in Article 6 EEA and Article 3 SCA.
- 34 When determining whether the measures in question are in breach of Article 40 EEA, it first needs to be examined whether provision of means of security, such as those involved in the case at hand, constitutes capital movement within the meaning of Article 40 EEA. In that regard the Court notes, that the security involved covers many different types of security, such as bank deposit books, mortgages on plots of land, and guarantees and legal security provided by individuals, as well as other means of domestic security deemed adequate by the national courts.
- 35 The nomenclature of capital movements in Annex I to Directive 88/361, as referenced in Annex XII to the EEA Agreement, provides a non-exhaustive list of capital movements. It covers various forms of securities. Heading IX of Annex I lists “*Sureties, other guarantees and rights of pledge*”.
- 36 Accordingly, the Court concludes that the provision of foreign security, such as those types relevant in the case at hand, constitutes capital movement within the meaning of Article 40 EEA.
- 37 As concerns the question of whether a provision, such as the one involved in the proceedings before the national court, entails a restriction or discrimination within the meaning of Article 40 EEA, the Government of Liechtenstein objects to the submission of the Commission that it entails overt discrimination. The Government, however, seems to admit that it might entail covert discrimination based on the place where the security provider is established or the place where the security is held.

- 38 A national provision, such as the one referred to by the national court, differentiates between means of security on the sole basis of whether they originate in Liechtenstein or not. Such a differential treatment inevitably restricts the movement of capital between the Contracting Parties, since it impedes claimants in court proceedings in Liechtenstein from posting security that originates in a Contracting Party other than Liechtenstein (see, with respect to guarantees of credit institutions, Case C-279/00 *Commission v Italy* [2002] ECR I-1425, at paragraph 37).
- 39 Next, it needs to be determined whether such a restriction can be justified. As stated above, the rules governing the free movement of capital in the EEA Agreement are essentially identical in substance to those in the EC Treaty. In light of the objective of the EEA Agreement to provide for a homogeneous European Economic Area, this must apply equally to rules prohibiting restrictions on the free movement of capital and rules governing any possible justification. Consequently, national rules restricting the free movement of capital in the EEA may, as in Community law, be justified on grounds such as those stipulated in Article 58 EC or on considerations of overriding public interest. In order to be so justified, the national rules must be suitable for securing the objective that they pursue and must not exceed what is necessary in order to achieve it, so as to accord with the principle of proportionality (see, inter alia, Case C-174/04 *Commission v Italy*, judgment of 2 June 2005, not yet reported, at paragraph 35).
- 40 In its observations, the Government of Liechtenstein claims that a national provision such as the one at issue can be justified on public policy grounds. The Government maintains that the enforcement of decisions on costs by Liechtenstein courts is considerably more difficult abroad than the domestic enforcement of such decisions. In that respect, the Government refers to the fact that the Principality of Liechtenstein has not ratified the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1988 L 319, p. 9, hereinafter, the “Lugano Convention”). The Government emphasises the necessity of protecting the interests of the party entitled to security and thereby the good functioning of the civil justice system. To that end, a national provision such as the one at issue is, in the opinion of the Government, necessary. A general exclusion of foreign security is, however, in the opinion of the Government, disproportionate when foreign security can provide the same protection as domestic security.
- 41 The EFTA-Surveillance Authority claims that although it may constitute a legitimate aim to protect the good functioning of the civil justice system, a national provision, such as the one at issue, is disproportionate. The Commission, on the other hand, is of the opinion, that no justificatory grounds exist in this case.
- 42 On this point, the Court first notes that deviations from the fundamental principles of the EEA Agreement must be construed narrowly. As the Court has held in an earlier judgment, justification on public policy grounds can only be

accepted in the case of a genuine and sufficiently serious threat affecting one of the fundamental interests of society (see, with respect to Article 33 EEA, case E-3/98 *Rainford-Towning* [1998] EFTA Ct. Rep. 205, at paragraph 42).

- 43 The good functioning of the judicial systems is a common principle in the constitutional structure of the EEA Contracting Parties, and a necessary element for ensuring access to justice, which is an essential part of the EEA legal order (see Case E-2/02 *TBW and Bellona v EFTA Surveillance Authority* [2003] EFTA Ct. Rep. 52, at paragraph 36). Bearing this in mind, the good functioning of the civil justice system could, as a matter of principle, be considered as a public policy ground (see for comparison in relation to the right of establishment, Case E-2/01 *Pucher* [2002] EFTA Ct. Rep. 44, at paragraph 32).
- 44 However, even under this perspective, it must be examined whether measures such as those referred to in the national provision in question before the national court, can be regarded as suitable and proportionate in relation to the aim pursued.
- 45 In connection with the question of suitability of the measures in question, the Court notes that rules on security for costs may influence the possibilities of parties to a legal dispute to protect their legitimate interest by taking recourse through the judicial system. Therefore, it may serve the aforementioned legitimate aim to include, in national legislation, provisions to ensure that costs of court proceedings can be effectively collected. However, it needs to be examined whether the conditions of proportionality are fulfilled in the case at hand.
- 46 The proportionality principle requires the national legislator, when pursuing a legitimate aim, to choose the means that is the least restrictive on the freedoms protected by the EEA Agreement. The Court recognises that enforcement of foreign security may be difficult since it often involves costs and complications that will not arise when enforcing domestic security. In that regard, the Court notes that this may especially be so in the case of Liechtenstein, which has not ratified the Lugano Convention. However, such a situation does not give leave to the Contracting Parties to fail to fulfil their obligations under the EEA Agreement (see, for comparison in relation to the right of establishment Case E-2/01 *Pucher* [2002] EFTA Ct. Rep. 44, at paragraph 39).
- 47 Security for costs can be provided by various means, and their form is not harmonised within the EEA. Nevertheless, some means of security originating in another EEA Contracting Party do not raise additional difficulties with respect to their enforcement, and may therefore be as convenient as security of domestic origin. An example thereof, as pointed out by the referring Court, is an unconditional bank guarantee of unspecified duration. Consequently, an outright exclusion of any security originating in other Contracting Parties cannot satisfy the conditions of proportionality.

- 48 Similarly, a decision by a national court that excludes all means of security originating in other Contracting Parties on the sole ground that they are not of domestic origin, would be disproportionate. The decisive question must be whether procedural costs can be recovered without additional difficulties caused by, inter alia, litigation proceedings or other cumbersome recovery procedures abroad. It is for the national court to evaluate the facts of the case in this regard.
- 49 Based on the foregoing, the Court concludes that a national provision, which excludes all means of security for costs in court proceedings, originating in other Contracting Parties, violates Article 40 EEA and cannot be justified on grounds of public policy in order to ensure the good functioning of the civil justice system.

Article 36 EEA

- 50 The questions referred to the Court are based on both Article 40 EEA and Article 36 EEA. Moreover, the Commission has suggested that the questions should be examined under both Articles and refers in that regard to the approach of the Court of Justice of the European Communities in Case C-484/93 *Svensson and Gustavsson v Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955.
- 51 Article 36 EEA requires the abolition of all restrictions on the provision of services, including financial services, within the EEA, whereas Article 40 EEA prohibits all restrictions on the movement of capital within the EEA. It follows from the wording of these two provisions, as well as their placement in different chapters of the Agreement, that they are intended to regulate different situations.
- 52 The predominant feature of the case at hand is the free movement of capital. National provisions which exclude means of security originating in other Contracting Parties restrict the flow of capital between the Contracting Parties. Such provisions may, however, also hinder lending institutions from providing services abroad, and parties to court proceeding from buying their services abroad. However, that is not the central issue of this case. Furthermore, as stated by the Court in Case E-1/00 *Íslandsbanki-FBA*, at paragraph 33, Articles 40 and 36 are, as a rule, not intended to apply simultaneously.
- 53 The present case is therefore only dealt with under Article 40.

IV Costs

- 54 It follows from Article 97(5) of the Rules of Procedure that it shall be for the national court to decide as to the cost of the reference. The costs incurred by the EFTA Surveillance Authority, the Commission of the European Communities, the Government of Liechtenstein which have submitted observations to the Court, are not recoverable.

On those grounds,

THE COURT,

in answer to the questions referred to it by Fürstliches Landgericht by a reference of 16 December 2004, hereby gives the following Advisory Opinion:

A national provision, which excludes all means of security for costs in court proceedings, originating in other Contracting Parties, violates Article 40 EEA and cannot be justified on grounds of public policy in order to ensure the good functioning of the civil justice system.

Carl Baudenbacher

Per Tresselt

Thorgeir Örlygsson

Delivered in open court in Luxembourg on 1 July 2005.

Henning Harborg
Registrar

Carl Baudenbacher
President