REPORT FOR THE HEARING
in Case E-10/04
-revised- *

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.

I Introduction

1. By a reference dated 16 December 2004, registered at the Court on 31 December, the Fürstliches Landgericht made a request for an Advisory Opinion in a case pending before it between Paolo Piazza (the "Claimant") and Paul Schurte AG (the "Defendant").

II Facts and procedure

2. The questions referred arose in the context of a labour law dispute pending in the Fürstliches Landgericht, which concerns a pecuniary claim from an Italian national, Mr Paolo Piazza, resident in Switzerland, against his former employer, Paul Schurte AG, a joint-stock company incorporated under Liechtenstein law.

3. At the first hearing held on 9 December 2004, the Fürstliches Landgericht decided to instruct the Claimant to provide security. The national court must then determine what constitutes adequate security under the circumstances, and in that

* Paragraphs 11 and 12 have been added, and subsequent paragraphs renumbered.

regard, has requested the opinion of the EFTA Court. The Fürstliches Landgericht emphasises that its questions are confined to the means of security, and do not extend to the obligation to post security.

4. The Liechtenstein Zivilprozessordnung (the Civil Procedure Act, the "ZPO") provides in Sections 38, 57, 407 and 492, that in certain cases, a party to proceedings shall be ordered to provide security for costs.

5. The means of security is governed by Section 56 of the Civil Procedure Act. According to paragraph 1 of that provision, in the absence of agreement between the parties, security shall be furnished in the form of cash or securities. Section 56(2) provides a list of different forms of domestic security, i.e. deposit books from a domestic savings bank or a domestic agricultural or other lending institution, or security provided by means of a mortgage on a plot of land in Liechtenstein or a guarantee issued by a solvent guarantor resident in Liechtenstein.

6. In a letter dated 21 April 2005, and with reference to Article 96(4) of the Rules of Procedure, the Court requested the Fürstliches Landgericht to clarify the procedural rules and factual circumstances on which its decision on means of security will be based, including the relationship between Article 56(1) ZPO and Article 56(2) ZPO. The Fürstliches Landgericht replied by letter dated 25 April 2005.

7. By a communication dated 31 March 2005, the Fürstliches Landgericht commented on the observations by the Government of Liechtenstein.

III Questions

8. The following questions were referred to the EFTA 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?**
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> **(2) If such a provision is justifiable, is it also proportionate?**

IV Legal background

Liechtenstein law

9. Section 56 of the Zivilprozessordnung 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

10. 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.

11. Article 39 of the EEA Agreement reads:

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

12. 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.

13. 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.*

14. Article 1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the EC Treaty[1] (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.*
>
> *2. Transfers in respect of capital movements shall be made on the same exchange rate conditions as those governing payments relating to current transactions.*

15. 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.*

V Written Observations

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

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

- 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;

17. The Claimant has submitted materials relating to the substance of the main proceedings, but has not addressed the questions referred to the EFTA Court. The Defendant has submitted no communication to this Court.

The Government of Liechtenstein

18. The principal submission of the Government of Liechtenstein is that the questions referred by the national court are inadmissible. In the alternative, the Government submits that Article 56 of the Civil Procedure Act is compatible with EEA law.

Admissibility

19. The Government of Liechtenstein presents two independent legal grounds in support of its view on inadmissibility. First, that the facts of the case are not sufficiently explained in the request, and second, that the questions referred are hypothetical.

a. Insufficient description of the facts of the case

20. The Government maintains that a request by a national court for an advisory opinion can only be admitted when the referring court has submitted a sufficient explanation of the factual circumstances on which the referred questions are based. In this regard, the Government refers to the case law of the EFTA Court and of the Court of Justice of the European Communities,[2] and to Article 96(3) of the Rules of Procedure of the EFTA Court which states:

> *The request for an advisory opinion shall be accompanied by a summary of the case before the national court including a description of the facts of the case as well as a presentation of the provision in issue in relation to*

[2] Case E-4/01 *Karl K. Karlsson* v *Iceland* [2002] EFTA Court Report 11; and Case C-235/95 *AGS Assedic Pas-de-Calais* v *François Dumon and Froment* [1998] ECR I-4531, para 3.

the national legal order, necessary to enable the Court to assess the question to which a reply is sought.

21. In the view of the Government of Liechtenstein, the referring court must provide all the necessary information about the pending case to enable both the EFTA Court to assess the referred questions, and also to allow the Governments of the EEA Member States, the EFTA Surveillance Authority, the EC Commission and the parties to the dispute to make observations on the questions referred.

22. The Government asserts that the referring court has failed to fulfil the requirements in Article 96(3) of the Rules of Procedure. First, it did not sufficiently describe the factual circumstances of the dispute. In particular, it is not clear from the request if the form of security for procedural costs was disputed before that court, and if so, what form of security was actually the subject of such dispute. The Government states that it would be relevant to know if it was a Swiss security or a security from an (other) EEA Member State which led to the question now pending before the EFTA Court.

23. Second, the referring court did not present sufficient information regarding the circumstances surrounding the issue of security. In particular, it was not explained why the decision on the posting of security was made without at the same time determining the means of security.

b. Hypothetical nature of the questions referred

24. The Government contends that the questions should be dismissed as hypothetical, in particular because the questions are not at issue in the main proceedings. The Government refers in this regard to the case law of the Court of Justice of the European Communities, according to which, questions referred for a preliminary ruling which are of a hypothetical nature are to be dismissed.[3] The Government reads that case law as containing three conditions which must be fulfilled in order for a question to be admitted as non-hypothetical: 1) There must be a genuine dispute; 2) that dispute must be the subject of proceedings before a body that has the power to resolve it in a legally binding way; and 3) the question referred must be an issue in those proceedings. If one of these conditions is not fulfilled, the Court of Justice of the European Communities will refuse to give a ruling. According to the Government of Liechtenstein, it is in particular the third condition that is not fulfilled in the case at hand.

25. The Government of Liechtenstein goes on to supplement the description of the facts of the case, with a view to assessing the nature of the question referred.

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[3] Case 104/79, *Foglia/Novello I* [1980] ECR 745, para 10 et seq.; Case 244/80, *Foglia/Novello II* [1981] ECR 3045, para 2; and, Case 83/91 *Meilicke* [1992] ECR I-4919, para 25 et seq.

26. As stated in the request to the EFTA Court, the dispute in the main proceedings is in the area of labour law. However, what was not mentioned is that the amount at issue in the main proceedings does not exceed CHF 30.000. This is important since § 1173a Art. 71 (3) of the Civil Code (*Allgemeines bürgerliches Gesetzbuch)* provides that where the amount in dispute in labour law cases does not exceed that threshold, the dispute shall be resolved pursuant to a special non-contentious procedure (*Rechtsfürsorgeverfahren*), and governed by the Non-contentious Dispute Procedure Act *(Gesetz betreffend das Rechts-fürsorgeverfahren).* The intention of the legislator was to provide the parties to a labour law dispute with a simple, quick and inexpensive procedure, bearing in mind the unequal balance of power between employers and employees.

27. The Fürstliches Obergericht has held that in labour law cases where the amount in dispute does not exceed CHF 30.000, no security for procedural costs shall be imposed upon a Claimant who is demanding salary payments from his former employer unless the claim is entirely abusive.[4] By this decision the Fürstliches Obergericht also affirmed the legal view on the provision of security in the *Rechtsfürsorgeverfahren*.[5]

28. Assuming that the claim by the Claimant in the main proceedings is not abusive, since no such information has been provided by the referring court, the Government of Liechtenstein states that by ordering the Claimant to provide security in the dispute at hand, the national court did not take account of the above mentioned decision of the Fürstliches Obergericht. Consequently, the provision of security should not have been an issue at all in the pending proceeding and it is therefore hypothetical. It can also be questioned whether the national court has disregarded the principles of the non-contentious procedure *(Rechtsfürsorgeverfahren*) by referring a question to the EFTA Court which should not be an issue in the main proceedings and which has not been the subject of dispute between the parties before the national court. In the view of the Government of Liechtenstein, the national court interrupted the proceedings *ex officio* and referred a question to the EFTA Court which is of no avail whatsoever to the resolution of the dispute. The Government of Liechtenstein further states that the reference by the national court to the EFTA Court seems even more inequitable in light of the fact that the Claimant is not represented by legal counsel, in which case it would be incumbent upon the responsible judge to inform the Claimant about the above mentioned decision of the Fürstliches Obergericht.

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4 The decision is attached to the Written Observations of the Government of Liechtenstein.

5 See *Fasching*, Zivilprozessrecht, Lehr- und Handbuch, Rz 818.

The questions referred

29. The submissions of the Government of Liechtenstein concerning the substance of the questions referred are submitted in case the EFTA Court should consider the questions admissible.

30. The Government of Liechtenstein states that the questions referred essentially concern the issue of whether a national rule containing a non-exhaustive list of different forms of domestic security for procedural costs, permitted at the discretion of the court requiring the security, is compatible with Article 40 EEA on the freedom of capital movement and Article 36 EEA on the freedom to provide services. The question which arises is thus whether EEA law limits the discretion of the national court with respect to the choice of alternative means of security. In any event, the Fürstliches Landgericht, in its order of reference, itself suggests that a foreign bank guarantee may be satisfactory as a means of security.

31. The Government of Liechtenstein begins its examination of this question, by explaining the content and purpose of security for procedural costs under Section 56 ZPO.

32. On the one hand, the obligation to provide security for costs under the rules of civil procedure has the aim of preventing a claimant from bringing legal proceedings without running any financial risk in the event that he or she should lose the case, and therefore provides pre-emptive protection. On the other hand, the obligation to provide security for costs protects the defendant, who should not bear the risk of not being able to enforce claims for the reimbursement of his or her costs against the claimant, in the event the claim is rejected or dismissed by the court. The historical legislator regarded only domestic guarantors as suitable for posting security for procedural costs.

33. The means of security, and indirectly also the amount of security to be provided, is in principle subject to agreement between the parties, cf. Section 56(1) of the Code of Civil Procedure. It is only in the absence of an agreement between the parties that the provision of security for costs is determined by the court in accordance with Section 56(1) and (2).[6] In such a case, the court must determine what constitutes adequate security at its discretion having sole regard to the purpose of the security. The court may accept alternative means of security that are not expressly referred to in Section 56 of the Code of Civil Procedure ("*können insbesondere auch*"). In practice, bank guarantees that are customary in present day credit and bank business have gained wide acceptation as alternative forms of security for costs.[7]

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[6] The Government of Liechtenstein refers in this respect to *Fasching,* Zivilprozessrecht, Lehr- und Handbuch, Rz 474.

[7] The Government of Liechtenstein refers on this regard to the Judgment by the Constitutional Court dated 23 March 1993, (*Staatsgerichtshof*, 1992/10 and 11), where that court did not see

34. The Government of Liechtenstein states that the referring court does not seem to consider it possible to permit, within the limits of its discretion, foreign security as an alternative form of security. The Government notes in this regard that the referring court states in the request that a foreign bank guarantee may satisfy the purpose of the security set out in Section 56 of the Code of Civil Procedure due to the fact that it can be enforced at any time without the need for judicial intervention.

35. The Government of Liechtenstein then turns to the question of compatibility of the national provision at issue with EEA law. It states that the first issue is whether the national procedural provision at issue falls within the scope of the EEA Agreement. In accordance with settled case law of the Court of Justice of the European Communities, in the absence of a Community rule it is up to the internal legal order of each Member State to lay down the procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law. However, Community law also limits this competence.[8] Such rules may not: discriminate against persons to whom Community law gives the right to equal treatment; or restrict the fundamental freedoms guaranteed by Community law.[9] The EFTA Court has not yet ruled on this matter. The Government of Liechtenstein states that in view of the autonomy of the national courts, it should be taken into consideration that the degree of integration foreseen by the EEA Agreement is less extensive than that of the EC Treaty.

36. The Government of Liechtenstein states that it is obvious that Section 56(2) of the Code of Civil Procedure does not base itself on the nationality of the parties involved in legal proceedings, and the legal situation is therefore different from those assessed by the Court of Justice of the European Communities in *Data Delecta*, *Hayes* and *Saldanha.*[10] In this respect, nationals from other Member States do not find themselves in a position with regard to access to justice that is any less favourable than the position of the citizens of the Principality of Liechtenstein. Furthermore, the means of security required for civil proceedings can not affect the economic activities of traders from other Member States in the market of the State in question, in particular in view of the fact that the means of security to be furnished is primarily subject to agreement between the parties. To the contrary, if non-enforceable foreign security is

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"*any decisions that crossed the line into the realms of unconstitutional arbitrary rule, which an independent judiciary could not reasonably make in the course of finding justice*"; see also Judgement of the *Oberster Gerichtshof* (Highest Court) dated 17 August 1993 (OGH 5C 99/92-14 or 4C 98/92-16).

8 Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, para 42.

9 Case 186/87 *Cowan* [1989] ECR 195, para 19.

10 Case C-43/95 *Data Delecta Aktiebolag and Ronny Forsberg* v *MSL Dynamics Limited* [1996] ECR I-4661; Case C-323/95 *David Charles Hayes and Jeanette Karen Hayes* v *Kronenberger GmbH* [1997] ECR I-1711; and, Case C-122/96 *Stephen Austin Saldanha and MTS Securities Corporation* v *Hiross Holding AG* [1997] ECR I-5325.

permitted, it could provide an incentive for potential contractual partners to favour service providers, suppliers of goods or employees from their own home state or from other Member States where claims for costs for civil proceedings, can be enforced quickly and without difficulties, e.g. on the basis of bilateral treaties.

37. The Government of Liechtenstein states with regard to the scope of Article 36 and Article 40 EEA, that the fundamental question is what form of security is in question and if the security is to be provided from an (other) EEA Member State or from outside the EEA, e.g. from Switzerland. However, the request does not contain this information. In the event the EFTA Court should find, despite this lack of information, that the exclusion of foreign security constitutes discrimination against foreign capital or against service providers domiciled abroad, regardless of whether the activities of traders from another Member State are affected in Liechtenstein or whether the security is provided from outside the EEA, the Government of Liechtenstein states that the Court of Justice of the European Communities has expressly recognised that a provision ensuring the enforcement of a decision on costs in favour of a defendant who has been successful in proceedings is not in itself contrary to Article 6 of the EC Treaty.[11] In the view of the Government of Liechtenstein, the purpose of the national provision at issue, i.e. the protection of the security interests of the party entitled to security and the prevention of delayed proceedings due to the difficulty of the court in assessing the suitability of foreign security, does not constitute a purely private interest, but is rather a public interest with regard to the good functioning of the civil justice system, which can justify a restriction of the fundamental freedoms guaranteed by the EEA Agreement.

38. The Government of Liechtenstein states that the EFTA Court should acknowledge that the enforcement of decisions on costs by a Liechtenstein court is considerably more difficult abroad than the domestic enforcement of such decisions, and is in some cases even impossible.

39. The Principality of Liechtenstein is the only EEA Contracting Party that has not ratified the international conventions governing the Enforcement of Judgments in Civil and Commercial Matters (the 1988 Lugano Convention and the 1968 Brussels Convention). In this respect, the Principality of Liechtenstein exercises its right to invoke its decision-making autonomy with regard to the ratification or non-ratification of international treaties, as guaranteed by the EEA Agreement, cf. its preamble. Furthermore, the rules on the recognition and enforcement of judgments, as simplified for EU Member States in Council Regulation (EC) No 44/2001 on legal jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation), belong to the field of judicial cooperation in civil matters and do therefore not fall within the scope of application of the EEA Agreement.

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[11] Case C-398/92 *Mund & Fester* [1994] ECR I-467, paras 16, 18 *seq.*; Case C-122/96 *Saldanha* [1997] ECR I-5325, para 29.

40. The Government of Liechtenstein concludes on this basis that a national provision, which permits only domestic security as adequate security for the procedural costs, is undoubtedly an appropriate means to protect the security interests of the party entitled to security and thus the good functioning of the civil justice system.

41. The Government of Liechtenstein further states that a general exclusion of foreign security is disproportionate when foreign security can provide the same protection as domestic security. In this regard the Government of Liechtenstein refers to the statement by the national court that an equivalent protection in this sense could be guaranteed through an unrestricted and unconditional bank guarantee provided by a bank of an (other) EEA Member State. The Government of Liechtenstein notes that it cannot be assumed that the securing of costs by means of a foreign bank guarantee from an EEA Member State will in all cases imply the same legal consequences and the same abstract payment obligations as a domestic bank guarantee. This is due to national variations and differences as regards form and substance of such guarantees, for instance with regard to their enforceability and possible objections thereto. When assessing the suitability of foreign security in an individual case, the national court must therefore balance the rights protected by the EEA Agreement against the legitimate aim to safeguard the good functioning of the civil justice system.

42. On this basis, the Government of Liechtenstein suggests that the request by the national court should be answered as follows:

> *The question referred by the Lower Court for an advisory opinion is inadmissible due to the lack of a sufficient description of the facts of the case as well as due to its hypothetical nature.*

43. In the alternative, the answer to the questions referred should be:

> *Article 40 EEA Agreement on the freedom of capital movement and Article 36 EEA Agreement on the freedom to provide services do not preclude a national procedural rule which allows the national court, within the limits of its discretion, to refuse foreign security as suitable security for procedural costs in case such a security, especially with regard to its enforcement, does not constitute an equivalent suitable security as a domestic security with regard to the protection of the good functioning of the civil justice procedure. It is for the national court, within the limits of its discretion, to assess the suitability of a foreign bank guarantee in the individual case.*

The EFTA Surveillance Authority

44. The EFTA Surveillance Authority first recalls the case law of the Court of Justice of the European Communities concerning the role of the referring court in

determining the matters on which it seeks the enlightenment of the Court. In this case law, the Court of Justice of the European Communities underlined that the right to determine the questions to be put to the Court devolved upon the national court alone.[12] A widening of the questions posed by the national court would be incompatible with its duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 20 of the Statute of the Court of Justice of the European Communities (comparable to Article 20 of the Statute of the EFTA Court), bearing in mind that, under that provision, only the order of the referring court is notified to the interested parties.[13]

45. The EFTA Surveillance Authority adds that limitations concerning any expansion of the question posed by a referring court do not imply that the Court is barred from taking account of EEA provisions that have not been mentioned in the order of reference.[14]

46. Before outlining its analysis of the possible negative impact of the national law provisions at issue on rights arising from the EEA Agreement, the EFTA Surveillance Authority explains its understanding of those national law provisions.

47. First, the EFTA Surveillance Authority points to the fact that the term "*inter alia*" in Section 56(2) ZPO could lead to the conclusion that the Liechtenstein sources of security, while individually identified, do not constitute an exhaustive list of permitted security, either by nature or by origin, and that the security for costs for which Section 56(2) provides is not limited to security of Liechtenstein origin.

48. However, based on the referring court's description of the provision in the request, the EFTA Surveillance Authority assumes that Section 56(2) of the Code on Civil Procedure should be interpreted as limiting the types of security for costs that national courts may accept to security of Liechtenstein origin, such as deposit books from Liechtenstein lending institutions, mortgages on Liechtenstein property, or a guarantee issued by a solvent guarantor resident in Liechtenstein. Section 56(2) thus limits the type of acceptable security that non-resident claimants may provide to specific types of security of Liechtenstein origin.

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12 Case 44/65 *Hessische Knappschaft* v *Singer* [1965] ECR 965, p. 970; Case C-412/96 *Kainuum Liikenne Oy and Oy Pohjolan Liikenne Ab* [1998] ECR I-5141, para 23; Case C-402/98 *ATB and Others* v *Ministero per le Politiche Agricole and Mario Pittaro* [2000] ECR I-5501, para 29; and, Case C-337/88 *Società agricola fattoria alimentare SpA (SAFA)* v *Amministrazione delle finanze dello Stato* [1990] ECR I-1, para 20.

13 Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, para 24.

14 C-304/00 *Regina* v *Ministry of Agriculture, Fisheries and Food, ex parte W.H. Strawson (Farms) Ltd and J.A. Gagg & Sons (a firm)* [2002] ECR I-10737 paras 57-58; C-469/00 *Ravil SARL* v *Bellon import SARL and Biraghi SpA* [2003] ECR I-5053, para 27; and, C-60/03 *Wolff & Müller GmbH & Co. KG* v *José Filipe Pereira Félix*, not yet published, paras 24-27.

49. Second, the EFTA Surveillance Authority states that the Code on Civil Procedure imposes an obligation to provide security for costs on non-resident claimants commencing actions before Liechtenstein courts, while no such requirement is imposed on claimants resident in Liechtenstein.

50. The analysis by the EFTA Surveillance Authority is based on both of these aspects of national law. In its view, such requirements under national law are contrary to the general prohibition of discrimination contained in Article 4 EEA.

51. In this regard, the EFTA Surveillance Authority contends that, since the majority of non-residents before Liechtenstein courts may be presumed to be foreigners, the requirement to provide security for costs has an indirectly discriminatory effect against rights that EEA nationals who do not reside in Liechtenstein derive from the EEA Agreement. Where non-residents are required to provide security for costs, this discrimination is aggravated by the obligations imposed by Section 56(2) of the Code on Civil Procedure.

52. The EFTA Surveillance Authority refers to the finding by the Court of Justice of the European Communities that, in the absence of Community legislation, it is for the internal legal order of each Member State to lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law, although Community law does impose certain limits on that competence.[15] Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law.[16] According to the EFTA Surveillance Authority, this conclusion applies equally within the territory of the EFTA States.

53. EEA law guarantees exercise of the fundamental freedoms provided for by the EEA Agreement. It is a corollary of those freedoms that individuals who seek to exercise those rights must be able, in order to resolve any disputes arising from their economic activities, to bring actions in the courts of an EEA State in the same way as a national of that State.[17]

54. In the view of the EFTA Surveillance Authority, it is perfectly conceivable that workers from other EEA States would be discouraged from exercising the rights which the EEA Agreement grants them when faced with the risk that, should they be required to resort to litigation before the Liechtenstein courts, they will be placed at a disadvantage as compared to both claimants

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15 Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, para 42; and, Case C-323/95 *Hayes* v *Kronenberger GmbH* [1997] ECR I-1711, para 13.

16 Case C-186/87 *Cowan* [1989] ECR 195, para 19; and, Case C-323/95 *Hayes* v *Kronenberger GmbH* [1997] ECR I-1711, para 13.

17 Case C-43/95 *Data Delecta and Fosberg* [1996] ECR I-4661, para 13; and, Case C-323/95 *Hayes* v *Kronenberger GmbH* [1997] ECR I-1711, para 13.

resident in Liechtenstein and to defendants. The same would apply with respect to traders in goods and services in the EEA. This disadvantage would result from the provisions of the Code on Civil Procedure requiring that, by simple reason of not having a residence in Liechtenstein, they are obliged to provide security for costs before they even commence their action.

55. According to the EFTA Surveillance Authority, given the effects of the contested national provisions on intra-EEA trade in goods and services, as well as workers' rights in the present case, those provisions are subject to the general principle of non-discrimination laid down in Article 4 of the EEA Agreement, without there being any need to connect them with the specific provisions of Articles 8, 28, 36 or 40 of the EEA Agreement.[18]

56. In the view of the EFTA Surveillance Authority, the contested provisions can not be considered to have a directly discriminatory effect on non-Liechtenstein nationals, since the requirement to provide security for costs is not limited to non-Liechtenstein nationals. However, the Court of Justice of the European Communities has concluded that rules governing equality of treatment forbid not only overt discrimination by reason of nationality but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.[19] Moreover, the Court of Justice of the European Communities has found that national rules, under which a distinction is drawn on the basis of residence, are liable to operate mainly to the detriment of nationals of other Member States.[20]

57. The EFTA Surveillance Authority then turns to the question of whether the indirectly discriminatory treatment is justified by objective circumstances. The EFTA Surveillance Authority points out that the request for an Advisory Opinion contains no specific information regarding the purpose of Section 56(2). In the absence of such information, the EFTA Surveillance Authority presumes that the provision pursues the same purpose as does the basic requirement, imposed on non-resident claimants, of providing security for costs.

58. The fact that Liechtenstein has not ratified the Lugano Convention,[21] may render the recognition and enforcement of the judgments of Liechtenstein courts by the national courts of other EEA States, with the exception of Austria, difficult. The Court of Justice of the European Communities has acknowledged that, in such circumstances, there is a real risk as between some Member States, that it will be impossible or, at least, considerably more difficult and more

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18 Case C-43/95 *Data Delecta and Fosberg*, para 14.

19 Case C-330/91 *The Queen* v *Inland Revenue Commissioners, ex parte Commerzbank AG* [1993] ECR 1993 I-4017, para 14 (freedom of establishment); and, Case C-279/93 *Finanzamt Köln-Altstadt* v *Roland Schumacker* [1995] ECR I-0225, para 26 (free movement of workers).

20 Case C-279/93 *Finanzamt Köln-Altstadt* v *Roland Schumacker* [1995] ECR I-0225, para 28.

21 The Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

expensive, to enforce an order for costs made in a Member State against non-residents.[22] In the view of the EFTA Surveillance Authority, national legislation requiring security for costs to be provided within the territory of the state in which the litigation is pursued might, in such circumstances, be justified as the only rational way in which costs may be recovered by a successful defendant against an unsuccessful claimant. The EFTA Surveillance Authority refers to the finding of the Court of Justice of the European Communities, admittedly in cases concerning criminal matters which fall outside the application of the Lugano Convention, that where a court is faced with a difficulty concerning enforcement of judgments, such a situation objectively justifies imposition of security for costs.[23]

59. The EFTA Surveillance Authority refers to the acknowledgement by the EFTA Court that, as regards the execution of civil law judgments, certain complications could arise from the unavailability of the benefits of the Lugano Convention. The EFTA Court observed that, if such complications were of vital concern in relation to the public policy objective pursued, accession to this instrument would constitute one remedy. Moreover, it recognised that litigation or execution in foreign jurisdictions often involves costs and complications that will not arise in the domestic jurisdiction. The imposition of a requirement that deposit books, mortgages and guarantees must be of Liechtenstein origin when provided as security for costs, might be considered one way of avoiding such difficulties.

60. The EFTA Surveillance Authority further states that the encouragement of cross-border activity is a fundamental objective of the EEA Agreement. Whenever such activity gives rise to litigation, the enforcement of judgments must often be sought within the jurisdiction of another EEA State. The situation in Liechtenstein is, therefore, not exceptional.[24] In such circumstances, irrespective of acknowledged difficulties in enforcement of judgments, the fundamental rights provided for by the EEA Agreement may only be compromised for reasons that are justifiable and proportionate.

61. According to the EFTA Surveillance Authority, Section 56(2) ZPO forms part of, and contains requirements relating to, the system of security for costs imposed on non-residents by Liechtenstein law. Even if this provision were to be considered to pursue a legitimate aim, it must comply with the principle of proportionality. According to the understanding of the EFTA Surveillance Authority, Section 56(2) prevents non-resident claimants from providing security for costs from a non-Liechtenstein source even if this security would permit a successful defendant to recover his costs without resorting to litigation or other recovery procedures in another EEA State. In the view of the EFTA Surveillance

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22 Case C-323/95 *Hayes* v *Kronenberger GmbH* [1997] ECR I-1711, para 23.

23 Case C-29/95 *Pastoors and Trans-Cap* v *Belgian State* [1997] ECR I-285, para 22.

24 Case E-2/01 *Dr. Franz Pucher* [2002] Report of the EFTA Court p. 44, para 39.

Authority, the fact that the provision does not allow a non-resident claimant to demonstrate that such a possibility exists, suggests that it is incompatible with EEA law.

62. The EFTA Surveillance Authority points to the statement by the referring court that it is possible for costs to be recovered by a successful defendant against a non-resident claimant from a source outside Liechtenstein without resorting to litigation, for example by an unconditional bank guarantee issued by a bank in another EEA State. If that is so, the requirement to provide security solely of Liechtenstein origin must be considered disproportionate, and consequently, contrary to Article 4 EEA. The EFTA Surveillance Authority states in this regard that it is for the national court to determine whether this is the case in practice.

63. The EFTA Surveillance Authority adds that Section 56(2) of the Code on Civil Procedure may also be analysed under the EEA rules concerning the free movement of capital or services. However, given the approach by the Court of Justice of the European Communities, and the fact that the core of the problem lies, in the view of the EFTA Surveillance Authority, in the effect that the national provision has on non-resident claimants, the Authority has refrained from an assessment under those rules.

64. The EFTA Surveillance Authority proposes that the questions referred to the EFTA Court be answered as follows:

> *To require that the security for costs that a non-resident plaintiff in an action before the national court must deposit can be provided solely in the form of tangible or intangible assets of national origin is incompatible with Article 4 of the EEA Agreement when there exists the possibility that a successful defendant may seek recovery of costs from funds held in a non-national source without resorting to litigation in the state where the funds are held. It is for the national court to determine whether this is the case in practice.*

The Commission of the European Communities

65. The Commission considers a provision such as section 56(2) of the Liechtenstein Code of Civil Procedure incompatible with Articles 36 and 40 of the EEA Agreement in that it represents an unjustified restriction on the free movement of capital and services. Referring to *Svensson and Gustavsson*, the Commission of the European Communities considers the question put to the EFTA Court first under Article 40 EEA, and then under Article 36 EEA.[25]

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[25] Case 484/93 *Svensson and Gustavsson* [1995] ECR I-3955.

Free movement of capital

66. With regard to free movement of capital, the Commission of the European Communities refers to the prohibition of restrictions and discrimination in Article 40 EEA, and to Annex XII which lists Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the [EC] Treaty.[26]

67. The prohibition of restrictions and discriminatory measures regarding the free movement of capital under the EC Treaty and the EEA Agreement - third country aspects aside - are to be regarded as equivalent.[27]

68. The Commission of the European Communities points to the fact that Article 40 EEA gives effect to the free movement of capital belonging to persons resident in EC Member States or EFTA/EEA States. In the present case, the Claimant is said to be resident in Switzerland, so that, in that respect, not being able to provide security using his Swiss assets would not be covered by Article 40 EEA. However, the Claimant is an Italian national who was, for some 13 years, an employee of a Liechtenstein company. The Commission of the European Communities further states that in all circumstances, limiting security, in the context of court proceedings, to domestic assets would deter investors from investing in assets in the other EEA States and would, therefore, represent a restriction on the free movement of capital.[28]

69. In the view of the Commission of the European Communities, the transactions mentioned in the order of reference are movements of capital within the meaning of Article 56 EC and Article 40 EEA. Although the EEA Agreement does not define the term “movement of capital”, it is, for the purposes of the EC Treaty, settled case law that Directive 88/361, together with the nomenclature annexed thereto, may be used for the purposes of defining what constitutes a capital movement.[29] Point V(B(2)) in the nomenclature set out in Annex I to Directive 88/361, and the explanatory notes in that annex, indicate that the introduction of foreign securities and instruments to the domestic money market constitutes capital movement.

70. The Commission of the European Communities reads Section 56(2) of the ZPO to the effect that, only deposit books, or security by means of a mortgage or guarantee, which originate entirely in Liechtenstein, are acceptable as security for court proceedings. On that basis, the question is whether the EEA Agreement enables an EFTA/EEA State to restrict accepting such instruments when they originate in another EEA State.

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26 OJ 1988 L 178, p. 5. The Commission states that whilst Directive 88/361 is no longer in force, its annexes remain relevant to clarify the concept of movement of capital.

27 Case C-452/01 *Ospelt* [2003] ECR I-9743, paras 28, 29 and 32.

28 Cases C-463/00 *Commission* v *Spain* [2003] ECR I-4581, para 61; and, C-98/01 *Commission* v *UK* [2003] ECR I-4641, para 47.

29 Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, para 20 and 21.

71. In this regard, the Commission of the European Communities refers to *Svensson and Gustavsson*, where the Court of Justice explained that provisions which "are liable to dissuade those concerned from approaching banks established in another Member State" for the provision of certain financial resources (in that case, bank loans) constitute an obstacle to movements of capital.[30] Provisions such as those in the ZPO deprive those concerned even of the possibility of approaching banks in another EEA State. Capital, in the form of deposit books or guarantees, is prevented from moving freely.

72. Furthermore, in *Commission* v *Italy,* the Court of Justice of the European Communities addressed the requirement to establish a guarantee with a credit institution having its registered office in the Member State in question.[31] The Court of Justice of the European Communities expressly stated that the obligation to establish a guarantee with a credit institution, having its registered or a branch office in Italian territory, was a restriction on capital movements within the meaning of Article 56(1) EC, in so far as it impeded an undertaking from putting forward a guarantee established with a credit institution established in another Member State.[32]

73. The Commission of the European Communities states that where domestic rules governing the capital market and the credit system are applied to the movements of capital liberalized in accordance with the provisions of this Agreement, Article 42 EEA provides that this shall be done in a non-discriminatory manner.

74. The ZPO discriminates by differentiating between a security which originates in Liechtenstein and one which is constituted in another country (the former is acceptable, while the latter is not).

75. With regard to the suggestion by the referring court that this discrimination may be justified in the interests of ensuring the proper functioning of the civil justice system, the Commission of the European Communities is of the opinion that the discrimination resulting from Section 56(2) ZPO cannot be justified on grounds of public policy or public security: such grounds do not exist in the case at hand, and in any event, the mechanisms chosen do not comply with the proportionality requirement.

76. In the framework of Community law, regard would be had to Article 58(1)(b) EC, which provides that Article 56 EC shall be without prejudice to the right of Member States to take measures which are justified on grounds of public policy or public security. Within the EEA, this 'reserve', i.e. a possible justification to restrict a fundamental freedom, could be deemed to be a general principle inherent in Article 40 EEA.

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30 Case C-484/93 *Svensson and Gustavsson,* para 10.

31 Case C-279/00 *Commission* v *Italy* [2002] ECR I-01425.

32 Case C-279/00 *Commission* v *Italy*, at para 37.

77. On this issue, the Commission of the European Communities observes, first, that while the Member States are still, in principle, free to determine the requirements of public policy and public security in the light of their national needs, such needs must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions.[33] Thus, public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[34]

78. Second, measures which restrict the free movement of capital may be justified on public-policy and public-security grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures.[35]

79. According to the Commission of the European Communities, the argument put forward by the referring court (that Liechtenstein does not have agreements with the majority of Member States for the execution, abroad, of judgments and orders of Liechtenstein courts, so that court orders for the execution of security, originating in another Member State, would be entirely ineffective) does not demonstrate the existence of any serious threat to the fundamental interests of society. It merely shows that the legislator has chosen inappropriate mechanisms to secure the payment of costs for the purpose of implementing court judgments abroad.

80. In the view of the Commission of the European Communities, there are mechanisms for the execution abroad, which are considerably easier than those set out in the Liechtenstein legislation: for example, an unconditional bank guarantee of unspecified duration provided by a bank of another EEA State. Liechtenstein could also adopt a provision that a deposit payment, originating abroad, is payable upon request. However, none of these possibilities were chosen.

Free movement of services

81. In the view of the Commission of the European Communities, a provision, such as that of Section 56(2) ZPO, is directly contrary to the freedom to provide services, in so far as it renders impossible, in the state in question, the supply of services by undertakings established in other EEA States.[36] In order for it to be accepted, it must be shown that it constitutes a condition indispensable for

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33 Case 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219, para 26 and 27.

34 Cases 36/75 *Rutili* , para 28; and, C-348/96 *Calfa* [1999] ECR I-11, para 21.

35 Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, para 23.

36 Case 279/00 *Commission* v *Italy*, para 17.

attaining the objective pursued.[37] That requirement is not fulfilled in the case at hand.

82. In a Community context, such discriminatory restrictions may only be allowed if they are justified by one of the derogations expressly provided by Article 46 EC (cf. Article 33 EEA), in conjunction with Article 55 EC (cf. Article 39 EEA).[38]

83. Article 46 EC contains the grounds of public interest which, according to the case law of the Court of Justice of the European Communities must be interpreted restrictively.[39] Recourse to the concept of public policy presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[40] No such threat exists in the case at hand.

The provision of security

84. Referring to the express statement by the Fürstliches Landgericht that it does not wish the EFTA Court to address the issue of whether the obligation to provide security for costs is itself legitimate, the Commission of the European Communities nevertheless finds it appropriate to comment on that issue.

85. The Commission of the European Communities states that in the absence of information in the order of reference concerning the circumstances in which the Claimant is ordered to provide security, it would seem that, according to Liechtenstein law, a judge may require the posting of security by the mere fact that a claimant is a non-resident.

86. In the view of the Commission of the European Communities, such a requirement is contrary to the prohibition of discrimination contained in Article 4 EEA.

87. Although it is for each Member State to lay down the detailed procedural rules governing legal proceedings for fully safeguarding the rights that individuals derive from Community law, that law, nevertheless, imposes limits on that competence.[41] Such legislative provisions may not discriminate against

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37 Cases C-222/95 *Parodi* [1997] ECR I-3899, para 31; and, C-493/99 *Commission* v *Germany* [2001] ECR I-8163, para 19.

38 Cases 484/93 *Svensson and Gustavsson*, para 15; and, C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, para 11.

39 Cases C-260/89 *ERT* [1991] ECR I-2925, para 24; and, C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, para 28.

40 Cases C-350/96 *Clean Car Autoservice* [1998] ECR I-2521, para 40; and, C-355/98 *Commission* v *Belgium*, para 28.

41 Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, para 42.

persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law.[42]

88. The Commission of the European Communities states that a national procedural rule, such as Section 56(1) ZPO, is liable to affect access to justice of a resident of another EEA State.

89. National legislative provisions that fall within the scope of application of the EC Treaty, especially the fundamental freedoms, are necessarily subject to the general principle of non-discrimination laid down by the first paragraph of Article 6 (now Article 12) of the EC Treaty (cf. Art. 4 EEA[43]), without there being any need to connect them with the specific provisions of Articles 49 and 56 of the EC Treaty (Articles 36 and 40 EEA).[44]

90. In so far as it prohibits any discrimination on grounds of nationality, Article 12 EC requires persons in a situation governed by Community law and nationals of the Member State concerned to be treated equally.[45] In an EEA context, this would mean that persons resident in the territory of an EEA State or being nationals of the EU and EFTA/EEA states resident in a third country, such as the Claimant in the case at hand, should be given equal opportunities as regards access to justice before the courts of other EEA States.

91. In the view of the Commission of the European Communities, a provision such as Section 56(1) ZPO, which makes it more cumbersome for nationals of one EEA State to bring an action before a court of another EEA State due to the requirement to post security, constitutes indirect discrimination on grounds of nationality.

92. According to the Commission of the European Communities, Section 56(1) ZPO can not be justified by the fact that Liechtenstein is not a party to any international convention on recognition and enforcement of judgments abroad, except for its agreements with Switzerland and Austria.[46] The right to equal

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42 Case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195, para 19.

43 Cf. EFTA Court Cases E-5/98 *Fagtùn* [1999] EFTA Court Report 51, para 42; E-1/00 *State Debt Management Agency* [2000-1] EFTA Court Report 8, paras 35 and 36; E-1/01 *Einarsson* [2002] EFTA Court Report 1, para 38; and, E-2/01 *Pucher* [2002] EFTA Court Report 44, para 25.

44 Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, para 27; and, Case C-43/95 *Data Delecta* v *MSL* [1996] ECR I-4661, para 14.

45 Case C-323/95 *Hayes* v *Kronenberger* [1997] ECR I-1711, para 18; see also, Case C-43/95 *Data Delecta*, para 16.

46 Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabular* [1986] ECR 1651, para 18; and, Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International* v *Commission* [2003] ECR II-0001, para 121.

treatment laid down in Community law may not be made dependent on the existence of reciprocal agreements concluded by the Member States.[47]

93. In the view of the Commission of the European Communities, a provision, such as that of Section 56(1) ZPO, were it included in the legislation of a Member State, would be found to be contrary to a fundamental principle of Community law, namely non-discrimination as regards access to justice.

Per Tresselt
Judge-Rapporteur

[47] Cases 1/72 *Frilli* v *Belgian State* [1972] ECR 457: C-186/87 *Cowan*; and, C-20/92 *Hubbard* v *Hamburger* [1993] ECR I-3777, para 17.