

26 September 2022

REGISTERED LETTER

EFTA Court
Registry
1, Rue du Fort Thúngen
1499 Luxembourg
Luxembourg

Request for an advisory opinion (VGH 2022/050)

To the Judges of the EFTA Court,

The Administrative Court of the Principality of Liechtenstein decided, in a closed session on 23 September 2022, to stay proceedings in the administrative appeal proceedings, case number VGH 2022/050 (applicant: Lawyer Dr Maximilian Maier), pending before it and to request an advisory opinion from the EFTA Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA).

Facts

The applicant Dr Maximilian Maier is an Austrian national residing in Austria. He is an Austrian lawyer and is entered in the register of lawyers in Vorarlberg, Austria. At his request the Liechtensteinische Rechtsanwaltskammer (Liechtenstein Bar Association) entered him in the register of European lawyers established in Liechtenstein. The applicant's Liechtenstein law office is located at Industriestrasse 16, LI-9487 Gamprin.

Following a dispute between the applicant and the Liechtenstein Bar Association, in particular as to whether the applicant was authorised to assume the mandates of other Liechtenstein lawyers in the context of legal aid, the Liechtenstein Bar Association decided by order of 5 April 2022 as follows:

It is found, on the basis of Article 62(2)(c) of the Lawyers Act [Rechtsanwaltsgesetz (RAG)], that Dr Maximilian Maier as an established European lawyer is not authorised to accept mandates in the context of legal aid, nor may he assume such mandates as a substitute.

The Government [of Liechtenstein] dismissed the applicant's appeal on 29 June 2022. The applicant lodged an appeal with the Administrative Court challenging that decision.

Relevant provisions of Liechtenstein law

In accordance with Liechtenstein procedural law the courts may grant legal aid to any individual who is unable to pay the costs of the proceedings, whether they are civil, criminal, administrative or constitutional law proceedings, and provide them with a lawyer as legal aid (legal aid lawyer, legal aid defence counsel, public defender). The costs of the legal aid lawyer (notably their fee) are, at least temporarily, assumed by the State and paid directly to the legal aid lawyer.

The profession of lawyer is regulated by the Lawyers Act (Rechtsanwaltsgesetz (RAG)) of 8 November 2013, Liechtenstein State Gazette (Liechtensteinisches Landesgesetzblatt (LGB1)) 2013 No. 415.

The Lawyers Act serves, inter alia, to transpose the relevant European directives, in particular Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (Article 1(1) of the RAG).

Chapter III of the Lawyers Act deals with the establishment of lawyers from the European Economic Area (EEA) in Liechtenstein. The provisions relevant in the present case are as follows:

Article 59 Basic principle

- 1) Nationals of a State which is a party to the Agreement on the European Economic Area (EEA) who are authorised in their home State to practise the lawyer's profession under any of the professional titles listed in the Annex to this Act, may establish themselves on domestic territory to practise the lawyer's profession, provided that they are entered in the register of established European lawyers (established European lawyers) upon application.
- 2) Apart from the rules of ethical conduct applicable in the home State, the established European lawyer shall, with regard to all activities that he or she exercises on

domestic territory, be subject to the same rules of professional and ethical conduct as the domestic lawyers.

Article 62

Professional status

- 1) Except as provided otherwise, the established European lawyer shall be authorised to engage in the same professional activities as any lawyer entered in the register of lawyers.
- 2) An established European lawyer shall have the status of a lawyer entered in the register of lawyers. However, he or she is not authorised:
 - a) to be elected as an officer of the Chamber of Lawyers;
 - b) to train trainee lawyers;
 - c) to be appointed as a legal aid lawyer, legal aid defence counsel or ex officio defence counsel.

Article 63

Domestic lawyer acting in conjunction with the established European lawyer (Einvernehmensrechtsanwalt)

- 1) In proceedings in which the party must be represented by a lawyer or in which a defence counsel is mandatory, an established European lawyer may act as representative or defence counsel of a party only in conjunction with a lawyer entered in the register of lawyers (Einvernehmensrechtsanwalt - domestic lawyer acting in conjunction with the established European lawyer). That lawyer must ensure that the established European lawyer will observe the requirements of proper administration of justice in the course of the representation or defence. [...]

Article 21

Substitution

- 1) If lawyers are prevented from performing their function, they may be substituted by another lawyer. In this process, their statutory liability shall be maintained.

The applicant is a European lawyer established in Liechtenstein in accordance with Chapter III of the Lawyers Act.

Liechtenstein law distinguishes between acting as a lawyer's representative and his substitute. A lawyer's representative is an agent of the lawyer. He does not act independently. Furthermore, the lawyer is required to duly select, instruct and monitor the representative. In

contrast, the substitute replaces rather than represents the lawyer. Consequently, the substitute acts independently. The substituted lawyer is only responsible for the proper selection of a substitute (see Christian Zib in Fasching/Konecny, Commentary on the rules of Civil procedure II/1, 3. Edition, Vienna 2015, Sections 31 and 32 of the Code of Civil Procedure, para. 37 et seq.; Feil/Wennig, Law of the Legal Profession, 6th Edition, Vienna 2010, Section 14 of the Lawyers Code para.1, Section 15 of the Lawyers Code para. 2).

Relevant provisions of European law

The Agreement on the European Area (EEA) not only sets out a general prohibition of discrimination on the basis of nationality (Article 4 EEA) but also ensures the free movement of persons (Article 28 EEA et seq.), the freedom of establishment (Article 31 EEA et seq.) and the freedom to provide services (Article 36 EEA et seq.).

As for the reasons for adopting Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (hereinafter ‘Directive 98/5/EC’), the Directive states inter alia that the abolition of obstacles to freedom of movement for persons and services between Member States constitutes one of the objectives of the Community (recital 1), and that inequalities and distortions in competition between lawyers from the Member States and thus obstacles to freedom of movement shall be eliminated (recital 6), even though the host Member State may require a lawyer practising under his home-country professional title to work in conjunction with a local lawyer when representing or defending a client in legal proceedings (recital 10).

Consequently, Article 1(1) of Directive 98/5/EC states that the purpose of the Directive is to facilitate practice of the profession of lawyer on a permanent basis in a self-employed or salaried capacity in a Member State other than that in which the professional qualification was obtained.

Specifically, the Directive grants lawyers established in another Member State the following rights:

Any lawyer shall be entitled to pursue on a permanent basis, in any other Member State under his home-country professional title, the activities specified in Article 5 (Article 2, subparagraph 1 of Directive 98/5/EC).

Subject to paragraphs 2 and 3, a lawyer practising under his home-country professional title carries on the same professional activities as a lawyer practising under the relevant professional title used in the host Member State [...] (Article 5(1) of Directive 98/5/EC).

Arguments raised

The applicant claims that he wants to be eligible to be appointed as a legal aid lawyer, legal aid defence counsel or public defender by the Liechtenstein courts in proceedings in which one of the parties has been granted legal aid. In addition, he wants to be eligible to act as a substitute for lawyers appointed by the courts as a legal aid lawyer, legal aid defence counsel or public defender. The prohibition, pursuant to Article 62(2)(c) of the Lawyers Act, according to which established European lawyers are not authorised to be appointed as a legal aid lawyer, legal aid defence counsel or public defender, contradicts European law in particular the fundamental freedoms guaranteed under the EEA Agreement as well as Directive 98/5/EC, which do not contain such a prohibition.

The Government argues in its decision of 28-29 June 2022 as follows:

The applicant is correct insofar as the only exceptional case provided for by Article 5 of Directive 98/5 is that a lawyer acting in conjunction may be required. However, the applicant overlooks the fact that Article 5 does not represent a complete harmonisation and that the Member States remain competent to adopt national measures but only if such a limitation of the freedom to provide services, or the freedom of establishment, can be justified.

*According to the case law of the CJEU national rules may be justified on the basis of overriding requirements in the public interest, if they are applied in a non-discriminatory fashion, are suitable for achieving the desired objective, and are proportionate to the intended purpose (Baudenbacher, *Fundamental Freedoms and Fundamental Rights in EEA Law*, edition Kley/Vallender, LPS volume 52, p. 826). According to the case law of the CJEU, first, the protection of consumers, in particular recipients of legal services provided by persons involved in the administration of justice and, second, the proper administration of justice may be regarded as overriding requirements in the public interest capable of justifying a restriction on the freedom to provide services (judgment of 18 May 2017, *Lahorgue*, C-99/16, EU:C:2017:391, para. 34 and the case law cited).*

Objectively, such a justification of national measures is evidenced by the fact that legal aid for representation before a court is a positive obligation of the State. It enables the State to ensure that individuals can effectively avail themselves of their right of access to justice. The

Constitutional Court derives the entitlement to legal aid both from the right of appeal and the principle of equal treatment, however it bases itself in practice primarily on Article 6(1) of the ECHR (Wille, Right of appeal, edition Kley/Vallender, LPS volume 52, pp. 527-528). The State has some leeway as regards the manner in which it guarantees these constitutionally protected rights. The arrangement for legal aid in Liechtenstein does not conflict with the provisions of the ECHR.

A further justification lies in the fact that legal aid for representation before the courts is only granted in difficult circumstances or difficult legal situations, where it is all the more important to ensure that the mandate will be undertaken by a lawyer with experience in Liechtenstein law. Thereby the public interest of safeguarding an orderly administration of justice can be taken into account.

An established European lawyer comes to Liechtenstein with the professional training and experience obtained in his country of origin. He is qualified and authorised to practice as a lawyer in his country of origin, however, he is not yet familiar with Liechtenstein law. In this respect he does not have the same wealth of experience as a lawyer qualified in Liechtenstein law.

Furthermore, it constitutes a justification, that if legal aid is granted, clients have no choice. Consumer protection requires that a lawyer appointed ex officio must be familiar with the legal system in Liechtenstein in order to fulfil his mandate in the best possible manner. This can best be ensured by appointing as legal aid a lawyer who is entered in the register of Liechtenstein lawyers.

A client that is able to select and pay for his lawyer himself can choose to select an established European lawyer. However, someone requiring legal aid cannot actively decide in favour or against selecting an established European lawyer, nor can they lodge an appeal if a Liechtenstein lawyer substitutes his legal aid mandate to an established European lawyer. In this context, consumer protection requires a legal framework that protects the concerned clients of legal aid. The limitation in Article 52(2)(c) of the RAG is a suitable means of achieving this objective.

Such a limitation is also proportionate as it is time-limited and does not represent an excessive interference to the freedom to provide services. An established European lawyer may, either by completing the aptitude test pursuant to Article 68 et seq. of the RAG or by integration following three years of professional activity pursuant to Article 74 et seq. of the

RAG, be entered in the register of Liechtenstein lawyers. Thus he will be able to assume legal aid mandates or to act as a substitute for an appointed Liechtenstein legal aid lawyer.

Question submitted

The assignment of legal aid mandates by the courts, as well as the appointment of a legal aid lawyer, legal aid defence counsel or public defender, can be financially attractive as the lawyer is paid by Liechtenstein, even though according to a fixed tariff. Acting as a substitute for a lawyer appointed by the court as a legal aid lawyer can also be financially attractive if the substituted lawyer and his substitute reach an appropriate financial agreement. In this respect, the prohibition in Article 62(2)(c) RAG hinders European lawyers established in Liechtenstein from freely pursuing their profession.

This prohibition does not appear to be based on Directive 98/5/EC. Therefore, the question arises as to whether the freedoms guaranteed by the EEA Agreement and Directive 98/5/EC can be restricted beyond the wording of Directive 98/5/EC in Article 62(2)(c) RAG on the basis of reasons of public interest such as invoked by the Government.

Request

On these grounds the Administrative Court requests that the EFTA Court answer the following question:

Is a national provision, according to which a lawyer, who normally practices his profession in a Member State other than the one in which he obtained his qualification, is not authorised to be appointed as a legal aid lawyer, legal aid defence counsel or public defender, compatible with Directive 98/5/EC?

The Administrative Court is available to provide further information and explanations if requested.

Yours faithfully,

Administrative Court

[signature and official stamp]

lic. iur. Andreas Batliner
Presiding Judge

Cc: Dr Maximilian Maier, Rechtsanwalt, Industriestrasse 16, 9487 Gamprin-Bendern