



## JUDGMENT OF THE COURT

25 April 2012\*

*(Jurisdiction agreements – Freedom to provide and receive services – Discrimination on grounds of nationality – Justification – Remedies for non-conformity with EEA law)*

In Case E-13/11,

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 the Fürstliches Landgericht (Princely Court of Justice), Liechtenstein, in the case of

**Granville Establishment**

and

**Volker Anhalt, Melanie Anhalt and Jasmin Barbaro, née Anhalt**

concerning the interpretation of Articles 4 and 36 of the EEA Agreement with regard to the Liechtenstein Jurisdiction Act,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen, and Páll Hreinsson (Judge-Rapporteur), Judges,

Acting Registrar: Kjartan Björgvinsson,

having considered the written observations submitted on behalf of:

- Granville Establishment, represented by Ritter and Wohlwend Rechtsanwälte AG;
- the Liechtenstein Government, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, of the EEA Coordination Unit, Vaduz, acting as Agents;

---

\* Language of the request: German.

- the EFTA Surveillance Authority (“ESA”), represented by Xavier Lewis, Director, Florence Simonetti, Deputy Director, and Markus Schneider, Senior Officer, Department of Legal & Executive Affairs, acting as Agents;

having regard to the Report for the Hearing,

having heard oral argument of the Liechtenstein Government, represented by Dr Andrea Entner-Koch; the Norwegian Government, represented by its Agent, Pål Wennerås, Advocate, Office of the Attorney General (Civil Affairs); ESA, represented by Xavier Lewis; and the European Commission (“the Commission”), represented by its Agent, Michael Wilderspin, member of its Legal Service, at the hearing on 29 February 2012,

gives the following

## **Judgment**

### **I Legal context**

#### *EEA law*

- 1 Article 4 of the EEA Agreement provides as follows:

*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.*

- 2 Article 36(1) of the EEA Agreement reads as follows:

*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.*

#### *National law*

- 3 According to Section 97(1) of the Constitution of the Principality of Liechtenstein, the Princely Court in Vaduz exercises ordinary jurisdiction at first instance. Thus, pursuant to Sections 30 and 36 of the Act on the exercise of jurisdiction and the jurisdiction of the courts in civil proceedings, also known as the Jurisdiktionsnorm (“the Jurisdiction Act”), the Princely Court of Justice has jurisdiction in relation to Granville Establishment in the main proceedings (i.e. it constitutes the general forum).
- 4 Pursuant to Section 53(1) of the Jurisdiction Act, parties to a contract may submit themselves by express agreement to the jurisdiction of the Princely Court also

when that court would not ordinarily have jurisdiction. In those circumstances, this agreement must be proven to the court in a recorded form on the lodging of a claim.

- 5 According to Section 53a(1) of the Jurisdiction Act, agreements between Liechtenstein nationals and foreign nationals, or between Liechtenstein nationals in Liechtenstein in certain types of contracts, or in clauses forming part of other contracts, which seek to confer jurisdiction on a foreign court are only valid if they have been publicly recorded.
- 6 In view of Liechtenstein's accession to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the requirement for the registration of clauses conferring jurisdiction in arbitration proceedings was deleted from the Jurisdiction Act.
- 7 Pursuant to Section 24(1) of the Jurisdiction Act, if a case pending is not subject to the jurisdiction of the domestic courts, irrespective of the stage of the proceedings which have been reached, the Princely Court must immediately dismiss the matter for lack of competence and order previous procedural steps to be set aside.

## **II Facts and procedure**

- 8 By a letter of 14 September 2011, registered at the Court on 22 September 2011, the Princely Court of Justice made a request for an Advisory Opinion in a case pending before it between Granville Establishment ("the Plaintiff") and Volker Anhalt, Melanie Anhalt and Jasmin Barbaro, née Anhalt ("the Defendants").
- 9 The Plaintiff is a legal person registered in Liechtenstein which offers business consultancy services, in particular regarding mergers and acquisitions. The Defendants are German nationals resident in Stuttgart, Germany.
- 10 On 22 September 2009, the first of the Defendants signed a confidentiality, agency and fee agreement in which he and the other two Defendants are mentioned as the vendors/clients and the Plaintiff as the agent/contractor. By that agreement, the Defendants commissioned the Plaintiff to sell shares in a company belonging to the Defendants. The agreement was not publicly recorded.
- 11 Article 4(4) of the agreement is worded as follows:

*Place of performance and jurisdiction: The laws of Liechtenstein shall apply. Unless mandatory law requires otherwise, all claims arising in connection with this commercial relationship shall be heard exclusively by the court having jurisdiction in the place where Granville has its headquarters.*

- 12 In the case before the national court, the Plaintiff claims from the Defendants on the basis of the agreement the sum of EUR 34 249. As the shares have now been

sold, the Plaintiff claims that the Defendants are obliged to pay commission fees to the Plaintiff.

- 13 After the claim was served, the Defendants raised the plea that the Princely Court in Vaduz lacked jurisdiction on the basis that a valid jurisdiction agreement had not been concluded.
- 14 By order of 14 September 2011, the Princely Court decided to seek an Advisory Opinion from the Court. In its request, the referring court notes, having regard to all the circumstances, that it considers the facts of the case to fall within the scope of the EEA Agreement, in that they concern the freedom to provide services, and the national rules in question to discriminate directly on grounds of nationality, while no justification is apparent. Notwithstanding that general approach, it submitted the following questions to the Court:

*1. Can a national of an EEA State rely on a provision such as Section 53a of the Liechtenstein Jurisdiction Act, which accords Liechtenstein nationals the right not to be sued abroad on the basis of a jurisdiction agreement unless that jurisdiction agreement has been publicly recorded, and derive directly therefrom also the right not to be sued in Liechtenstein (and, thus, from the perspective of that national, also abroad) on the basis of a jurisdiction agreement unless it has been publicly recorded?*

*2. If Question 1 is answered in the affirmative. Can that right be invoked in a case such as the one at hand, that is, in civil law proceedings, and thus directly in a dispute between private parties?*

- 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 insofar as is necessary for the reasoning of the Court.

### **III The questions referred**

#### *Admissibility*

- 16 The Plaintiff, the Liechtenstein Government and the Norwegian Government argue that the questions are inadmissible on the ground that they are purely hypothetical and that the referring court has not shown that the answers have any bearing on the outcome of the case. ESA also expresses doubts whether the questions are admissible, arguing that the lack of public recording in Liechtenstein of the relevant clause has no immediate consequences under national law regarding the validity of the parties' choice to confer jurisdiction on the referring court.
- 17 The Commission submits that the questions are admissible. It argues that although the questions, read in isolation, concern an interpretation of a national provision, which is as such inadmissible, a careful reading of the request shows

that what the national court essentially asks is whether a national of an EEA State can rely on EEA law, in particular Articles 4 and 36 EEA, in order to benefit from the formal requirements laid down in Section 53a(1) of the Jurisdiction Act.

- 18 The Court notes that under the system of judicial cooperation established by Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”), the interpretation of national rules is a matter for the national courts and not the Court (see, to that effect, Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 22). Similarly, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the 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 which it submits to the Court.
- 19 Consequently, where the questions submitted concern the interpretation of EEA law, the Court is in principle bound to give a ruling (see *Piazza*, cited above, paragraph 21, and case-law cited).
- 20 It follows that questions concerning EEA law enjoy a presumption of relevance. Thus, the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EEA law that is sought is unrelated to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, *Piazza*, cited above, paragraph 21, and, for comparison, Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, paragraph 36, and case-law cited).
- 21 In that regard, the Court recalls that Article 34 SCA is intended as a means of ensuring a homogenous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 25).
- 22 Accordingly, the Court may extract from all the factors provided by the national court and, in particular, from the statement of grounds in the order for reference, the elements of EEA law requiring an interpretation having regard to the subject-matter of the dispute and to restrict its analysis to the provisions of EEA law and provide an interpretation of them which will be of use to the national court, which has the task of determining the compatibility of the provisions of national law with that law (see, for comparison, Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraphs 18 to 19, and case-law cited).
- 23 In this case, the national court seeks an interpretation of Articles 4 and 36 EEA in the framework of the provision of services. It is clear from the reference submitted by the national court that the present dispute relates to remuneration for a service in the context of the freedom to provide services. Furthermore, it

follows from the reference that the national court considers it necessary to request an Advisory Opinion.

- 24 In those circumstances, the request for an Advisory Opinion must be held admissible.

*The first question*

- 25 At the outset, the Court notes that the first question referred must be understood as essentially asking whether Articles 4 and 36 EEA are to be interpreted as precluding a provision of domestic law, such as Section 53a of the Liechtenstein Jurisdiction Act, which accords Liechtenstein nationals the right not to be sued abroad on the basis of a jurisdiction agreement unless that jurisdiction agreement has been publicly recorded. Secondly, the national court asks whether these provisions of the EEA Agreement must be interpreted as giving nationals from other EEA States, who in the present case are German, the right not to be sued in Liechtenstein in accordance with Section 53a of the Jurisdiction Act, on the basis of a jurisdiction agreement which has not been publicly recorded.

*Observations of the parties*

- 26 The Plaintiff, the Liechtenstein and Norwegian Governments, and ESA submit that the first question should be answered in the negative.
- 27 In the view of the Plaintiff it is inconceivable that Section 53a of the Jurisdiction Act could be regarded as disadvantaging a foreign plaintiff in his State of domicile or establishment simply because a defendant established or domiciled in Liechtenstein cannot under any circumstances successfully rely on that provision before a foreign court.
- 28 The Liechtenstein and Norwegian Governments contend that Section 53 of the Jurisdiction Act concerns situations in which the Liechtenstein courts are conferred jurisdiction where they otherwise lack jurisdiction, whereas Section 53a of the same Act concerns cases in which foreign courts are conferred jurisdiction where the Liechtenstein courts otherwise have jurisdiction. Both essentially argue that the difference between Section 53 and Section 53a does not constitute discrimination, as the two provisions are not comparable.
- 29 In ESA's view, Section 53a(1) of the Jurisdiction Act enshrines a difference in treatment between jurisdiction agreements where the parties to such agreements are purely domestic and identical agreements involving domestic and foreign parties.
- 30 ESA contends that Section 53a(1) of the Jurisdiction Act therefore gives rise to issues of discrimination on grounds of nationality, which, in principle, is prohibited by Article 36 EEA. This arises, first, in cases where a private party to an agreement covered by that provision invokes Section 53a(1) to contest the jurisdiction of a national court in another EEA State; and second, in cases where

a Liechtenstein court considers the jurisdiction of a national court in another EEA State based on such an agreement invalid. In the latter situation, applying Section 53a(1) would result in the impossibility of having the foreign court's decision recognised or executed in Liechtenstein, or taken into account in Liechtenstein insolvency proceedings.

- 31 ESA further notes that since Section 53a(1) of the Jurisdiction Act renders any execution impossible in Liechtenstein of a decision issued by a foreign court on the basis of a jurisdiction clause lacking domestic public registration, assets held in Liechtenstein are less exposed to execution compared to assets held elsewhere in the EEA.
- 32 ESA argues that there is no justification for the measure. A public policy provision may only be relied upon if there is a genuine and sufficiently serious threat to a fundamental interest of society. The historical reason for the adoption of the measure in 1924 was to strengthen the position of the domestic courts vis-à-vis foreign jurisdictions in matters concerning Liechtenstein nationals. This reason fails to meet the settled test for justification.
- 33 ESA further submits that whatever the policy objective pursued by the measure today, this objective is pursued in an inconsistent manner. In this regard, ESA observes that the Jurisdiction Act has recently been amended to remove the requirement for registration of clauses conferring jurisdiction in arbitration proceedings, which was necessary to permit Liechtenstein to accede to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. ESA fails to see why the measure is still needed in the case of judicial proceedings undertaken abroad whereas it is no longer regarded necessary as a matter of public policy in the case of arbitration abroad.
- 34 The Commission asserts that Section 53a(1) of the Jurisdiction Act, which concerns the conferment of jurisdiction on foreign courts, entails both direct and indirect discrimination. It constitutes direct discrimination in that it applies only where at least one of the parties is a national of Liechtenstein. It is thus not applicable where none of the parties is a national of that State.
- 35 In the Commission's view, the essential element of discrimination lies in the fact that Section 53 and Section 53a(1) of the Jurisdiction Act, which according to the Commission concern equivalent situations, impose different requirements dependent on whether the jurisdiction agreement confers jurisdiction on a Liechtenstein court or a foreign court. Since the formal requirements which must be satisfied in order to have jurisdiction conferred on the Liechtenstein courts are less strict than those that a national of another EEA State must satisfy in order to escape Liechtenstein jurisdiction, the rules are plainly discriminatory in favour of Liechtenstein nationals.

*Findings of the Court*

- 36 In order to ascertain the provisions of EEA law applicable to a case such as the one in the main proceedings, it must be observed, first, that Article 4 EEA, which lays down as a general principle a prohibition of discrimination on grounds of nationality, applies independently only to situations governed by EEA law in regard to which the EEA Agreement lays down no specific rules prohibiting discrimination (see Case E-5/10 *Dr Kottke* [2009-2010] EFTA Ct. Rep. 320, paragraph 19, and case-law cited).
- 37 In so far as the freedom to provide and receive services is concerned, this principle is given specific expression and effect by Article 36 EEA (see, for comparison, Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraph 32, and case-law cited, and, with regard to the freedom to receive services in particular, Case 186/87 *Cowan v Trésor Public* [1989] ECR 195).
- 38 For such services to fall within the scope of Article 36 EEA, it is sufficient for them to be provided to nationals of an EEA State on the territory of another EEA State, irrespective of the place of establishment of the provider or recipient of the services (see, to that effect, Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 18).
- 39 In the case at hand, the national court seeks an interpretation of Articles 4 and 36 EEA in the framework of the provision of services. It is clear from the reference submitted by the national court that the present dispute relates to remuneration for a corporate consultancy rendered by a Liechtenstein company to German nationals. It follows that the first question should be answered in the light of Article 36 EEA.
- 40 According to consistent case-law, the freedom to provide services under Article 36 EEA entails, in particular, the abolition of any discrimination against a service provider on account of its nationality or the fact that it is established in an EEA State other than that in which the service is to be provided (see, for comparison, Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 114, and case-law cited).
- 41 It also follows from case-law that discrimination can arise not only through the application of different rules to comparable situations but also through the application of the same rule to different situations (compare Case C-157/10 *Banco Bilbao Vizcaya Argentaria*, judgment of 8 December 2011, not yet reported, paragraph 41, and case-law cited).
- 42 The Court notes that Sections 53(1) and 53a(1) of the Jurisdiction Act establish different conditions for the validity of jurisdiction agreements conferring jurisdiction on a court dependent on whether the court is located in Liechtenstein or in a foreign State.



- 43 Under Section 53(1) of the Jurisdiction Act, parties to a contract may submit themselves by express agreement to the jurisdiction of the Princely Court also when that court would not ordinarily have jurisdiction. In those circumstances, this agreement must be proven to the court in a recorded form on the lodging of a claim.
- 44 On the other hand, where nationals of other EEA States conclude an agreement with Liechtenstein nationals and agree to confer jurisdiction on a court outside of Liechtenstein, these agreements are subject to the registration requirements of Section 53a(1) of the Jurisdiction Act and are only valid if they have been publicly recorded.
- 45 Therefore, agreements concluded with nationals from other EEA States are subjected to rules on formal validity in Liechtenstein that are more onerous than those applied to jurisdiction agreements in favour of Liechtenstein courts. In order to be valid, the former must have been recorded publicly in Liechtenstein.
- 46 A national rule, such as the one at issue in the main proceedings, which imposes different requirements dependent on whether the jurisdiction agreement confers jurisdiction on a Liechtenstein court or a foreign court, treats Liechtenstein nationals differently from other EEA nationals, in so far as Liechtenstein nationals are protected against the enforcement of foreign agreements in Liechtenstein, unless they have been publicly recorded, whereas non-Liechtenstein EEA nationals are not given the same protection.
- 47 As regards the execution of civil law judgments in general, the Court notes that certain complications arise since Liechtenstein has acceded neither to the Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters nor the Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which replaces the 1988 Convention.
- 48 As there is no objective difference between the situations of Liechtenstein service providers and providers from other EEA States such as to justify different treatment in this regard, this treatment gives rise to discrimination against foreign service providers, contrary to Article 36 of the EEA Agreement.
- 49 In that regard, it follows from Article 39 EEA, applied in conjunction with Article 33 EEA, which must be interpreted strictly, that a rule such as that at issue in the case at hand may be justified only on grounds of an express derogating provision, such as Article 33 EEA, that is, on grounds of public policy, public security or public health (see, to that effect, *Case C-311/97 Royal Bank of Scotland* [1999] ECR I-2651, paragraph 32, and case-law cited).
- 50 The parties have not relied on any of the grounds referred to in Article 33 EEA in order to justify the discrimination inherent in the legislation in question. On the other hand, it appears from the preparatory works to the contested provisions of the Jurisdiction Act, set out in the request by the national court, that application

of those rules is intended to force companies doing business with Liechtenstein nationals to have recourse to Liechtenstein courts, by making it more difficult to avoid their jurisdiction.

- 51 Since such considerations are not permissible, it must be held that discrimination such as that at issue in the main proceedings cannot be justified.
- 52 The Court recalls that Article 3 EEA requires the EEA States to take all measures necessary to guarantee the application and effectiveness of EEA law. It is inherent in the objectives of the EEA Agreement that national courts are bound to interpret national law as far as possible in conformity with EEA law. Consequently, they must apply the methods of interpretation recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule (Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 245, paragraph 39).
- 53 In this regard, the Court notes that, according to Section 24(1) of the Jurisdiction Act, which the Princely Court of Justice mentions in its request, the Princely Court of Justice must immediately dismiss a case for lack of competence, irrespective of the stage of the proceedings which have been reached, if a case pending is not subject to the jurisdiction of the domestic courts.
- 54 The answer to the national court must therefore be that Article 36 EEA precludes a provision of domestic law, such as Section 53a(1) of the Jurisdiction Act, which accords only nationals the right not to be sued abroad on the basis of a jurisdiction agreement unless that jurisdiction agreement has been publicly recorded.
- 55 In the present case, it is for the national court, as far as possible, to interpret and apply the relevant provisions of national law in such a way that it is possible duly to remedy the consequences of the breach of EEA law. In that context, it is for the national court to determine whether the provisions of the Jurisdiction Act or any other national provisions can be applied for the purposes of an interpretation in conformity with EEA law.

*The second question*

- 56 As a result of the Court's reply to the first question, it is unnecessary for the Court to answer the second question.

**IV Costs**

- 57 The costs incurred by the Liechtenstein Government, Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Princely Court of Justice, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Fürstliches Landgericht hereby gives the following Advisory Opinion:

**Article 36 EEA precludes a provision of domestic law, such as Section 53a(1) of the Jurisdiction Act, which accords only nationals the right not to be sued abroad on the basis of a jurisdiction agreement unless that jurisdiction agreement has been publicly recorded.**

**It is for the national court, as far as possible, to interpret and apply the relevant provisions of national law in such a way that it is possible duly to remedy the consequences of the breach of EEA law. In that context, it is for the national court to determine whether the provisions of the Jurisdiction Act or any other national provisions can be applied for the purposes of an interpretation in conformity with EEA law.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 25 April 2012.

Skúli Magnússon  
Registrar

Carl Baudenbacher  
President