REPORT FOR THE HEARING*

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 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 Section 53a of the Liechtenstein Jurisdiction Law.

I Introduction

1. By a letter of 14 September 2011, registered at the EFTA 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, a company registered in Liechtenstein ("the Plaintiff"), and the German citizens Volker Anhalt, Melanie Anhalt and Jasmin Barbaro, née Anhalt ("the Defendants").

2. According to Liechtenstein law, Liechtenstein nationals/registered companies may contest the validity of private law agreements with foreigners that confer jurisdiction on courts outside Liechtenstein but which have not been publicly recorded in Liechtenstein. In this case, the national court asks whether EEA law, and in particular its prohibition on discrimination on grounds of nationality, should permit nationals of other EEA States to contest the validity of private law agreements entered into with Liechtenstein nationals/registered companies conferring jurisdiction on the Liechtenstein courts but which have not been publicly recorded.

* Revised in paragraphs 38 and 42.

II Legal background

EEA law

3. 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.*

4. Article 36 of the EEA Agreement reads as follows:

> *1. 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[†]

5. According to Article 97(1) of the Constitution of the Principality of Liechtenstein,[1] the Princely Court in Vaduz exercises ordinary jurisdiction at first instance. Thus, pursuant to Sections 30 and 36 of the Law on the exercise of jurisdiction and the jurisdiction of the courts in civil proceedings, also known as the Jurisdiktionsnorm ("JN" or "Liechtenstein Jurisdiction Law"),[2] the Princely Court has jurisdiction in relation to the Plaintiff (i.e. it constitutes the general forum).

6. Pursuant to Section 53(1) of the JN, the parties may submit themselves by express agreement to the jurisdiction of the Princely Court where it would not ordinarily have jurisdiction and, in those circumstances, on lodging a claim, this agreement must be proven to the court in a recorded form.

7. According to Section 53a(1) of the JN, agreements between Liechtenstein nationals and foreign nationals, or between Liechtenstein nationals in Liechtenstein in certain 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.

8. Pursuant to Section 24(1) of the JN, if a case pending is not subject to the jurisdiction of the domestic courts, irrespective of the stage of the proceedings

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[†] Translations of national provisions are unofficial and based on those contained in the documents of the case.

[1] *Die Verfassung des Fürstentums Liechtenstein*, Law Gazette 1921 No 15, as amended.

[2] *Gezetz über die Ausübung der Gerichtsbarkeit und die Zuständigkeit der Gerichte in bürgerlichen Rechtssachen (Jurisdiktionsnorm, JN)*, Law Gazette 1912 No 9/2, as amended.

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.

III Facts and procedure

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. In the case before the national court, the Plaintiff claims the sum of EUR 34 249 from the Defendants on the basis that, by agreement of 22 September 2009, the Defendants commissioned the Plaintiff to sell shares in a company belonging to the Defendants. As the shares have now been sold, the Plaintiff claims that the Defendants are obliged to pay commission to the Plaintiff.

11. 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. That agreement was not publicly recorded. Article 4(4) of that 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. 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.

13. By order of 14 September 2011, the Princely Court decided to seek an Advisory Opinion from the EFTA Court. In its request, the Princely Court appears inclined towards the view that the facts of the case fall within the scope of the EEA Agreement (that is, the freedom to provide services) and that the national rules discriminate directly on grounds of nationality while, at the same time, no justification is apparent. Notwithstanding that general approach, the Princely Court 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 Law, 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?**

IV Written observations

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

- the Plaintiff, represented by Ritter + 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;
- 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.

V Summary of the pleas and arguments submitted

The Plaintiff

Admissibility

15. The Plaintiff notes that it clearly follows from the second paragraph of Article 34 SCA that the Court will only give an opinion on questions to which an answer is necessary for the referring court to give judgment, i.e. questions which are material. The Plaintiff submits that, contrary to the view taken by the referring court, Section 53a(1) of the JN does not apply to the matter at hand in the main proceedings and, thus, must be regarded as not material to the case.

16. In the Plaintiff's view, Section 53a(1) of the JN only applies to jurisdiction agreements which confer jurisdiction on a foreign court. However, the present proceedings before the national court are not governed by a jurisdiction agreement conferring jurisdiction on a foreign court. Rather, the agreement in question confers jurisdiction on the courts in Liechtenstein. According to the Plaintiff, a jurisdiction agreement of that kind is not covered by Section 53a.

17. The Plaintiff submits that, for that reason, the referring court is not required to apply the provision specified in the request for an Advisory Opinion and the questions referred concerning Section 53a of the JN constitute purely hypothetical questions in relation to EEA law in the present case.

18. In the Plaintiff's view, it is Section 53(1) and not Section 53a of the JN which is material to the case. The Plaintiff submits that it is evident that Section 53(1) of the JN does not differentiate in any manner which is problematic from an EEA law perspective.

19. In this regard, the Plaintiff notes that also under EU law, in particular Article 5(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) ("the Brussels Regulation"), it is regarded as legitimate for a jurisdiction agreement to confer jurisdiction on the courts having jurisdiction in the place where the obligations in question are to be performed or where one of the parties is domiciled or established.

20. In light of the foregoing, the Plaintiff claims that the Court should reject the request of the referring court on the grounds that the questions referred are not material to the matter in dispute.

Substance

The first question

21. In the event that the Court considers Section 53a(1) of the JN and the questions of the referring court to be material to the present case and decides to give an opinion, the Plaintiff submits that Section 53a(1) is compatible with EEA law.

22. The Plaintiff notes that it follows from the preparatory works to Section 53a(1) of the JN that the purpose of the provision is to protect insured persons and consumers with reference to the jurisdiction clauses included in insurance policies and other general terms and conditions which, to the disadvantage of domestic policyholders and consumers, conferred (exclusive) jurisdiction on foreign courts. In this regard, the Plaintiff contends that the particular need to protect these groups in relation to jurisdiction clauses continues to be recognised. Indeed, protection of the weaker party in relation to jurisdiction clauses constitutes a principle which is also recognised in EU law. Recital 13 in the preamble to the Brussels Regulation states that in relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.

23. In addition, the Plaintiff continues, it should be noted that provisions governing the jurisdiction of courts must be categorised as public law provisions and, as a consequence, in determining the validity of a jurisdiction clause the national court concerned will apply the relevant provisions of national law or, where appropriate, the directly applicable provisions of Community law. This entails that an objection pursuant to Section 53a(1) of the JN raised by a person domiciled or established in Liechtenstein (i.e. a domestic person) before a foreign court challenging the jurisdiction of that foreign court will be determined in all

cases according to the jurisdiction rules of that foreign State. It is inconceivable, therefore, that Section 53a of the JN 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.

24. According to the Plaintiff, and contrary to the view taken by the referring court, the term "domestic person" mentioned in Section 53a(1) of the JN does not simply specify Liechtenstein nationals but includes all persons, irrespective of nationality, for whom the Liechtenstein courts are the general forum. Thus, this cannot be regarded under any circumstances as discrimination on grounds of nationality as was incorrectly presumed by the referring court.

25. Moreover, the Plaintiff submits that the view taken by the referring court to the effect that the ECJ judgment in Case C-274/96 *Bickel and Franz* [1998] ECR I-7637 is comparable to and relevant in the present proceedings is incorrect. The case before the ECJ concerned the language regime applicable in criminal proceedings in the Italian province of Bolzano and the possibility for German-speaking nationals of other Member States to take advantage of that regime. The present case does not share this starting position for the simple reason that, before the Liechtenstein courts, all persons irrespective of their nationality may rely on the same provisions governing jurisdiction and, in the present case, this is Section 53(1) of the JN.

26. In contrast, the Plaintiff continues, a person for whom the general forum is Liechtenstein cannot successfully plead Section 53a(1) of the JN before a foreign court and, as a result, persuade such a court to dismiss the action brought against that party on the grounds that the foreign court lacks jurisdiction. The foreign court in question must apply its own national procedural law. In the case at hand, this means that all parties may only rely on the national jurisdiction provisions in the State in question. Moreover, this rule applies whether or not the law of their home State or State of domicile contains comparable or divergent provisions on jurisdiction. It is inconceivable that a foreign plaintiff could experience adverse treatment in his home State or State of domicile as a result of Section 53a(1) of the JN if he were to sue a person having Liechtenstein as a general forum.

27. Furthermore, the Plaintiff notes that, except in relation to Austria and Switzerland, Liechtenstein has not concluded any conventions on the recognition and enforcement of judgments and, in addition, is not a party to the Lugano Convention. As a consequence, a foreign judgment delivered, for example, by a German court, irrespective of the provisions on jurisdiction on which that judgment is based, would not be enforceable in Liechtenstein. Consequently, there is no remotely conceivable scenario in which a foreign person would be precluded, as in *Bickel and Franz*, from relying on the same provisions on jurisdiction as a domestic person and, as a consequence, would experience a disadvantage.

28. The Plaintiff proposes that the Court should reply to the first question as follows:

> *Section 53a(1) of the Jurisdiction Law does not fall within the scope of application of the EEA Agreement and does not entail any discrimination contrary to EEA law based on grounds of nationality.*

The second question

29. The Plaintiff submits that provisions on jurisdiction must be categorised as provisions of public law which confer on individuals a right of access to the administration of justice enforceable against the State. However, the Plaintiff argues, the possibility is completely precluded that provisions on jurisdiction may confer (whether directly or indirectly) a right enforceable against another individual, let alone the opposing party. This is the case simply by reason of the fact that the jurisdiction of courts and the administration of justice constitute public rights, which, as elements of State sovereignty, are accorded only and without exception to the State. The proceedings at issue illustrate this point clearly, as the outcome would be absurd if the Defendants were permitted to rely against the Plaintiff on requirements governing form which are not applicable in their home State and State of domicile.

30. Moreover, if the general requirement for the written form provided for in Section 53(1) of the Jurisdiction Law, as is standard also under EU law, is displaced in favour of the more stringent requirement of public recording provided for as an exception in Section 53a(1) of the Jurisdiction Law, this would result in an outcome which is entirely inconsistent with the notion of legal protection. This would contradict not only the scheme of a general rule and an exception thereto provided for in the Liechtenstein Jurisdiction Law but also, in particular, the principle that party autonomy and legal protection should not be hindered by unnecessary formalities.

31. The Plaintiff proposes that the Court should reply to the second question as follows:

> *Section 53a(1) of the Jurisdiction Law is not directly applicable between private parties and in the context of a civil law dispute a party may not rely on this provision against its opponent.*

The Liechtenstein Government

Admissibility

32. The Liechtenstein Government submits that the questions referred for an Advisory Opinion are inadmissible. In its view, the questions are targeted at an interpretation of rules of national law. In addition, they are of purely hypothetical nature and not of actual relevance in the proceedings before the national court.

33. The Government argues that, first, according to Article 34 SCA, the Court has jurisdiction to give advisory opinions on the interpretation of EEA law. Therefore, questions referred must concern the interpretation of EEA law, and be linked to the question of whether or not such an interpretation precludes the application of a certain national provision.[3]

34. However, by its questions, the referring court asks exclusively for an interpretation of Liechtenstein national law – no reference is made to any provision of the EEA Agreement.

35. Moreover, the Government notes that, in any event, it follows from case-law that the Court "may not rule on a question, where it is quite obvious, that the sought interpretation of EEA law bears no relation to the actual facts of the main action or its purpose or where the issue is hypothetical."[4] In the view of the Liechtenstein Government, the requested interpretation of Section 53a of the Jurisdiction Law bears no relation to the actual facts of the main action.

36. The Government notes that, in the absence of mandatory provisions under the EEA Agreement, the EFTA States remain responsible and free to decide whether or not, and under which conditions, their domestic courts shall have jurisdiction.

37. The Government notes further that, in Liechtenstein, the exercise of jurisdiction and the competence of the domestic courts in civil matters are regulated by the Liechtenstein Jurisdiction Law. Except in cases of exclusive jurisdiction, the autonomy of the parties to a contract to determine the competent court must be respected. The parties can either agree to confer jurisdiction on a court which is otherwise not competent (prorogation of jurisdiction) or to waive the jurisdiction of an otherwise competent court (derogation of jurisdiction). These two types of jurisdiction clauses are kept clearly separate in the JN. Prorogation agreements, which require an express agreement between the parties in order to be legally valid, are regulated in Section 53 of the JN. Derogation agreements, which, in addition to express agreement between the parties must be publicly recorded, are regulated in Section 53a of the JN.

38. The Government also notes that, according to the request for an Advisory Opinion, the Plaintiff's claim that the Princely Court is competent to hear its action against the Defendants is based on the existence of a valid agreement of prorogation of jurisdiction in accordance with Section 53 of the JN. The Defendants, however, dispute the existence of a valid jurisdiction agreement, and contend that the Princely Court lacks jurisdiction. In the Government's view,

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[3] Reference is made to EFTA Court Notice 1/99 - Note for guidance on requests by national courts for advisory opinions (OJ 1999 C 223, p. 4), and Frenz, W., *Handbuch Europarecht, Band 5: Wirkungen und Rechtsschutz*, Springer, Berlin, 2010, p. 952.

[4] Reference is made to Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 21; EFTA Court Notice 1/99, cited above; and Case C-504/10 *Tanoarch s.r.o.*, judgment of 27 October 2011, not yet reported, paragraph 32, and the case-law cited.

there cannot be any doubt as to the validity of the jurisdiction agreement, and, consequently, to the competence of the Princely Court to decide the case pending before it.

39. The Government fails to understand how the reference to Section 53a(1) of the JN could affect the validity of the jurisdiction agreement in question and the jurisdiction of the Princely Court dependent thereon. Section 53a(1) of the JN only regulates situations where the parties to a contract conclude an agreement for the derogation of jurisdiction (which aims at waiving the jurisdiction of an otherwise competent court). In the present case, however, the parties to the contract concluded an agreement for the prorogation of jurisdiction (which aims at conferring jurisdiction on a court which is otherwise not competent).

40. In the view of the Liechtenstein Government, there is thus no link between the case before the national court and Section 53a of the JN, and an interpretation of Section 53a(1) of the JN is irrelevant to the actual facts of the main action. Against this background, the Government submits that the questions referred by the Princely Court are inadmissible.

Substance

The first question

41. In the event that the Court concludes that the request for an Advisory Opinion is admissible, the Liechtenstein Government submits that the first question should be answered in the negative.

42. The Government submits that the conditions necessary for relying on Section 53a of the JN are clearly not fulfilled. Only nationals may rely on the provision, and the Defendants are evidently not nationals. Furthermore, Section 53a concerns derogation agreements, which aim at waiving the jurisdiction of the Liechtenstein courts which otherwise would be competent. However, the jurisdiction agreement in question is, from the point of view of Liechtenstein jurisdiction, a prorogation agreement, which aims at conferring competence on a court which would otherwise not be competent. Therefore, the Defendants cannot rely on Section 53a of the JN.

43. The Liechtenstein Government proposes that the Court should answer the first question, if admissible, as follows:

> *Under the given circumstances, a national of an EEA State cannot rely on a provision such as Section 53a of the Liechtenstein Jurisdiction Law, which accords nationals the right not to be sued abroad on the basis of a jurisdiction agreement unless that jurisdiction agreement has been publicly recorded and cannot derive directly therefrom a right not to be sued in Liechtenstein on the basis of a jurisdiction agreement unless it has been publicly recorded*.

The second question

44. The Liechtenstein Government considers that in light of its proposed reply to the first question, the second question does not require a reply.

Additional observations not related to the questions referred

45. In its request (however not included in the questions referred) the referring court also mentions the principle of non-discrimination established in Article 4 EEA and the freedom to provide services. The Government submits, however, that Section 53a(1) of the JN is not discriminatory and does not infringe the freedom to provide services.

46. If Section 53a(1) of the JN is regarded as falling within the scope of the EEA Agreement, the Liechtenstein Government submits that it is not nationals of other EEA States but domestic nationals within the meaning of Section 53a(1) which are subject to the stricter formal requirement of public recording. Thus, if at all, Section 53a(1) appears to disadvantage nationals within the meaning of that provision. It certainly does not make it more difficult for nationals of other EEA States to act than is the case for nationals of the State in question.[5]

47. Moreover, the Liechtenstein Government fails to see how Section 53a(1) of the JN could have effects on the freedom to provide services which could be regarded as sufficiently certain and direct to warrant the conclusion that this freedom may have been infringed.[6]

48. Finally, the Liechtenstein Government points out that a negative conflict of jurisdiction could potentially arise if the Princely Court accepts the Defendants' claim and declines to exercise jurisdiction, and, at the same time, the competent court at the Defendants' place of residence declines to exercise jurisdiction because of the clear wording of the jurisdiction agreement concluded between the parties concerned. Under such circumstances, the Plaintiff could be deprived of effective access to justice, which, as the Court has emphasised, is an essential element of the EEA legal framework.[7]

The EFTA Surveillance Authority

Admissibility

49. ESA observes that the Court may hold questions to be inadmissible, where it is "quite obvious that the sought interpretation of EEA law bears no relation to

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[5] Reference is made to Case E-5/10 *Dr Kottke* [2009-2010] EFTA Ct. Rep. 320, paragraphs 31 to 32.

[6] Reference is made to Case C-231/03 *Consorzio Aziende Metano (Coname)* [2005] ECR I-7287, paragraph 20.

[7] Reference is made to *Dr Kottke*, cited above, paragraph 26. Reference is also made to Article 6(1) of the European Convention on Human Rights.

the actual facts of the main action or its purpose, or where the issue is hypothetical."[8]

50. In ESA's view, it follows from the facts set out in the order for reference that Section 53a(1) of the JN does not apply to a situation such as that in the main proceedings. The parties to those proceedings did not enter into an agreement conferring jurisdiction on a "foreign court" within the meaning of Section 53a(1), that is, a court outside the Principality of Liechtenstein. Conversely, the Plaintiff and the Defendant agreed to submit any dispute following from their contract to the Vaduz Princely Court of Justice, i.e. a domestic court. Thus, ESA understands 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.

51. Consequently, and notwithstanding the national court's general prerogative to determine both the need for an advisory opinion and the relevance of the questions that it submits, ESA doubts whether the questions referred are admissible within the meaning of Article 34 SCA.

Substance

The first question

52. ESA understands that, by its first question, the national court is asking what consequences should follow from the EEA law prohibition on discrimination on grounds of nationality when Liechtenstein nationals or companies and foreigners contract to confer jurisdiction on the Liechtenstein Princely Court of Justice without publicly registering that agreement, given that Section 53a(1) of the JN would essentially oblige the same private parties to publicly register, in Liechtenstein, a similar agreement to confer jurisdiction on a *foreign* court.

53. ESA submits that any breach of the prohibition on discrimination on grounds of nationality should not be resolved by according other EEA nationals additional rights and, consequently, the question should be answered in the negative.

54. As a starting point, ESA contends that the agreement in question conferring jurisdiction on a Liechtenstein court is not covered by Section 53a(1) of the JN. In ESA's view, there is no reason to assume that the agreement is invalid under the relevant Liechtenstein legislation, as clauses conferring jurisdiction on the courts of Liechtenstein do not need to be registered there.

55. In contrast, ESA continues, Section 53a(1) of the JN allows private parties to contest the validity of agreements between Liechtenstein nationals or

[8] Reference is made to *Piazza*, cited above, paragraph 21.

Liechtenstein registered companies and foreigners that confer jurisdiction on a *foreign* court but lack public registration in Liechtenstein.

56. ESA notes that the general prohibition on discrimination on grounds of nationality, under Article 4 EEA, applies independently only to situations governed by EEA law for which the EEA Agreement lays down no specific rules prohibiting discrimination.[9] In the case at hand, questions of discrimination arise in the context of a dispute on remuneration for the provision of certain corporate consultancy services. Since Article 36 EEA requires, *inter alia*, the elimination of all discrimination based on nationality and place of residence,[10] ESA does not consider it necessary to conduct a separate assessment under Article 4 EEA.

57. Although of no direct application to the facts in the main proceedings, ESA takes the view that Section 53(1) of the JN ("the measure") may give rise to issues of discrimination on grounds of nationality within its scope of application. The problem can arise in two situations: (i) in cases where a private party to an agreement covered by that provision invokes Section 53a(1) JN to contest the jurisdiction of a national court in another EEA State; and (ii) 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 former case, the measure gives rise to a problematic situation because it is normally for the foreign court seized to determine, according to the law of the forum, whether it has jurisdiction over the matter. In the latter case, applying the measure would result in the impossibility of having the foreign court's decision executed or recognised in Liechtenstein, or taken into account in Liechtenstein insolvency proceedings.

58. ESA notes that the measure results in a duty to publicly register agreements conferring jurisdiction on a foreign court when concluded (i) between non-Liechtenstein nationals (or companies) and Liechtenstein nationals (or companies), or (ii) between Liechtenstein nationals (or companies) in Liechtenstein. On the other hand, identical jurisdiction agreements do not need to be registered when they are concluded (iii) between non-Liechtenstein nationals (or companies) only, or (iv) between Liechtenstein nationals (or companies) outside Liechtenstein.

59. According to ESA, the measure therefore enshrines a difference in treatment between jurisdiction agreements where the parties to such are purely domestic (group iv) and identical agreements involving "mixed or diverse" – domestic and foreign – parties (group i).

60. ESA submits that this difference in treatment is prohibited by the EEA Agreement for two reasons.

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[9] Reference is made to Case E-1/00 *Islandsbanki-FBA* [2000-2001] EFTA Ct. Rep. 8, paragraphs 35 to 36; Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep. 1, paragraph 38; *Piazza*, cited above, paragraph 31; and Case E-7/07 *Seabrokers* [2008] EFTA Ct. Rep. 172, paragraph 27.

[10] Reference is made to Case E-1/03 *ESA* v *Iceland* [2003] EFTA Ct. Rep. 143, paragraph 28.

61. First, otherwise identical jurisdiction agreements (groups i and iv) are treated differently solely because of the foreign nationality – or place of residence, in the case of companies – of one party. In ESA's view, this entails direct discrimination on grounds of nationality which, in principle, is prohibited by Article 36 EEA.

62. Second, the measure also restricts fundamental freedoms under the EEA Agreement. Article 36 EEA requires not only the elimination of all discrimination based on nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other States party to the EEA Agreement. A measure that is liable to prohibit or otherwise impede the provision of services between EEA States as compared to the provision of services purely within one EEA State constitutes a restriction.[11]

63. ESA submits that the measure impedes the cross-border provision of services to Liechtenstein. Service providers in other EEA States are less likely to provide services to Liechtenstein parties if they cannot confer jurisdiction on the courts of their own or another EEA State. In this regard, the measure makes it less attractive to agree in contracts for such services a foreign jurisdiction than to agree Liechtenstein jurisdiction where no public registration duty is imposed.

64. ESA notes that the ECJ has held that a requirement to register documents with national authorities can constitute a restriction on the freedom to provide services.[12] ESA contends that, in the present case, the effect of the measure is to deprive a contract with a foreign jurisdiction clause for the supply of services to a Liechtenstein national of its validity or enforceability in Liechtenstein. According to ESA, the present case must thus be distinguished from the circumstances in Case C-291/09 *Francesco Guarnieri*.[13] In that case, which concerned a dispute relating to defective goods, the ECJ held that a rule relating to security for costs was purely procedural and its purpose was not to regulate trade in goods, and did not deprive the contract in question of any legal effect.

65. In ESA's view, the measure restricts not only the cross-border provision of services to Liechtenstein but also access to the courts of Liechtenstein by nationals of other EEA States who seek the recognition or execution of foreign judgments against Liechtenstein parties. Since the measure 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.

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[11] Ibid.

[12] Reference is made to Case C-515/08 *Santos Palhota*, judgment of 7 October 2010, not yet reported, paragraphs 29 to 35.

[13] Case C-291/09 *Francesco Guarnieri*, judgment of 7 April 2011, not yet reported.

66. ESA submits that the historical reason for the adoption of the measure in 1924, that is, to strengthen the position of the domestic courts vis-à-vis foreign jurisdictions in matters concerning Liechtenstein nationals, fails to meet the settled test for justification. It observes that a public policy provision may only be relied upon if there is a genuine and sufficiently serious threat to a fundamental interest of society.[14] According to ESA, the request for an Advisory Opinion does not set out any element which points to any problem of such magnitude which needs to be addressed more than 80 years after the adoption of the discriminatory measure.

67. Moreover, ESA points out that, according to consistent ECJ case-law, national legislation is appropriate to ensure attainment of the objective it pursues, only if it genuinely reflects a concern to attain it in a consistent and systematic manner.[15] In ESA's view, whatever the policy objective pursued by the measure today, this objective is pursued in an inconsistent manner. In this regard, ESA notes that the measure has recently been amended to remove the requirement of registration of clauses conferring jurisdiction in arbitration, 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 in public policy terms in the case of arbitration abroad.

68. Finally, ESA submits that the remedy to the discrimination should not be the one that the national court appears to suggest. In ESA's view, the national court suggests the creation, by interpretation of Article 36 EEA, of rights for non-Liechtenstein nationals or companies not to be sued in a Liechtenstein court unless that jurisdiction agreement is "publicly registered". This would, ESA continues, not only raise the practical question as to where the parties should perform such a public registration but also as to how. For instance, such public registration may be unknown in other jurisdictions.

69. In ESA's view, the solution to address any incompatibility with the EEA Agreement should be to correct the situation within the Liechtenstein legal order. In other words, the correct remedy to address the discriminatory and restrictive effects of the relevant Liechtenstein measure should not be equal treatment in illegality, but a process to remove any elements which are in breach of EEA law from the relevant national legislation.

The second question

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[14] Reference is made to *Piazza*, cited above, paragraph 42; and, in relation to Article 33 EEA, Case E-3/98 *Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 42.

[15] Reference is made to Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 51; Case C-347/09 *Dickinger & Ömer*, judgment of 15 September 2011, not yet reported, paragraph 56; Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler*, judgment of 21 July 2011, not yet reported, paragraph 85; and Case C-212/08 *Zeturf*, judgment of 30 June 2011, not yet reported, paragraph 57.

70. In light of its proposed reply to the first question, ESA sees no need for the Court to provide a separate reply to the second question.

71. ESA proposes that the questions should be answered as follows:

> *It follows neither from Article 4 EEA nor from Article 36 EEA that non-Liechtenstein EEA nationals may contest the validity of private law agreements under Liechtenstein law entered into with Liechtenstein nationals or Liechtenstein registered companies which confer jurisdiction to the Liechtenstein judiciary but have not been publicly recorded within the meaning of Article 53a section 1 of the Liechtenstein Jurisdiction Law.*

Per Christiansen
Judge-Rapporteur