



JUDGMENT OF THE COURT

3 June 2013

(Failure by a Contracting Party to fulfil its obligations – Freedom of establishment – Freedom to provide services – Articles 31 and 36 EEA – Obligation on temporary work agencies to deposit a guarantee – Indirect and direct discrimination – Residence requirement – Justification)

In Case E-14/12,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Clémence Perrin, Officer, and Catherine Howdle, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents,

defendant,

APPLICATION for a declaration that by maintaining in force legislation which imposes on persons resident in Liechtenstein who are responsible for a temporary work agency the obligation to supply a guarantee of 50 000 Swiss francs, whereas the guarantee of 100 000 Swiss francs is imposed upon persons performing a similar function who are resident outside of Liechtenstein, and on agencies seeking to deliver temporary employment services cross-border, the Principality of Liechtenstein has failed to fulfil its obligations under Article 31 and Article 36 of the EEA Agreement.

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

Judgment

I Introduction

- 1 By application lodged at the Court Registry on 4 December 2012, the EFTA Surveillance Authority (“ESA”) brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”), for a declaration that, by failing, within the time limit prescribed, to comply with a reasoned opinion delivered by ESA on 25 January 2012, the Principality of Liechtenstein (“Liechtenstein”) has failed to fulfil its obligations under Articles 31 and 36 EEA in the field of temporary work and employment services.

II Relevant law

EEA law

- 2 Article 31(1) EEA reads:

Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

- 3 Article 33 EEA 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.

4 Article 36(1) EEA 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.

5 Article 39 EEA establishes that the possibilities for derogation set out in Article 33 EEA also extend to the freedom to provide services under Article 36 EEA.

National law

6 Article 25 of the Regulation of 11 July 2000 concerning job placement and temporary employment services (*Verordnung vom 11. Juli 2000 zum Gesetz über die Arbeitsvermittlung und den Personalverleih*, LR 823.101, as amended) (“AVV”) reads:

(1) The provider of temporary employment services is obliged to provide a deposit, if the activity is subject to approval.

(2) The approval to offer temporary employment services can only be granted when the required deposit has been provided.

7 Article 26 of the AVV reads:

(1) If the person responsible for the management of the temporary work agency is resident in [Liechtenstein], the deposit for the economic activity in [Liechtenstein] and abroad is 50 000 Swiss Francs each.

...

(3) If the person responsible for the management of the temporary work agency is resident abroad, the deposit for the economic activity in [Liechtenstein] and abroad is 100 000 Swiss Francs each.

...

(6) For the cross-border provision of temporary employment services, the deposit is 100 000 Swiss Francs. ...

8 The legal basis for the AVV is the Act of 12 April 2000 on placement services and temporary work agencies (*Gesetz vom 12. April 2000 über die Arbeitsvermittlung und den Personalverleih*, LR 823.10, as amended) (“AVG”).

III Facts and pre-litigation procedure

- 9 The contested Liechtenstein measures are Articles 25 and 26 of the AVV. These measures impose on persons resident in Liechtenstein responsible for a temporary work agency established in Liechtenstein the obligation to supply a guarantee of CHF 50 000. An obligation to supply a guarantee of CHF 100 000 is imposed upon persons performing a similar function who are resident outside of Liechtenstein. A guarantee of CHF 100 000 is also required from temporary work agencies established outside of Liechtenstein which seek to provide such services cross-border.
- 10 By letter of 11 February 2010, ESA received a complaint in relation to Liechtenstein concerning the provisions of Articles 25 and 26 of the AVV. According to the complaint, these provisions discriminate against service providers established outside of Liechtenstein.
- 11 On 19 March 2010, ESA sent a request for information to Liechtenstein. ESA asked Liechtenstein to explain, *inter alia*, (i) the purpose of the guarantee provision; (ii) why, in comparison to agencies established in Liechtenstein, the guarantee required of temporary work agencies established outside of Liechtenstein is twice as high; (iii) whether Liechtenstein considered the guarantee requirement to be justified by a legitimate objective and, if so, (iv) whether the measure could be considered proportionate to that objective.
- 12 By letter of 6 April 2010, Liechtenstein replied to ESA's request. The protection of workers was given as the main purpose of the provisions, in particular the fact that the deposit was intended to secure the wage entitlement of workers if an agency became insolvent. Furthermore, Liechtenstein considered the deposit amount to be proportionate, and sought to justify the differing amounts required by reference to the difficulties in cross-border enforcement of claims.
- 13 On 27 October 2010, ESA issued a letter of formal notice. ESA took the view that, in imposing different requirements on persons responsible for the management of a temporary work agency with respect to the deposit amount required depending on whether they were resident in Liechtenstein or another State, Article 26 of the AVV infringed the freedom of establishment. It places a temporary work agency in Liechtenstein whose responsible person is resident on the national territory in a better position than a temporary work agency whose responsible person is resident in another EEA State. ESA also took the view that Article 26 of the AVV discriminates between cross-border service providers on the basis of their place of residence and establishment and thus constitutes a discriminatory restriction on the freedom to provide services. ESA concluded that, as such restrictions cannot be justified, Liechtenstein has failed to fulfil its obligations arising from Articles 31 and 36 EEA.
- 14 On 8 February 2011, Liechtenstein replied to the letter of formal notice. It stated that Article 26 of the AVV was to be amended, regardless of its compatibility with Article 36 EEA.

- 15 In an e-mail of 19 October 2011, Liechtenstein informed ESA that the proposed new wording of Article 26 of the AVV, consistent with EEA rules, went beyond the scope of the primary legislation (the AVG) on which it was based. Consequently, Liechtenstein stated that it was not possible to bring Article 26 of the AVV in line with EEA law without amending the AVG.
- 16 Liechtenstein further explained that the necessary modification to the AVG could only be made by Parliament. It stated that an amendment to the AVG was planned to take account of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9), which at that time was due to be incorporated into the EEA Agreement. In the light of this anticipated amendment, the Liechtenstein Government wished to ask Parliament to amend the AVG only once and not twice in quick succession.
- 17 On 25 January 2012, ESA delivered a reasoned opinion to Liechtenstein, maintaining the conclusion reached in the letter of formal notice. Pursuant to Article 31(2) SCA, ESA requested Liechtenstein to take the measures necessary to comply with the reasoned opinion within two months following notification thereof, i.e. no later than 25 March 2012.
- 18 In its reply of 20 March 2012 in response to the reasoned opinion, Liechtenstein repeated that it was still waiting for the incorporation of Directive 2008/104/EC into the EEA Agreement before commencing any amendment of the AVG. It stated that it intended to make the amendments necessary for compliance with Articles 31 and 36 EEA at the same time as the amendments made necessary by Directive 2008/104/EC.
- 19 In a letter of 29 October 2012, Liechtenstein confirmed that amendments to both the AVV and the AVG will not enter into force before January 2014.
- 20 On 3 December 2012, ESA decided to bring the matter before the Court.

IV Procedure before the Court

- 21 ESA lodged the present application at the Court Registry on 4 December 2012. The application is based on two pleas in law. First, ESA submits that the CHF 100 000 deposit obligation, pursuant to Article 26(3) of the AVV, on persons responsible for temporary work agencies established in Liechtenstein, but who are resident outside of Liechtenstein amounts to a restriction on the freedom of establishment under Article 31 EEA. Second, ESA submits that the CHF 100 000 deposit obligation, pursuant to Article 26(6) AVV, on temporary work agencies which are not established in Liechtenstein but seek to provide services cross-border amounts to a restriction on the freedom to provide services under Article 36 EEA.
- 22 The time limit for lodging a defence was set for 7 February 2013. In a letter of 11 February 2013, Liechtenstein made a request for an extension of the time limit.

By a letter of 13 February 2013, ESA supported Liechtenstein's request. In a letter of 15 February 2013, Liechtenstein was informed that the President of the Court had granted an extension of the time limit until 28 February 2013.

- 23 The statement of defence from Liechtenstein was received on 28 February 2013. Liechtenstein does not dispute the declaration sought by ESA.
- 24 Liechtenstein requests the Court to order each party to bear its own costs of the proceedings.
- 25 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided pursuant to Article 41(2) of the Rules of Procedure to dispense with the oral procedure.

V Findings of the Court

Compatibility of Article 26(3) of the AVV with Article 31(1) EEA on the freedom of establishment

- 26 Article 31(1) EEA provides, in its first subparagraph, for the abolition of all restrictions on the freedom of establishment between the EEA States. According to the second subparagraph, the freedom of establishment includes the right of nationals of the EEA States to take up and pursue activities as self-employed persons and to set up and manage undertakings in another EEA State under the same conditions as are laid down by the law of the EEA State of establishment with respect to its own nationals.
- 27 The Court notes that it follows from Article 26(3) of the AVV, read in conjunction with Article 25 AVV, that in order to be allowed to operate in Liechtenstein, temporary work agencies established in Liechtenstein whose responsible person resides in another State must make a deposit of CHF 100 000. In contrast, pursuant to Article 26(1) of the AVV, if the responsible person resides in Liechtenstein, the agency is obliged to deposit only half that amount, i.e. CHF 50 000.
- 28 While there is no overt discrimination on the basis of nationality, the provisions distinguish between temporary work agencies established in Liechtenstein on the basis of the residency of the person responsible for the management of that agency. It is settled case law that the rules on equal treatment in the EEA Agreement, including Article 31(1) EEA, prohibit not only overt discrimination based on nationality, but also covert forms of discrimination which, by applying other distinguishing criteria, achieve in practice the same result (see, *inter alia*, Case E-8/04 *ESA v Liechtenstein* [2005] EFTA Ct. Rep. 51, paragraph 16, and the case law cited).
- 29 The greater deposit required of undertakings where the person responsible resides outside of Liechtenstein places those undertakings in a less favourable position than undertakings where the person responsible is a resident of Liechtenstein. It

must therefore be held that Article 26(3) of the AVV constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

- 30 National rules entailing indirectly discriminatory restrictions on the freedom of establishment, in this case through a distinguishing criterion based on residence, may be justified by considerations of overriding public interest, provided that they are appropriate to secure the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it (see, *inter alia*, Case E-9/11 *ESA v Norway*, judgment of 16 July 2012, not yet reported, paragraph 83, and *ESA v Liechtenstein*, cited above, paragraph 23).
- 31 Although Liechtenstein does not contest the order sought by ESA in the present case, the defence refers to the protection of workers as the main purpose of the restriction. The greater deposit required of temporary work agencies where the person responsible resides outside of Liechtenstein was deemed necessary due to the difficulties in cross-border enforcement of claims, for instance claims to wages in the event of insolvency.
- 32 The overriding reasons relating to the public interest already recognised in case law include the social protection of workers (see, *inter alia*, Case E-2/11 *STX Norway and Others*, judgment of 23 January 2012, not yet reported, paragraph 81, and the case law cited). However, in order to be justified, the measure in question must also be proportionate, in that it must be appropriate and necessary as described in paragraph 30 of this judgment. It falls on the EEA State responsible for the restriction to demonstrate that this is the case (see Case E-1/09 *ESA v Liechtenstein* [2009-2010] EFTA Ct. Rep. 46, paragraph 38, and *ESA v Norway*, cited above, paragraph 88).
- 33 Liechtenstein has not provided any arguments as to why the measure should be regarded as appropriate or necessary. It must therefore be held that Article 26(3) of the AVV is not justified and that, in maintaining in force that provision, Liechtenstein has failed to fulfil its obligations pursuant to Article 31(1) EEA.

Compatibility of Article 26(6) of the AVV with Article 36 EEA on the freedom to provide services

- 34 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 (Case E-13/11 *Granville Establishment*, judgment of 25 April 2012, not yet reported, paragraph 40, and the case law cited).
- 35 Article 26(6) of the AVV provides that undertakings established outside Liechtenstein wishing to provide cross-border temporary employment services in Liechtenstein must supply a deposit of CHF 100 000. In contrast, Article 26(1) of the AVV requires temporary work agencies established in Liechtenstein, and

with a responsible person resident in Liechtenstein, to supply a deposit of only half that amount, i.e. CHF 50 000.

- 36 The distinction set out in Article 26(1) and (6) of the AVV is made on the basis of the place of establishment of the undertaking, with Article 26(6) of the AVV imposing a greater economic burden on undertakings established outside of Liechtenstein than on undertakings established in Liechtenstein. Therefore, the provision is overtly discriminatory and constitutes a restriction on the freedom to provide services contrary to Article 36 EEA.
- 37 National rules entailing directly discriminatory restrictions, 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 *Granville Establishment*, cited above, paragraph 49, and the case law cited).
- 38 As noted above in paragraph 31, Liechtenstein refers to the protection of workers as the main purpose of the measures in Article 26 of the AVV. It does not rely directly on any of the grounds for justification in Article 33 EEA. It is not necessary for the Court to assess whether the protection of workers could serve as basis for justification under the grounds mentioned in Article 33 EEA, as Liechtenstein has not provided any arguments as to why the measure should be regarded as appropriate or necessary. Consequently, it must be held that, in maintaining in force Article 26(6) of the AVV, Liechtenstein has failed to fulfil its obligations pursuant to Article 36 EEA.

VI Costs

- 39 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the EFTA Surveillance Authority has requested that Liechtenstein be ordered to pay the costs and the latter has been unsuccessful, and since none of the exceptions in Article 66(3) apply, Liechtenstein must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by maintaining in force legislation which imposes on persons resident in Liechtenstein who are responsible for a temporary work agency the obligation to supply a guarantee of 50 000 Swiss francs, whereas the guarantee of 100 000 Swiss francs is imposed upon persons performing a similar function who are resident outside of Liechtenstein, and on agencies seeking to deliver temporary employment services cross-border, the Principality of Liechtenstein has failed to fulfil its obligations under Article 31 and Article 36 of the EEA Agreement.**
2. **Orders Liechtenstein to bear the costs of the proceedings.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 3 June 2013.

Gunnar Selvik
Registrar

Carl Baudenbacher
President