



JUDGMENT OF THE COURT

31 March 2015

(Failure by an EEA/EFTA State to fulfil its obligations – Freedom of establishment – Restrictions on pursuit of the profession of “Dentist” in Liechtenstein – Proportionality)

In Case E-17/14,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Janne Tysnes Kaasin, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

The 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 the Principality of Liechtenstein has failed to fulfil its obligations arising from Article 31 EEA by maintaining in force national rules, such as Article 63 of the Health Act and the transitional provision in the Act on the repeal of that Article, including the applicability of Article 63(2) of the Health Act in those respects, which require an authorised “*Dentist*” to pursue this profession as an employee, under the direct supervision, instruction and responsibility of a fully qualified dental practitioner,

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, and the written observations of Ireland, represented by Eileen Creedon, Chief State Solicitor, acting as Agent,

and the European Commission, represented by Hans Støvlbæk and Nicola Yerrell, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by Xavier Lewis and Janne Tysnes Kaasin; the defendant, represented by Dr Andrea Entner-Koch, and the European Commission, represented by Nicola Yerrell, at the hearing on 12 March 2015,

gives the following

Judgment

I Introduction

- 1 By an application lodged at the Court Registry on 25 July 2014, 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 the Principality of Liechtenstein has failed to fulfil its obligations arising from Article 31 EEA by maintaining in force national rules such as Article 63 of the Health Act and the transitional provision in the Act on the repeal of that Article, including the applicability of Article 63(2) of the Health Act in those respects, which require an authorised “*Dentist*” to pursue this profession as an employee, under the direct supervision, instruction and responsibility of a fully qualified dental practitioner.

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.

National law

4 Article 63 of the Health Act of 13 December 2007 (*Gesundheitsgesetz*, LR 811.01) (“Article 63”) reads:

1. The Ministry of Health may authorise for an established dental practitioner the employment of a Dentist provided that the Dentist is either a Liechtenstein national or national of one of the EEA States and has been, by 1 March 1986, in possession of a diploma from a recognised dentist school.

2. The Dentist shall pursue his profession according to the qualifications attested by his diploma and is under the direct supervision, instruction and responsibility of the dental practitioner holding the authorisation.

5 This Article was repealed by an Act of 22 November 2012 (*Gesetz über die Abänderungen des Gesundheitsgesetzes*), which entered into force on 1 March 2013. However, the Act was annulled by a judgment of 2 September 2013 of the Liechtenstein State Court (*Staatsgerichtshof des Fürstentums Liechtenstein*) due to its lack of transitional measures. Following the annulment, a new Act repealing Article 63 was adopted on 10 April 2014. This Act entered into force on 1 July 2014 and included the following transitional provision:

Authorisations for employment of a Dentist that have been provided under the current legislation remain valid until 31 December 2017 at the latest; in cases where the employment is ended, the authorisation may, after prior approval by the Ministry of Health, be transferred to another dental practitioner until that date. Article 63(2) of the current legislation shall remain applicable.

III Facts and pre-litigation procedure

6 In Austria, the qualification referred to in German as “*Dentist*” (and in the plural as “*Dentisten*”) could be obtained until 31 December 1975. A person with this qualification can only perform a limited number of dental services in comparison with a fully qualified dental practitioner. There are still a number of *Dentisten* working in Austria, where the profession may be pursued independently.

7 In Liechtenstein, one person at present is practising as a *Dentist* on the basis of Austrian qualifications. However, pursuant to Article 63, a *Dentist* can only practise in Liechtenstein under the employment, supervision, instruction and responsibility of a fully qualified dental practitioner (“*Zahnarzt*”).

8 On 27 April 2010, ESA informed Liechtenstein that it had received a complaint concerning a refusal of establishment for a *Dentist* in Liechtenstein.

- 9 On 25 May 2010, Liechtenstein provided information on its regulation of the profession of *Dentist*. It explained that Article 63 permits EEA nationals holding the degree of *Dentist* on 1 March 1986 to pursue that profession in Liechtenstein under the supervision of an authorised dental practitioner. Liechtenstein argued that public health reasons justify the supervision of *Dentisten*, given that a *Dentist* is not a fully qualified dental practitioner and does not meet the minimum requirements under Directive 2005/36/EC of the European Parliament and the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22) (“the Directive”).
- 10 By letter of 2 February 2011, ESA requested Liechtenstein to provide further information. Liechtenstein replied on 31 March 2011, claiming that the complaint from the *Dentist* in question was unfounded. It appears that Liechtenstein did not submit substantive observations in response to ESA’s letter.
- 11 On 13 July 2011, ESA issued a letter of formal notice, concluding that, by maintaining in force Article 63, Liechtenstein had failed to fulfil its obligations arising from Article 31 EEA.
- 12 By letter of 14 September 2011, Liechtenstein contested ESA’s assessment, arguing that the measure was proportionate with a view to ensuring the protection of public health, in particular to avoid confusion among the general public with regard to the differences between the professions of *Dentist* and *Zahnarzt*.
- 13 On 25 April 2012, ESA delivered a reasoned opinion to Liechtenstein. It maintained its earlier conclusion set out in the letter of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA required Liechtenstein to take the measures necessary to comply with the reasoned opinion within two months following its notification, which was no later than 25 June 2012.
- 14 On 20 June 2012, Liechtenstein replied that Article 63 would be repealed. On 1 March 2013, Liechtenstein informed ESA that this had taken place with effect from that day. The practical effect was that *Dentisten* were no longer allowed to practise in Liechtenstein.
- 15 On 10 October 2013, Liechtenstein informed ESA that, following legal action brought by the only *Dentist* practising in Liechtenstein, the State Court had annulled the repealing Act as unconstitutional because it did not provide for an adequate transitional period.
- 16 On 10 February 2014, Liechtenstein informed ESA that a repeal of Article 63, with a transitional provision allowing *Dentisten* to continue their existing employment relationship until 31 December 2017, would be presented to Parliament.

- 17 On 16 May 2014, Liechtenstein informed ESA that Parliament had adopted the proposal. Article 63 was repealed and the transitional provision entered into force on 1 July 2014.

IV Procedure and forms of order sought

- 18 ESA lodged the present application at the Court Registry on 25 July 2014. ESA requests the Court to:

1. *Declare that by maintaining in force national rules such as Article 63 of the Health Act and the transitional provision in the Act on the repeal of the Health Act, including the applicability of Article 63 paragraph 2 of the Health Act in those respects, which require that an authorised “Dentist” has to pursue his profession as an employee, under the direct supervision, instruction and responsibility of a fully qualified dental practitioner, the Principality of Liechtenstein has failed to fulfil its obligations arising from Article 31 of the EEA Agreement.*
2. *Order the Principality of Liechtenstein to bear the costs of the proceedings.*

- 19 In a statement of defence registered at the Court on 2 October 2014, Liechtenstein contests the application and requests the Court to order each party to bear its own costs.

- 20 The reply from ESA was registered at the Court on 5 November 2014. The rejoinder from Liechtenstein was registered at the Court on 8 December 2014.

- 21 Written observations were received from Ireland and the European Commission (“the Commission”) on 3 and 4 December 2014, respectively.

- 22 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.

V Pleas and arguments submitted to the Court

- 23 ESA submits that the question whether an EEA/EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion. Article 63 was still in force at the end of that period, that is, on 25 June 2012. Furthermore, even after the repeal on 1 July 2014, the transitional provision entails that the legal situation for a *Dentist* currently working in Liechtenstein has not substantially changed, and Article 63(2) still applies in those cases. A *Dentist* can only work as an employee under the direct supervision, instruction and responsibility of a fully qualified dental practitioner.

- 24 In ESA's view, the requirements laid down in Article 63 entail a restriction on a *Dentist's* right under Article 31 EEA to exercise his freedom of establishment in Liechtenstein.
- 25 ESA observes that, pursuant to Article 33 EEA, the protection of public health may justify restrictions on the freedom of establishment. However, the restriction must be appropriate for securing the objective pursued and not go beyond what is necessary for attaining that objective. Moreover, the concept of public health can only be invoked in a case of a genuine and sufficiently serious threat. Therefore, the threshold for justification must be high, and the reasons relied upon must be accompanied by appropriate evidence.
- 26 ESA fails to see why an employment relationship, in which a fully qualified dental practitioner attributes tasks to the *Dentist* in accordance with the qualifications of the latter, is necessary to guarantee the desirable degree of supervision of the *Dentist's* activities. A *Dentist* may never legally perform any tasks other than those for which he is qualified, whether he is employed or works in a self-employed capacity. The scope of his services may be pre-determined by the State, as in Austria, where the profession of *Dentist* nevertheless may be pursued independently. In ESA's view, professional supervision of *Dentisten* could be undertaken with measures less restrictive than a requirement to exercise the profession through the subordinate status of an employee.
- 27 According to ESA, possible confusion among the general public in the event that a *Dentist* is allowed to practise independently could be avoided by the *Dentist* designating himself by that term and not as *Zahnarzt*. For an average and well-informed consumer, such a clearly distinctive label or means of identification would be sufficient. It is not decisive whether all members of the public in Liechtenstein can tell the exact difference between a *Dentist* and a *Zahnarzt*. There are many medical professions whose exact qualifications may be unclear, or even unknown, to average citizens. Moreover, as a medical professional, a *Dentist* has to report his activities within the social security system and to professional associations. Thus, it would be easily detected if he performed services other than those permitted.
- 28 ESA rejects the submission that the judgment of the State Court prevented Liechtenstein from fulfilling its obligations arising from Article 31 EEA. The judgment appears to accept different forms of transitional measures. Consequently, it was not necessary to maintain the employment requirement. Moreover, ESA submits that provisions, practices or circumstances existing in the internal legal system of an EEA State cannot justify a failure to comply with EEA law.
- 29 ESA contends that Liechtenstein has not raised any particular public health concerns, substantiated by the requisite evidence, that could not be satisfied by a duly supervised *Dentist* performing his services as an independent self-employed individual. Consequently, the requirement that a fully trained and qualified *Dentist*, wishing to pursue his professional activity in accordance with his

diploma, has to be employed by a fully qualified dental practitioner in Liechtenstein goes beyond what is necessary to attain the protection of public health.

- 30 Liechtenstein submits that the repeal of Article 63 without providing for an adequate transitional period was deemed unconstitutional by the State Court. An analysis of the judgment shows that the State Court proposed one single form of transitional provision, namely the extension in time of the existing legal framework until the complainant reaches statutory retirement age. In Liechtenstein's view, the State Court carefully balanced the different requirements of EEA law, fundamental rights and Liechtenstein constitutional law. Consequently, a renewed repeal, accompanied by a transitional provision, was adopted and entered into force on 1 July 2014.
- 31 On this basis, Liechtenstein opposes the order sought by ESA. Liechtenstein contends that the renewed repeal of Article 63, combined with the transitional provision, strikes a reasonable balance between the different requirements of EEA law, fundamental rights and Liechtenstein constitutional law.
- 32 Ireland argues that any examination of the regulation of health professions must be considered on a case by case basis, as the regulatory regimes in the EEA States vary. If uniformity does not exist, each EEA State has discretion to determine the level of protection it wishes to afford to public health and the regulation of health professions. In the present case, the Court must consider whether the restrictions following from Article 63 can be justified on grounds of maintaining public health in Liechtenstein.
- 33 The Commission notes that a *Dentist* must be distinguished from the profession of dental practitioner (*Zahnarzt*) referred to in Articles 34 to 37 of the Directive. Furthermore, the issue at stake is not recognition of the qualification of *Dentist* as such, but the conditions attaching to the pursuit of that professional activity. The Commission shares ESA's view that the regime provided for in Article 63 clearly constitutes a restriction on the freedom of establishment.
- 34 A restriction may be justified by overriding reasons in the public interest, provided that it is appropriate for achieving that objective and does not go beyond what is necessary. Consequently, it may be necessary for public health reasons and in particular to avoid any risk of confusion for potential patients to ensure that a *Dentist* clearly distinguishes himself from a *Zahnarzt*. A certain degree of professional supervision may also be necessary.
- 35 However, in the Commission's view, any such measure must be proportionate to the aim of protecting public health. The Commission supports ESA's view that the requirement that a *Dentist* can only practise as an employee, negates the very principle of freedom of establishment and is clearly disproportionate to any public health objective.

- 36 Consequently, the Commission submits that Liechtenstein has failed to fulfil its obligations under Article 31 EEA by maintaining in force a rule such as that set out in Article 63.

VI Findings of the Court

- 37 The deadline for compliance with ESA's reasoned opinion in the present case was 25 June 2012. This is the reference date for the determination of whether Liechtenstein has failed to fulfil its obligations under the EEA Agreement (see, inter alia, Case E-7/14 *ESA v Norway*, judgment of 24 September 2014, not yet reported, paragraph 31 and case law cited). At that time, Article 63 was still in force. In its application, ESA contests the compatibility of that provision with Article 31 EEA.
- 38 Article 31 EEA prohibits restrictions on the freedom of EEA nationals to establish themselves in other EEA States. All measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions on that freedom (see, inter alia, Case E-7/07 *Seabrokers* [2008] EFTA Ct. Rep. 172, paragraph 50 and case law cited).
- 39 At the relevant time, Article 63 prohibited persons with the degree of *Dentist* from independently pursuing the profession in Liechtenstein. The provision represented a restriction on the freedom of establishment. This is common ground between the parties.
- 40 However, restrictions on the freedom of establishment may be justified on the basis of one of the derogations in Article 33 EEA or by overriding reasons in the public interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective (see *ESA v Norway*, cited above, paragraph 35 and case law cited).
- 41 Liechtenstein has argued that the employment requirement in Article 63 could be justified on grounds of public health. In particular, reference was made to the need for supervision of the services provided by *Dentisten*, and to the risk of confusion of the general public if *Dentisten* were allowed to pursue their profession independently.
- 42 When assessing whether the principle of proportionality has been observed in the field of public health, account must be taken of the fact that the EEA States are free to determine the level of protection of public health which they wish to afford to the population. For example, the fact that one EEA State imposes less strict rules than another EEA State does not mean that the latter's rules are disproportionate (compare Case C-141/07 *Commission v Germany* [2008] ECR I-6935, paragraph 51 and case law cited).
- 43 The Court acknowledges that it constitutes a public health objective to ensure that a *Dentist* only performs activities for which he is qualified. An employment

relationship in which a *Zahnarzt* attributes tasks in accordance with the *Dentist's* qualifications may contribute to that objective. However, it must also be considered whether an employment requirement goes beyond what is necessary for attaining that objective, that is, whether the objective could be achieved by means of less restrictive measures.

- 44 Generally, *Dentisten* must be expected not to perform activities for which they are not qualified, whether they are employed or self-employed. *Dentisten* working independently may be subject to supervision, for example by way of reporting duties to the social security system, mandatory membership in a dental health service provider's association, and/or inspections by a national supervisory authority. Such measures would be less restrictive than the employment requirement, as they would allow *Dentisten* to pursue their profession in the legal form, in accordance with the economic interest and to the practical extent that they choose. By contrast, the employment requirement in Article 63 completely deprives *Dentisten* of their freedom of establishment in Liechtenstein. Hence, the employment requirement goes beyond what is necessary to attain the objective pursued.
- 45 A potential risk of confusion among the general public in the event that *Dentisten* were allowed to practise independently could be minimized by requiring *Dentisten* clearly to label their practice as such. Those not aware of the differences in dental qualifications between a *Zahnarzt* and a *Dentist* may experience being sent from the *Dentist* to a *Zahnarzt*, depending on the service they seek. Such minor annoyance cannot outweigh the interest of *Dentisten* to pursue their profession on an independent basis.
- 46 It must therefore be held that Article 63 of the Health Act amounted to a disproportionate restriction on the freedom of establishment, in violation of Article 31 EEA. By maintaining this provision in force at the relevant time, Liechtenstein has failed to fulfil its obligations arising from Article 31 EEA.
- 47 Article 63 was repealed with effect from 1 March 2013. Both in its defence and at the oral hearing, Liechtenstein stressed that the effect of the repeal was that *Dentisten* were no longer allowed to practise in Liechtenstein. On 2 September 2013, the State Court set aside the repealing Act due to its lack of transitional measures. A renewed repeal, with a transitional period until 31 December 2017 for *Dentisten* currently in employment, entered into force on 1 July 2014. Liechtenstein argues that the transitional provision strikes a balance between the different requirements at stake under EEA law, fundamental rights and Liechtenstein constitutional law. ESA claims that the transitional provision breaches Article 31 EEA as it extends in time the applicability of Article 63, and has included this point in its form of order sought.
- 48 However, these events have occurred after the expiry of the deadline of 25 June 2012 laid down in ESA's reasoned opinion. Therefore, it is not for the Court in the present case to decide upon those issues. Nevertheless, it is difficult to see how a prohibition in Liechtenstein on the activities of a *Dentist*, regardless of any

transitional period, may be more easily justified than the requirements of Article 63 dealt with in the present case.

VII Costs

- 49 Under Article 66(2) of the Rules of Procedure (“RoP”), the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. ESA has requested that Liechtenstein be ordered to pay the costs. Since Liechtenstein has been unsuccessful, and none of the exceptions in Article 66(3) RoP apply, it must therefore be ordered to pay the costs. The costs incurred by Ireland and the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

- 1. Declares that the Principality of Liechtenstein has failed to fulfil its obligations arising from Article 31 EEA by maintaining in force Article 63 of the Health Act, which requires that a person holding the qualification referred to in German as “*Dentist*” has to pursue this profession as an employee, under the direct supervision, instruction and responsibility of a fully qualified dental practitioner (“*Zahnarzt*”).**
- 2. Orders the Principality of Liechtenstein to bear the costs of the proceedings.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 31 March 2015.

Gunnar Selvik
Registrar

Per Christiansen
Acting President