



E-17/14-28

**REPORT FOR THE HEARING**  
in Case E-17/14

APPLICATION to the Court pursuant to 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 in the case between the

**EFTA Surveillance Authority**

and

**The Principality of Liechtenstein**

seeking a declaration 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(2) of the Health Act in those respects, which require that a “*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.

**I Legal background**

*EEA law*

1. 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.*

2. 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*

3. Article 63(1) and (2) of the Liechtenstein Health Act of 13 December 2007<sup>1</sup> (“the Health Act”) 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.*

4. Article 63 of the Health Act was repealed by an Act of 22 November 2012, which entered into force on 1 March 2013.<sup>2</sup> However, the Act was annulled by a judgment of 2 September 2013 of the Liechtenstein Constitutional Court (*Staatsgerichtshof des Fürstentums Liechtenstein*) due to its lack of transitional measures. Following the annulment, a new Act repealing Article 63 of the Health Act was adopted on 10 April 2014. The 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.*

---

<sup>1</sup> *Gesundheitsgesetz (GesG), LR 811.01.*

<sup>2</sup> *Gesetz über die Abänderung des Gesundheitsgesetzes.*

## II Pre-litigation procedure

5. In Austria, the qualification referred to in German as “*Dentist*” 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 about 200 *Dentists* working in Austria. The profession of *Dentist* may be pursued independently.

6. In Liechtenstein, one person at present is practising as a *Dentist* in accordance with the Austrian system. However, pursuant to Article 63 of the Health Act, a *Dentist* can only practise in Liechtenstein if he is employed by and under the supervision, instruction and responsibility of a dental practitioner (“*Zahnarzt*”).

7. On 27 April 2010, the EFTA Surveillance Authority (“ESA”) informed Liechtenstein that it had received a complaint concerning the establishment of a *Dentist* in Liechtenstein.

8. On 25 May 2010, Liechtenstein provided information on the Liechtenstein regulation of the profession of *Dentist*. It explained that Article 63 of the Health Act is a transitional provision, enabling EEA nationals possessing the qualification of *Dentist* on 1 March 1986 to pursue the profession of *Dentist* in Liechtenstein under the supervision of an authorised dental practitioner. Liechtenstein contended that public health reasons justify the supervision of *Dentists*, given that a *Dentist* is not a fully qualified dental practitioner and does not meet the minimum requirements under Directive 2005/36/EC on the recognition of professional qualifications.<sup>3</sup>

9. By letter of 2 February 2011, ESA requested further information from Liechtenstein. 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.

10. On 13 July 2011, ESA issued a letter of formal notice, concluding that, by maintaining in force Article 63 of the Health Act, Liechtenstein has failed to fulfil its obligations arising from Article 31 EEA.

11. 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.

12. On 25 April 2012, ESA delivered a reasoned opinion to Liechtenstein. It maintained its earlier conclusion in the letter of formal notice. Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the

---

<sup>3</sup> 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).

Establishment of a Surveillance Authority and a Court of Justice (“SCA”), ESA required Liechtenstein to take the measures necessary to comply with the reasoned opinion within two months following notification, which was no later than 25 June 2012.

13. On 20 June 2012, Liechtenstein replied that Article 63 of the Health Act 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 *Dentists* were no longer allowed to practise in Liechtenstein.

14. On 10 October 2013, Liechtenstein informed ESA that, following legal action brought by the only *Dentist* practising in Liechtenstein, the Constitutional Court had annulled the repealing Act as unconstitutional because it did not provide for an adequate transitional period.

15. On 10 February 2014, Liechtenstein informed ESA that a repeal of Article 63 of the Health Act, with a transitional provision allowing *Dentists* to continue their existing employment relationship until 31 December 2017, would be presented to Parliament.

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

### **III Procedure and forms of order sought by the parties**

17. By an application registered at the Court on 25 July 2014, ESA brought an action under the second paragraph of Article 31 SCA requesting 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.*

18. On 1 October 2014, Liechtenstein submitted a statement of defence, contesting the application and requesting the Court to order each party to bear its

own costs. On 31 October 2014, ESA submitted its reply. On 5 December 2014, Liechtenstein submitted its rejoinder. The European Commission (“the Commission”) and Ireland submitted written observations on 1 and 3 December 2014, respectively.

#### **IV Written procedure before the Court**

19. Written arguments have been received from the parties:

- ESA, represented by Xavier Lewis, Director, and Janne Tysnes Kaasin, temporary officer, Department of Legal & Executive Affairs, acting as Agents; and
- Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents.

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

- Ireland, represented by Eileen Creedon, Chief State Solicitor, acting as Agent; and
- the Commission, represented by Hans Støvlbæk and Nicola Yerrell, members of its Legal Service, acting as Agents.

#### **V Summary of the arguments and observations submitted to the Court**

*ESA*

21. ESA submits that Article 63 of the Health Act was in force when the time limit of 25 June 2012 given in the reasoned opinion expired. Furthermore, as a result of the transitional provision, the legal situation for a *Dentist* currently working in Liechtenstein has not substantially changed, and Article 63(2) of the Health Act still applies in these cases. The *Dentist* can only work as an employee under the direct supervision, instruction and responsibility of a fully qualified and registered dental practitioner.

22. ESA refers to Article 31 EEA, according to which there shall be no restrictions on the freedom of establishment. All measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as constituting

restrictions of that kind.<sup>4</sup> In ESA's view, the requirements laid down in Article 63 of the Health Act entail a restriction on a *Dentist's* right to exercise his freedom of establishment in Liechtenstein, contrary to Article 31 EEA. The fact that the provision is of a transitional nature cannot affect this assessment.<sup>5</sup>

23. ESA observes that, pursuant to Article 33 EEA, the protection of public health may justify restrictions on the fundamental freedoms guaranteed by the EEA Agreement, such as 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.<sup>6</sup> Moreover, the Court of Justice of the European Union has held that the concept of public health can only be invoked in case of a genuine and sufficiently serious threat.<sup>7</sup> Therefore, the threshold for justification must be high, and the reasons relied upon must be accompanied by appropriate evidence.<sup>8</sup>

24. ESA acknowledges that when assessing whether the principle of proportionality has been observed in the field of public health, account must be taken of the fact that it is for each EEA State to determine the level of protection that it wishes to afford to public health and the way it is to be delivered.<sup>9</sup>

25. ESA fails to see why an employment relationship with a dental practitioner, in which the 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. In ESA's view, a *Dentist* could never legally perform any tasks other than those for which he is qualified, whether he is employed or works in a self-employed capacity. Professional supervision, to the extent considered necessary, could equally be undertaken without requiring the subordinate status of an employee. This would be a less restrictive measure that would allow a *Dentist* to pursue his profession in the legal and practical form of his choice with regard to matters such as working hours and income.

26. ESA points out that the regulation of health professions in itself is a measure aiming at ensuring public health. The very objective of regulated education and

---

<sup>4</sup> Reference is made to Case C-261/11 *Commission v Denmark*, judgment of 18 July 2013, published electronically, paragraph 27, with further references, and Case E-7/07 *Seabrokers* [2008] EFTA Ct. Rep. 172, paragraph 50, with further references.

<sup>5</sup> Reference is made to Joined Cases C-53/13 and C-80/13 *Strojírny Prostějov*, judgment of 19 June 2014, published electronically, paragraph 42, with further references, and, on establishment, Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, paragraph 50, with further references.

<sup>6</sup> Reference is made to Joined Cases C-159/12 to C-161/12 *Venturini*, judgment of 5 December 2013, published electronically, paragraphs 37 and 41, with further references.

<sup>7</sup> Reference is made to Case C-257/05 *Commission v Austria* [2006] ECR I-134, paragraph 25.

<sup>8</sup> Reference is made to Case C-254/05 *Commission v Belgium* [2007] ECR I-4269, paragraphs 36 and 37, with further references.

<sup>9</sup> Reference is made to *Venturini*, cited above, paragraph 59, with further references.

training for a given health profession is to qualify those trained to pursue the profession independently and without a need for constant additional supervision.

27. In this context, ESA does not question the general competence of Liechtenstein to restrict the access to a regulated profession to persons meeting certain educational qualifications, or to determine the scope of professional activities in its territory. However, additional supervision by means of the mandatory employment requirement under Article 63 of the Health Act exceeds what can be considered necessary, given that the actual scope of the regulated services of a *Dentist* can be pre-determined by the State. As an example, Austrian law clearly specifies which activities may be performed in that EEA State by a *Dentist* and which may only be carried out by a dental practitioner. Nevertheless, Austrian legislation does not prohibit *Dentists* from working on a self-employed basis.

28. The fact that one EEA State imposes less strict rules than another does not of itself imply that the latter's rules are disproportionate.<sup>10</sup> However, such a lower level of protection may be relevant when assessing the proportionality of a stricter measure taken to protect public health.<sup>11</sup> In any event, an EEA State restricting fundamental EEA freedoms has to demonstrate clearly that the situation was carefully assessed and the likelihood of potential damage established.<sup>12</sup>

29. ESA thus takes the view that a *Dentist* should be allowed to perform independently, without unjustified additional supervision, the services for which he is qualified. ESA does not question that a *Dentist* may be prohibited from carrying out services that only a dental practitioner is authorised to perform.

30. 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.<sup>13</sup> On a more practical note, it appears that most *Dentists* do not hold a degree of doctor of (dental) medicine ("*Dr. med. dent*"), whereas almost all dental practitioners in Liechtenstein at present hold that academic degree.

31. In ESA's view, it is not decisive in this regard 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 competences 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

---

<sup>10</sup> Reference is made to Case C-262/02 *Commission v France* [2004] ECR I-6569, paragraph 37.

<sup>11</sup> Reference is made to Case C-421/09 *Humanplasma* [2010] ECR I-12869, paragraph 41.

<sup>12</sup> Reference is made to Case C-192/01 *Commission v Denmark* [2003] ECR I-9693, paragraph 45 et seq.

<sup>13</sup> Reference is made to Case C-159/09 *Lidl* [2010] ECR I-11761, paragraph 47.

professional associations. Thus, it would be easily detected if he performed services other than those permitted.

32. ESA rejects the submission that the judgment of the Constitutional Court, in which an immediate repeal of Article 63 of the Health Act was deemed unconstitutional, prevented Liechtenstein from fulfilling its obligations arising from Article 31 EEA. According to ESA, the judgment appears to accept different forms of transitional measures. Consequently, it was not necessary to maintain the employment requirement. Moreover, ESA reiterates that provisions, practises or circumstances existing in the internal legal system of an EEA State cannot justify a failure to comply with EEA law.<sup>14</sup>

33. 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 dental practitioner in Liechtenstein goes beyond what is necessary to attain the protection of public health.

#### *Liechtenstein*

34. Liechtenstein submits that repeal of Article 63 of the Health Act without providing for an adequate transitional period was deemed unconstitutional by the Constitutional Court. However, given that repeal of Article 63 of the Health Act was seen as an appropriate measure to bring Liechtenstein law into conformity with EEA law, the Constitutional Court argued in favour of a renewed repeal, combined with an adequate transitional period in order to meet the requirements of EEA law, fundamental rights and Liechtenstein constitutional law.

35. In Liechtenstein's view, the Constitutional Court carefully balanced the different requirements of EEA law, fundamental rights and Liechtenstein constitutional law. An analysis of the judgment shows that the Constitutional 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.

36. Consequently, a renewed repeal of Article 63 of the Health Act, accompanied by a transitional provision, was presented to Parliament. The amended Health Act including the repeal of Article 63 and the introduction of the transitional provision entered into force on 1 July 2014. Existing employments of *Dentists* shall remain valid until 31 December 2017.

---

<sup>14</sup> Reference is made to Case C-421/12 *Commission v Belgium*, judgment of 10 July 2014, published electronically, paragraph 43, with further references.



37. On this basis, Liechtenstein opposes the order sought by ESA. Liechtenstein takes the view that the renewed repeal of Article 63 of the Health Act, combined with the transitional provision, strikes a reasonable balance between the different requirements of EEA law, fundamental rights and Liechtenstein constitutional law.

#### *Ireland*

38. 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.<sup>15</sup> Therefore, the Court should base its findings on Article 63 of the Health Act, Liechtenstein's defence of the regulatory regime in place for *Dentists* in Liechtenstein, and whether or not the restriction is justified on grounds of maintaining public health in Liechtenstein.

#### *The Commission*

39. The Commission notes that a *Dentist* must be distinguished from the profession of dental practitioner (*Zahnarzt*), referred to in Articles 34 to 37 of Directive 2005/36/EC on the recognition of professional qualifications. Further, 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.

40. The Commission shares ESA's view that the regime provided for in Article 63 of the Health Act clearly constitutes a restriction on the freedom of establishment.

41. The Commission observes that a restriction may however 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.<sup>16</sup> 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 dental practitioner. A certain degree of professional supervision may also be necessary.

42. However, in the Commission's view, any such measure must be proportionate to the aim of protecting public health. In this regard, the Commission supports ESA's view that the requirement laid down in Article 63 of the Health Act, that a *Dentist* can only practise as an employee, negates the very principle of

---

<sup>15</sup> Reference is made to Case C-141/07 *Commission v Germany* [2008] ECR I-6935, paragraph 51.

<sup>16</sup> Reference is made to *Venturini*, cited above.

freedom of establishment and is clearly disproportionate to any public health objective.

43. 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 contained in Article 63 of the Health Act.

Per Christiansen  
Judge-Rapporteur