E-19/15-15

REPORT FOR THE HEARING
in Case E-19/15

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 on prior authorisation schemes for undertakings willing to establish themselves and/or to provide cross-border services in Liechtenstein, the Principality of Liechtenstein has breached its obligations arising from Articles 9, 10, 13 and 16 of the Act referred to at point 1 of Annex X to the EEA Agreement (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market), as adapted to the EEA Agreement under its Protocol 1, and, to the extent that establishment and the provision of cross-border services fall outside the scope of that Act, its obligations arising from Articles 31 and 36 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.

3. 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.

4. Article 39 EEA reads:

The provisions of Article 30 and 32 to 34 shall apply to the matters covered by this Chapter.

5. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) ("the Directive") was made part of the EEA Agreement by Joint Committee Decision No 45/2009 of 9 June 2009 (OJ 2009 L 162, p. 23), and is referred to at point 1 of Annex X to the Agreement (Services in general). That decision entered into force on 1 May 2010, and the time limit for the EEA/EFTA States to implement the Directive expired on the same date.

6. Recitals 39, 42, 43 and 54 to the Directive read:

(39) The concept of 'authorisation scheme' should cover, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession. Authorisation may be granted not only by a formal decision but also by an implicit decision arising, for example, from the silence of the competent authority or from the fact that the interested party

must await acknowledgement of receipt of a declaration in order to commence the activity in question or for the latter to become lawful.

…

(42) The rules relating to administrative procedures should not aim at harmonising administrative procedures but at removing overly burdensome authorisation schemes, procedures and formalities that hinder the freedom of establishment and the creation of new service undertakings therefrom.

(43) One of the fundamental difficulties faced, in particular by SMEs, in accessing service activities and exercising them is the complexity, length and legal uncertainty of administrative procedures. For this reason, following the example of certain modernising and good administrative practice initiatives undertaken at Community and national level, it is necessary to establish principles of administrative simplification, inter alia through the limitation of the obligation of prior authorisation to cases in which it is essential and the introduction of the principle of tacit authorisation by the competent authorities after a certain period of time elapsed. Such modernising action, while maintaining the requirements on transparency and the updating of information relating to operators, is intended to eliminate the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, the 'red tape' involved in submitting documents, the arbitrary use of powers by the competent authorities, indeterminate or excessively long periods before a response is given, the limited duration of validity of authorisations granted and disproportionate fees and penalties. Such practices have particularly significant dissuasive effects on providers wishing to develop their activities in other Member States and require coordinated modernisation within an enlarged internal market of twenty-five Member States.

…

(54) The possibility of gaining access to a service activity should be made subject to authorisation by the competent authorities only if that decision satisfies the criteria of non-discrimination, necessity and proportionality. That means, in particular, that authorisation schemes should be permissible only where an a posteriori inspection would not be effective because of the impossibility of ascertaining the defects of the services concerned a posteriori, due account being taken of the risks and dangers which could arise in the absence of a prior inspection. …

7. Under Chapter I (General provisions), Article 4 of the Directive reads:

Definitions

For the purposes of this Directive, the following definitions shall apply:

…

5) 'authorisation scheme' means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;

…

7) 'overriding reasons relating to the public interest' means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives;

…

8. Under Chapter III (Freedom of establishment for providers), Article 9(1) of the Directive reads:

Authorisation schemes

1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

9. Article 10(1) to (5) of the Directive reads:

Conditions for the granting of authorisation

1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

2. The criteria referred to in paragraph 1 shall be:

(a) non-discriminatory;

(b) justified by an overriding reason relating to the public interest;

(c) proportionate to that public interest objective;

(d) clear and unambiguous;

(e) objective;

(f) made public in advance;

(g) transparent and accessible.

3. The conditions for granting authorisation for a new establishment shall not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State or in the same Member State. The liaison points referred to in Article 28(2) and the provider shall assist the competent authority by providing any necessary information regarding those requirements.

4. The authorisation shall enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, including by means of setting up agencies, subsidiaries, branches or offices, except where an authorisation for each individual establishment or a limitation of the authorisation to a certain part of the territory is justified by an overriding reason relating to the public interest.

5. The authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.

10. Article 13(1) to (4) of the Directive reads:

Authorisation procedures

1. Authorisation procedures and formalities shall be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially.

2. Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures.

3. Authorisation procedures and formalities shall provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance. The period shall run only from the time when all documentation has been submitted. When justified by the complexity of the issue, the time period may be extended once, by the competent authority, for a limited time. The extension and its duration shall be duly motivated and shall be notified to the applicant before the original period has expired.

4. Failing a response within the time period set or extended in accordance with paragraph 3, authorisation shall be deemed to have been granted. Different arrangements may nevertheless be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.

11. Under Chapter IV (Free movement of services), Article 16(1) to (3) of the Directive reads in extract:

Freedom to provide services

1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

(a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;

(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

(c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

…

(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;

…

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.

National law

12. Article 2 of the Act of 22 June 2006 on trade and commerce (*Gewerbegesetz, LR 930.1*) ("the Trade Act") reads:

1. Subject to the provisions of Article 3, this act applies to all commercially pursued and not legally prohibited activities.

2. An activity is regarded as commercially pursued if it is pursued on a self-employed and regular basis and with the intention to gain a profit or other economic benefit, regardless of the purpose for which that profit is used.

3. For the purposes of this act, an activity is pursued on a self-employed basis if it is pursued at one's own risk and for one's own account.

13. Article 7 of the Trade Act reads:

1. Subject to the provisions of Articles 20 to 23, a person wishing to pursue an economic activity within the meaning of Article 2 requires an authorisation from the Office of Economic Affairs (trade authorisation).

2. The trade authorisation is personal and non-transferable.

3. The Government may establish by ordinance exemptions from the obligation to obtain authorisation for the pursuit of a simple profession.

14. Article 8 of the Trade Act reads:

1. The trade authorisation will be granted if the applicant:

(a) is capable of acting;

(b) is reliable (Article 9);

(c) is a national of an EEA member state or of Switzerland or is a third country national with an uninterrupted domicile in the country of 12 years or more and which is maintained continuously;

(d) is qualified for the pursuit of a qualified profession (Article 10);

(e) has business premises on the national territory and the necessary personnel at his disposal (Article 11);

(f) has indicated a domestic address for service; this can be, in particular, the address of the business premises on the national territory or of a representative appointed according to the provisions of company law;

(g) has an adequate command of the German language.

2. A trade authorisation will be granted to legal entities with legal capacity and to general and limited partnerships [Kollektiv- und Kommanditgesellschaften] if they fulfil the requirements of points (b), (e) and (f) of paragraph 1 and have appointed a managing director (Article 12) and where required an operations manager (Article 12a). The same applies for branches of legal entities or general and limited partnerships with domicile abroad.

3. For business carried out in the form of an industrial enterprise no proof of professional qualification (Article 10) is needed.

15. Article 16(1) to (3) of the Trade Act reads:

1. The trade authorisation will be granted when the applicant fulfils the requirements specified in Articles 8 to 14.

2. In special circumstances, the trade authorisation may be granted for a limited duration and include obligations and conditions.

3. The economic activity applied for may only be pursued after the trade authorisation has been issued.

16. Article 21 of the Trade Act reads:

1. Service providers shall notify in writing to the Office of Economic Affairs using an official form the first provision of services in Liechtenstein.

2. The notification shall be renewed annually if the service provider intends to provide services temporarily or occasionally in Liechtenstein during the year in question.

3. When first notifying the service provision the service provider shall submit the following documents:

(a) A certificate confirming

1. that the service provider lawfully pursues the activity in question in the State of establishment;

2. that the service provider is not prohibited, not even temporarily, from pursuing that activity at the time the certificate is submitted;

(b) A proof of professional qualification;

(c) A proof of nationality;

…

4. The service may only be provided after the Office of Economic Affairs has confirmed that the correct notification has been submitted. If no confirmation is issued within seven working days from receipt of the notification, the confirmation shall be deemed granted.

…

17. Article 29b of the Trade Act reads:

Any person not complying with the notification requirement specified in Article 21 may be excluded by the Office of Economic Affairs from cross-border service provision for a period not exceeding one year.

18. Article 4 of the Act of 20 October 2010 on the Provision of Services (*Gesetz über die Erbringung von Dienstleistungen, LR 930.4*) ("the Services Act") reads:

The provisions of this act only apply to the extent that special legislation does not make other provision.

19. Article 11 of the Services Act reads:

Procedure for granting an authorisation

1. *Unless special legislation makes other provision, the competent authority shall decide by order on an application for an authorisation within six weeks. The period may be extended reasonably by the authority once if this is necessary because of the difficulty of the matter. The extension must be reasoned and communicated to the parties of the proceedings before the expiry of the deadline for the decision.*

2. *The period within which a decision must be taken referred to in paragraph 1 begins to run once the complete application has been received. The applicant shall be informed, in the relevant case, of the incompleteness of the application and of the resulting legal consequences.*

3. *The authorisation of an application shall be considered granted if the competent authority does not take a decision within the period established in paragraph 1 or the special legislation.*

4. *The competent authority shall confirm immediately in writing the grantof an authorisation under paragraph 3. This confirmation shall be sent to the parties of the proceedings. Each party shall have the right, within four weeks of receipt of this confirmation, to request an order stating that an authorisation has been issued in accordance with paragraph 3.*

20. Article 13 of the Services Act reads:

> *Exemption from requirements and controls*
>
> *For the purposes of granting an authorisation, a service provider shall be exempted from requirements and controls if he has been granted an authorisation in Liechtenstein or another EEA State conditional on requirements and controls that are equivalent to those of the procedure in question or that are comparable as regards their purpose.*

II Pre-litigation procedure

21. In December 2010, the Liechtenstein Government notified to the EFTA Surveillance Authority ("ESA") the national measures considered to ensure implementation of the Directive. ESA subsequently informed Liechtenstein that it had undertaken an own initiative case to examine whether the Trade Act complied with the requirements set out in the Directive, in particular as regards the authorisation schemes contained in that act.

22. In February 2012, ESA sent a letter to Liechtenstein requesting information on the interpretation of the Trade Act and its compliance with the Directive. Liechtenstein responded to that letter in May 2012. Further exchanges of information and views on the matter also took place during 2012 and 2013.

23. On 3 July 2013, ESA issued a letter of formal notice, concluding that several provisions of the Trade Act were in breach of the Directive. In particular, ESA considered that Articles 7 and 21 of the Trade Act amounted to authorisation schemes for companies wishing to establish themselves or to provide cross-border services in Liechtenstein, which did not satisfy the requirements specified in Articles 9 and 16 of the Directive.

24. In the event that the authorisation schemes for establishment as such were considered compatible with the Directive, ESA argued that certain requirements were nonetheless in breach of Article 10(2)(d) and (3) and Article 13(1) of the Directive.

25. On 2 October 2013, Liechtenstein responded to the letter of formal notice, maintaining that the authorisation schemes for establishment and cross-border services were as such compatible with the Directive and Articles 31 and 36 EEA. On the other hand, Liechtenstein accepted the conclusions of ESA with regard to some aspects of the authorisation schemes. A proposal to Parliament accommodating ESA's concerns would be presented. No time frame for those amendments was mentioned.

26. On 24 April 2014, ESA delivered a reasoned opinion to Liechtenstein, maintaining the conclusion set out in its letter of formal notice. 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 ("SCA"), ESA required Liechtenstein to take the necessary measures to comply with the reasoned opinion within two months following the notification, i.e. no later than 24 June 2014. Upon request, ESA extended this deadline to 19 August 2014.

27. On 19 August 2014, Liechtenstein replied to the reasoned opinion, maintaining the conclusions set out in its response to the letter of formal notice.

28. On 3 June 2015, ESA decided to bring the matter before the Court pursuant to the second paragraph of Article 31 SCA.

III Procedure and forms of order sought by the parties

29. ESA lodged the present application at the Court Registry on 29 July 2015 requesting the Court to:

1. *Declare that the Principality of Liechtenstein has breached its obligations arising from Articles 9, 10, 13 and 16 of the Act referred to at point 1 of Annex X to the EEA Agreement (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market), as adapted to the EEA Agreement by Protocol 1 thereto, and, to the extent that establishments and the provisions of cross-border services fall outside the scope of that Act, its obligations arising from Articles 31 and 36 of the EEA Agreement:*
   (a) by maintaining in force Article 7 of the Liechtenstein Trade Act which sets up a prior authorisation scheme for undertakings willing to establish themselves in Liechtenstein; and,
   (b) by maintaining in force Article 8(1) of the Liechtenstein Trade Act in so far as it imposes conditions that are not clear and unambiguous for granting prior authorisation for undertakings willing to establish themselves in Liechtenstein (namely the obligation to have the necessary personnel and the obligation to have an adequate command of the German language); and,
   (c) by failing to ensure that requirements, which are equivalent or essentially comparable as regard their purpose to which the service provider is already subject in another EEA State or in the same EEA State, in the procedure for prior authorisation for undertakings intending to establish themselves in Liechtenstein are not duplicated and that the procedure and formalities concerning the authorisation scheme under the Trade Act are clearly laid down; and,
   (d) by maintaining in force Article 21 of the Liechtenstein Trade Act which sets up a prior authorisation scheme for undertakings intending to provide cross-border services in Liechtenstein; and

2. Order the Principality of Liechtenstein to bear the costs of the proceedings.

30. The application was served on Liechtenstein on 5 August 2015. The time limit for lodging a defence under Article 35(1) of the Rules of Procedure ("RoP") expired on 5 October 2015. After expiry Liechtenstein sent a letter to the Court requesting an extension of the time limit for lodging the defence. The missed deadline was explained by the fact that ESA's application was only served on the Liechtenstein Mission in Brussels and not on the EEA Coordination Unit of the Liechtenstein Government. Since the Liechtenstein Mission had assumed that the application had also been served on the EEA Coordination Unit, it had not forwarded the application to the latter.

31. By letter of 7 October 2015, the Court informed Liechtenstein that the President had decided not to grant an extension of the time limit.

32. By letter of 9 October 2015, ESA informed the Court that it waived its right to apply for a judgment by default under Article 90 RoP.

33. On 20 December 2015, the European Commission ("the Commission") submitted written observations.

IV Written procedure before the Court

34. Written arguments have been received from the applicant:

- ESA, represented by Markus Schneider, Deputy Director, Clémence Perrin, Officer, and Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents.

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

- the Commission, represented by Hélène Tserepa-Lacombe and Luigi Malferrari, members of its Legal Service, acting as Agents.

V Summary of the arguments and observations submitted to the Court

ESA

36. ESA's application consists of four pleas. First, Liechtenstein has breached Article 9 of the Directive by maintaining in force a prior authorisation procedure for establishment. Second, several of the conditions and rules applying to that authorisation procedure are in breach of Articles 10 and 13 of the Directive. Third,

Liechtenstein has breached Article 16 of the Directive by maintaining in force a prior authorisation procedure for the provision of cross-border services. And fourth, the prior authorisation procedures for establishment and cross-border services, to the extent that they apply to establishment and services outside the scope of the Directive, are in breach of Articles 31 and 36 EEA.

First plea – breach of Article 9 of the Directive

37. ESA submits that the rules on establishment under Liechtenstein law amount to a prior authorisation scheme. In order to establish itself legally in Liechtenstein, any undertaking has to first file an application to the Liechtenstein authorities and then wait either for a decision on the application or, alternatively, for the expiry of a six-week period specified under Liechtenstein law. This, in effect, amounts to an authorisation scheme, within the meaning of Article 4(6) of the Services Directive. That finding is not contested by Liechtenstein.

38. ESA observes that, according to Article 9(1) of the Directive, an authorisation scheme in the field of establishment can only be imposed if it is non-discriminatory, justified by an overriding reason in the public interest, and proportionate. In ESA's view, the authorisation scheme at issue is neither justified nor proportionate.

39. Liechtenstein has put forward three public interest objectives to justify the scheme, namely, the protection of service recipients, the fight against fraud and tax evasion, and the protection of legal certainty. However, in ESA's view, Liechtenstein has failed to put forward evidence to substantiate those claims.

40. Although the protection of service recipients is mentioned in Article 4(8) of the Directive as a permissible overriding reason in the public interest, ESA argues that Liechtenstein has failed to provide any evidence substantiating the reasons why the authorisation scheme is required to protect the recipients of services and how the scheme is proportionate in light of the aim sought.[1]

41. ESA submits that, by applying to all instances of establishment without making any distinction according to the nature of the services provided by the undertaking and the potential risks for service recipients, the authorisation scheme is not appropriate for ensuring effective protection of service recipients. Such a general and wide scope runs counter to the aim of the Directive which is to limit prior authorisation schemes.

---

[1] Reference is made to Cases E-12/10 *ESA* v *Iceland* [2011] EFTA Ct. Rep. 117, paragraph 57; E-16/10 *Philip Morris Norway* [2011] EFTA Ct. Rep. 330, paragraph 85; judgment in *Atral*, C-14/02, EU:C:2003:265, paragraph 69; and judgment in *Commission* v *Belgium*, C-254/05, EU:C:2007:319, paragraph 37.

42. Liechtenstein has sought to justify the wide ranging authorisation scheme by stating that a risk to safety, life and health cannot be excluded for any service. Therefore, an *a posteriori* inspection would be too late to be effective in ensuring the protection of service providers and recipients. ESA contends that such general statements cannot suffice as evidence, as this would be tantamount to reversing the rule and exception regime under the Directive in relation to prior authorisation schemes.

43. ESA submits that an *a posteriori* inspection, taking place shortly after the date of establishment or otherwise as appropriate, could be considered as an alternative to the prior authorisation scheme. Another alternative would be to limit the authorisation scheme to specific sectors where it has been established and evidenced that there is an actual need for the protection of service recipients. Therefore, alternative methods of control might offer a protection to service recipients and still offer the legal certainty required for undertakings to establish themselves in Liechtenstein.

44. As for Liechtenstein's second justification, ESA does not dispute that combating fraud and tax evasion may constitute overriding reasons relating to the public interest within the meaning of Article 4(8) of the Directive.[2] However, ESA contends that Liechtenstein has failed to demonstrate that the prior authorisation scheme at issue is required in order to avoid fraud and tax avoidance and how the authorisation scheme is the only effective measure to ensure the required level of protection against such risks.[3]

45. ESA submits that less restrictive measures could have been adopted in order to tackle fraud and tax evasion. For example, Liechtenstein could have targeted specific areas or professions where fraud or tax evasion have been detected rather than adopting a blanket measure covering all services under the Trade Act. In addition, it appears doubtful whether a prior authorisation scheme is the most effective system for the detection of such fraudulent or evasive practices, as, for example, tax filings and financial statements would appear to provide a better insight into the business practices of such firms.

46. As for the protection of legal certainty, ESA understands Liechtenstein's view to the effect that tradesmen and consumers have more legal certainty with a prior authorisation scheme than under a notification scheme with subsequent inspections. ESA considers that legal certainty is a fundamental principle of EEA law but claims that Liechtenstein has failed to show that, aside from being a fundamental principle

---

[2] Reference is made to judgment in *Établissements Rimbaud*, C-72/09, EU:C:2010:645, paragraphs 33 and 34, and Joined Cases E-3/13 and E-20/13 *Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraphs 166 and 167.

[3] Reference is made to judgments in *Commission* v *Belgium*, C-577/10, EU:C:2012:814, paragraph 53, and *Établissements Rimbaud*, EU:C:2010:645, paragraph 34.

of law, it also amounts to an overriding reason in the public interest within the meaning of Article 4(8) of the Directive. In fact, recital 5 to the Directive explicitly refers to the principle of legal certainty not as a reason to justify restrictions but, on the contrary, as one of the main reasons why unnecessary barriers to the fundamental rights of establishment and the freedom to provide services should be removed by the Directive.

47. Even if the protection of legal certainty could be suited to justify an authorisation scheme, ESA submits that Liechtenstein has not demonstrated that the authorisation scheme at issue is appropriate to achieve that aim. In particular, Liechtenstein has failed to address the fact that the alleged advantage of legal certainty comes at the cost of an administrative burden actually impacting on the legal certainty of businesses.

48. In any event, ESA contends that the prior authorisation scheme goes beyond what is necessary to ensure legal certainty. ESA fails to see that commercial activities would lack legal certainty if only a notification scheme with on-site inspections applied. Such argument ignores the very spirit and purpose of the Directive. Liechtenstein could also ensure that the relevant regulations applying in the context of establishment are sufficiently clear and accessible such that undertakings wishing to establish themselves in Liechtenstein have the necessary information and can obtain appropriate assistance from the competent national authorities.

49. Consequently, ESA submits that Article 7 of the Trade Act amounts to an authorisation scheme in breach of the Directive since it does not fulfil the three cumulative conditions expressly mentioned in Article 9(1) of the Directive.

Second plea – breach of Articles 10 and 13 of the Directive

50. Even if the authorisation scheme addressed above were considered non-discriminatory, justified and proportionate, ESA submits that certain conditions imposed by the scheme are in breach of the Directive. In particular, the obligations pursuant to Article 8(1)(e) and (g) of the Trade Act, which set out the requirements to have the necessary personnel and an adequate command of the German language in order to obtain an authorisation, are contrary to Article 10(1) read in conjunction with 10(2)(d) of the Directive as they are not clear and unambiguous.

51. In response to the argument by Liechtenstein that these requirements are practised very liberally, ESA contends that this would still be insufficient to ensure compliance with the Directive. Even if a national measure is not enforced, this does not constitute an appropriate way to remedy a breach of EEA law.[4]

[4] Reference is made to judgments in *Commission* v *France*, 167/73, EU:C:1974:35, paragraph 42, and *Commission* v *Germany*, 29/84, EU:C:1985:229, paragraph 17.

52. Furthermore, ESA argues that the Trade Act fails to ensure adequate legal certainty with regard to the obligation in Article 10(3) of the Directive not to duplicate comparable requirements and controls. A provision to this effect in Article 13 of the Services Act is not sufficient as the Trade Act is considered a *lex specialis*. This means that the provisions of the Services Act apply as long as the Trade Act does not provide for any deviating rules. Applicants and the national administration might therefore not be aware of the duty to consider the comparable requirements which an applicant has already fulfilled in its home State of establishment. In any event, the absence of any reference to Article 13 of the Services Act in the Trade Act leads to a lack of legal certainty for actual and potential applicants for authorisation.

53. Finally, ESA submits that, contrary to Article 13 of the Directive, the Trade Act fails to lay down the procedures and formalities concerning the authorisation scheme applying to establishment. It is not sufficient that those procedures and formalities are laid down in Article 11 of the Services Act. Rather, a provision such as Article 11 of the Services Act should be inserted in the Trade Act, or at least a reference to the Services Act should be included in the Trade Act.

54. ESA notes that Liechtenstein has not contested the conclusions concerning the compatibility of all such provisions (i.e. Article 8(1)(e), (g), the obligation not to duplicate comparable requirements and controls and the obligation to set up clear authorisation procedures and formalities) with Articles 10 and 13 of the Directive. However, Liechtenstein has not provided ESA with any time frame for the adoption or entry into force of the necessary amendments. ESA submits in this regard that practices, circumstances or situations prevailing in the domestic legal order are the responsibility of the EEA/EFTA States and cannot justify failure to observe obligations arising under EEA law.[5]

Third plea – breach of Article 16 of the Directive

55. ESA submits that the rules under Article 21 of the Trade Act on cross-border services amount to an authorisation scheme with a tacit acceptance period of seven days and is as such prohibited under Article 16(2)(b) of the Directive. That finding is not contested by Liechtenstein.

56. ESA contends that an authorisation scheme may be imposed on the provision of cross-border services only if it is justified by one of the public interest objectives expressly listed under Article 16(3) of the Directive, and provided that such measure is non-discriminatory, necessary and proportionate to the objective sought, in

[5] Reference is made to Case E-19/14 *ESA* v *Norway*, judgment of 19 June 2015, not yet reported, paragraph 48.

accordance with Article 16(1)(a) to (c). In ESA's view, the authorisation scheme at issue cannot be justified and is not proportionate.

57. ESA submits that the list set out in Article 16(3) of the Directive is exhaustive in nature. The Directive harmonises all the areas falling within its scope. Any national measure must therefore be assessed in the light of the provisions of the Directive, and not in the light of the more general articles of the main text of the EEA Agreement.[6] There is no indication in the wording of Article 16(3) that the list should also include other public interest objectives. Therefore, only the justifications listed in Article 16(3) are acceptable.[7] The application of Article 3(3) of the Directive does not alter that conclusion.[8]

58. Liechtenstein has sought to justify the authorisation scheme by reference to the high intensity of cross-border services provision in Liechtenstein, in which an ordinary notification procedure with an *a posteriori* inspection would not be workable. In addition, the authorisation scheme allegedly prevents social dumping from employers in neighbouring countries with lower wages, and protects the public by establishing the reliability and professional competence of cross-border service providers. However, ESA argues that none of those considerations are listed under Article 16(3) of the Directive. They are therefore not permissible in the present circumstances.

59. ESA submits that the concepts of public policy, public security and public health, which are the justifications listed in Article 16(3) of the Directive, have been interpreted strictly in case law. Such justifications require the State to show a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[9] This case law is explicitly referred to in recital 41 of the Directive. However, Liechtenstein has provided no information or arguments to demonstrate that the alleged threat in the absence of the authorisation scheme is genuine and sufficiently serious to warrant recourse to any justification ground.

60. Even if the considerations relied on by Liechtenstein were permissible under Article 16(3) of the Directive, ESA submits that they would still fail to meet the proportionality test, as the prior authorisation scheme is not suitable for attaining the

---

6 Reference is made to judgment in *Lidl Magyarország*, C-132/08, EU:C:2009:281, paragraph 42.

7 Reference is made to the Commission's Handbook on the implementation of the Services Directive, paragraph 7.1.3.1.

8 Reference is made to judgment in *Rina Services and Others*, C-593/13, EU:C:2015:399, paragraph 37.

9 Reference is made to Cases E-3/98 *Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 42 (concerning Article 33 EEA); E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 42 (concerning Article 40 EEA); judgment in *Église de scientologie*, C-54/99, EU:C:2000:124, paragraph 17; and judgment in *Commission* v *Austria*, C-257/05, EU:C:2006:785, paragraph 25.

objective pursued, goes beyond what is necessary to attain those objectives and is not proportionate.

61. In this regard, ESA submits that other measures could have been adopted in order to achieve the objectives sought, for example the implementation of a system of *a posteriori* controls, together with deterrent penalties to prevent and/or to identify instances of fraud. Although an *ex ante* control applicable to all provision of cross-border services may be more efficient in preventing risks, it constitutes a disproportionate restriction on the freedom to provide services.

Fourth plea – breach of Articles 31 and 36 EEA

62. ESA notes that the scope of the Trade Act is broader than that of the Directive. The Trade Act will therefore also be analysed under Articles 31 and 36 EEA to the extent it applies to instances of establishment and provision of cross-border services that are not covered by the Directive.

63. ESA submits that any national measure, although applicable without discrimination on grounds of nationality, which is liable to hinder or render less attractive the exercise by EEA nationals of the freedom of establishment guaranteed by the EEA Agreement constitutes a restriction within the meaning of Article 31 EEA.[10] In ESA's view, the authorisation scheme for establishment in Liechtenstein is a measure of that kind.

64. Liechtenstein has advanced the same justification grounds for the restriction under Article 31 EEA as under Article 9 of the Directive. ESA refers to its arguments made under the first plea. It contends that Liechtenstein has failed to demonstrate that the prior authorisation scheme is required in order to protect any of the overriding reasons in the public interest that Liechtenstein relies on. ESA also submits that the authorisation scheme is neither proportionate nor suitable for ensuring attainment of the objectives pursued in that it goes beyond what is necessary to achieve those objectives.

65. As for the freedom to provide services enshrined in Article 36 EEA, ESA submits that the authorisation procedure for cross-border service providers established

[10] Reference is made to judgments in *Gebhard*, C-55/94, EU:C:1995:411, paragraph 37; *Caixabank France*, C-442/02, EU:C:2004:586, paragraph 11; E-2/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 164, paragraph 64; E-4/00 *Dr Johann Brändle* [2000-2001] EFTA Ct. Rep. 123, paragraph 12; E-5/00 *Dr Josef Mangold* [2000-2001] EFTA Ct. Rep. 163, paragraph 13; and E-6/00 *Dr Jürgen Tschannett* [2000-2001] EFTA Ct. Rep. 203, paragraph 12.

by the Trade Act qualifies as an authorisation scheme, which amounts to a restriction on that freedom.[11]

66. Liechtenstein has advanced basically the same justification grounds for the restriction under Article 36 EEA as under Article 16 of the Directive. However, ESA takes the view that Liechtenstein has failed to provide any explanation, supported by evidence, why the authorisation scheme can be justified under any of the public interest objectives listed in Article 33 EEA, or demonstrated any overriding reasons relating to the public interest developed under this Article. ESA also submits that the restrictive measure is neither proportionate nor suitable for ensuring attainment of the objectives pursued in that it goes beyond what is necessary to achieve those objectives.

67. In ESA's view, Liechtenstein could have relied on other administrative measures to control the provision of cross-border services than case by case analysis under the authorisation scheme, which is the most restrictive form of limitation on the freedom to provide services.[12] In addition, in the field of the freedom to provide services, EEA States have to take into account controls operated in the EEA State of establishment.[13]

The Commission

68. The Commission agrees with the legal arguments developed by ESA. It limits itself to highlighting selected legal aspects which it deems of particular importance.

Authorisation obligation for the establishment of service providers – the Directive

69. The Commission concurs with ESA in considering the requirement for authorisation for the establishment of service providers to breach Article 9 of the Directive as it is neither justified nor proportionate. In this regard, Article 29(1) of the Directive already provides for administrative cooperation mechanisms among EEA States through which the Liechtenstein administration could obtain the same information without imposing burdensome formalities on service providers.

---

[11] Reference is made to judgments in *Säger*, C-76/90, EU:C:1991:331, paragraph 14; *Vander Elst*, C-43/93, EU:C:1994:310, paragraph 15; and *Commission* v *Belgium*, C-355/98, EU:C:2000:113, paragraph 35.

[12] Reference is made to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1) and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22). Both directives have been incorporated into the EEA Agreement.

[13] Reference is made to judgments in *Webb*, 279/80, EU:C:1981:314, paragraphs 19 to 21; *Commission* v *Italy*, C-134/05, EU:C:2007:435, paragraph 25; *Commission* v *Portugal*, C-171/02, EU:C:2004:270, paragraph 60; and *Commission* v *Netherlands*, C-189/03, EU:C:2004:597, paragraph 18.

70. The Commission agrees with ESA's assessment of the requirements in the Trade Act for a service provider to have the necessary personnel and an adequate command of the German language. In addition, the Commission points out that the requirement in Article 8(1)(b) of the Trade Act that the service provider must be reliable appears not to be based on clear and objective criteria set out in advance and thus in breach of Article 10(2)(d), (e) and (g) of the Directive. Furthermore, the requirement in Article 8(1)(e) of the Trade Act to have business premises in Liechtenstein breaches Article 10(2)(b) and (c) of the Directive for certain categories of service providers, such as door-to-door salesmen.

71. With regard to the overriding reason of combating fraud and tax evasion, the Commission notes that the requirement for authorisation for the establishment of service providers is unsuitable for achieving that objective, because a large number of cross-border service providers are likely to remain fiscally resident in their country of establishment. The measure also goes beyond what is necessary because more targeted controls on tax issues can be deployed.[14]

72. The Commission stresses that Liechtenstein cannot invoke legal certainty as an overriding reason of general interest capable of justifying a restriction on fundamental freedoms. Rather, legal certainty is a general principle of EU law, which requires legal rules to be sufficiently clear and precise, and their legal implications foreseeable. Also, sufficient information must be made public to enable parties to know what the law is and how to comply with it. These aspects are reflected in recital 5, Article 10(2)(d) to (g) and Article 13(1) of the Directive. From the viewpoint of legal certainty, the requirement for authorisation for the establishment of service providers is in fact problematic. In particular, there is a lack of clarity regarding the applicability of the tacit approval rule, given the condition of written confirmation set out in Article 11(4) of the Services Act in breach of Article 13(4) of the Directive.

Authorisation obligation for the establishment of service providers – Article 31 EEA

73. The Commission agrees with ESA that the requirement for authorisation for the establishment of service providers in Liechtenstein amounts to an unjustifiable and disproportionate restriction on the freedom of establishment guaranteed under Article 31 EEA.

Authorisation obligation for the provision of services – the Directive

74. As for the obligation on providers of services to notify the authorities under Article 21 of the Trade Act, the Commission shares the view of ESA that this constitutes in fact an authorisation scheme. The Commission distinguishes between situations where a foreign EEA-established service provider physically crosses the

[14] Reference is made to judgment in *Lasteyrie du Saillant*, C-9/02, EU:C:2004:138.

Liechtenstein border and provides its services in Liechtenstein, and situations where the foreign EEA-established service provider is not physically present on Liechtenstein territory.

75. In situations where the service provider physically moves to Liechtenstein, Article 16(3) of the Directive provides for the possibility to impose requirements with regard to the provision of services on grounds of public policy, public security, public health or the protection of the environment, on condition that they are non-discriminatory, necessary and proportionate. The Commission considers this list of overriding reasons relating to the public interest to constitute an exhaustive list.

76. The Commission argues that this view is supported, first, by the wording of Article 16. Only four public interests are mentioned in that provision. These are the original three mentioned in the Treaty together with environmental protection. The drafting of Article 16 in this particular way reflects a conscious choice by the Union legislative bodies, as can be seen from its legislative history.[15]

77. Second, the teleology of the provision also supports this interpretation. The Commission refers to recitals 6, 43 and 116 of the Directive. Moreover, to adopt a different interpretation based on Article 3(3) of the Directive would deprive Article 16 of any purpose. It follows from case law that when adopting secondary legislation, such as the Directive, giving effect to a fundamental freedom the EU legislature is entitled to restrict certain derogations.[16]

78. Third, the scheme of the Directive itself also indicates that the list of public interests in Article 16 is exhaustive. The idea underlying Articles 29 to 33 and 35 of the Directive regarding administrative cooperation among EEA States is that the responsibility for the regulation of service providers lies with the EEA State of establishment.

79. The Commission agrees with ESA that Liechtenstein has not provided any evidence that the authorisation scheme for the provision of services can be justified by any of the overriding reasons mentioned in Article 16(3).

80. In any event, the Commission also shares the view of ESA on the disproportionate nature of the authorisation scheme for service providers. There is a strong presumption that the requirements listed in Article 16(2) of the Directive

---

[15] Reference is made in particular to the Commission's original proposal (SEC(2004) 21) as well as to the Commission's second proposal (COM(2006) 160 final, p. 10).

[16] Reference is made, by analogy, to *Rina Services and Others*, EU:C:2015:399, paragraphs 36 to 38 and 40.

cannot be justified because they are particularly harmful to the freedom to provide services.[17]

81. In a situation where the service provider physically does not cross the Liechtenstein border but provides services from a distance, the Commission considers it doubtful whether Article 16(3) of the Directive can be invoked, as it applies only to the EEA State to which the service provider moves.[18] The wording of Article 16(2) is clear: it provides for a prohibition for EEA States and does not set out any possibility for justification.[19] A different interpretation would render Article 16(3) redundant, given that the latter provision has a more limited scope.[20]

Authorisation obligation for the provision of services – Article 36 EEA

82. In relation to services not covered by the Directive and to which only Article 36 EEA is applicable, the Commission shares the view expressed by ESA that the requirement for authorisation under Article 21 of the Trade Act should be deemed an unjustifiable and disproportionate restriction on the freedom to provide services guaranteed by Article 36 EEA.

83. The Commission considers the justification put forward by Liechtenstein to be unconvincing on a number of accounts. First, the fight against alleged lower levels of wages in neighbouring countries does not constitute as such an overriding reason of public interest under the EU law on fundamental freedoms. Undertakings from different EEA States are in competition with each other and may offer their products or services on a cross-border basis; and, in that regard, the level of wages in each EEA State depends on a number of factors, including social and fiscal charges. To fight against the difference in wage levels from one EEA State to another would be tantamount to fighting the very notion of the freedom to provide services.[21]

84. Second, a proportionality analysis is barely possible with regard to a requirement for authorisation which applies to all services. An authorisation scheme can be justified only if there are precise, detailed and substantiated reasons why it is

---

[17] Reference is made to the Opinion of Advocate General Bot in *Commission* v *Hungary*, C-179/14, EU:C:2015:619, point 157.

[18] Reference is made to the Opinion of Advocate General Bot in *Commission* v *Hungary*, EU:C:2015:619, point 156, and to the Opinion of Advocate General Cruz Villalón in *Rina Services and Others*, EU:C:2015:159, point 46 et seq.

[19] Reference is made, by analogy, to judgment in *Rina Services and Others*, EU:C:2015:399, paragraph 30.

[20] Ibid., paragraph 37.

[21] Reference is made to judgment in *Commission* v *Luxembourg*, 2/62 and 3/62, EU:C:1962:45, p. 434.

necessary in a specific field.[22] In addition, no presumption of fraud or violation of rules can be permitted in relation to foreign-established service providers.[23]

85. Third, the authorisation scheme for the provision of services is not suitable to attain the objective of combating bogus self-employment. The authorisation provided for in Article 21 of the Trade Act and the ensuing paper-based control will not be able to cast any light on the real substance of the service provider concerned. For similar reasons, the requirement for authorisation is also unsuitable to attain the objective of consumer protection or to ensure reliability and professional competence of EEA-established cross-border service providers.

86. Fourth, the Commission considers the authorisation scheme to go beyond what is necessary, as its scope is not limited to categories which are particularly prone to abuse or to specified situations of dangers. Furthermore, the reliability and professional competence of the service provider, and to an extent also consumer protection, is generally ensured by the EEA State of establishment on the basis of its legislation and through its controls. Moreover, a generalised risk for consumer protection ensuing from any cross-border service provider cannot be accepted.

87. Fifth, the Commission agrees with ESA that there are alternative but less restrictive measures, such as ad hoc inspections, which could allow the Liechtenstein authorities to attain the objectives pursued.

88. Sixth, the Commission stresses that an administrative scheme must be based on objective and non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion.[24] In the present case the criteria used by the Liechtenstein authorities to decide on a request for authorisation to provide services in Liechtenstein are not laid down in the Trade Act.

Per Christiansen
Judge-Rapporteur

---

[22] Reference is made to judgment in *Commission* v *Luxembourg*, C-319/06, EU:C:2008:350, paragraph 51; the Opinion of Advocate General Szpunar in *Trijber and Harmsen*, C-340/14 and C-341/14, EU:C:2015:505, point 80 and the case law cited; and judgment in *Commission* v *Austria*, C-161/07, EU:C:2008:759, paragraph 37.

[23] Reference is made to judgments in *Commission* v *Belgium*, C-433/04, EU:C:2006:702, paragraph 37; *Commission* v *Belgium*, EU:C:2012:814, paragraph 53; *Lasteyrie du Saillant*, EU:C:2004:138, paragraph 51; and *Commission* v *Denmark*, C-464/02, EU:C:2005:546, paragraphs 66 and 67.

[24] Reference is made to judgment in *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 64 and the case law cited.