JUDGMENT OF THE COURT

3 August 2016*

(Freedom to provide services – Article 36 EEA – Directive 2005/60/EC – Proportionality)

In Joined Cases E-26/15 and E-27/15,

REQUESTS to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Appeal of the Principality of Liechtenstein (*Fürstliches Obergericht*) and the Appeals Board of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*), in cases pending before them, respectively, in

Criminal proceedings against B

and

B

v

Finanzmarktaufsicht

concerning the interpretation of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing,

THE COURT,

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

Registrar: Gunnar Selvik,

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* Language of the request: German. Translations of national provisions are unofficial and based on those contained in the documents of the case.

having considered the written observations submitted on behalf of:

- the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, EEA Coordination Unit, and Christoph Büchel, attorney at law, acting as Agents;

- the Government of the Kingdom of Spain, represented by Alejandro Rubio González, Abogado del Estado, member of the Spanish Legal Service before the Court of Justice of the European Union, acting as Agent;

- the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Clémence Perrin and Lillian Biørnstad, members of its Department of Legal & Executive Affairs, acting as Agents; and

- the European Commission ("the Commission"), represented by Ion Rogalski and Karl-Philipp Wojcik, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of B ("the defendant"), appearing in person; the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch and Christoph Büchel; ESA, represented by Carsten Zatschler and Lillian Biørnstad; and the Commission, represented by Ion Rogalski, at the hearing on 10 May 2016,

gives the following

Judgment

I Legal background

EEA law

1 Article 31(1) of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") provides as follows:

> *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 36(1) EEA provides as follows:

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.

3 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing ("the Directive") (OJ 2005 L 309, p. 15) was incorporated into the EEA Agreement at point 23b of Annex IX to the Agreement by EEA Joint Committee Decision No 87/2006 of 7 July 2006 (OJ 2006 L 289, p. 23, and EEA Supplement 2006 No 52, p. 19). The decision entered into force on 1 April 2007.

4 Recital 1 in the preamble to the Directive reads as follows:

Massive flows of dirty money can damage the stability and reputation of the financial sector and threaten the single market, and terrorism shakes the very foundations of our society. In addition to the criminal law approach, a preventive effort via the financial system can produce results.

5 Recital 3 in the preamble to the Directive reads as follows:

In order to facilitate their criminal activities, money launderers and terrorist financers could try to take advantage of the freedom of capital movements and the freedom to supply financial services which the integrated financial area entails, if certain coordinating measures are not adopted at Community level.

6 Recital 5 in the preamble to the Directive reads as follows:

Money laundering and terrorist financing are frequently carried out in an international context. ...

7 Recital 15 in the preamble to the Directive reads as follows:

As the tightening of controls in the financial sector has prompted money launderers and terrorist financers to seek alternative methods for concealing the origin of the proceeds of crime and as such channels can be used for terrorist financing, the anti-money laundering and anti-terrorist

financing obligations should cover life insurance intermediaries and trust and company service providers.

8 Recital 17 in the preamble to the Directive reads as follows:

Acting as a company director or secretary does not of itself make someone a trust and company service provider. For that reason, the definition covers only those persons that act as a company director or secretary for a third party and by way of business.

9 Recital 28 in the preamble to the Directive reads as follows:

In the case of agency or outsourcing relationships on a contractual basis between institutions or persons covered by this Directive and external natural or legal persons not covered hereby, any anti-money laundering and anti-terrorist financing obligations for those agents or outsourcing service providers as part of the institutions or persons covered by this Directive, may only arise from contract and not from this Directive. The responsibility for complying with this Directive should remain with the institution or person covered hereby.

10 Recital 39 in the preamble to the Directive reads as follows:

When registering or licensing a currency exchange office, a trust and company service provider or a casino nationally, competent authorities should ensure that the persons who effectively direct or will direct the business of such entities and the beneficial owners of such entities are fit and proper persons. The criteria for determining whether or not a person is fit and proper should be established in conformity with national law. As a minimum, such criteria should reflect the need to protect such entities from being misused by their managers or beneficial owners for criminal purposes.

11 Article 1(1) of the Directive reads as follows:

Member States shall ensure that money laundering and terrorist financing are prohibited.

12 Article 2 of the Directive reads as follows:

1. This Directive shall apply to:

...

(3) the following legal or natural persons acting in the exercise of their professional activities:

(a) auditors, external accountants and tax advisors;

(b) notaries and other independent legal professionals, when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or execution of transactions for their client concerning the:

(i) buying and selling of real property or business entities;

(ii) managing of client money, securities or other assets;

(iii) opening or management of bank, savings or securities accounts;

(iv) organisation of contributions necessary for the creation, operation or management of companies;

(v) creation, operation or management of trusts, companies or similar structures;

(c) trust or company service providers not already covered under points (a) or (b);

...

13 Article 3 of the Directive reads as follows:

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

...

(7) 'trust and company service providers' means any natural or legal person which by way of business provides any of the following services to third parties:

(a) forming companies or other legal persons;

(b) acting as or arranging for another person to act as a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;

(c) providing a registered office, business address, correspondence or administrative address and other related services for a company, a partnership or any other legal person or arrangement;

(d) acting as or arranging for another person to act as a trustee of an express trust or a similar legal arrangement;

(e) acting as or arranging for another person to act as a nominee shareholder for another person other than a company listed on a regulated market that is subject to disclosure requirements in

conformity with Community legislation or subject to equivalent international standards;

...

(9) 'business relationship' means a business, professional or commercial relationship which is connected with the professional activities of the institutions and persons covered by this Directive and which is expected, at the time when the contact is established, to have an element of duration;

...

14 Article 5 of the Directive reads as follows:

The Member States may adopt or retain in force stricter provisions in the field covered by this Directive to prevent money laundering and terrorist financing.

15 Article 7 of the Directive reads as follows:

The institutions and persons covered by this Directive shall apply customer due diligence measures in the following cases:

(a) when establishing a business relationship;

...

(d) when there are doubts about the veracity or adequacy of previously obtained customer identification data.

16 Article 8 of the Directive reads as follows:

1. Customer due diligence measures shall comprise:

(a) identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;

(b) identifying, where applicable, the beneficial owner and taking risk-based and adequate measures to verify his identity so that the institution or person covered by this Directive is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts and similar legal arrangements, taking risk-based and adequate measures to understand the ownership and control structure of the customer;

(c) obtaining information on the purpose and intended nature of the business relationship;

(d) conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's or person's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up-to-date.

2. The institutions and persons covered by this Directive shall apply each of the customer due diligence requirements set out in paragraph 1, but may determine the extent of such measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction. The institutions and persons covered by this Directive shall be able to demonstrate to the competent authorities mentioned in Article 37, including self-regulatory bodies, that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing.

17 Article 9 of the Directive reads as follows:

1. Member States shall require that the verification of the identity of the customer and the beneficial owner takes place before the establishment of a business relationship or the carrying-out of the transaction.

...

6. Member States shall require that institutions and persons covered by this Directive apply the customer due diligence procedures not only to all new customers but also at appropriate times to existing customers on a risk-sensitive basis.

18 Article 21(1) of the Directive reads as follows:

Each Member State shall establish a FIU [financial intelligence unit] in order effectively to combat money laundering and terrorist financing.

19 Article 22 of the Directive reads as follows:

1. Member States shall require the institutions and persons covered by this Directive, and where applicable their directors and employees, to cooperate fully:

(a) by promptly informing the FIU, on their own initiative, where the institution or person covered by this Directive knows, suspects or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted;

(b) by promptly furnishing the FIU, at its request, with all necessary information, in accordance with the procedures established by the applicable legislation.

2. The information referred to in paragraph 1 shall be forwarded to the FIU of the Member State in whose territory the institution or person forwarding the information is situated. The person or persons designated in accordance with the procedures provided for in Article 34 shall normally forward the information.

20 Article 30 of the Directive reads as follows:

Member States shall require the institutions and persons covered by this Directive to keep the following documents and information for use in any investigation into, or analysis of, possible money laundering or terrorist financing by the FIU or by other competent authorities in accordance with national law:

(a) in the case of the customer due diligence, a copy or the references of the evidence required, for a period of at least five years after the business relationship with their customer has ended;

(b) in the case of business relationships and transactions, the supporting evidence and records, consisting of the original documents or copies admissible in court proceedings under the applicable national legislation for a period of at least five years following the carrying-out of the transactions or the end of the business relationship.

21 Article 36(1) of the Directive reads as follows:

Member States shall provide that currency exchange offices and trust and company service providers shall be licensed or registered and casinos be licensed in order to operate their business legally. Without prejudice to future Community legislation, Member States shall provide that money transmission or remittance offices shall be licensed or registered in order to operate their business legally.

22 Article 37 of the Directive reads as follows:

1. Member States shall require the competent authorities at least to effectively monitor and to take the necessary measures with a view to ensuring compliance with the requirements of this Directive by all the institutions and persons covered by this Directive.

2. Member States shall ensure that the competent authorities have adequate powers, including the power to compel the production of any information that is relevant to monitoring compliance and perform checks, and have adequate resources to perform their functions.

...

23 Article 38 of the Directive reads as follows:

> *The Commission shall lend such assistance as may be needed to facilitate coordination, including the exchange of information between FIUs within the Community.*

24 Article 39(1) of the Directive reads as follows:

> *Member States shall ensure that natural and legal persons covered by this Directive can be held liable for infringements of the national provisions adopted pursuant to this Directive. The penalties must be effective, proportionate and dissuasive.*

National law

25 Liechtenstein has implemented the Directive by way of the Law of 11 December 2008 on professional due diligence to combat money laundering, organised crime and terrorist financing (*Sorgfaltspflichtgesetz, LR 952.1*) ("SPG").

26 Article 2 of the SPG reads as follows:

> *1. For the purposes of this law, the following definitions apply:*
>
> ...
>
> *(c) 'business relationship' means a business, professional or commercial relationship which is connected with the professional activities of the person under an obligation to apply due diligence measures and which is expected, at the time when the contact is established, to have an element of duration;*
>
> ...
>
> *(f) 'legal entity' means a legal person, company, trust or other collective or asset entity, irrespective of its legal form;*
>
> ...

27 Article 3 of the SPG reads as follows:

> *1. This law shall apply to persons under an obligation to apply due diligence measures. These are:*
>
> ...

(r) natural and legal persons to the extent that by way of a business they provide to a legal entity a registered office, business address, correspondence or administrative address or other related services;

...

(t) natural and legal persons who, by way of a business and on the account of a third party, act as a partner of a partnership or on behalf of the board or as managing director of a legal entity or carry out a comparable function on the account of a third party;

...

2. To the extent that such branches are permitted, Liechtenstein branches of foreign undertakings referred to in paragraph 1 shall also be deemed subject to an obligation to apply due diligence measures.

...

28 Article 5 of the SPG reads as follows:

1. In the cases specified in paragraph 2, persons under an obligation to apply due diligence measures shall satisfy the following requirements:

(a) identification and verification of the identity of the contracting party (Article 6);

...

(c) compilation of a business profile (Article 8);

...

2. Due diligence measures shall be applied in the following cases:

(a) when establishing a business relationship;

...

(c) when there are doubts about the veracity or adequacy of previously obtained data concerning the identity of the contracting party or the beneficial owner. ...;

...

29 Article 6 of the SPG reads as follows:

1. Persons subject to the obligation to apply due diligence measures shall identify the identity of their contracting party and verify that identity by means of documentary evidence.

2. If in the course of the business relationship doubts arise concerning the identity of the contracting partner, persons subject to the obligation to apply due diligence measures shall identify and verify afresh the identity of the contracting party.

...

30 Article 8 of the SPG reads as follows:

1. Persons under an obligation to apply due diligence measures must compile a profile concerning the business relationship including in particular information on the origin of the assets and on the purpose and intended nature of the business relationship (business profile).

2. They shall ensure that the data and information contained in the business profile are kept up-to-date.

...

31 Article 30 of the SPG reads as follows:

1. The Princely Court of Justice shall punish with a sentence of imprisonment for a period not exceeding six months or a fine not exceeding 360 daily units for a misdemeanour any person who wilfully:

(a) does not carry out or repeat the identification and verification of the identity of the contracting party as specified in Article 6;

...

32 Article 31 of the SPG reads as follows:

1. The FMA shall punish for an administrative offence by a fine not exceeding SFR 100 000 any person who:

...

(e) does not compile and maintain up-to-date the profile concerning the business relationship as specified in Article 8;

...

II Facts and procedure

33 The defendant is an Austrian national who lives in the United Kingdom. He acts as a director for three companies, which are A Ltd and B Ltd, both registered in the United Kingdom, and CA Inc., registered in the British Virgin Islands. The defendant acts as the sole director, on behalf of third parties, in relation to all the companies in return for remuneration.

34 The defendant carried out individual administrative activities on behalf of these three companies in Liechtenstein.

35 In Case E-26/15, following an appeal by the defendant, the referring court has to review a judgment by the Princely Court of Justice (*Fürstliches Landgericht*) handed down on 13 July 2015. In that judgment, the defendant was convicted pursuant to Article 30(1)(a) of the SPG and sentenced to a suspended fine. That court found that the defendant had failed wilfully to identify and verify the identity of the contracting party and to carry out afresh such identification and verification in Liechtenstein, in particular in relation to the three companies, on the establishment of the business relationship, with regard to A Ltd in 2004, B Ltd in 2008 and CA Inc. in 2008, and on a continuing basis from 1 September 2009 to 10 February 2014.

36 The finding of the Princely Court of Justice was based on the lack of any statement or clear information documenting that the defendant had identified and verified the identity of the contracting party. Likewise, there was nothing on file or no clear documentation to show when and on what grounds a renewed verification of the identity of the contracting party had been carried out, even though, according to the court, clearly contradictory information existed. Consequently, when the Financial Market Authority (*Finanzmarktaufsicht*) ("the FMA") carried out checks on the defendant in Liechtenstein, it had not been possible to establish an unambiguous identification of which person, at what time, and on which contractual basis had in fact been the contracting party under each of these mandates.

37 The Princely Court of Justice concluded that the obligation to apply due diligence measures resulted from the existence of a person subject to a duty to apply due diligence measures and the activities of that person. The registered office of the legal entity administered was not considered decisive in determining the existence of an obligation to apply due diligence measures. Consequently, it held that the defendant was under an obligation to apply due diligence measures when he acted in Liechtenstein, on behalf of third parties, as a governing body ("director") of a foreign legal entity. For the purposes of exercising that function, the Princely Court of Justice found it to suffice that telephone calls are made, resolutions are signed or other administrative activities are carried out on behalf of the foreign legal entities. As a result, the court held that the defendant had violated Article 30(1)(a) of the SPG.

38 The defendant has appealed against that conviction to the referring court, arguing, *inter alia*, that all three companies were, without exception, established from London and that it is inconceivable that all his English and Austrian clients could now also be subject to the requirements of the Liechtenstein SPG.

39 In Case E-27/15, the defendant has brought a complaint to the Appeals Board of the Financial Market Authority ("the Appeals Board") challenging the FMA's order of 31 July 2015. The order concerns the defendant's duties as director of the three companies mentioned above.

40 Pursuant to the contested order the defendant was found guilty of an administrative offence under Article 31(1)(e) of the SPG and ordered to pay a fine. According to that order, the defendant, as a person under an obligation to carry out due diligence measures in relation to the business relationships with the three companies concerned, had failed in the period 1 February 2013 until at least 14 February 2014 in a total of three separate cases to compile the profile of the business relationship as required under Article 8 of the SPG.

41 The FMA's order resulted from its finding, when checks were carried out on the defendant in Vaduz concerning his business relationships with the three companies, that the profiles compiled on those business relationships were unsigned and undated. According to the FMA, the obligation to apply due diligence measures resulted from the existence of a person subject to a duty to apply due diligence measures and the activities of that person. Consequently, it held the defendant to be under an obligation to apply due diligence measures when he acts in Liechtenstein as a company director on behalf of third parties.

42 For the purposes of exercising that function, the FMA considered it to suffice that telephone calls are made, resolutions are signed or other administrative activities are carried out. The registered office of the legal entity administered was not considered decisive in determining the existence of an obligation to apply due diligence measures. As the profiles of the business relationships concerning the three companies did not meet the formal requirements, the FMA found that the defendant had failed to compile in full the business profiles required under Article 8 of the SPG and as a result he had committed an administrative offence pursuant to Article 31(1)(e) of the SPG in the period 1 February 2013 until at least 14 February 2014.

43 In challenging this order, the defendant contends, *inter alia*, that all three companies were, without exception, established and operated from London.

44 By an order of 4 November 2015, received at the Court Registry on 9 November 2015, the referring court sought an Advisory Opinion in Case E-26/15. By an order of 30 October 2015, received at the Court Registry on 16 November 2015, the Appeals Board sought an Advisory Opinion in Case E-27/15.

45 By a decision of 21 December 2015, the Court, pursuant to Article 39 of the Rules of Procedure ("RoP") and after having received observations from the parties, joined the two cases for the purposes of the written and oral procedure and final judgment.

46 The following questions were submitted to the Court in Case E-26/15:

> *1. Must Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing be interpreted as meaning that 'trust and company service providers', within the meaning of Article 2(1)(3)(c) and point (7)(b)*

of Article 3 of that Directive, are subject to the obligation to verify the customer's identity as specified in Article 8(1)(a) and Article 9(1) and (6) of the Directive solely in accordance with the legislation of the Member State in which they are established (in welchem [der Dienstleister für Trusts und Gesellschaften] seinen rechtlichen Sitz hat)?

2. *If Question 1 is answered in the negative: what criteria must be used to determine whether 'trust and company services providers' are under the obligation to verify the customer's identity as specified in Article 8(1)(a) and Article 9(1) and (6) of the Directive in accordance with the legislation of another Member State?*

3. *Do the answers to Questions 1 and 2 also apply where the company for which administrative services are provided is a company not incorporated in a Member State?*

47 In Case E-27/15, the first two questions referred are substantively similar to the first two questions in Case E-26/15, with the only difference being that instead of writing "obligation to verify the customer's identity as specified in Article 8(1)(a) and Article 9(1) and (6) of the Directive", the Appeals Board writes "obligation to obtain information on the purpose and intended nature of the business relationship as specified in Article 8(1)(c) and Article 9(6) of the Directive". The third question in Case E-27/15 is identical to the third question in Case E-26/15.

48 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.

III Admissibility

Arguments submitted to the Court

49 The Liechtenstein Government contends that the referring court and the Appeals Board base their questions on the understanding that the defendant was a provider of services in Liechtenstein under Article 36 EEA. In contrast, the Liechtenstein Government argues, subject to the caveat that the facts of the cases have not yet been fully determined, that the defendant performed his services in Liechtenstein by way of establishment in accordance with Article 31 EEA. If the Court accepts this view, this renders the requests for Advisory Opinions to a considerable extent redundant or hypothetical with the result that the Court might consider the requests inadmissible.

Findings of the Court

50 Under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), any court or tribunal

in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers an advisory opinion necessary to enable it to give judgment.

51 The request in Case E-27/15 is made by the Appeals Board of the Financial Market Authority. The Court has already held that body to constitute a court or tribunal for the purposes of Article 34 SCA (see Case E-4/09 *Inconsult* [2009-2010] EFTA Ct. Rep. 86, paragraphs 22 to 24).

52 The purpose of Article 34 SCA is to establish cooperation between the Court and the national courts and tribunals. It is intended to be a means of ensuring a homogenous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see Joined Cases E-15/15 and E-16/15 *Hagedorn and Armbruster*, judgment of 10 May 2016, not yet reported, paragraph 25 and case law cited).

53 Furthermore, it is settled case law that questions on the interpretation of EEA law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. Accordingly, the Court may only refuse to rule on a question referred by a national court where it is quite obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Hagedorn and Armbruster*, cited above, paragraph 26 and case law cited).

54 The Court does not find that such exceptional circumstances are applicable to the questions in the case at hand. On the basis that the trust and company service provider operated in Liechtenstein under the freedom to provide services, the questions referred are admissible. Whether the trust and company service provider operated instead under the freedom of establishment is for the referring court and the Appeals Board to determine.

55 It follows that the questions referred are admissible.

IV Answers of the Court

The first two questions

56 By the first two questions in each case, which it is appropriate to consider jointly, the referring court and the Appeals Board seek in essence to establish whether, and, if so, to what extent, the Directive precludes EEA States from applying their national legislation to trust and company service providers that operate in their territory by means of the freedom to provide services while being established in other EEA States with regard to the obligation to verify the customer's identity as specified in Article 8(1)(a) and Article 9(1) and (6) of the Directive and the

obligation to obtain information on the purpose and intended nature of the business relationship as specified in Article 8(1)(c) and Article 9(6) of the Directive.

Observations submitted to the Court

57 The Liechtenstein Government deduces from the facts provided to the Court that the defendant performed his services in Liechtenstein by way of establishment and for that reason the SPG fully applies to him. Moreover, for the purposes of Article 31 EEA, the decisive factor is not the place of the registered office, but the character of economic activity performed in the territory of an EEA State (reference is made to the judgments of the Court of Justice of the European Union ("ECJ") in *Gebhard*, C-55/94, EU:C:1995:411, paragraphs 25 and 27, and *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 46).

58 Turning to the first question in each case, the Liechtenstein Government submits that the Directive does not include the term "legal seat". Consequently, that term cannot be decisive for the outcome of the cases. Rather, it is the activity of a person falling under the Directive which triggers its applicability. The reference in Article 22(2) of the Directive to "the Member State in whose territory the institution or person forwarding the information is situated" does not alter this conclusion since the case law of ECJ demonstrates that these words must be understood in accordance with their ordinary meaning (reference is made to the judgment in *Jyske Bank*, C-212/11, EU:C:2013:270, paragraph 42). According to the Liechtenstein Government, the ordinary meaning of "situated" corresponds neither to the notion of a legal seat nor to the place of establishment.

59 The Liechtenstein Government argues that national supervisory authorities must have the competence, without exception, to supervise any activity covered by the Directive that is carried out in their territory.

60 With regard to the second question in each case, the Liechtenstein Government reiterates that a trust and company service provider, such as the defendant, has to comply with the national legislation of the EEA State in the territory of which he is active, or more precisely, where he performs the services covered by the Directive.

61 Furthermore, the Liechtenstein Government rejects the notion that Article 48(4) of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ 2015 L 141, p. 73) ("Directive 2015/849") can be relied upon in interpreting the Directive.

62 According to the Liechtenstein Government, Article 37 of the Directive does not contain any specific rules on cooperation between national supervisory authorities. Therefore, each national supervisory authority operates more or less

independently. Due to the absence of comprehensive cooperation and information exchange between national supervisory authorities, the FMA cannot have recourse to the equivalent authority in the United Kingdom and ascertain whether, and, if so, to what extent, the activities carried out by the defendant are being supervised there. In the absence of such cooperation, effective supervision of the defendant's compliance would not be ensured, as required by the Directive, if supervisory authorities were competent only to supervise service providers established in their territory.

63 With regard to the issue of whether double supervision might be a restriction on the defendant's freedom to provide services under Article 36 EEA, the Liechtenstein Government submits that, in adhering to what is specified in the Directive, the application of the SPG cannot constitute a restriction on the freedom to provide services. Even if such a restriction were found to exist, it would certainly be justified.

64 Elaborating on the issue of justification, the Liechtenstein Government states that the requirements under national law for the defendant to identify customers and compile a business or risk profile must be regarded as serving the aim of preventing and combating money laundering. Those obligations are based on Article 8(1)(a) and (c) of the Directive and must therefore be considered suitable for attaining the aims which they pursue.

65 As for the issue of proportionality, the Liechtenstein Government emphasises that Article 37(1) of the Directive requires effective supervision of service providers such as the defendant. Noting the lack of comprehensive cooperation with other supervisory authorities in the EEA States, the Liechtenstein Government argues that an absence of the possibility for the FMA to verify information could create weaknesses or even loopholes in the supervision of service providers. Furthermore, even if the defendant were required to comply with two or more national regimes regarding one and the same business relationship, that could not constitute a serious burden on him. Namely, this does not entail having to identify the customers or beneficial owners twice. Rather, the defendant would only have to keep two or more sets of due diligence files.

66 At the hearing, the defendant argued that he had in fact complied with the relevant due diligence requirements with regard to his clients, verifying their identity by means of, *inter alia*, copies of passports, obtaining information on their residence and utility bills. He also maintained that he had already provided the FMA with such documents regarding the persons connected to his clients, but that such documents must have had been overlooked by the FMA. Furthermore, he stated that he had offices both in the United Kingdom and in Liechtenstein.

67 With regard to the first question in each case, the Government of Spain argues, focusing mainly on the first question in Case E-26/15, that this legal issue requires an assessment of whether the Directive forbids host State authorities to check if an operator has duly verified customer identities.

68 Referring to the objective of the Directive and the context in which it was adopted, the Government of Spain submits that the combating of money laundering and terrorist financing are legitimate aims which the Member States have endorsed both at international and European level (reference is made to the ECJ´s judgment in *Jyske Bank*, cited above, paragraphs 46 and 62, and to the Opinion of Advocate General Bot in the same case, EU:C:2012:607, points 48 to 50, 55 to 56 and 63). It adds that the Directive does not constitute full harmonisation of this field.

69 The Government of Spain contends that the ECJ has accepted that Article 22(2) of the Directive does not preclude the host State from requiring an institution carrying out activities in its territory under the rules on the freedom to provide services to forward the required information directly to its own financial intelligence unit (reference is made to the judgment in *Jyske Bank*, cited above, paragraph 56).

70 Furthermore, the Government of Spain argues that the ECJ's case law demonstrates that the combating of money laundering constitutes a legitimate aim capable of justifying a barrier to the freedom to provide services (reference is made to the judgments in *Jyske Bank*, cited above, paragraph 64, and *Zeturf*, C-212/08, EU:C:2011:437, paragraphs 45 to 46).

71 The Government of Spain concludes that authorities of the host State should be entitled to monitor compliance with their domestic law obligations in accordance with the procedures established in their national legislation on anti-money laundering.

72 Turning to the second question in each case, the Government of Spain submits that in order to answer these questions, the Court will need to ascertain whether the obligations under national law are compatible with Article 36 EEA. In that regard, the Government of Spain stresses that, at the relevant time, there was no mechanism for cooperation and exchange of information that could have enabled host EEA States in all circumstances to effectively combat money laundering and terrorist financing. It adds that, although a due diligence requirement by the host EEA State may give rise to additional expense and administrative burdens, these would be relatively limited, particularly since trust and company service providers should already have identified the customer and verified its identity in the EEA State where they are situated.

73 At the outset, ESA argues that the cases require a balance to be struck between, on the one hand, the important aims of preventing money laundering and terrorist financing pursued by the Directive and, on the other, ensuring that the freedom to provide services of institutions and persons covered by the Directive is not unnecessarily restricted. ESA contends that the case law of the ECJ provides valuable guidance in this respect (reference is made to the judgment in *Jyske Bank*, cited above, paragraphs 59 and 62 and onwards).

74 Dealing with the first and second questions together, ESA submits that, although the Directive lacks some precision, it is in effect based on a home country control system. This is the case because whenever a specific reporting obligation is

imposed, the reporting is to be done to the competent authorities of the EEA State where the institution or person is situated, i.e. the State of origin (reference is made to the judgment in *Jyske Bank*, cited above, paragraph 43). ESA adds that the competent authorities of the EEA State of establishment are best placed to supervise compliance with the Directive. Moreover, the requirement under Article 36(1) of the Directive for EEA States to provide for trust and company service providers to be registered must entail that they only need register once, as any other interpretation would constitute a serious restriction on the fundamental freedoms.

75 ESA maintains that, consequently, the defendant was clearly bound by the due diligence requirements established in United Kingdom legislation. Nonetheless, the Directive, as a minimum harmonisation measure, does not preclude other EEA States from imposing due diligence requirements, as long as they seek to strengthen the effectiveness of the fight against money laundering and terrorist financing.

76 ESA is of the opinion that, in order to provide a satisfactory answer to the questions referred, the Court should also consider provisions of EEA law not mentioned in the questions. In this regard, ESA notes that the assumption underlying the references seems to be that the defendant provided services in Liechtenstein in accordance with Article 36 EEA and was not established there within the meaning of Article 31 EEA. ESA stresses that this is an issue for the referring court and the Appeals Board to assess in light of the concrete factual circumstances in which the defendant pursued his activities.

77 Continuing on the basis that Article 36 EEA applies to the present case, ESA notes that the defendant is established in the United Kingdom and is subject to its legislation. Any imposition of administrative requirements or formalities by Liechtenstein is therefore in principle liable to restrict the defendant's fundamental freedom to provide services. Notwithstanding that fact, national measures reinforcing due diligence obligations are in principle capable of being justified by reference to the objective of preventing the use of the financial system for the purpose of money laundering and terrorist financing, an objective recognised in recitals 1 and 3 in the preamble to the Directive as an important public policy objective. Moreover, this objective has been accepted as a legitimate aim capable of justifying a barrier to a fundamental freedom (reference is made to the judgment in *Jyske Bank*, cited above, paragraph 64).

78 Moving on to the issue of proportionality, ESA notes that the referring court and the Appeals Board must examine whether the legitimate public interest is not already safeguarded by the rules of the State of establishment to which the service provider is subject. A duplication of requirements must be justified, for example, by rendering more effective the combating of money laundering and terrorist financing in the absence of any effective mechanism guaranteeing full and complete cooperation between EEA States (reference is made to the judgment in *Jyske Bank*, cited above).

79 ESA adds that it may be useful to distinguish between the application of national rules transposing the Directive to foreign service providers and procedures for verifying that such service providers have complied with the national implementing rules of the EEA State in which they are established. In the latter case such additional verifications would, in principle, appear proportionate granted that the additional verifications are not unnecessarily burdensome for trust and company service providers, and merely involve the presentation of documents which are already kept on file by virtue of the obligations imposed in the service provider's State of establishment, e.g. in light of Article 30(a) of the Directive.

80 However, as regards the requirements to establish and verify the identity of the customer and renew such verification, those requirements seem substantially equivalent to the requirements under the implementing legislation of the United Kingdom. Therefore, the application of Liechtenstein legislation to the defendant would in that case constitute an unjustified duplication of the requirements. ESA argues that there are no provisions in the Directive expressly requiring documents to be either dated or signed. Furthermore, such requirements do not seem necessary in order to attain the objectives of the Directive.

81 Finally, ESA notes that an EEA State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom to provide services for the purpose of avoiding professional rules which would be applicable to him if he were established within that State (reference is made to the ECJ´s judgment in *van Binsbergen*, 33/74, EU:C:1974:131, paragraph 13).

82 The Commission's arguments are for the most part substantively the same as those of ESA. In addition, the Commission argues that further support for reading the Directive as including the home country principle can be found in Article 6, Article 22(2), and Articles 37 and 39 of the Directive.

83 With regard to proportionality, the Commission adds that it would tend to consider a requirement to keep in Liechtenstein all original records of the foreign trust and company service provider, such as certified copies of passports, transaction documents etc., as disproportionate, since less restrictive means can be envisaged in the case of cross-border provision of services, such as producing a copy of those records, upon request (reference is made, by analogy, to the ECJ´s judgment in *Arblade and Others*, C-369/96 and C-376/96, EU:C:1999:575, paragraph 65). According to the Commission, a similar conclusion appears to be warranted with regard to the requirements that the profiles of business relationships should be dated and signed. Finally, there should be no general presumption of fraud, leading to a full, systematic check on all entities established in other EEA States that provide services on a temporary basis in the host EEA State (reference is made to the ECJ´s judgment in *Commission* v *Belgium*, C-577/10, EU:C:2012:814, paragraph 53).

Findings of the Court

84 The Court notes that the regulatory framework at issue has been revised and amended, particularly with the introduction of Directive 2015/849. However, the assessment in the present proceedings must be based on the Directive as it stood at the relevant time.

85 The supervision of trust and company service providers under the Directive is governed by Articles 36 and 37 thereof, while cooperation between the competent authorities of the EEA States is addressed in Article 38. These provisions, in particular the requirement of licensing or registration in Article 36, demonstrate that, with regard to the supervision of trust and company service providers operating across borders, the references to EEA States and their competent authorities in the Directive must, in principle, be understood, as referring to the home EEA State of the service provider, which is the EEA State of establishment, and its competent authorities (see, for comparison, *Jyske Bank*, cited above, paragraphs 41 to 43). Consequently, the defendant, who resides in the United Kingdom, is already subject to due diligence requirements in the United Kingdom.

86 However, the Directive only provides for a minimum level of harmonisation and, in particular, Article 5 thereof allows EEA States to adopt stricter provisions, where those provisions seek to strengthen the combating of money laundering or terrorist financing (see, for comparison, *Jyske Bank*, cited above, paragraph 61).

87 Consequently, the Directive does not deprive host EEA States of their competence to adopt stricter measures with regard to the content and scope of customer due diligence obligations, and to apply those measures to trust and company service providers operating in their territory by means of the freedom to provide services (see, by analogy, *Jyske Bank*, cited above, paragraph 48). Therefore, the Directive must be interpreted as not precluding the host EEA State from laying down, in its national legislation, due diligence requirements for a trust and company service provider, established in another EEA State, who engages in activities such as those at issue in the present proceedings, in the territory of the host EEA State.

88 Beyond that, the Court recalls, that, according to established case law, it may, in order to provide a useful answer to national courts, extract, from all the factors provided by them and, in particular, from the statement of grounds in the order for reference, the elements of EEA law requiring an interpretation having regard to the subject-matter of the dispute (see Case E-25/13 *Gunnar Engilbertsson* v *Íslandsbanki hf.* [2014] EFTA Ct. Rep. 524, paragraph 52).

89 In order to provide a useful answer the Court notes that national legislation, adopted in order to achieve the objectives of the Directive by granting the host EEA State certain competences with regard to those who operate in their territory by means of the freedom to provide services, must be compatible with the fundamental freedoms guaranteed by the EEA Agreement, including Article 36 EEA which prohibits all restrictions on the freedom to provide services within the EEA.

90 National legislation that gives rise to difficulties and additional costs for activities carried out under the rules governing the freedom to provide services, and liable to be additional to the controls already conducted in the home EEA State of the trust and company service provider, thus dissuading the latter from carrying out such activities, constitutes a restriction on the freedom to provide services. This appears to be the case in the present proceedings. However, this must, ultimately, be determined by the referring court and the Appeals Board.

91 The Court adds that national legislation constituting a restriction on the fundamental freedoms may be justified where it meets an overriding requirement relating to the public interest and that interest is not already safeguarded by the rules to which the service provider is subject in the EEA State in which he is established and in so far as it is appropriate for securing the attainment of the aim which it pursues and does not go beyond what is necessary in order to attain it (see, for comparison, *Jyske Bank*, cited above, paragraph 60 and case law cited).

92 Taking account of recitals 1 and 3 in the preamble to the Directive, the Court finds that the prevention and combating of money laundering and terrorist financing constitute legitimate aims, capable of justifying a restriction on the fundamental freedoms (see, for comparison, *Jyske Bank*, cited above, paragraphs 62 to 64 and case law cited).

93 With regard to the issue whether the national legislation in question is suitable for attaining the aims it pursues, the Court recalls, having regard to recital 5 in the preamble to the Directive, that money laundering and terrorist financing are frequently carried out in an international context. Moreover, recital 15 in the preamble to the Directive states that anti-money laundering and anti-terrorist financing obligations should also cover trust and company service providers since the tightening of controls in the financial sector has prompted money launderers and terrorist financers to seek alternative methods for concealing the origin of the proceeds of crime and as such channels can be used for terrorist financing. In this regard, national legislation which enables supervision over trust and company service providers established in other EEA States, with regard to services provided in the territory of the host EEA State, appears to facilitate the gathering of information necessary for competent authorities of the host EEA State to combat money laundering and terrorist financing effectively within its territory. It follows that the legislation appears suitable for ensuring the public interests pursued. However, this is an issue that is, ultimately, for the referring court and the Appeals Board to assess.

94 As for proportionality, a balance must be struck between, on the one hand, the aims pursued by the Directive, notably the prevention of money laundering and terrorist financing and, on the other, ensuring that the freedom to provide services of institutions and persons covered by the Directive is not unnecessarily restricted.

95 In order to effectively combat money laundering and terrorist financing, an EEA State must be able to obtain the information necessary to enable it to identify and pursue possible infringements in that regard which take place in its territory or

which involve persons established on that territory (see, for comparison, *Jyske Bank*, cited above, paragraph 69). In cases where such information can be obtained through effective mechanisms of cooperation between the competent authorities of the EEA States, national legislation of a host EEA State imposing on a trust and company service provider operating in its territory an obligation to provide documents containing that same information, is, in principle, not justified.

96 However, the Court observes that the Directive does not lay down a framework for full cooperation between the competent authorities of the EEA States. Article 38 of the Directive provides only for limited cooperation, which appears not to have been put into effect. Furthermore, Council Decision 2000/642/JHA concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information (OJ 2000 L 271, p. 4) does not extend to the EEA Agreement. Consequently, the mechanism for cooperation between the competent authorities of the EEA States under the Directive suffers from certain deficiencies (see, for comparison, *Jyske Bank*, cited above, paragraph 73).

97 Accordingly, in the absence of an effective system of cooperation between the competent authorities of EEA States, a host EEA State is, in principle, not precluded from directly approaching a trust and company service provider in order to establish that its rules concerning the combating of money laundering and terrorist financing are respected. This should, however, be done in a proportionate manner. Therefore, host EEA States should not automatically subject all trust and company service providers, which operate in their territory by means of the freedom to provide services, to the full scope of application of national legislation. In particular, there should be no general presumption of fraud, leading to full, systematic checks of all those who are established in other EEA States and provide services on a temporary basis in the host EEA State (see, for comparison, *Commission* v *Belgium*, cited above, paragraph 53).

98 Furthermore, the Court finds that where the host EEA State requests information, such as documents, located in the EEA State of establishment, the host EEA State must grant the trust and company service provider a reasonable period of time to provide that information, e.g. by handing over copies of documents. In this regard, the appropriate length of the notice will depend on the volume of documents requested and the medium on which they are stored.

99 However, the assessment of proportionality in the present proceedings is ultimately a matter for the referring court and the Appeals Board to determine, having regard to all the facts and circumstances before them and the guidance provided by the Court.

100 For the sake of completeness, the Court notes that the guidance above is based on the premise that the defendant carried out his activities in Liechtenstein under the freedom to provide services and not the freedom of establishment. If the referring court and the Appeals Board find, however, that the defendant did not carry out his activities in Liechtenstein by means of the freedom to provide services, but as a trust and company services provider established there under Article 31 EEA, then

the activities of the defendant performed on grounds of that establishment fall under the supervision of the competent authorities in Liechtenstein.

101 In determining whether the defendant operated under the freedom of establishment or merely under the freedom to provide services, the referring court and the Appeals Board need to consider the duration, regularity, periodical nature or continuity of the defendant's activity in Liechtenstein. A person may, while still remaining within the scope of application of the freedom to provide services, equip himself with some infrastructure in the host EEA State, including an office, chambers or consulting rooms, in so far as such infrastructure is necessary for the purposes of performing the service in question (see, for comparison, the judgment in *Schnitzer*, C-215/01, EU:C:2003:662, paragraph 28 and case law cited). That situation must, however, be distinguished from that of a person who pursues a professional activity on a stable and continuous basis in another State where he holds himself out from an established professional base, to amongst others, nationals of that State. Such a person comes under the provisions on the freedom of establishment and not those on the freedom to provide services (see, for comparison, *Gebhard*, cited above, paragraph 28).

102 It follows from all the considerations above that the answer to the first two questions in each case is that the Directive must be interpreted as not precluding a host EEA State from making a trust and company service provider operating in its territory under the freedom to provide services subject to due diligence requirements laid down in its national legislation. However, in so far as such legislation gives rise to difficulties and additional costs for activities carried out under the rules governing the freedom to provide services and is liable to be additional to the controls already conducted in the home EEA State of the trust and company service provider, thus dissuading the latter from carrying out such activities, it constitutes a restriction on the freedom to provide services. Article 36 EEA must be interpreted as not precluding such legislation provided that it is applied in a non-discriminatory manner, justified by the objective of combating money laundering and terrorist financing, suitable for securing the attainment of that aim and does not go beyond what is necessary in order to attain it. In particular, for national supervisory measures of the host EEA State to be considered proportionate, there should be no general presumption of fraud, leading to full, systematic checks of all those who are established in other EEA States and provide services on a temporary basis in the host EEA State. Furthermore, the host EEA State must, when requesting information, such as documents, located in the EEA State of establishment, grant the service provider a reasonable period of time to provide that information, e.g. by handing over copies of documents. In this regard, the appropriate length of the notice will depend on the volume of documents requested and the medium on which they are stored.

The third questions

103 By the third question in each case, the referring court and the Appeals Board ask, in essence, whether the answers to the first and second questions are any different

where the company for which administrative services are provided is not incorporated in an EEA State.

Observations submitted to the Court

104 The Liechtenstein Government submits that the place of incorporation, whether within or outside the EEA, of companies that are the recipients of services listed in Article 3(7) of the Directive has no relevance whatsoever. Only the location of the trust and company service provider is of relevance.

105 The Government of Spain argues that there is no reason under EEA law for a different treatment if the company for which administrative services are provided is not incorporated in an EEA State. The Government of Spain adds that such companies are not granted any rights under Articles 34 and 39 EEA to provide services.

106 ESA and the Commission submit that the provisions of the Directive are intended to impose obligations on trust and company service providers irrespective of the place of incorporation of companies in respect of which they provide administrative services. As the defendant is an EEA national, established in an EEA State and engaging in economic activity in another EEA State, the application of Article 36 EEA is not influenced by the place of incorporation of companies in respect of which he provides services in the EEA.

Findings of the Court

107 The Court has already established that, with regard to the supervision of trust and company service providers, the Directive is, in principle, based on home State control and a minimum level of harmonisation. Article 5 of the Directive allows EEA States to adopt stricter provisions, where those provisions seek to strengthen the combating of money laundering or terrorist financing. The Court has also concluded that Article 5 must be interpreted as meaning that national legislation, adopted in order to achieve the objectives of the Directive by granting the host EEA State certain competences with regard to those who operate in their territory by means of the freedom to provide services, has to comply with the fundamental freedoms guaranteed by the EEA Agreement, including Article 36 EEA.

108 For these reasons, trust and company service providers are, in principle, only subject to supervision in their EEA State of establishment. That supervision extends to their activities regardless of the place of incorporation of a company in respect of which they provide administrative services, whether the place of incorporation is in an EEA State or outside the EEA.

109 The answer to the third question in each case must therefore be that the answers to the first and second questions do not differ where the company to which administrative services are provided is not incorporated in an EEA State.

V Costs

110 The costs incurred by the Government of the Principality of Liechtenstein, the Government of Spain, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Princely Court of Appeal of the Principality of Liechtenstein and the Appeals Board of the Financial Market Authority hereby gives the following Advisory Opinion:

1. **Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing must be interpreted as not precluding a host EEA State from making a trust and company service provider operating in its territory under the freedom to provide services subject to due diligence requirements laid down in its national legislation.**

2. **However, in so far as such legislation gives rise to difficulties and additional costs for activities carried out under the rules governing the freedom to provide services and is liable to be additional to the controls already conducted in the home EEA State of the trust and company service provider, thus dissuading the latter from carrying out such activities, it constitutes a restriction on the freedom to provide services. Article 36 EEA must be interpreted as not precluding such legislation provided that it is applied in a non-discriminatory manner, justified by the objective of combating money laundering and terrorist financing, suitable for securing the attainment of that aim and does not go beyond what is necessary in order to attain it. In particular, for national supervisory measures of the host EEA State to be considered proportionate, there should be no general presumption of fraud, leading to full, systematic checks of all those who are established in other EEA States and provide services on a temporary basis in the host EEA State. Furthermore, the host EEA State must, when requesting information, such as documents, located in the EEA State of establishment, grant the service provider a reasonable period of time to provide that information, e.g. by handing over copies of documents. In this regard, the appropriate length of the notice will depend on the volume of documents requested and the medium on which they are stored.**

3. **The Court's answers to the first and second questions do not differ where the company to which administrative services are provided is not incorporated in an EEA State.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 3 August 2016.

Theresa Haas
Acting Registrar

Páll Hreinsson
Acting President