REPORT FOR THE HEARING
in Joined Cases E-26/15 and E-27/15

REQUESTS to the Court pursuant to 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.

I Introduction

1. By a letter of 4 November 2015, registered at the Court as Case E-26/15 on 9 November 2015, the Princely Court of Appeal ("the referring court") made a request for an Advisory Opinion in criminal proceedings against B ("the defendant") pending before it. By a separate letter of 30 October 2015, registered at the Court as Case E-27/15 on 16 November 2015, the Appeals Board of the Financial Market Authority ("the referring authority") made a request for an Advisory Opinion in a case pending before it between the defendant and the Financial Market Authority (*Finanzmarktaufsicht*) ("the FMA").

2. The cases before the referring court and the referring authority concern the extent to which Liechtenstein legislation on money laundering and terrorist financing may apply to the activities of the defendant, an Austrian national living in the United Kingdom, who acts as a director for three foreign companies, but

carries out individual administrative activities on behalf of these companies in Liechtenstein.

II Legal background

EEA law

3. 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.*

4. 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.*

5. 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[1] ("the Directive") 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.[2] The decision entered into force on 1 April 2007.

6. 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*

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[1] OJ 2005 L 309, p. 15.

[2] OJ 2006 L 289, p. 23, and EEA Supplement 2006 No 52, p. 19.

only those persons that act as a company director or secretary for a third party and by way of business.

7. 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.

8. 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.

9. Article 1(1) of the Directive reads as follows:

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

10. 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);

...

11. 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;

...

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

...

21. 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[3]

22. 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 ("SPG").[4]

23. Article 2 of the SPG reads as follows:

> *1. For the purposes of this law, the following definitions apply:*
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> ...
>
> *(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;*
>
> ...

24. 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;*
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> ...
>
> *(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;*
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> ...

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[3] Translations of national provisions are unofficial.

[4] *Sorgfaltspflichtgesetz, LR 952.1*.

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.

...

25. 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:

...

(c) compile 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.

...

26. 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.

...

27. 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.

...

28. 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;

...

29. 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;

...

III Facts and procedure

30. 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.

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

32. In Case E-26/15, following an appeal by the defendant, the referring court is reviewing a judgment by the Princely Court of Justice (Fürstliches Landgericht) handed down on 13 July 2015. In that judgment, the defendant was convicted of a misdemeanour pursuant to Article 30(1)(a) of the SPG and sentenced to a suspended fine. That court found that in Vaduz, Liechtenstein, 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 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.

33. 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 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.

34. 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 was guilty of the misdemeanour specified in Article 30(1)(a) of the SPG.

35. 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.

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

37. 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 from 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.

38. 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, on behalf of third parties, as company director.

39. 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 from 1 February 2013 until at least 14 February 2014.

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

41. 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 referring authority sought an Advisory Opinion in Case E-27/15.

42. 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 procedure, oral procedure and final judgment.

IV Questions

43. The following questions were referred 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*)?**
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> **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?

44. 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 referring authority 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.

V Written observations

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

— 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.

VI Summary of the arguments submitted and answers proposed

Admissibility

46. The Liechtenstein Government contends that the referring court and the referring authority 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 the country 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.

The questions referred to the Court

Government of the Principality of Liechtenstein

47. Notwithstanding the submission on admissibility, 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.[5]

48. 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 the Court of Justice of the European Union ("ECJ") demonstrates that these words must be understood in accordance with their ordinary meaning.[6] 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.

49. Furthermore, 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.

50. 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.

51. 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)

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[5] Reference is made to the judgments 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.

[6] Reference is made to the judgment in *Jyske Bank*, C-212/11, EU:C:2013:270, paragraph 42.

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[7] can be relied upon in interpreting the Directive.

52. 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 more or less stands by itself. Due to the lack of comprehensive cooperation and information exchange between national supervisory authorities, the FMA cannot resort to the equivalent authority in the United Kingdom and ascertain whether and 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.

53. 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.

54. Elaborating on the issue of justification, the Liechtenstein Government states that the requirements under national law on 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 suited for attaining the aims which they pursue.

55. Moving on to consider 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 of verification by the FMA 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.

56. Turning to the third question in each case, 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

[7] OJ 2015 L 141, p. 105.

has no relevance whatsoever. Only the provider of trust and company services is of relevance.

57. Should the Court consider the cases admissible, the Liechtenstein Government proposes that the Court should provide the following answers to the questions referred:

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 requires that institutions and persons covered by the Directive, such as trust and service providers according to the definition in Article 3(7) of that Directive, are subject to the customer due diligence measures as foreseen in the Directive, in particular in its Articles 7, 8 and 9, of the legislation in EEA States in the territory of which they perform such services covered by the Directive, irrespective of the place of their "rechtlicher Sitz", registered office, central administration, principal place of business, or establishment.*

2. *If institutions and persons covered by Directive 2005/60/EC perform services covered by that Directive by relying on the rules on the freedom to provide services in the territory of an EEA State (host) and being established in another EEA State, each EEA State has to apply its legislation implementing that Directive to the extent necessary to effectively pursue and ensure the attainment of the aims of that Directive regarding the prevention of money laundering and terrorist financing, provided the national measures applied are suitable for attaining such aims and are proportionate. In cases of doubt with respect to the applicability of the national provisions, such (host) EEA State shall resort to the national provisions transposing that Directive fully guaranteeing the pursuance of that Directive's aim of an effective and efficient EEA-wide supervision of activities covered by that Directive.*

3. *The jurisdiction of incorporation of the company to which services in the meaning of Article 3(7) of Directive 2005/60/EC are provided is of no relevance for the question of applicability of customer due diligence measures provided for in the Directive.*

Government of the Kingdom of Spain

58. With regard to the first question referred 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.

59. 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.[8] It adds that the Directive does not constitute full harmonisation of this field.

60. 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.[9]

61. Furthermore, the Government of Spain stresses 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.[10]

62. 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.

63. Turning to the second question referred 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 expenses 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.

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[8] Reference is made to the judgment in *Jyske Bank*, cited above, paragraphs 46 and 62. Reference is also made to the Opinion of Advocate General Bot in the same case, EU:C:2012:607, points 48 to 50, 55 to 56 and 63.

[9] Reference is made to the judgment in *Jyske Bank*, cited above, paragraph 56.

[10] Reference is made to the judgment in *Jyske Bank*, cited above, paragraph 64. Reference is also made to the judgment in *Zeturf*, C-212/08, EU:C:2011:437, paragraphs 45 to 46.

64. Turning to the third question referred in each case, the Government of Spain argues that there is no reason under EEA law to dispense a different treatment if the company for which administrative services are provided is a company 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.

65. The Government of Spain proposes that the Court should provide the following answers to the questions referred:

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 meaning that "trust and company service providers" are not subject to the obligation to obtain information on the purpose and intended nature of the business relationship solely in accordance with the legislation of the Member State in which they are established. 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 allows Host States to adopt legislation to more effectively combat money laundering and terrorist financing and impose obligations to non-established subjects which operate in their territory under the freedom to provide services.*

2. *"Trust and company service providers" are under 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 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 in accordance with the legislation of the host Member State provided they carry out activities in its territory.*

3. *There is not any reason under EEA law to dispense a different treatment if the company for which administrative services are provided is a company not incorporated in a Member State.*

ESA

66. 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.[11]

67. 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, which, according to the ECJ, means the State of origin.[12] 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.

68. 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.

69. In ESA's view, 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 referring authority to assess in light of the concrete factual circumstances in which the defendant pursued his activities.

70. 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 give rise to a restriction of his 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 by the Directive itself in the first and third recitals in its preamble 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.[13]

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[11] Reference is made to the judgment in *Jyske Bank*, cited above, paragraphs 59 and 62 and onwards.

[12] Reference is made to the judgment in *Jyske Bank*, cited above, paragraph 43.

[13] Ibid., paragraph 64.

71. Moving on to the issue of proportionality, ESA notes that the referring court and the referring authority 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 in itself, for example, by rendering more effective the combat against money laundering and terrorist financing in the absence of any effective mechanism guaranteeing full and complete cooperation between EEA States.[14]

72. ESA adds that it may be useful to distinguish between any 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, as long as the additional verifications requested by Liechtenstein are not unnecessarily burdensome for trust and company service providers, and in particular involve merely 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, such additional verifications would, in principle, appear proportionate. 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.

73. ESA argues that, by contrast, there are no provisions in the Directive which expressly require documents to be either dated or signed. Furthermore, such requirements do not seem necessary in order to attain the objectives of the Directive.

74. 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.[15]

75. As regards the third question referred in each case, ESA submits 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.

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[14] Reference is made to the judgment in *Jyske Bank*, cited above.

[15] Reference is made to the judgment in *van Binsbergen*, C-33/74, EU:C:1974:131, paragraph 13.

76. ESA proposes that the Court should provide the following answers to the questions referred:

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 an EEA State on whose territory a 'trust and company service provider' established in another EEA State engages in activities such as those in issue in the present cases from making that provider subject to due diligence requirements laid down in its national legislation, as long as those requirements are justified by meeting an overriding requirement relating to the public interest which is not already safeguarded to the same level of protection by the rules to which the service provider is subject in the EEA State in which it is established, are appropriate for securing the attainment of the aim which they pursue and do not go beyond what is necessary in order to attain it.*

2. *The place of incorporation of a company in respect of which a 'trust and company service provider' provides administrative services, and whether or not such a company is incorporated in an EEA State, is immaterial for these purposes.*

The Commission

77. The Commission's arguments, with regard to the questions referred in each case, are for the most part substantively the same as those of ESA.

78. 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.

79. 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.[16] 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, systemic check on all entities

[16] Reference is made, by analogy, to the judgment in *Arblade and Others*, Joined Cases C-369/96 and C-376/96, EU:C:1999:575, paragraph 65.

established in other EEA States that provide services on a temporary basis in the host EEA State.[17]

80. The Commission proposes that the Court should provide the following answers to the questions referred:

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 legislation of an EEA State, adopted to prevent money laundering and terrorist financing, being made applicable to a trust and company service provider established in another EEA State and providing cross-border services on its territory, and thus conferring to its competent authorities the power to take supervisory measures and to apply penalties with a view to ensuring compliance of the service provider with those requirements, irrespective of where the recipient of the services rendered by the trust and company service provider is incorporated.*

2. *Such legislation needs to comply with Article 36 of the EEA Agreement. Article 36 of the EEA Agreement does not preclude such legislation if it is justified by the objective of combating money laundering and terrorist financing, if it is suitable for securing the attainment of that aim and if it does not go beyond what is necessary in order to attain it. In particular, national supervisory measures may be considered proportionate if they take into account the equivalent rules and controls to which the service provider is subject in the EEA State in which it is established, in view of avoiding a duplication of similar requirements, and if controls on service providers established in other EEA States are not based on a general presumption of fraud, but on concrete suspicions related to individual transactions concluded on their territory.*

Páll Hreinsson
Judge-Rapporteur

[17] Reference is made to the judgment in *Commission* v *Belgium*, C-577/10, EU:C:2012:814, paragraph 53.