JUDGMENT OF THE COURT

14 June 2001*

(Right of establishment – Single practice rule – Justification by overriding reasons of general interest)

In Case E-4/00

REQUEST 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 Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein) for an Advisory Opinion in the appeal against the decision of the Government of the Principality of Liechtenstein by

Dr Johann Brändle

on the interpretation of Article 31 of the EEA Agreement.

THE COURT,

composed of: Thór Vilhjálmsson, President, Carl Baudenbacher and Per Tresselt (Judge-Rapporteur), Judges,

Registrar: Gunnar Selvik

after considering the written observations submitted on behalf of:

– Dr Johann Brändle, represented by Toni Jäger;

– the Government of Liechtenstein, represented by Christoph Büchel, Director, EEA Coordination Unit, and Frank Montag, Rechtsanwalt;

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* Language of the Request for an Advisory Opinion: German.

– the Government of Iceland, represented by Högni S. Kristjánsson, Legal Officer, Ministry of Foreign Affairs, acting as Agent;

– the Government of Norway, represented by Helge Seland, Assistant Director General, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Anne-Lise H. Rolland, Officer, Legal & Executive Affairs, acting as Agent;

– the Commission of the European Communities, represented by Maria Patakia and John Forman, Legal Advisers, Legal Service, acting as Agents;

having regard to the Report for the Hearing,

after hearing the oral observations of the Government of Liechtenstein, the EFTA Surveillance Authority, represented by Michael Sanchez Rydelski, and the Commission of the European Communities at the hearing on 6 March 2001,

gives the following

Judgment

Facts and procedure

1 Dr Johann Brändle (hereinafter the "Complainant") is an Austrian national with an established medical practice in Rankweil, Austria. By an application dated 17 November 1997, the Complainant filed a request with the Liechtenstein Sanitätskommission (Board of Public Health) for the grant of a licence to set up and operate a medical practice in Liechtenstein.

2 The Sanitätskommission, by a decision dated 11 November 1999, refused to grant the licence applied for by the Complainant. The reason given for that decision was, essentially, that according to Article 9(1) of the *Verordnung vom 17 Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe* (Regulation on medical professions), a physician seeking a licence to practise in Liechtenstein may not operate more than one practice, regardless of location (hereinafter the "single practice rule"), and that a licence could not be granted until the Complainant had given up his practice in Austria and provided written confirmation to that effect from the Vorarlberger Ärztekammer (Vorarlberg Medical Association).

3 On 24 January 2000, the Complainant submitted to the Government of Liechtenstein a complaint against the decision of the Sanitätskommission, asking for the contested decision to be rescinded and for the licence to be granted. The

Government of Liechtenstein did not deal with that complaint within three months. On 8 May 2000, the Complainant submitted, by way of appeal, a further complaint to the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein. In the proceedings before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, the Complainant has raised issues concerning the compatibility of the single practice rule with the EEA Agreement.

4 The Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein decided to stay the proceedings and submit a Request for an Advisory Opinion to the EFTA Court on the following question:

> *Is the single practice rule applying without exception to all doctors under Liechtenstein national law, and in particular Article 9(1) of the Regulation of 8 November 1988 on the medical professions which provides: "A doctor may pursue his profession in a self-employed capacity, as a sole practitioner or jointly with others, only if he holds a licence authorising him to do so and only if he himself works on his own behalf in the practice concerned. A doctor may not operate more than one practice, whether as a sole practitioner or jointly with others" compatible with the EEA and/or with the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992?*

5 Reference is made to the Report for the Hearing for a detailed account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Findings of the Court

6 Before addressing directly the question formulated by the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, the Court finds it appropriate to consider a more general argument submitted by the Government of Liechtenstein. In the Government of Liechtenstein's contention, the case-law of the Court of Justice of the European Communities relating to the freedom of establishment under Article 43 EC is not directly relevant for the interpretation of the corresponding provision in Article 31 EEA. That contention is based on, *inter alia*, the argument that there are fundamental differences in the scope and purposes of the Community legal order and the EEA legal order.

7 The Court has consistently held that, when one is interpreting the EEA Agreement, it is necessary always to take into account that the objective of the Contracting Parties was to create a dynamic and homogeneous European Economic Area (see, *inter alia*, Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205, at paragraph 17). This point of departure has particular weight with regard to fundamental principles, such as the freedom of establishment set out in Article 31 EEA. The Court has, at the same time, recognised that there are differences in the scope and purpose of the EEA Agreement as compared to the

EC Treaty, and has stated that these differences might, under specific circumstances, lead to differences in interpretation (see Case E-2/97 *Mag Instruments* v *California Trading Company Norway* [1997] EFTA Court Report 127, at paragraph 25 *et seq.*). In the present case, the Court has not been presented with any specific circumstance which would compel it to disregard the case-law of the Court of Justice of the European Communities in respect of Article 43 EC (see Case E-3/98 *Rainford-Towning*, cited above, at paragraph 21). Therefore, the Court cannot accept the contention of the Government of Liechtenstein to the effect that the case-law of the Court of Justice of the European Communities is not relevant to the consideration of the EEA provisions raised in the present case.

8 In this case, the national court is essentially asking whether a national provision stating that a physician seeking a licence to practise in Liechtenstein may not operate more than one practice, regardless of location, is compatible with the provisions of the EEA Agreement.

9 The pursuit of an economic activity by an EEA national in an EEA State other than his State of nationality may, under the EEA Agreement, be governed by the chapter on the free movement of workers, or the chapter on the right of establishment, or the chapter on services, these being mutually exclusive (see Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, at paragraph 20).

10 In the present case, the Complainant, resident in and a national of Austria, seeks to take up and pursue, on a stable and continuous basis, activities as a self-employed physician in Liechtenstein, maintaining permanent premises there. This follows clearly from the Complainant's own pleadings. Therefore, the case must be dealt with under the rules on the freedom of establishment (see Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, cited above, at paragraphs 23 to 25).

11 Freedom of establishment is one of the fundamental principles of the EEA Agreement. Chapter 2 of Part III of the EEA Agreement contains the principal treaty provisions relating to the freedom of establishment within the EEA. Article 31 EEA provides as follows:

> "1. 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.
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> 2. Annexes VIII to XI contain specific provisions on the right of establishment."

12 This provision is specific and far-reaching. It refers explicitly to self-employed persons, and to the setting up of agencies, branches or subsidiaries. This indicates that the right to secondary establishments is equated with the right to establish a principal seat of activity. Article 31 EEA requires national treatment for nationals of other EEA States (see *inter alia* Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, cited above, at paragraph 33), and abolishes all restrictions on establishment between the Contracting Parties to the EEA Agreement.

13 Therefore, it is necessary for the Court to consider whether a single practice rule such as that at issue in the main proceedings constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

14 The Court of Justice of the European Communities has consistently held that the right of establishment entails the freedom to set up and maintain, subject to observance of the professional rules of conduct, more than one place of work within the Community (see, *inter alia*, Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351, at paragraph 20, and Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945, at paragraph 11).

15 The contested single practice rule does not distinguish between Liechtenstein physicians and physicians of other EEA States. It applies equally to all physicians seeking to operate a medical practice in Liechtenstein, regardless of whether they have their primary establishment in Liechtenstein or in any other EEA State, and regardless of their nationality and place of residence. There is no overt discrimination in this respect.

16 It is settled case-law that the rules of equal treatment prohibit not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, or through the exercise of administrative discretion with regard to exceptions and dispensations, would in practice lead to the same result (see, *inter alia*, Case E-3/98 *Rainford-Towning*, cited above, at paragraph 27).

17 The Court observes that, for physicians who have previously not conducted a practice, the contested single practice rule does not entail negative effects with regard to their establishment in Liechtenstein.

18 Nor does it provide a barrier to the establishment of a practice within the territory of Liechtenstein by those physicians who have already established a practice outside that country when, in their evaluation, the relative professional career prospects are such that they would be induced to give up the practice they already have established, or for those who, for reasons unconnected with their professional calculations, would discontinue their previous practice.

19 The practical effect of the single practice rule appears to be that it prevents physicians who are already in practice outside the territory of Liechtenstein from establishing a secondary practice in Liechtenstein. Having to give up an

established practice renders it less attractive for foreign physicians to establish themselves in Liechtenstein, and directly affects physicians' access to the market in that country. The negative consequences of the rule would be more likely to materialise for physicians established in another EEA State than for physicians already in practice in Liechtenstein.

20 From the submissions of the Government of Liechtenstein, it appears that a primary objective of the contested single practice rule is to limit the total number of physicians active in the country. This must mean that the rule is assumed to be an effective mechanism for restraining the inclination of non-national physicians to establish themselves in Liechtenstein, and that the rule is intended to function as a restriction on the general right to establishment for a large number of physicians from other EEA States.

21 The Government of Liechtenstein has submitted that the single practice rule at issue does not prevent physicians established in other EEA States from providing services to patients in Liechtenstein from their established practices abroad.

22 The Court finds that this circumstance does not remove the restrictive effect of the national rule with regard to secondary establishments. The fact that the contested national rule is not contrary to the provisions of the EEA Agreement relating to the freedom to provide services does not affect the compatibility of that national rule with the provisions of the EEA Agreement on the freedom of establishment.

23 The Government of Liechtenstein has also submitted that the high proportion of physicians from other EEA States practising in Liechtenstein implies that the single practice rule, in practice, has not had the effect of rendering it more onerous for nationals from other EEA States to establish themselves in Liechtenstein.

24 That argument cannot be accepted. The single practice rule may potentially dissuade physicians from other EEA States from establishing themselves in Liechtenstein. This is sufficient to establish a breach of Article 31 EEA. There is no requirement that an appreciable effect on cross-border establishment be demonstrated.

25 The Court concludes from the foregoing that a single practice rule such as that at issue in the main proceedings constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

26 The Court must now examine whether this restriction can be objectively justified so as to permit the continued application of such a single practice rule.

27 Non-discriminatory national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, such as the single practice rule at issue in the present case, can be justified only if they fulfil the following conditions: they must be justified by overriding reasons based on

the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective (see, to this effect, Case C-424/97 *Haim* [2000] ECR I-5123, at paragraph 57, and, most recently, Case C-108/96 *Mac Quen and Others* v *Grandvision Belgium*, judgment of 1 February 2001, not yet reported, at paragraph 26).

28 The Government of Liechtenstein has submitted that the underlying main objective of the single practice rule is the maintenance of the financial equilibrium of the Liechtenstein social security system. Protecting this equilibrium must be held to be an overriding reason based on the general interest, justifying a restriction on the freedom of establishment in this case. It is argued that if the single practice rule were disallowed, Liechtenstein would experience a significant increase in the number of medical practitioners. Such an increase in the supply of medical services in the country would simultaneously cause an artificial increase in the demand for such services. This would again lead to a corresponding rise in the expenditure relating to medical treatment in the Liechtenstein social security system. The Government of Liechtenstein has submitted that such increases in expenditure might threaten the sustainability of a health care system accessible to all.

29 Moreover, the Government of Liechtenstein has submitted that reasons connected with the maintenance of the high quality of medical services provided in Liechtenstein must also be taken into account. The single practice rule ensures the availability and continuity of presence of the practitioner. Medical practitioners who establish a second practice would not be able to provide the necessary continuous and permanent medical care for their patients as practitioners who exclusively operate one practice in the country.

30 The Court recalls that EEA law does not detract from the powers of the EEA States to organise their social security systems. In the absence of harmonisation at the EEA level, it is for each EEA State to determine whether and to what extent expenses for medical treatment are to be borne by the social security system.

31 The Court notes from the information presented to it that, under the Liechtenstein health system, a considerable share of the costs for medical treatment is covered by the social security system. Consequently, an increase in the demand for medical services may result in a corresponding increase in the expenditure of the social security system. That being so, it is necessary to consider whether the single practice rule is necessary and proportionate in order to limit opportunities for physicians to create artificial demand for their services.

32 It cannot be ruled out that, in certain circumstances, an increase in the supply of medical services in the country may lead to an increase in the demand for such services which does not reflect a real need among patients. However, there seem to be other, less restrictive means to deal with artificial and excessive supply-

induced demand than by restricting the freedom of establishment by way of a single practice rule.

33 The application of suitable control measures may be one way of preventing medical practitioners from exercising their profession in such a manner as to create artificial demand. All medical practitioners established in an EEA State must observe the national rules governing professional practice (see, *inter alia*, Case C-351/90 *Commission* v *Luxembourg*, cited above, at paragraph 11), and such rules may be used to limit the alleged risk of medical practitioners creating demand among their patients for unnecessary medical services. The observance of those rules may be encouraged by supervisory professional bodies or administrative agencies.

34 Economic considerations alone cannot justify a barrier to one of the fundamental freedoms provided for in the EEA Agreement (see Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931, at paragraph 41). In the present case, even a considerable difference in the expenditure expected over a range of years from increases in the consumption of medical services generated by the establishment of secondary medical practices would not by itself serve to justify the maintenance of the single practice rule.

35 It cannot be excluded that the risk of seriously undermining the financial balance of the social security system, and of jeopardising the sustainability of a health care system accessible to all, might nevertheless constitute an overriding reason in the general interest capable of justifying a barrier of that kind (see, *inter alia*, Case C-158/96 *Kohll* v *Union des Caisses de Maladie*, cited above, at paragraphs 41 and 50). The evidence presented in the case at hand does not, however, allow the Court to evaluate whether this risk will materialise.

36 As regards the submission concerning the maintenance of the high quality of medical services, the Court observes that it is not, under contemporary conditions, necessary for a physician to be close to the patient on a continuous basis after the treatment has been given. Modern transport and communications have obviated the need to require medical practitioners to work in one place only.

37 In this respect, the Court notes that the single practice rule does not require that physicians reside in Liechtenstein or be continuously available locally. Therefore, the general rule prohibiting medical practitioners from establishing a secondary establishment in Liechtenstein seems to be neither suitable nor necessary in order to attain the objective of maintaining the high quality of medical services.

38 It is recalled that in Case C-351/90 *Commission* v *Luxembourg*, cited above, at paragraph 14, the Court of Justice of the European Communities held that measures such as that in question here are compatible with EC law if “the restrictions which they entail are actually justified in view of the general obligations inherent in the proper practice of the professions in question” and do not discriminate on grounds of nationality. The circumstances in which the

consideration adduced by the Court of Justice of the European Communities might be invoked at some time in the future cannot be established theoretically.

39 In the context of indicating which circumstances could provide a basis for a finding that the application of a single practice rule would be "actually justified" for reasons which relate to the "general obligations inherent in the proper practice" of a profession, the Court refers to the geographical, demographic and sociological situation of Liechtenstein. The Court recalls that it has taken note of the express recognition by the EEA Council, in its Declaration on free movement of persons (OJ 1995 L 86/80), that "Liechtenstein has a very small inhabitable area of a rural character with an unusually high percentage of non-national residents and employees" and "acknowledge[d] the vital interest of Liechtenstein to maintain its own national identity" (see Case E-3/98 *Rainford-Towning*, cited above, at paragraph 40).

40 On the reasoning set out in the foregoing, and on the basis of what has been submitted to the Court, and without entering into any examination of questions of fact and their appreciation, this Court must hold that the contested single practice rule is not justified by overriding reasons based on the general interest.

41 In those circumstances, the answer to the national court must be that a national provision of a Contracting Party to the EEA Agreement which provides that a physician may not operate more than one practice, regardless of location, is incompatible with Article 31 EEA.

Costs

42 The costs incurred by the Government of Iceland, the Government of Norway, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein by an order of 13 June 2000, hereby gives the following Advisory Opinion:

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A national provision of a Contracting Party to the EEA Agreement which provides that a physician may not operate more than one practice, regardless of location, is incompatible with Article 31 EEA.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 14 June 2001.

Gunnar Selvik
Registrar

Thór Vilhjálmsson
President