REPORT FOR THE HEARING

in Case E-4/00

– revised[*] –

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 Articles 4, 31 and 33 of the EEA Agreement.

I. Introduction

1. By an order dated 13 June 2000, registered at the Court on 21 June 2000, the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein) made a Request for an Advisory Opinion in the appeal against the decision of the Government of the Principality of Liechtenstein by Dr Johann Brändle (hereinafter the "Complainant").

2. The dispute before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein concerns the compatibility with the EEA Agreement of a Liechtenstein provision requiring that a medical practitioner seeking a licence to practise in Liechtenstein may not operate more than one practice, regardless of location.

II. Legal background

EEA law

3. The questions submitted by the national court concern the interpretation of Articles 4, 31 and 33 EEA.

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[*] Amendments to paragraphs 41, 42, and 44.

4. Article 4 EEA reads as follows:

> *"Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."*

5. Article 31 EEA reads 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.*
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> *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."*

6. Article 33 EEA reads as follows:

> *"The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."*

National law

7. The national legislation contested before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein is the *Verordnung vom 17 Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe* (Regulation of 17 December 1996 amending the rules governing the medical professions, hereinafter the "Regulation on medical professions").

8. Article 9 of the Regulation on medical professions reads as follows:

> *"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."*

III. Facts and procedure

9. The Complainant, Dr. Johann Brändle, is an Austrian national with an established medical practice in Rankweil, Austria. It appears from the Request for an Advisory Opinion from the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein that the Complainant had sought to establish himself as a specialist in internal medicine in Liechtenstein.

10. By an application dated 17 November 1997/4 June 1998, 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.

11. The Sanitätskommission, by a decision dated 11 November/21 December 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 Regulation on medical professions, a medical practitioner may not operate more than one practice (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).

12. 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.

13. The Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein decided to stay the proceedings and submit a Request for an Advisory Opinion to the EFTA Court.

IV. Question

14. The following question was referred to the EFTA Court:

> **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?

V. Written Observations

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

– the Complainant, Dr Johann Brändle, represented by Toni Jäger;

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

– 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.

Dr Johann Brändle

16. In his written observations, the Complainant, Dr Johann Brändle, refers to the facts and arguments already set out in the Request for an Advisory Opinion, with accompanying enclosures, submitted by the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein.

17. The Complainant submits that the contested single practice rule is contrary to EEA law. It follows from Article 6 EEA that provisions of the EEA Agreement, in so far as they are identical in substance to corresponding rules of the EC Treaty, are to be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities. The Complainant refers to the judgments in *Commission* v *France*[1] and *Commission* v *Luxembourg*,[2] in which

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1 Case 96/85 *Commission* v *France* [1986] ECR 1475.

2 Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945.

the Court of Justice of the European Communities held similar single practice rules to be contrary to Community law.

18. The Complainant also draws attention to the *EFTA Surveillance Authority Annual Report 1998*, from which it follows that the EFTA Surveillance Authority has initiated formal proceedings against the Government of Liechtenstein for failure to comply with Article 31 EEA by reason of the contested single practice rule. The single practice rule prevents physicians with a medical practice in another EEA State from establishing themselves in Liechtenstein.

19. The Complainant proposes the following answer to the question:

> *"The 'single practice rule' applying to doctors under the national law of Liechtenstein, and in particular Article 9(1) of the Regulation of 8 November 1988 on the medical professions, is not in conformity with the EEA, and/or not compatible with the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992."*

The Government of Liechtenstein

The existence of overt or covert discrimination

20. The Government of Liechtenstein submits that the single practice rule at issue in the main proceedings is compatible with Article 31 EEA.

21. The Government of Liechtenstein argues that the contested single practice rule does not constitute either overt or covert discrimination prohibited by Article 31 EEA.

22. The single practice rule at issue applies equally to Liechtenstein nationals and to nationals of other EEA States. Neither a Liechtenstein national nor a national of another EEA State, who already operates a practice anywhere in the EEA, will be granted a licence to establish a practice in Liechtenstein. No exceptions to the single practice rule have ever been made. The single practice rule treats nationals of all EEA States in the same way. Therefore, it does not discriminate on grounds of nationality and, consequently, does not constitute overt discrimination prohibited by Article 31 EEA.

23. The Government of Liechtenstein acknowledges that, according to the case-law[3] of the Court of Justice of the European Communities, the principle of equal treatment prohibits not only overt discrimination on grounds of nationality,

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[3] Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153; Case 3/88 *Commission* v *Italy* [1989] ECR 4035; Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279.

but also all covert forms of discrimination which, by application of other criteria of differentiation, lead in fact to the same result.

24. The Government of Liechtenstein notes that the Court of Justice of the European Communities rejected single practice rules in *Commission* v *Luxembourg*[4] and *Commission* v *France*.[5] However, the Government of Liechtenstein submits that those cases differ on essential points from the present case, in terms of their wording, effect, and context. Moreover, the Court of Justice of the European Communities did not consider single practice rules inadmissible in principle, but merely deemed the justifications invoked in those cases to be insufficient. It was the specific circumstances in both judgments which led the Court to the conclusion that the single practice rules were applied in a discriminatory way.

25. By contrast, the single practice rule at issue in the present case applies without distinction to nationals and non-nationals of Liechtenstein and is, in practice, not applied more strictly to physicians practising in other EEA States than those practising in Liechtenstein. There is no available derogation to the single practice rule, and no exception has ever been made to it, either for physicians established in Liechtenstein, or for physicians established in other EEA States. Thus, there is nothing which can substantiate the assertion that the persons disadvantaged by the single practice rule are exclusively or mainly foreign nationals. Referring to case-law[6] of the Court of Justice of the European Communities, the Government of Liechtenstein argues that the contested single practice rule cannot be viewed as giving rise to indirect discrimination on grounds of nationality.

26. The Government of Liechtenstein adds that the present case also differs substantially from the situations in the judgments in *Ciola* v *Land Vorarlberg*[7] and *Rainford-Towning*,[8] in which extremely strict standards were applied to the question of non-discrimination. The provisions under scrutiny in those cases used as a distinguishing criterion not the nationality of the persons concerned, but their place of residence. The single practice rule at issue in the present case is in no way linked to any residence requirement in Liechtenstein. The single practice rule applies to all physicians already operating a practice in the EEA, be it in Liechtenstein or in any other EEA State, regardless of their nationality or their place of residence.

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4 See footnote 2.

5 See footnote 1.

6 Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877; Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897.

7 Case C-224/97 *Ciola* v *Land Vorarlberg* [1999] ECR I-2517.

8 Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

27. The Government of Liechtenstein submits that the extremely high proportion of medical specialists from other EEA States practising in Liechtenstein implies that the single practice rule has not had the effect of rendering it more onerous for nationals from other EEA States to establish themselves in Liechtenstein.

The existence of a restriction on the freedom of establishment

28. The Government of Liechtenstein acknowledges that the Court of Justice of the European Communities, in its judgments in *Commission* v *France*,[9] *Commission* v *Luxembourg*[10] and *Ordre des Avocats au Barreau de Paris* v *Klopp*,[11] found an infringement of the fundamental freedom of establishment, independently of the existence of any overt or covert discrimination. It follows that, even under the principle of equal treatment, of which Article 43 EC embodies a specific instance, a national measure which is applied without distinction to nationals and non-nationals of a Member State may still be considered incompatible, if it has the effect of restricting the right of establishment. The Court of Justice of the European Communities has followed this approach in several other cases.[12]

29. The Government of Liechtenstein considers that this progressive interpretation of Article 43 EC, which the Court of Justice of the European Communities has applied in its case-law on the single practice rule, is not directly relevant to the interpretation of Article 31 EEA.

30. Referring to the Advisory Opinion of the EFTA Court in *Rainford-Towning*,[13] the Government of Liechtenstein argues that, although the wording of Article 31 EEA is identical to that of Article 43 EC, the specific circumstances of the present case necessitate a different interpretation. This reasoning is based both on the fundamental differences in the scope and the purposes of the Community legal order and the EEA, and on the progressive development of the case-law of the Court of Justice of the European Communities on the freedom of establishment.

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9 See footnote 1.

10 See footnote 2.

11 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971.

12 Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897; Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877; Case C-53/95 *Inasti* v *Kemmler* [1996] ECR I-703; Case 292/86 *Gullung* v *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne* [1988] ECR 111; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

13 See footnote 8.

31. The Government of Liechtenstein submits that, through the progressive interpretation adopted by the Court of Justice of the European Communities, Community law reaches far into sensitive areas of national policy. Applying the same interpretation to the scope of the freedom of establishment under the EEA Agreement would affect Liechtenstein's autonomy to regulate its social policy. This interpretation is compatible with the objectives of Community law, but is not justifiable under the less ambitious intentions of the EEA Agreement.

32. The Government of Liechtenstein refers to *Opinion 1/91*[14] of the Court of Justice of the European Communities, in which the differences between the Community legal order and the EEA Agreement are discussed. The Government of Liechtenstein notes that the Contracting Parties to the EEA Agreement transferred no sovereign rights to the institutions which they set up. Therefore, they retain greater autonomy than the Member States of the European Communities, especially in the field of national legislative powers.

33. With the expansion of the EC Treaty in the field of social policy by the Treaty on the European Union and the Treaty of Amsterdam, the competence of the Community in the field of social policy was significantly increased. The EC Member States have, in the field of social policy, transferred sovereign rights to the Community institutions which go beyond the promotion of economic relations.

34. However, no such transfer of sovereign rights in the field of social policy has taken place under the EEA Agreement. If the EEA Agreement were to be extended to cover areas of national policy, the national ratification procedure and therefore the consent of the EEA States would be required.

35. The Government of Liechtenstein points out that the EEA Agreement is concerned solely with the promotion of trade and economic relations between the parties, whereas, within the EC Treaty, these objectives are not an end in themselves, but are instrumental in achieving economic and social progress "through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency".[15] The EEA Agreement contains no explicit reference to economic and monetary union. There is furthermore no equivalent commitment to establish an internal market as set out in Article 14 EC. The EEA is not intended to be an area without internal frontiers.

36. In the view of the Government of Liechtenstein, an interpretation of Article 31 EEA within the meaning of the judgments in *Commission* v *France*[16]

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14 *Opinion 1/91* [1991] ECR I-6079

15 Article 2 EU.

16 See footnote 1.

and *Commission* v *Luxembourg*[17] would depart from the actual wording of that provision, which embodies a specific instance of the principle of equal treatment laid down in Article 4 EEA. This results in a severe restriction of the EEA States' sovereign rights. Such an interpretation cannot find a valid basis in the EEA Agreement, which is a traditional international agreement. An interpretation of the EEA Agreement may not go beyond what is necessary for the furtherance of trade and economic relations.

37. The Government of Liechtenstein takes the view that, under Article 31 EEA, the freedom of establishment of physicians in Liechtenstein is guaranteed to the extent required in the EEA Agreement. Any further requirement or modifications of the relevant provisions in this field, in particular the elimination of the single practice rule, would go beyond the aim of strengthening trade between the EEA States. Therefore, even if the EFTA Court were to take the view that the single practice rule restricted the freedom of establishment, such a restriction would still be within the objectives of the EEA Agreement.

Assessment under the case-law of the Court of Justice of the European Communities

38. In the alternative, if the EFTA Court were to conclude that Article 31 EEA must be construed and applied in the same way as the corresponding Article 43 EC, the Government of Liechtenstein submits that the restrictions entailed by the single practice rule are nonetheless compatible with Article 31 EEA.

39. The Government of Liechtenstein argues that the Court of Justice of the European Communities, in *Commission* v *Belgium*,[18] accepted Belgian legislation which was substantially similar to the single practice rule at issue in the present case, in that it hindered the possibility of secondary establishment. The Court held that the national rule was non-discriminatory, and upheld it, without assessing its proportionality in relation to its restrictive effect on the freedom of establishment. The Government of Liechtenstein also refers to *Fearon* v *Irish Land Commission*,[19] on similar reasoning.

40. The Government of Liechtenstein argues, in essence, that it is difficult to see how the Court of Justice of the European Communities arrived at different results in *Commission* v *Belgium*,[20] on the one hand, and in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[21] *Commission* v *France*[22] and *Commission* v

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17 See footnote 2.

18 Case 221/85 *Commission* v *Belgium* [1987] ECR 719.

19 Case 182/83 *Fearon* v *Irish Land Commission* [1984] ECR 3677.

20 See footnote 18.

21 See footnote 11.

22 See footnote 1.

Luxembourg,[23] on the other hand. The Government of Liechtenstein contends that the latter judgments do not give a complete picture of the Court's case-law on secondary establishment. These differing results render it difficult to determine when the absence of discrimination on grounds of nationality alone is to be considered sufficient to show that the right of establishment has not been restricted.

41. In addition, there are substantial differences between the judgments in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[24] *Commission* v *France*,[25] and *Commission* v *Luxembourg*,[26] and the situation in the present dispute. In the opinion of the Government of Liechtenstein, the economic and socio-political contexts of the cases are entirely different. In particular, there is one phenomenon which characterises and influences the health market at issue in the present case, but may not be found with respect to the activities of lawyers at issue in the *Klopp* case: the phenomenon of supply-induced demand. Referring to the *Liechtenstein Health Report*,[27] the Government of Liechtenstein submits that the increase in the supply on the health market, such as the increase in the number of practices, results in an increase in the demand for medical services and, ultimately, in an increase in health expenditure. This phenomenon is principally based on the incapability of the potential customers (the patients) to decide upon objective and rational considerations on their state of health and whether to avail themselves of the medical services offered or not. Therefore, establishment of further practices may have the effect of (artificially) increasing demand for medical services.

42. The Government of Liechtenstein asserts that, due to the phenomenon of supply-induced demand, the implications of the establishment of secondary practices in the present case differs substantially from the situation in the *Klopp* case. In the case of physicians, the setting-up of secondary practices induces higher demand and therefore imposes higher, and often unbearable, costs on the health system of the host State. The single practice rules in these cases protect entirely different interests and, therefore, cannot be considered from the same point of view.

43. The Government of Liechtenstein adds that, in contrast to the situations in the cases *Commission* v *France*[28] and *Commission* v *Luxembourg*,[29] the single

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23 See footnote 2.

24 See footnote 11.

25 See footnote 1.

26 See footnote 2.

27 Professor Friedrich Schneider, *Aktuelle Entwicklungen im Gesundheitssystem von Liechtenstein unter dem besonderen Aspekt der Single Practice Rule* (Current Developments of the Health System in Liechtenstein with a Particular View to the single practice rule), 24 October 2000 (Annex I to the written observations of the Government of Liechtenstein).

28 See footnote 1.

practice rule at issue here does not, in practice, prevent access to the medical profession. Neither physicians nor patients are hindered in any way from providing/demanding cross-border medical services. Patients who avail themselves of the medical services offered by physicians in the neighbouring countries receive a complete refund by the Liechtenstein health insurances of the costs which arise. In addition, there is no other EEA State where so many representatives of the medical professions from other EEA States offer their services, invoking the freedom of establishment, as in Liechtenstein.

44. According to the Government of Liechtenstein, the single practice rule constitutes a measure aimed at regulating the increasing health expenditure and ensuring the high quality of the medical services provided, and is, therefore, part of the national legislation which regulates the health system in the country. Neither at Community level, nor in the framework of the EEA Agreement, has harmonisation of health systems taken place. Referring to *Decker* v *Caisse de Maladie des Employés Privés*,[30] the Government of Liechtenstein submits that it must be for the national legislation of each Member State to determine the conditions of the exercise of the medical profession and to regulate the way in which the health expenditures of the country are controlled. The Government of Liechtenstein asserts that there is no common definition of the exercise of the medical profession throughout the EEA. To ensure the high quality of the medical services provided in Liechtenstein, the professional rules of Liechtenstein's association of the medical professions require that a practitioner must be capable of operating a practice full-time. The Government of Liechtenstein submits that such provisions form part of the national legislation determining the ethics of the medical profession in the country. It is within the competence of the EEA States to adopt national rules aimed at ensuring the high quality of medical services in the country.

The justification of the single practice rule

45. In the alternative, if the EFTA Court takes the view that the single practice rule is a restriction on the freedom of establishment within the meaning of Article 31 EEA, the Government of Liechtenstein submits that the single practice rule must be considered as justified by imperative reasons relating to the public interest.

46. The Government of Liechtenstein states that, in accordance with the case-law of the Court of Justice of the European Communities, non-discriminatory national measures liable to restrict the freedom of establishment may be justified by imperative requirements relating to general interest if they fulfil three conditions: first, they must be suitable for securing the attainment of the

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29 See footnote 2.

30 Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

objective which they pursue; second, they must not go beyond what is necessary in order to attain the objective; third, the restriction of the freedom of establishment must be proportionate to the general interest of the objective pursued.

Imperative reasons relating to the general interest

47. The Government of Liechtenstein submits that the single practice rule at issue is adequately justified by imperative reasons relating to the general interest. The public interest at stake is the maintenance of the financial equilibrium of Liechtenstein's social security system in view of the significant increase in the number of practitioners which would otherwise occur, the sustainability of a health care system accessible to all, and the maintenance of the high quality of medical services provided in Liechtenstein.

48. According to the *Liechtenstein Health Report*,[31] the abolition of the single practice rule would have a serious effect on the financial equilibrium of the social security system and therefore endanger the sustainability of the current health system and the high quality of the medical services provided.

49. In relation to the abovementioned public interests, the Government of Liechtenstein refers to *Duphar and Others* v *Netherlands*,[32] from which it follows that Community law does not detract from the powers of Member States to organise their social security system. Member States may adopt provisions which not only promote financial stability but also eliminate the deficit of their health care system. Moreover, it follows from *Kohll* v *Union des Caisses de Maladie*[33] that measures connected with the control of health expenditures may be justified.

The specific nature of the health market

50. The Government of Liechtenstein asserts that the specific nature of the health system and the health market justifies the way in which the health system is funded and can remain beneficial and efficient. The Government of Liechtenstein finds support for this view in *Webb*.[34]

51. The Government of Liechtenstein submits that the health market and the health service in Liechtenstein are of an extraordinarily high standard and quality.

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31 See footnote 27.

32 Case 238/82 *Duphar BV and Others* v *Netherlands* [1984] ECR 523.

33 Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931.

34 Case 279/80 *Webb* [1981] ECR 3305.

52. The Government of Liechtenstein furthermore submits that the Liechtenstein health market is distinguished by being extremely liberal. Neither physicians nor patients are limited with regard to supply or demand of cross-border medical services. Physicians practising in Liechtenstein obtain a complete refund of the services covered by the health insurance. Patients enjoy a high degree of freedom in the choice of providers of medical services. They may consult physicians in other EEA States and receive a complete refund of their costs from the health insurance system.

53. In addition, the Government of Liechtenstein points out that, due to the small size of the country, there exists a strong interdependence between the health market in Liechtenstein and the development of the respective health regimes in Liechtenstein's neighbouring countries.

54. Referring to the *Liechtenstein Health Report*,[35] the Government of Liechtenstein also submits that the financial stability of the health system in Liechtenstein is exposed to growing pressure, due to increasing demand and continually rising health costs. Health insurers and insured patients have suffered from major increases in expenditure and premiums. One of the most important reasons for the cost increases in the health service is the rapid increase in the number of established physicians.

55. Based on collected statistical material,[36] the Government of Liechtenstein contends that the number of practitioners offering medical services in Liechtenstein is proportionally higher than in neighbouring countries. The financial stability of the health system in Liechtenstein is exposed to growing pressure due to an increasing demand and continually increasing health costs. Referring to the *Liechtenstein Health Report*,[37] the Government of Liechtenstein submits that the health expenditure *per capita* in Liechtenstein is already higher than in countries that traditionally have been assumed to spend most on their health service, such as Switzerland.

56. Referring to the *Liechtenstein Health Report*[38] and the Commission's *Report on Social Protection in Europe 1999*,[39] the Government of Liechtenstein points out that there is a strong correlation between the supply of medical services and the expenditure on the health system, namely, the phenomenon of

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35 See footnote 27.

36 Statistics on the number of physicians per inhabitants in Austria and Liechtenstein based on data provided by the Ärztekammer Wien and the Government of Liechtenstein, Department of Public Health and Social Affairs, October 2000 (Annex II to the written observations of the Government of Liechtenstein).

37 See footnote 27.

38 Ibid.

39 Commission of the European Communities: *Report on Social Protection in Europe 1999*, COM/2000/0163 final.

supply-induced demand. Supply-induced demand is, in particular, made possible in health systems with a high level of insurance coverage for treatment costs. On this basis, the Government of Liechtenstein states that the total health expenditure in Liechtenstein can be expected to rise significantly if the number of physicians offering medical services in Liechtenstein becomes even higher.

57. The Government of Liechtenstein observes that, since the health market in Liechtenstein was made accessible to physicians from other EEA States in 1997, there has been a sharp increase in the number of physicians operating in Liechtenstein. Based on the *Liechtenstein Health Report*,[40] the Government of Liechtenstein points out that the rise in medical expenses in Liechtenstein during the same period gives cause for concern.

58. The Government of Liechtenstein states that Liechtenstein needs to find ways to monitor its escalating health expenditure. One way consists of preventing an uncontrollable increase in the number of practising physicians, as implemented through the single practice rule.

The suitability of the single practice rule

59. The Government of Liechtenstein contends that the necessity of the single practice rule and its suitability for the maintenance of the financial stability and high quality of the Liechtenstein health system must be considered with reference to the specific nature of Liechtenstein's health market. The single practice rule must also be seen in conjunction with certain other measures which have been introduced during the health reform in Liechtenstein, in particular the *Hausarztsystem* (Family Doctor System), as described in the *Liechtenstein Health Report*.[41]

60. The single practice rule has for years been applied consistently in order to prevent further, unaffordable increases in the number of physicians and the ensuing rise in health costs, without at the same time preventing the establishment of practitioners from other EEA States.

61. It was in the light of these considerations that, during the reform of the health system in Liechtenstein, the Government of Liechtenstein opted for the maintenance of the single practice rule, rather than introducing a system requiring a licence from the national health insurance agencies, and allowing only a certain number of practitioners to provide services covered by health insurance in Liechtenstein.

62. The attractive economic conditions for operating a practice in Liechtenstein, the virtually complete refund of all medical expenses for services

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40 See footnote 27.

41 Ibid.

provided in the country, and the strong temptation for physicians to create supply-induced demand, all bring about a strong incentive for physicians to operate a practice, and particularly a second practice, in Liechtenstein. Moreover, health insurers in Liechtenstein pay considerably more for medical services than a physician would receive for the same services in another EEA State.

63. Referring to the *Liechtenstein Health Report*,[42] the Government of Liechtenstein contends that, if the single practice rule is abolished, health expenditure in Liechtenstein is likely to rise by between 26% and 34.8%, based on hypothetical calculations.

64. The Government of Liechtenstein points out that it is primarily Austrian physicians who are keen to establish secondary practices in Liechtenstein. Due to the adjacency of the two countries, those physicians can reap the benefits of having two practices close together.

65. The Government of Liechtenstein contends that nationals of EEA States who have not yet established a practice enjoy an advantage under the system of the single practice rule. They will generally be authorised to operate a practice in Liechtenstein. The single practice rule is only applicable to those who already operate a practice. It prevents exploitation by physicians of the economic advantages offered by Liechtenstein and its liberal health system through the establishment of secondary practices.

66. The Government of Liechtenstein contends that, under the influence of supply-induced demand, the rules of the market economy do not apply. The single practice rule reduces the possibility of creating artificial demand and increasing health expenditure. This ultimately benefits the consumers, as their contributions would otherwise be raised either by an increase in health insurance premiums or by an increase in costs.

67. The aim of the adopted Hausarztsystem is to intensify the relationship between patients and their physician in order to prevent supply-induced demand and thereby reduce costs. The Government of Liechtenstein submits that physicians who establish a second practice would not be able to provide the necessary continuous and permanent medical care for their patients as physicians who exclusively operate one practice in a country.

68. The Government of Liechtenstein submits, therefore, that the single practice rule is a suitable measure to secure the financial stability of the social security system, the sustainability of its health system, and the high quality of medical services provided in the country.

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42 Ibid.

The necessity of the single practice rule

69. The Government of Liechtenstein argues that the single practice rule does not go beyond what is necessary in order to maintain the objectives pursued. During the preparation of the health reform in Liechtenstein, other systems were considered in order to assess whether they constituted a less restrictive way to prevent excessive cost increases. The Government of Liechtenstein asserts that the single practice rule constitutes the least restrictive means of attaining the abovementioned objectives.

70. An increase in the number of physicians on a national health market results at the same time in an increase of the total health expenditure in that country. Several other EEA States have experienced this. Some of these EEA States, for example, Austria and Germany, have reacted to the increasing costs by introducing a licence system limiting the number of practitioners under the health insurance system. According to the Government of Liechtenstein, the Commission of the European Communities has deemed such a system of limiting the number of practitioners to be compatible with Community law, as long as practitioners from all Member States are guaranteed equal access to obtain a licence, under the same conditions, and in the same manner as nationals from the host Member State.

71. The Government of Liechtenstein contends that such systems may also employ conditions for admission under the health insurance scheme which might result in a considerably stronger restriction on the freedom of establishment. Liechtenstein operates a system with comparably limited restrictions and prerequisites.

72. Other public health regimes apply systems which limit the admission of practitioners as soon as there is a disproportionate number of practitioners in a certain area. However, such a reaction to an excessive number of physicians in the country may, in fact, result in a complete restriction of admissions for a certain period of time. Liechtenstein has chosen an approach which, in its result, is less restrictive, as it constantly allows practitioners of the EEA States to establish themselves in Liechtenstein. This approach was kept even though the representation of physicians in Liechtenstein (one for every 642 inhabitants in 2000) is generally higher than in other countries and the increase in the density of physicians in Liechtenstein gives cause for concern.

73. The Government of Liechtenstein claims that it must be the effect of a provision, and not merely the wording of a provision, which determines its compatibility or incompatibility with the EEA Agreement. The proportion in Liechtenstein of medical specialists from other EEA States (20% in 1999) is higher than in many other EEA States.

74. The Government of Liechtenstein emphasises that the role of the single practice rule is to reduce the attractiveness for all those who intend to exploit the economically advantageous conditions of a secondary practice in Liechtenstein. The measure simply prevents an increase in the number of suppliers and, therefore, an increase in health expenditure which does not at the same time contribute to the quality of the health system for the benefit of the patients.

75. According to the Government of Liechtenstein, it must be concluded that none of the systems which has been considered as an alternative to the single practice rule and the related Hausarztsystem offers a less restrictive means for the attainment of the financial equilibrium of the social security system. On the contrary, the single practice rule constitutes an extremely moderate restriction on access to the profession as a practitioner in Liechtenstein and achieves freedom of establishment in Liechtenstein to the greatest possible extent.

The proportionality of the single practice rule

76. The Government of Liechtenstein submits that the single practice rule is proportionate to the general interest of the objectives pursued.

77. The Government of Liechtenstein finds support for this submission in *Ramrath* v *Ministre de la Justice*.[43] In that case, the Court of Justice of the European Communities held that, in view of the special nature of certain professional activities, the imposition of specific requirements pursuant to the rules governing such activities cannot be considered incompatible with the EC Treaty. The aims pursued in that case are, to a certain extent, comparable to the objectives pursued by the Liechtenstein rule in the present case, namely, to ensure the medical availability and continuity of presence of the physician. Yet, the objectives pursued by the Liechtenstein rule in the present case go further, since it also concerns the financial stability of the health care system and the high quality of medical services rendered in the country.

78. The Government of Liechtenstein submits that the judgments in *Kohll* v *Union des Caisses de Maladie*[44] and *Decker* v *Caisse de Maladie des Employés Privés*[45] are also of importance in this connection, since, in those cases, the Court of Justice of the European Communities explicitly acknowledged that national measures may be justified if they attempt to protect the financial balance of the social security system. The two cases show the Court's awareness of the tremendous importance of the affordability and sustainability of the health systems of the Member States.

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43 Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351.

44 See footnote 33.

45 See footnote 30.

79. The Government of Liechtenstein states that, in the light of the considerable public interest element at stake, the single practice rule constitutes a tolerable restriction on the freedom of establishment.

80. Many other countries in Europe are challenged with comparable difficulties in securing the financial balance of their social security systems and the maintenance of affordable health regimes. However, it must be considered that, in the special case of Liechtenstein, due to the limited size of the country and its strong inter-dependence with the neighbouring countries, the public interest at stake takes on an even stronger significance.

81. The Government of Liechtenstein observes that, if it were to adopt a licence system regulating the admission of practitioners in the country, the number of practitioners from other EEA States would be considerably lower than it is under the current regime.

82. The Government of Liechtenstein concludes that the single practice rule is justified by imperative reasons relating to the general interest. It constitutes a non-discriminatory and suitable measure which is necessary to attain the intended objective and is proportionate to the general interest of the objective pursued.

Justification for the single practice rule under Article 33 EEA

83. If the EFTA Court were to conclude that the contested single practice rule constitutes a discriminatory measure, the Government of Liechtenstein submits that the rule may also be justified on grounds of public health under Article 33 EEA.

84. The Government of Liechtenstein states that the single practice rule prevents an increase in the number of suppliers who operate a practice in Liechtenstein merely as a sideline and thereby diminish the quality of the health system. The Government of Liechtenstein, while acknowledging the reasoning in *Commission* v *France*[46] and *Commission* v *Luxembourg*,[47] submits that, under the particular health system of Liechtenstein, the availability of the practitioner is indispensable to ensure the protection of the patients' health. Under the established Hausarztsystem, the general practitioner is the key person in the treatment of patients and the referral of patients to specialists and hospitals, and the presence of the practitioner is required to a much higher degree than in other health systems.

85. Moreover, the aforementioned arguments concerning the significance of the single practice rule in order to ensure a balanced medical service accessible to

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46 See footnote 1.

47 See footnote 2.

all, the financing of the social security system, the sustainability of the health system, and the high quality of the medical services provided, will also be valid in the assessment under Article 33 EEA.

86. Based on the arguments set out above, the Government of Liechtenstein proposes the following answer to the question:

> *"Article 31 of the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992 does not preclude a Member State from providing that a doctor may not operate more than one practice whether as a sole practitioner or jointly with others throughout the territory of the European Economic Area."*

The Government of Iceland

87. The Government of Iceland begins by stating that, as regards Article 31 EEA, the contested single practice rule is incompatible with the principle of freedom of establishment laid down in that provision.

88. The Government of Iceland does not dispute that the national provision at issue in the main proceedings applies equally to Liechtenstein nationals and nationals of other EEA States. However, the Government of Iceland asserts that a national provision of that kind can lead to indirect discrimination. The Government of Iceland contends, in essence, that the single practice rule will, by its very nature, be more onerous for physicians of other EEA States than for physicians of Liechtenstein, since the former have to give up their practice in that other EEA State in order to establish a practice in Liechtenstein.

89. The Government of Iceland argues that it is settled case-law of the Court of Justice of the European Communities, *inter alia*, *Ordre des Avocats au Barreau de Paris* v *Klopp*,[48] and *Gullung* v *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne*,[49] that, even if national provisions apply equally to all parties, irrespective of their nationality, they may still be contrary to Article 31 EEA.

90. The Government of Iceland adds that it is also contrary to the EEA Agreement for an EEA State to impose a single practice rule on its own nationals when they seek to establish themselves in another EEA State and thereby restrict their possibilities to pursue their profession in that other EEA State.

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48 See footnote 11.

49 Case 292/86 *Gullung* v *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne* [1988] ECR 111.

91. Referring to the judgment in *Commission* v *France*,[50] the Government of Iceland contends that a single practice rule in general is unnecessarily restrictive and that it, as such, is too far-reaching.

92. In the opinion of the Government of Iceland, the case-law[51] of the Court of Justice of the European Communities supports the view that it is contrary to the fundamental principles of Articles 31 and 34 EEA for an EEA State to require members of a profession who seek to establish themselves in that EEA State to give up their practice in another EEA State.

93. The Government of Iceland does not agree with the Government of Liechtenstein that the reasoning in *Commission* v *France*[52] is not applicable in the present case, since, in that case, the French physicians were allowed to open a second practice whereas that possibility was not available to practitioners from other Member States. According to the Government of Iceland, this fact was not decisive for the ruling, as the Court also found the rule to be unduly restrictive on its own, irrespective of any discriminatory effect.

94. As regards possible grounds of justification for the single practice rule at issue, the Government of Iceland states that the relevant legal basis to be considered is Article 33 EEA and the public health derogation set out in that provision. The Government of Iceland observes that it is settled case-law of the Court of Justice of the European Communities that this provision is to be interpreted narrowly.

95. The Government of Iceland refers to the judgment in *Commission* v *France*,[53] in which the Court of Justice of the European Communities held a similar single practice rule to be too far-reaching to be justified on grounds of public health.

96. The Government of Iceland argues that the Government of Liechtenstein has not shown that the single practice rule is necessary to maintain the financial equilibrium of the social security system and that the objective cannot be reached through less restrictive means.

97. The Government of Iceland states that an EEA State may, without infringing Article 31 EEA, adopt and apply national rules aimed at guaranteeing a certain level and quality of service to patients. It furthermore states that it is for

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50 See footnote 1.

51 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877; Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351; Case 96/85 *Commission* v *France* [1986] ECR 1475.

52 See footnote 1.

53 Ibid.

the EEA State concerned to regulate its social security system. This discretion of the Member States is confirmed by the case-law[54] of the Court of Justice of the European Communities. However, such a power has to be practised in accordance with the fundamental principles of the EEA Agreement.

98. The Government of Iceland proposes the following answer to the question:

> *"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 on the medical professions, is incompatible with the EEA Agreement."*

The Government of Norway

99. The Government of Norway states that the wording of Article 31 EEA suggests that what is required is the equal treatment of nationals and non-nationals, including a prohibition against direct discrimination. The Government of Norway observes, however, that the scope of the right of establishment has been given a wider interpretation in recent case-law from the Court of Justice of the European Communities and the EFTA Court. Referring to *Clean Car Autoservice* v *Landeshauptmann von Wien*,[55] *Merino García* v *Bundesanstalt für Arbeit*[56] and *Rainford-Towning*,[57] the Government of Norway contends 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, lead to the same result in practice.

100. The Government of Norway submits, furthermore, that it is settled case-law[58] of the Court of Justice of the European Communities that a person may be established in more than one Member State, in particular through the setting-up of agencies, branches or subsidiaries, or by establishing a second professional base.

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54 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351; Case 96/85 *Commission* v *France* [1986] ECR 1475; Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

55 Case C-350/96 *Clean Car Autoservice* v *Landeshauptmann von Wien* [1998] ECR I-2521.

56 Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279.

57 See footnote 8.

58 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351.

101. The Government of Norway states that it follows from the case-law[59] of the Court of Justice of the European Communities that any restriction on the freedom to set up a secondary establishment by requiring that a person give up his establishment elsewhere before he can establish himself in the host country needs justification. Such restrictions are considered to be national measures that are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement. Article 31(1) EEA would be deprived of its meaning if it did not include the right to maintain the business in the EEA State of origin.

102. The Government of Norway asserts that, if national rules of an EEA State have the effect of placing nationals of other EEA States in a less favourable position than their own nationals, and thus are liable to hinder or make less attractive the exercise of the right of establishment, such rules must, according to *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*,[60] fulfil four conditions: first, they must be applied in a non-discriminatory manner; second, they must be justified by imperative requirements in the general interest; third, they must be suitable for securing the attainment of the objective which they pursue; fourth, they must not go beyond what is necessary in order to attain it.

103. The Government of Norway submits that the contested single practice rule is a restriction within the meaning of Article 31 EEA, one which requires justification. The Government of Norway finds support for this view in *Commission* v *Luxembourg*.[61]

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59 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Case 96/85 *Commission* v *France* [1986] ECR 1475; Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945.

60 Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

61 See footnote 2.

104. The Government of Norway acknowledges that the single practice rule at issue in the main proceedings applies equally to Liechtenstein nationals and to nationals of other EEA States. There are no specific rules that apply only to non-nationals, as was the case in *Commission* v *France*,[62] nor are there exceptions that only apply to nationals, as was the case in *Commission* v *Luxembourg*.[63] However, it can be inferred that the purpose of the single practice rule is to discriminate against professionals from other EEA States.

105. In response to the Government of Liechtenstein's submissions on justification, as set out in the Request for an Advisory Opinion, the Government of Norway submits that restricting the growth in the number of physicians from other EEA States is not *per se* an "imperative requirement in the general interest".

106. The Government of Norway agrees that keeping health costs under control, maintaining the financial equilibrium of the social security system and maintenance of a medical and hospital security system are purposes that may constitute "imperative requirements in the general interest". The Government of Norway questions, however, whether the single practice rule is suitable for securing the attainment of such objectives, and argues that it goes beyond what is necessary in order to attain such objectives. More physicians would normally lead to lower costs per consultation, due to more competition. Cost control could be achieved by other means. The performance of medical services should also normally improve when there are more physicians, not the contrary. With modern transport and communication, there is no need to require physicians to work in one place only. Furthermore, the Government of Norway notes that it does not seem to be a requirement that physicians live in Liechtenstein to ensure that they are available locally 24 hours a day, but only that they have their sole place of work there.

107. The Government of Norway points out that arguments relating to keeping health costs under control, maintaining the financial equilibrium of the social security system and maintaining a sufficient supply of medical services were advanced by France and Luxembourg in *Commission* v *France*[64] and *Commission* v *Luxembourg*,[65] respectively, but the Court of Justice of the European Communities held in those cases that a single practice rule was "unduly restrictive".

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62 See footnote 1.

63 See footnote 2.

64 See footnote 1.

65 See footnote 2.

108. The Government of Norway adds that the grounds of justification can be considered to be within the concept of "public health" as set out in Article 33 EEA, but, having concluded that the single practice rule is unduly restrictive, it is clear that it cannot be justified under Article 33 EEA.

109. The Government of Norway proposes the following answer to the question:

> "*National legislation applying a single practice rule without exception to all doctors and dentists is in breach of Article 31 of the Agreement on the European Economic Area.*"

The EFTA Surveillance Authority

110. The EFTA Surveillance Authority begins by observing that the single practice rules were the object of the rulings of the Court of Justice of the European Communities in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[66] *Commission* v *France*[67] and *Commission* v *Luxembourg*.[68]

111. The EFTA Surveillance Authority states that, for the professions in question, the single practice rule dilutes the right of establishment enshrined in Article 31 EEA. Being a restriction of this fundamental freedom, the rule may only be compatible with the EEA Agreement if it can be justified by imperative requirements.

112. As regards possible grounds for justification of the single practice rule, the EFTA Surveillance Authority states that the main reason for the contested single practice rule appears to be that, in the absence of such a rule, the financial balance of the Liechtenstein social security system would be destroyed. In considering whether this can serve as a justification for the single practice rule, the EFTA Surveillance Authority refers to *Kohll* v *Union des Caisses de Maladie*[69] and *Decker* v *Caisse de Maladie des Employés Privés*,[70] in which the Court of Justice of the European Communities held that the risk of seriously undermining the financial balance of a social security system may constitute an overriding reason in the general interest capable of justifying a barrier to one of the fundamental freedoms.

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66 See footnote 11.

67 See footnote 1.

68 See footnote 2.

69 See footnote 33.

70 See footnote 30.

113. The EFTA Surveillance Authority states that it has no knowledge of any convincing proof to the effect that the financial balance of the Liechtenstein health insurance system would be seriously undermined by the absence of the single practice rule.

114. The EFTA Surveillance Authority adds that, even if sufficient proof had been provided, it would still have to be established that more suitable and less restrictive means could not be applied in order to achieve the same aim. It doubts whether that would be possible. In the view of the EFTA Surveillance Authority, it is not clear why one cannot apply cost reduction measures that do not restrict the fundamental freedoms. Furthermore, it is not clear how requiring physicians to give up their practice in other EEA States would preserve the financial balance of the social security system.

115. The EFTA Surveillance Authority notes that there are not, at present, any rulings by the Court of Justice of the European Communities in which an absolute and general restriction to the freedom of establishment has been justified by the need to preserve the financial balance of a social security system.

116. The EFTA Surveillance Authority proposes the following answer to the question:

> *"Article 31 of the EEA Agreement must be interpreted as precluding Liechtenstein from maintaining a provision of national law according to which doctors are required to give up any other establishment simultaneously held in other Member States in order to operate a practice in Liechtenstein."*

The Commission of the European Communities

117. The Commission of the European Communities refers to the arguments put forward in its written observations in Case E-6/00 *Dr Jürgen Tschannett*. In that case, the Commission begins by referring to the judgment of the EFTA Court in *State Dept Management Agency* v *Íslandsbanki-FBA hf*,[71] and observes that, since the principle of non-discrimination has been given effect in the field of the right of establishment by Article 31 EEA, Article 4 EEA does not require further consideration.

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[71] Case E-1/00 *State Debt Management Agency* v *Íslandsbanki-FBA hf*, judgment of 14 July 2000 (not yet reported).

118. Referring to the very broad understanding of the concept of establishment adopted by the Court of Justice of the European Communities in its judgments in *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[72] and *Reyners* v *Belgium*,[73] the Commission does not object to the single practice rule at issue in this case being assessed in the context of Article 31 EEA.

119. The Commission of the European Communities contends that Article 33 EEA is not applicable in this case, since the contested national provision constitutes a non-discriminatory measure which is applied without distinction.

120. As regards Article 31 EEA, the Commission of the European Communities contends that the single practice rule in question restricts the right of establishment. The Court of Justice of the European Communities held in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[74] *Stanton* v *Inasti*,[75] and *Inasti* v *Kemmler*[76] that the right of establishment includes the freedom to set up and maintain more than one place of work in the Community. The single practice rule runs counter to this, by preventing physicians of other EEA States from taking up and pursuing their activities in Liechtenstein, if they want to carry on working in their home State.

121. In support of the view that the single practice rule constitutes a restriction on the freedom of establishment, the Commission of the European Communities relies on *Commission* v *France*,[77] in which the Court of Justice of the European Communities held *inter alia* that requiring physicians established in another Member State to cancel their enrolment or registration in that other Member State in order to be able to practise their profession in the State in question, as a principal in a practice, was against the EC Treaty. The basis of the reasoning in that case was that the discrimination against practitioners established in other Member States, who were excluded from opening a further practice in the State in question, represented a restriction not similarly applicable to nationals of that State. In addition, the Court considered that such a general rule was unduly restrictive.

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72 See footnote 60.

73 Case 2/74 *Reyners* v *Belgium* [1974] ECR 631.

74 See footnote 11.

75 Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877.

76 Case C-53/95 *Inasti* v *Kemmler* [1996] ECR I-703.

77 See footnote 1.

122. As regards possible justification for the single practice rule, the Commission of the European Communities begins by referring to *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*.[78] According to that ruling, national measures liable to hinder or make less attractive the exercise of fundamental freedoms must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in 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 it.

123. The Commission of the European Communities does not agree with the Government of Liechtenstein that the single practice rule can be justified on the grounds that it constitutes a means of keeping health costs under control and of maintaining the financial equilibrium of the social security system. In setting out its view, the Commission refers to *Kohll* v *Union des Caisses de Maladie*,[79] in which the Court of Justice of the European Communities held that it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute a ground of justification. However, the Commission of the European Communities contends that, in the absence of any further evidence, the situation in Liechtenstein does not fall within the parameters set out in that judgment. The Commission's reasoning for that is threefold: first, cross-border provision of services by physicians operating a practice outside Liechtenstein is not covered by the national provision at issue, even though this could also have an effect on the social security system; second, the contested national provision would not necessarily lead to a quantitative limitation of physicians which might have an impact on the health budget, since physicians may set up a practice in Liechtenstein if they give up their practice in their country of origin; third, the national provision at hand could apply without there necessarily being any link between the physician in question and the social security system.

124. The Commission of the European Communities adds that, in its view, national provisions may not determine to what extent physicians are obliged to be present in their respective practices, save as in exceptional circumstances. To insist that physicians should work exclusively in one practice would have entirely the same result as the single practice rule. The Commission refers to *Commission* v *Luxembourg*.[80]

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78 See footnote 60.

79 See footnote 33.

80 See footnote 2.

125. The Commission of the European Communities proposes the following answer to the question:

> *"Article 31 of the EEA Agreement on the right of establishment precludes a national law which provides that doctors may only operate in a single practice. Such a measure is justifiable neither as a means of keeping health costs under control nor of maintaining the financial equilibrium of the social security system of an EFTA State except where it could be demonstrated that this was required by overriding reasons in the general interest. Nor is a national law compatible with Article 31 EEA to the extent that it obliges a doctor to have a certain presence in a particular practice except where it could be shown that this was required – and then only to the extent necessary – to ensure the well-being of patients. The legitimacy, or otherwise, of any such exceptional provision would be for the national courts to determine."*

Per Tresselt
Judge-Rapporteur