REPORT FOR THE HEARING
in Case E-5/10

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 the Fürstliches Obergericht (Princely Court of Appeal, hereinafter "the Obergericht"), Liechtenstein, in a case pending before the Fürstliches Landgericht (Princely Court of Justice, hereinafter "the Landgericht") between

Joachim Kottke

and

Präsidial Anstalt and Sweetyle Stiftung

on the question whether the prohibition on discrimination, contained in particular in Article 4 of the EEA Agreement, prohibits the imposition of an obligation on claimants who reside in another EEA State to provide security for legal costs, if claimants who reside in Liechtenstein are not obliged to provide such security.

I Introduction

1. By an order of 19 May 2010, the Obergericht made a request for an Advisory Opinion, registered at the Court on 27 May 2010, in a case pending before it between Joachim Kottke (hereinafter "the Plaintiff") and Präsidial Anstalt and Sweetyle Stiftung (hereinafter "the Defendants").

II Facts and procedure

2. The Plaintiff, a lawyer in Nuremberg, Germany, acts as the executor of the will of the late Edith Reiner, formerly resident in Nümbrecht, Germany. He has filed a case before the Landgericht in which he seeks to establish that various instructions issued by the deceased to Präsidial Anstalt, registered in Vaduz, Liechtenstein, to establish Sweetyle Stiftung, also registered in Vaduz, are void, ineffective or must be set aside.

3. At the first hearing before the Landgericht on 22 January 2010, the Defendants applied for an order in accordance with Article 57(1) of the Code of Civil Procedure (Zivilprozessordnung) requiring the Plaintiff to provide security for the legal costs likely to be incurred by the Defendants in the proceedings to the amount of CHF 125 000.

4. The Plaintiff objected to that application, submitting that to impose an obligation to provide security for costs would be contrary to the EEA Agreement.

5. By an order of 3 March 2010, the Landgericht granted the order sought and instructed the Plaintiff to deposit CHF 125 000 within four weeks as security for the legal costs of the Defendants, in cash, by transferring the amount to an account held by the Landgericht or in the form of an unlimited bank guarantee issued by a bank based in an EEA State. In the alternative, the Plaintiff was ordered to request that a hearing be scheduled within the same period for him to affirm by oath his inability to provide the security required by the Landgericht, otherwise following an application by the Defendant the Plaintiff's action would be deemed withdrawn. The Plaintiff was ordered of the court's own motion also to deposit CHF 4 000 as security for court fees within four weeks, subject to the same conditions as the security for costs and with the same consequences.

6. The Plaintiff appealed against that order to the Obergericht, arguing that the order should be dismissed as the imposition of an obligation on a foreign claimant not resident in Liechtenstein to provide security for costs is incompatible with the EEA Agreement, as is further explained in paragraphs 20-25 below.

III Questions

7. The following questions were referred to the Court:

> **1. Does the Agreement on the European Economic Area, which entered into force in Liechtenstein on 1 May 1995, constitute a (multilateral) treaty which, as a result of the prohibition on discrimination contained particularly in Article 4 thereof, prohibit an obligation to provide security for costs from being imposed on claimants who reside in another EEA Member State if claimants who reside in Liechtenstein are not obliged to provide such security for costs?**
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> **2. In the event that the first question is answered in the negative: is the provision contained in point 1 of Article 57(2) of the Liechtenstein Zivilprozessordnung (Code of Civil Procedure), whereby a waiver of the obligation on claimants who reside in another State to provide security is made conditional upon the possibility of enforcement in the country of residence, compatible with the EEA Agreement, in particular with the general prohibition on discrimination under Article 4 thereof, insofar as it applies to claimants who reside in an EEA Member State?**

IV Legal background

National law

8. The costs of pursuing civil action in Liechtenstein are governed in principle by the Civil Procedure Act of 10 December 1912, LR 271.0 (Gesetz vom 10. Dezember 1912 über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten, LR 271.0, known as the Zivilprozessordnung (Code of Civil Procedure), hereinafter "the ZPO").

9. According to Article 40(1) ZPO, initially, each party must bear its own costs of a civil action. However, a party may be entitled to recover costs from its opponent on the basis of Article 41(1) ZPO, which stipulates that the unsuccessful party must reimburse its opponent for all necessary litigation costs occurred in bringing the action or pursuing the defence. Pursuant to Article 52(1) ZPO, a decision must be made on liability for costs in every judgment or order fully adjudicating the case at that instance.

10. These costs are further specified in the Court Fees Act of 30 May 1974, LR 173.31 (Gesetz vom 30. Mai 1974 über die Gerichtsgebühren, LR 173.31 (Gerichtsgebührengesetz)); the Scale of Legal Fees Act of 16 December 1987, LR 173.511 (Gesetz vom 16. Dezember 1987 über den Tarif für Rechtsanwälte und Rechtsagenten, LR 173.511), and the Scale of Legal Fees Ordinance of 30 June 1992, LR 173.511.1 (Verordnung vom 30. Juni 1992, über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten, LR 173.511.1).

11. When a decision imposing the obligation on a party to pay its opponent's costs becomes final, that decision is regarded as an executory order for the purposes of Article 1(a) of the Execution of Judgments Act of 24 November 1971, LR 281.0 (Gesetz vom 24. November 1971 über das Exekutions- und Rechtssicherungsverfahren (Exekutionsordnung)). According to the Act, execution may be carried out on any movables or immovables belonging to the debtor, provided that these assets are held in Liechtenstein. Thus, if a claimant loses a case, he will be liable to reimburse the defendant's costs. The judgment dismissing the action together with the decision on costs constitutes the execution order. Where that claimant resides outside Liechtenstein, the defendant will have to enforce the order for payment of costs abroad.

12. The legal basis for imposing an obligation to provide security for costs on a natural person is set out in Article 57 ZPO, as amended by LGBl. 2009, No 206, which has been in force since 14 July 2009. Article 57 reads:

> *Security for costs*
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> *(1) If persons without residence in Liechtenstein appear as claimants or appellants, they shall, on an application by the defendant or respondent,*

provide the latter with security for costs unless international treaties provide otherwise.

(2) Such an obligation to provide security for costs shall not, however, arise:

1. *if a court decision ordering the claimant or appellant to bear the costs of the defendant or respondent can be enforced in the state of residence of the claimant or appellant;*

2. *if the claimant or appellant owns sufficient assets consisting of immovables or receivables registered as secured on such property to cover the costs, and a court decision ordering the claimant or appellant to bear the costs can be enforced in the state in which those immovables are situated;*

3. *in matrimonial disputes during the entire proceedings;*

4. *in actions of trespass with possession* ("Besitz-störungsverfahren"), *in actions based on a deed* ("Mandatsverfahren"), *in actions based on a bill of exchange* ("Wechselverfahren"), *in counterclaims, as well as in actions brought as the result of a public notice for the entire proceedings.*

(3) If an uncertainty arises concerning the application of a treaty or concerning the enforceability of an order on costs, a statement of the Government on that matter shall be obtained. That statement shall be binding on the court.

Article 57a

If a legal entity appears as claimant or appellant, the defendant or respondent may demand security for costs if this legal entity is not able to show evidence of assets in the amount of the anticipated costs subject to enforcement by a judgment imposing a duty to pay costs to the defendant or respondent.

13. As regards the exception pursuant to point 1 of Article 57(2) ZPO, relating to whether a court decision on costs can be enforced in the claimant's state of residence, Liechtenstein has entered into bilateral agreements with Switzerland and Austria on the reciprocal recognition and enforcement of court orders.[1]

[1] Agreement of 25 April 1968 between the Principality of Liechtenstein and the Swiss Confederation on the Recognition and Enforcement of Court Orders and Arbitral Verdicts in Civil Matters, LR 0.276.910.11, and Agreement of 5 July 1973 between the Principality of Liechtenstein and Austria on the Recognition and Enforcement of Court Decisions and Arbitral Verdicts in Civil Matters, LR. 0.276.910.21).

EEA law

14. Article 4 of the EEA Agreement reads:

> *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.*

15. Article 36(1) of the EEA Agreement reads:

> *Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

16. Article 39 of the EEA Agreement reads:

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

17. Article 33 of the EEA Agreement reads:

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

V Written Observations

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

- The Plaintiff, represented by Dr Harald Bösch, Rechtsanwalt;

- The Defendants in the national proceedings, Präsidial Anstalt and Sweetyle Stiftung, both represented by Ritter & Wohlwend, Rechtsanwälte, Dr Helmut Wohlwend, Mr Stefan Ritter, Mr Raphael Näscher and Mr Samuel P. Ritter, Attorneys-at-law;

- The Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, EEA Coordination Unit, acting as Agent;

- The EFTA Surveillance Authority, represented by Xavier Lewis, Director, Florence Simonetti, Officer and Jóhanna Katrín

Magnúsdóttir, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents; and

- The European Commission, represented by Friedrich Erlbacher and Minas Konstantinidis, Members of its Legal Service, acting as Agents.

The Plaintiff

19. The Plaintiff argues that a claimant residing in an EEA Member State other than Austria loses his legal protection if he fails to provide security for legal costs, in full, in part or on time. In the Plaintiff's view, this form of obligation constitutes a serious constraint on his legal position, liable to unduly impede legal action, if not making it impossible.

20. The Plaintiff argues that a national provision such as Article 57(1) ZPO that differentiates between claimants on the basis of residence by imposing a certain obligation on non-residents, which is not imposed on residents, disadvantages primarily nationals of other EEA States, since non-residents are usually foreigners. Article 57(1) ZPO thus results in indirect discrimination on grounds of nationality contrary to the prohibition on discrimination in Article 4 EEA. In this respect, the Plaintiff points out also that due to the restrictive rules on residence in Liechtenstein, it is generally impossible for other EEA nationals to avoid the obligation to provide security for costs.

21. In the view of the Plaintiff, the provisions on providing security under the ZPO cannot be justified under the EEA Agreement. The Plaintiff notes that others seek to justify the provisions by reference to a lack of bilateral treaties on the enforcement of judgments which makes it almost impossible for defendants to enforce Liechtenstein judgments abroad. The Plaintiff notes further that it has been argued that the proper administration of civil justice necessitates the imposition of security for legal costs unless an international agreement has been concluded or the right of the opposing party guaranteed.[2]

22. The Plaintiff disagrees with this argument, submitting that the provision of security ensures only the collectability of a right to recover the costs of a legal action. The Plaintiff notes that Article 57(1) ZPO places only the claimant under an obligation to provide security for costs. If he wins the legal dispute, however, there is absolutely no guarantee that he will be able to recover his legal costs from the unsuccessful domestic defendant.

23. The Plaintiff submits further that even if the absence of a statutory obligation to provide security for costs were to jeopardise the proper administration of civil justice, that would not constitute sufficient justification for

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[2] The Plaintiff refers in this respect to W. Ungerank, 'Entsprechen die nunmehrigen Bestimmungen der ZPO betreffend die Sicherheitsleistung für Prozesskosten dem EWR-Recht?', LJZ 2/10, p. 32 et seq.

the indirect discrimination of EEA nationals neither residing nor having assets in Liechtenstein. The Plaintiff observes that Liechtenstein is free to conclude bilateral agreements to enable orders for recovery of costs to be enforced within the EEA, and explicit reference is made to such agreements in point 1 of Article 57(2) ZPO. The Plaintiff concedes that as a matter of international law Liechtenstein may not be under any obligation to accede to the Lugano Convention[3] or any other bilateral or multilateral agreements to the same end. However, in the view of the Plaintiff, Liechtenstein has an obligation to abolish or suspend domestic measures discriminating against EEA nationals on the basis of its duty to honour the EEA Agreement and the precept of loyalty to the Agreement, *cf.* Article 3 EEA.

24. The Plaintiff asserts that from a practical point of view it may by no means be presumed that security for legal costs is essential for the proper administration of civil justice. However, if that presumption is made, less intrusive measures could certainly be adopted, such as the conclusion of relevant bilateral or multilateral agreements.

The Defendants

25. As regards the first question, the Defendants argue that the scope of the derogation for treaties in Article 57(1) ZPO is restricted to procedural treaties, in particular those concerning the reciprocal waiver of the obligation to provide security for costs, as well as recognition and enforcement agreements or similar provisions contained in such treaties.

26. According to the Defendants, this conclusion results not only from the wording of Article 57(1) ZPO, but also, in particular, from a historical and teleological interpretation of the Article, as well as the relevant case law and academic opinion on the foreign provision (Article 57 of the Austrian Code of Civil Procedure) giving rise to the Liechtenstein rule.

27. In the Defendant's view, it is clear from those sources that the original authors of the Liechtenstein ZPO intended to grant an exemption from the general obligation on claimants residing abroad to provide security for costs, only if a reciprocal waiver was established by treaty, and/or recognition and enforcement of Liechtenstein decisions on costs was ensured in the claimant's country of residence. The Defendants submit that this interpretation is confirmed by the amendments to Article 57(1) ZPO in 2009.

28. As the EEA Agreement is not a procedural treaty and civil procedure is not an EEA matter, the Defendants submit that it is without question that the EEA Agreement and its provisions do not fall within the scope of the derogation for treaties established in Article 57(1) ZPO.

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[3] The Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters, OJ 1988 L 319, p. 9.

29. Turning to the second question, the Defendants argue that even if it were presumed that Article 57 ZPO constitutes indirect discrimination for the purposes of Article 4 EEA, this would be justified on the grounds of proper administration of civil justice.[4]

30. The Defendants note that under the current legal situation applicable in Liechtenstein and the other EEA States with the exception of Austria it is not possible to enforce a Liechtenstein decision on costs as other EEA Member States do not recognize these decisions as enforcement orders. Thus, assets located in other EEA States cannot be seized or subject to enforcement proceedings on the basis of a Liechtenstein decision.

31. The Defendants argue that provision of security has the aim of preventing a foreign claimant from being able to bring legal proceedings without running any financial risk in the event that he should lose the case. It is noted that since enforcement of Liechtenstein decisions is impossible in Germany and other EEA States, successful defendants would have to institute new legal proceedings in order to enforce the right to recover costs in the event that the unsuccessful claimant is unwilling to pay.

32. The Defendants submit that the obligation to provide security for costs does not constitute unjustified discrimination for the purposes of EEA law, as it ensures that judicial enforcement of the right to recover costs is possible *de iure* and *de facto*,[5] which is necessary also in the light of the right to obtain justice, a constitutional right in Liechtenstein, and expressly enshrined in Article 6(1) of the European Convention on Human Rights.

33. Finally, the Defendants argue that provision of security constitutes also a reasonable measure, since under Article 56(2) ZPO it may be effected by way of a bank guarantee, provided that this has been issued by a bank within the EU/EEA. Thus, the resulting financial disadvantages to the claimant are kept to a minimum and are manageable. On the other hand, the defendant receives the necessary protection against the risk of bearing the costs of the case.

34. For the reasons given above, the Defendants suggest that the questions of the Obergericht be answered as follows:

> *1. The EEA Agreement does not constitute a treaty which, as a result of the prohibition on discrimination contained principally in Article 4 thereof, prohibits the obligation to provide security for costs from being imposed on claimants who reside in another EEA Member State, if claimants who reside in Liechtenstein are not obliged to provide such security for costs, provided that and inasmuch as:*

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[4] The Defendants refer to Case E-2/01 *Pucher* [2002] EFTA Ct. Rep. 44 and Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 43.

[5] The Defendants refer to Case C-398/92 *Mund and Fester* [1994] ECR I-467, paragraph 19 and Case C-43/95 *Data Delecta Aktiebolag* [1996] ECR I-4661.

- *enforcement of the Liechtenstein decision on costs within the claimant's country of residence is impossible or would involve additional difficulties, in particular litigation proceedings or other cumbersome recovery procedures;*

- *all means of providing security for costs originating from other EEA Member States – provided that the liquidity thereof is ensured – are accorded the same status as national means of providing security.*

2. *The obligation to provide security for costs pursuant to Article 57 ZPO may be made conditional upon the legal possibility of enforcement in the claimant's country of residence, provided that and inasmuch as all means of providing security for costs originating from other EEA Member States – provided that the liquidity thereof is ensured – are accorded the same status as national means of providing security.*

The Principality of Liechtenstein

35. In the view of the Government of the Principality of Liechtenstein, the absence of a scheme for the provision of security, as foreseen by Article 56 ZPO et seq, would endanger the good functioning of the judicial system, which forms an essential part of the Liechtenstein constitutional order.

36. The Government submits that sovereign states can only ensure enforcement of their court decisions within their own legal order. The rules of comity may encourage the recognition of a judicial act in another state out of that state's courtesy, but only if reciprocity is guaranteed.

37. The Government points out that bilateral or multilateral treaties may be concluded in order to safeguard enforcement of judgments in other jurisdictions and that the Principality of Liechtenstein currently maintains bilateral treaties with Austria and Switzerland in this regard.

38. However, Liechtenstein is not a party to multilateral treaties on the enforcement of judgments such as the Lugano Convention, mentioned in paragraph 24 above, and such agreements are not a part of the EEA Agreement. In this respect, Liechtenstein exercises its right to invoke its decision-making autonomy with regard to the ratification of international treaties, as guaranteed in the preamble to the EEA Agreement.

39. The Government argues that without the scheme set out in the ZPO on security for procedural costs a successful defendant would run the risk of not being legally able to recover such costs from an unsuccessful claimant. Thereby

claimants residing in a state where Liechtenstein court decisions cannot be enforced could bring frivolous lawsuits in Liechtenstein courts without any considerable risk, whereas the defendant concerned would not be offered any protection from such proceedings. Thus, the risk of procedural costs would be transferred entirely to the defendant and put him in an unfavourable position. The Government submits that it is the duty of the State under the rule of law to safeguard a fair distribution of risk within its judicial system.

40. In the view of the Government, the disputed provisions of the ZPO are in conformity with the EEA Agreement. In this respect, the Government argues that Article 57 ZPO certainly does not constitute direct discrimination for the purposes of Article 4 EEA. It is not the foreign residence as such which is decisive regarding the imposition of security for costs, but whether or not a court decision is enforceable in a particular state. The Government submits that a scheme safeguarding the recovery of procedural costs even serves to facilitate and enhance cross-border trade. In its view, the absence of such a regime and the ensuing cost risks would provide an incentive for businesses to favour service providers or suppliers from their home country, or of those EEA States where claims for the recovery of costs incurred in civil proceedings can be enforced quickly and efficiently.

41. In the event that the EFTA Court concludes that Article 57 ZPO constitutes covert discrimination for the purposes of Article 4 EEA, the Government submits that the provision is at least justified by objective reasons in the public interest, and that it does not go beyond what is necessary to achieve these objectives.

42. In terms of a public interest objective, the Government identifies the good functioning of the judicial system, a common principle in the constitutional structure of the EEA Contracting Parties. It argues that this objective could be jeopardized if a defendant were not able to enforce a court decision against an unsuccessful claimant, and that it would distribute risk unfairly between the parties.

43. Furthermore, the Government claims that the provisions of the ZPO form a necessary element for ensuring access to justice.[6] Procedural costs could otherwise not be recovered without additional difficulties caused by, *inter alia*, litigation proceedings or cumbersome recovery procedures abroad.[7]

44. In the view of the Government, requiring security also constitutes an adequate means of achieving the objective of the good functioning of the judicial system. The Government points out that the EFTA Court has already considered such a requirement to be an important element in securing compliance with

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[6] The Government of Liechtenstein refers to Case E-10/04 *Piazza*, cited above, paragraph 45, and Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation* [2003] EFTA Ct. Rep. 52, paragraph 36.

[7] The Government of Liechtenstein refers to Case E-10/04 *Piazza*, cited above, paragraph 48.

national legislation and decisions, facilitating the execution of civil court decisions.[8]

45. Finally, the Government argues that Article 57 ZPO does not go beyond what is necessary to achieve the stated objectives. It requires the provision of security only in cases in which it is indispensable, with regard to the interests of the defending party, and therefore the good functioning of the judicial system. The Government submits that this is the case when enforcement of a decision of a Liechtenstein court is not ensured. Moreover, the Government argues that the decisive question is whether procedural costs can be recovered without additional difficulties.[9]

46. The Government notes that, unlike Austria in the case of *Saldanha*, the Principality of Liechtenstein does not in any way refer to the nationality of a claimant, nor does it require residence in the Principality or any other specific state. Article 57 ZPO simply states that the enforcement of a cost order of a Liechtenstein court has to be ensured where the claimant is resident. [10]

47. The Government points out that Article 57 ZPO even grants further exemptions from the provision of security for procedural costs, such as possession of adequate immovable property or claims within a state where enforcement of a Liechtenstein court decision is ensured, as well as in the case of special procedures such as marriage law. The Government submits that in adopting this regime the Principality of Liechtenstein has taken the least onerous measure to achieve the objective of the good functioning of the judicial system. In this respect the Government observes that natural persons also have the possibility of applying for legal aid, which according to point 2 of Article 64(1) ZPO, may entail an exemption from the duty to provide a security for legal costs.

48. In accordance with these observations, the Government of the Principality of Liechtenstein proposes that the questions of the Obergericht be answered as follows:

> *1. The Agreement on the European Economic Area does not prohibit an obligation to provide a security for procedural costs from being imposed on claimants who reside in another EEA State where procedural costs cannot be recovered without additional difficulties, if claimants who reside in the Principality of Liechtenstein are not obliged to provide such security for legal costs.*

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[8] The Government of Liechtenstein refers to Case E-2/01 *Pucher*, cited above, paragraph 32, and Case E-3/98 *Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 35.

[9] The Government of Liechtenstein refers to Case E-10/04 *Piazza*, cited above, paragraph 48.

[10] The Government of Liechtenstein refers to Case C-122/96 *Stephen Austin Saldanha and MTS Securities Corporation* [1997] ECR I-5325, paragraph 29.

2. Point 1 of Article 57(2) of the Liechtenstein Zivilprozessordnung [ZPO], whereby a waiver of the obligation on claimants who reside in another State to provide security is made conditional upon the possibility of enforcement in the state of residence, is compatible with the EEA Agreement.

The EFTA Surveillance Authority

49. The EFTA Surveillance Authority (hereinafter "ESA") notes that this case once again raises the question of whether an obligation imposed on non-resident claimants to provide security for costs is compatible with the EEA Agreement.

50. ESA points out that the questions put to the Court essentially seek to establish whether Article 4 EEA prohibits the imposition of such an obligation on non-resident claimants bringing actions before the courts in Liechtenstein, where such an obligation is not imposed on resident claimants. In ESA's view, an unambiguous answer must now be given to that question.

51. ESA argues that the obligation to provide security for costs, such as the one at issue in the national proceedings, constitutes an unlawful and unjustified discrimination prohibited by Article 4 EEA. ESA points out that Article 4 EEA, according to its wording and settled case-law, constitutes a general non-discrimination provision which applies independently to those situations governed by EEA law for which the EEA Agreement lays down no specific rules prohibiting discrimination, such as the rules on free movement of goods, establishment, services or capital.[11]

52. In ESA's view, it is necessary therefore to ascertain whether activities such as those at issue in the main proceedings, where the provider of the service (the Plaintiff) and the recipient reside in the same country (Germany) but the provision of services is carried out in another country (Liechtenstein) come within the scope of Article 38 EEA. In this regard, ESA recalls *Cowan*, in which the Court of Justice of the European Union (hereinafter, "the ECJ") held that the provisions of Article 59 EC (now Article 56 TFEU) must apply in all cases where a person providing services offers services in a Member State other than that in which he is established, wherever the recipients of those services may be established.[12]

53. ESA notes that the present case appears similar to the situation in *Hubbard*, where the German rule at stake was considered a restriction on the freedom to provide services. In that case, the procedural rule in question imposed a disadvantageous treatment on a member of a profession established in another

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[11] ESA refers to Case 186/87 *Cowan* v *Trésor public* [1989] ECR 195, paragraph 10; Case C-43/95 *Data Delecta*, cited above, paragraph 16, and Case E-1/00 *Íslandsbanki-FBA* [2000-2001] EFTA Ct. Rep. 8, paragraphs 35 and 36.

[12] ESA refers to Case 186/87 *Cowan*, cited above, paragraph 15.

Member State whose task consisted in seeking, in the interest of the successors of a deceased client, possession of assets which that client held on the territory of the first state.[13]

54. Moreover, ESA notes that the provision at stake is general and may apply to any civil litigation proceedings, whether the dispute concerns labour law, the trade in goods or the provision of services. Given these effects of the national legislative provisions, ESA argues that the rules are subject to the general principle of non-discrimination laid down in Article 4 EEA, without any need to connect them with the specific provisions of Articles 8, 28, 36 or 40 EEA.

55. ESA points out that in the absence of EEA legislation, it is for the national legal order to lay down detailed procedural rules for legal proceedings intended to fully safeguard the rights which individuals derive from EEA law. Nevertheless, EEA law imposes limits on that competence.[14] Such legislative provisions may not discriminate against persons to whom EEA law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by EEA law.

56. As the requirement to provide security for costs is not limited to non-Liechtenstein nationals, the provisions cannot be considered to have a directly discriminatory effect on non-Liechtenstein nationals. However, ESA submits that it is settled case law that rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria or differentiation, lead to the same result.[15]

57. Furthermore, the ECJ has also declared that national rules under which a distinction is drawn on the basis of residence in that non-residents are denied certain benefits which are, conversely, granted to persons residing within a national territory, are liable to operate mainly to the detriment of nationals of other Member States.[16] Therefore, ESA considers that the requirement contained in Article 57 ZPO amounts to treating nationals more favourably than persons from another EEA State and is therefore caught by Article 4 EEA.[17]

58. As regards objective justification for the difference in treatment, ESA notes that the ECJ has held that discrimination will not be forbidden if it is justified by

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[13] ESA refers to Case C-20/92 *Hubbard* v *Hamburger* [1993] ECR I-3777, paragraph 13.

[14] ESA refers to Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 42, and Case C-323/95 *Hayes* [1997] ECR I-1711, paragraph 13.

[15] ESA refers to Case C-330/91 *The Queen* v *Inland Revenue Commissioners, ex parte Commerzbank AG* [1993] ECR I-4071, paragraph 14 (freedom of establishment), and Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225, paragraph 26 (free movement of workers).

[16] ESA refers to Case C-279/93 *Schumacker*, cited above, paragraph 28.

[17] Ibid.

objective considerations, independent of the nationality of the persons concerned, and if they are proportionate to the legitimate aim pursued by the national law.[18]

59. ESA points out that although national discriminatory rules may be justified on grounds of overriding public interest, all deviations from the fundamental principles of the EEA Agreement must be interpreted narrowly.

60. In ESA's view, it is necessary to assess whether the reasons put forward to justify the existence of rules on security for costs, *i.e.* to prevent the risk of non-payment of court fees and the legal costs incurred by the defendant, constitute objective justification.

61. In this respect, ESA argues that in *Data Delecta* and *Hayes* the ECJ dismissed the argument invoked by the governments concerned, namely, that difference of treatment was necessary in order to ensure that a foreign applicant would not escape the obligations to pay the court fees and legal costs of the opponent. ESA notes that the ECJ did not even discuss the legitimacy of the aim invoked by the governments in these cases, but held that a rule based on nationality was inappropriate to achieve the stated aim.[19]

62. ESA notes further that in *Pastoors* and *Commission* v *Italy* the ECJ acknowledged that a difference in treatment between resident and non-resident offenders may be objectively justified, if intended to prevent the non-payment of fines by non-resident offenders.[20] In *Piazza*, moreover, the EFTA Court considered that the good functioning of the judicial system was a common principle in the constitutional structure of the EEA Contracting Parties and a necessary element for access to justice, which could, in principle, be considered a public policy ground.[21]

63. Turning to the present case, ESA takes the view that Article 57 ZPO deals only with security for the defendant's legal costs and not security for court fees. ESA submits that only the recovery of court fees might justify an obligation to lodge security for costs on foreigners only.

64. Moreover, ESA submits that it is important to distinguish cases such as *Pastoors* that dealt with the advance payment of a sum corresponding to a fine in criminal proceedings, from the obligation of payment of court fees and the obligation of advance payment of the costs of the defendant in the main proceedings.

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[18] Ibid.

[19] ESA refers to Case C-43/95 *Data Delecta*, cited above, and Case C-323/95 *Hayes*, cited above.

[20] ESA refers to Case C-29/95 *Pastoors* v *Trans-Cap GmbH* [1997] ECR I-285 and Case C-224/00 *Commission* v *Italy* [2000] ECR I-2965.

[21] ESA refers to Case E-10/04 *Piazza*, cited above.

65. ESA submits that as regards payment of the costs of the defendants, the financial comfort and situation of a defendant does not constitute a matter of legitimate public policy.[22] It emphasises that it is settled case-law that justification on public policy grounds can only be accepted in the case of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[23]

66. On the other hand, ESA acknowledges that ensuring that court fees are ultimately paid by the claimant if his action is dismissed is necessary for the proper functioning of civil justice, and that it constitutes an overriding public interest that may justify a discriminatory national measure. In ESA's view, this aim is comparable to the aim of securing the effective payment of penalties by offenders at issue in *Pastoors* and *Commission* v *Italy*.

67. On the issue of proportionality, ESA recognizes that the enforcement of a Liechtenstein court decision may involve costs and complications if the claimant does not reside in Liechtenstein.

68. In order to examine whether those jurisdictional difficulties and additional costs justify legislation which provides for objectively different treatment, ESA considers it useful to distinguish between two scenarios, that is, cases where there is no international instrument open to EEA Contracting Parties that might facilitate the enforcement of foreign judgments, and, cases where these instruments exist, but an EEA Contracting Party decides not to ratify them.

69. In relation to the case at hand, ESA submits that the subject-matter of the dispute does not fall within the scope of the Lugano Convention, as it does not apply to matters such as wills and succession.[24] Furthermore, it observes that there is no multilateral agreement to which the EEA Contracting Parties might become parties in order to facilitate the enforcement on such matters. Accordingly, it treats the present case as falling within the first scenario, that is, where is there no international instrument.

70. ESA notes that in *Pastoors* and *Commission* v *Italy* the ECJ ruled that in the absence of a convention ensuring the prompt enforcement of criminal judgments there is a real possibility that a judgment rendered against a non-resident could remain a dead letter or at least be far more onerous to implement without security for costs.

71. In the opinion of ESA, these rulings are not transposable to the present case, however, as they concerned criminal law actions. In its view, the risk of a non-

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[22] ESA refers to the Opinion of Advocate General Darmon in Case C-20/92 *Hubbard*, cited above, point 28.

[23] ESA refers to Case E-3/98 *Rainford-Towning*, cited above, paragraph 42, and Case E-10/04 *Piazza*, cited above, paragraph 42.

[24] ESA refers to Article 1 of the Convention.

resident otherwise enjoying a large measure of impunity and of the penalty remaining ineffective is in itself of greater public interest than the risk that a non-resident would otherwise not pay the legal costs incurred by the defendant.

72. ESA submits further that the enforcement and recognition of criminal orders and judgments are treated very differently from civil orders and judgments. Whereas most national legal systems provide for a procedure to recognize and enforce civil judgments rendered by a foreign jurisdiction, criminal judgments and penalties are not enforced beyond the borders of the state in which they are imposed. Although procedures for enforcement of civil and commercial judgments may be lengthy and complex, enforcement is nevertheless possible as a matter of principle.

73. Accordingly, taking into account the aim pursued and the fact that the enforcement of civil judgments in other EEA States is possible, ESA considers it questionable whether the difference in treatment between resident and non-resident plaintiffs is proportionate.

74. As regards cases where conventions facilitating the enforcement of foreign judgment do exist, ESA submits that it follows from the judgment of the ECJ in *Mund and Fester* that special provisions for non-residents are not necessary to guarantee the enforceability of judgments.[25] ESA considers that the fact that a State refrains from becoming a party to such an instrument should not render discriminatory acts towards non-residents compatible with the EEA Agreement.

75. ESA notes that Article 57 ZPO is a general procedural rule that applies also to disputes falling within the scope of the Lugano Convention which simplifies and accelerates the recognition and enforcement of judgments between its parties. Although Liechtenstein has chosen not to ratify this Convention, in ESA's view, such a situation does not give leave to the Contracting Parties to fail to fulfil their obligations under the EEA Agreement.[26]

76. ESA submits further that the EFTA Court followed the same reasoning in relation to the right of establishment in *Pucher*. There, the Court conceded that certain complications might arise as regards the execution of civil law judgments, since Liechtenstein is not a party to the Lugano Convention. However, the Court observed that if such complications were of vital concern in relation to the public policy objective pursued, accession to the Convention would constitute a remedy.[27]

77. In this respect, ESA points out that the Court recognized in *Pucher* also that litigation and execution in foreign jurisdictions often involves costs and complications that do not arise in the domestic jurisdiction. However, the

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[25] ESA refers to Case C-398/92 *Mund and Fester*, cited above.

[26] ESA refers to Case E-10/04 *Piazza*, cited above, paragraph 46.

[27] ESA refers to Case E-2/01 *Pucher*, cited above, paragraph 39.

encouragement of cross-border activity is a fundamental objective of the EEA Agreement, and whenever such activity gives rise to litigation, the enforcement of judgments must often be sought within the jurisdiction of another EEA State.[28]

78. In the light of the above arguments, ESA takes the view that a provision imposing an obligation on non-residents to provide security for costs, if claimants who reside in Liechtenstein are not so obliged, violates Article 4 EEA.

79. Finally, ESA points out that Article 57(1) ZPO imposes an obligation on non-resident claimants to provide security for costs unless international treaties provide otherwise. According to ESA's understanding, this provision should be interpreted in such a way that the referring court can, in the case at hand, decide not to impose the obligation on claimants who reside in another EEA State to provide security for costs, because that would violate Article 4 EEA.

80. Accordingly, ESA submits that the questions referred to the Court be answered together as follows:

> *Article 4 of the EEA Agreement should be interpreted as meaning that an imposition of an obligation to provide security for costs on claimants who reside in another EEA Member State, while claimants who reside in Liechtenstein are not obliged to provide such security for costs, constitutes a breach of the Article.*

The European Commission

81. The European Commission (hereinafter "the Commission") notes that the referring court essentially asks the EFTA Court to determine whether Article 57(1) ZPO must be interpreted in such manner that the EEA Agreement, taking into account, in particular, Article 4 EEA, constitutes an "international treaty". Furthermore, it seeks to clarify whether point 1 of Article 57(2) is compatible with Article 4 EEA.

82. In this regard, the Commission submits that the EFTA Court has already held that it is not within its competence to interpret provisions of or to rule on national law.[29] The role of the EFTA Court is to provide the national court with all relevant guidance as to the interpretation of EEA law, with a view to enabling that court to assess the compatibility of national rules with the provisions of EEA law.

83. Second, the Commission notes that Article 57 of the Liechtenstein ZPO appears to relate only to security for the legal costs of the defendants and not the court fees. Indeed, it seems to result from Article 57(1) ZPO that it relates to a

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[28] Ibid.

[29] In this respect, the Commission refers to Case E-10/04 *Piazza*, cited above, paragraph 22; Case E-2/95 *Eidesund* [1995-1996] EFTA Ct. Rep. 1, paragraph 14; and also, *inter alia*, Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 6.

security to be granted "on an application by the defendant or respondent", and it is not apparent that the defendant or respondent can have an interest also to request the payment of a security for court fees.

84. The Commission notes that it appears to result from the description of the national rules given in the order for reference that the term "costs" used in Article 57 ZPO includes court fees as well as the costs of the parties' legal representatives. Furthermore, the Commission observes that the Plaintiff was ordered also of the court's own motion to deposit a security for court fees.

85. Subject to a clarification of this point of national law which may arise during the proceedings and in order to give a useful reply to the questions put by the referring court, the Commission departs in its written observations from the hypothesis that this case relates to the interpretation of Article 4 EEA with regard to the obligation to lodge security both for the Defendants' legal representatives and for court fees.

86. The Commission is of the opinion that the two questions put by the referring court should be examined together. The Commission understands the request of the referring court as seeking to determine, in essence, whether Article 4 EEA is to be interpreted as precluding the application of a national rule such as Article 57 ZPO.

87. The Commission remarks that if the reply to this question is in the affirmative, it is for the national court to ascertain whether Article 57 ZPO must be set aside, or whether this provision must be interpreted in such manner that the EEA Agreement constitutes for the purposes of Article 57(1) ZPO an "international treaty" which removes the obligation to provide security for costs in a case such as the one at issue.

88. As regards the analysis of the question as reformulated, the Commission notes that, pursuant to Article 4 EEA, any discrimination on the grounds of nationality is to be prohibited within the scope of application of the Agreement and without prejudice to any special provisions contained therein.

89. The Commission submits further that a rule of domestic civil procedure, such as the one in question in the main proceedings, falls within the scope of the non-discrimination clause contained in Article 12 EC (now Article 18 TFEU) and Article 4 EEA. Also, such a rule is subject to the general principle of non-discrimination laid down by that Article in so far as it has an effect, even though indirect, on trade in goods and services between Member States.[30]

90. The Commission points out that in the present case, the national legislation in question does not discriminate directly on grounds of nationality, since the

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[30] The Commission refers to Cases 20/92 *Hubbard*, cited above, C-43/95 *Data Delecta*, cited above, and C-323/95 *Hayes*, cited above.

obligation to lodge a security is imposed on any claimant who is not resident in Liechtenstein, irrespective of nationality. However, the ECJ has consistently held that rules regarding equality of treatment between nationals and non-nationals prohibit not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result.[31]

91. Moreover, the Commission notes that the ECJ has also held that a national rule which draws a distinction on the basis of residence, in that non-residents are denied certain benefits, which are, conversely, granted to persons residing within national territory, is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners, and, thus, to constitute indirect discrimination by reason of nationality.[32]

92. The Commission notes that in its order for reference the referring court has not provided any elements relating to the question whether Article 57 ZPO is, in fact, liable to operate mainly to the detriment of nationals of other EEA States. While conceding that it is for the national judge to examine this issue, the Commission recalls that the ECJ already had the occasion to examine similar situations and concluded that similar national rules had the same practical result as discrimination on grounds of nationality.

93. On the basis of the judgment of the Liechtenstein *Staatsgerichtshof* (Constitutional Court) of 30 June 2008 and the analysis published in legal literature on the same issue,[33] the Commission takes the view that the discriminatory nature of Article 57 ZPO can be presumed. The Commission argues that it appears, in the absence of a demonstration of the contrary by the national judge, that a provision such as Article 57 ZPO makes it – at best – more cumbersome for a national of one EEA State to bring an action before the court of another. As a requirement to lodge a security generally puts a greater burden on nationals of other States than on nationals of Liechtenstein, it constitutes, therefore, indirect discrimination on grounds of nationality.

94. The Commission concedes that a finding to that effect does not suffice, however, for such legislation to be held incompatible with Article 4 EEA. The legislation in question must also be incapable of being justified by objective circumstances.[34]

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[31] The Commission refers to Case 22/80 *Boussac* [1980] ECR 3427, paragraph 9, and Case C-175/88 *Biehl* [1990] ECR I-1779, paragraph 13.

[32] The Commission refers to Case C-279/93 *Schumacker*, cited above, paragraphs 28 and 29.

[33] The Commission refers to A. Schäfer, 'Die Prozesskostensicherheit – Eine Diskriminierung?', LJZ 2006, p. 17 et seq.

[34] The Commission refers to Case C-398/92 *Mund and Fester*, cited above, and C-43/95 *Data Delecta*, cited above, paragraph 19.

95. The Commission recalls that in accordance with consistent case-law, a discriminatory national rule can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions.[35]

96. The Commission argues further that in comparable situations the EFTA Court has examined whether a discriminatory national rule can be justified on public policy grounds which can only be accepted in the case of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[36]

97. Equally, the Commission observes that the EFTA Court has held that the good functioning of the judicial systems is a common principle in the constitutional structure of the EEA Contracting Parties, and a necessary element for ensuring access to justice, which is an essential part of the EEA legal order. In this regard, the EFTA Court has held that the good functioning of the civil justice system could, as a matter of principle, be considered as a public policy ground.[37]

98. The Commission points out that, as an exception to a basic principle of the EEA Agreement, any objective circumstances justifying a discriminatory national rule must be construed narrowly.

99. The Commission acknowledges that the enforcement of a judgment of a Liechtenstein court in other EEA States can involve certain costs and complications that may not arise if the claimant resides in Liechtenstein. This may be even more so if, as in the case at hand, a judgment cannot be enforced in the State of residence of the claimant by virtue of a treaty on enforcement but where recourse must be had in that state to common proceedings for the execution of judgments rendered by a court of a foreign state.

100. In the Commission's opinion, however, these costs and complications cannot take precedence over the fundamental interest of preventing obstacles to the free movement of goods and services. This applies all the more, as it is not apparent, and in any event has not been invoked by the referring court, that costs and complications are liable to seriously threaten the good functioning of the civil justice system. The Commission submits that this conclusion is confirmed also by the fact that the rules of civil procedure in other EEA States, such as in the Plaintiff's state of residence, relieve claimants who are resident in an EEA State from the obligation to provide security for costs.[38]

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[35] See, *inter alia*, Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 27.

[36] The Commission refers to Case E-10/04 *Piazza*, cited above, paragraph 42.

[37] The Commission refers to Case E-10/04 *Piazza*, cited above, paragraph 43.

[38] In this respect the Commission refers to Paragraph 110 of the German Code of Civil Procedure (Zivilprozessordnung).

101. The Commission observes that the main difficulty to collect outstanding debts following a court procedure appears to occur whenever a claimant does not possess sufficient property, and that this applies independently of the residence of the claimant.

102. In the Commission's view, therefore, a rule such as Article 57 ZPO does not serve the primary interests of a defendant. Rather, it is construed in a way that guarantees the costs of the defendants' legal representatives which cannot be considered as being of a fundamental interest sufficient to allow the creation of obstacles within the internal market.[39]

103. The Commission is aware that the ECJ has accepted, as in *Pastoors*, the existence of particular circumstances justifying a difference in treatment between residents and non-residents in a particular Member State.[40] However, on the Commission's view, the Court's findings in that case were linked to very specific factual circumstances different from the present case. Therefore, it argues that they cannot be transposed to the present case.

104. Therefore, the Commission takes the view that, in accordance with consistent case-law, Article 57 ZPO cannot be objectively justified and that, in any event, this rule is not limited to what is necessary to attain the objective pursued.

105. For these reasons, the Commission considers that the question from the Obergericht should be answered as follows:

> *Article 4 of the EEA Agreement is to be interpreted in a way that it precludes the application of a national rule such as Article 57 ZPO pursuant to which, upon request, claimants in civil procedures must provide security for costs where they are resident in an EEA Member State other than Liechtenstein or in one in which a judgment of a Liechtenstein Court can be enforced by virtue of a treaty on enforcement.*

Thorgeir Örlygsson
Judge-Rapporteur

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[39] The Commission refers, in particular, to the Opinion of Advocate General Darmon in Case C-20/92 *Hubbard*, cited above, point 28.

[40] Case C-29/95 *Pastoors*, cited above.