REPORT FOR THE HEARING

in Case E-6/13

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 Fürstliche Landgericht des Fürstentums Liechtenstein (Princely Court of the Principality of Liechtenstein) in the case of

Metacom AG

and

Rechtsanwälte Zipper & Collegen

concerning the interpretation of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

I Introduction

1. In a letter of 9 April 2013, registered at the EFTA Court on 15 April 2013, the Fürstliches Landgericht made a request for an Advisory Opinion in a case pending before it between Metacom AG, a company registered in Liechtenstein ("the plaintiff"), and Rechtsanwälte Zipper & Collegen, a firm of lawyers based in Germany ("the defendant").

2. The case concerns whether a European lawyer representing himself in proceedings in an EEA State other than his State of establishment can rely on EEA law on the freedom for lawyers to provide temporary cross-border legal services. If so, the case also raises the question of whether an obligation in national law requiring European lawyers to notify the relevant authorities in the host State prior to the exercise of temporary cross-border legal services is compatible with EEA law.

II Legal background

EEA law

3. Article 36(1) EEA 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.

4. Pursuant to Article 37(1) EEA, "services shall be considered services within the meaning of this Agreement where they are normally provided for remuneration". Pursuant to Article 37(1)(d) EEA, that notion includes the "activities of the professions".

5. Article 37(2) EEA states that, without prejudice to the provisions of Chapter 2 (right of establishment), "the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals".

6. Pursuant to Article 39 EEA, the provisions of, *inter alia*, Article 30 EEA shall apply to the matters covered by Chapter 3 (services) of the Agreement. Pursuant to Article 30 EEA, the Contracting Parties shall take the necessary measures, contained in Annex VII to the Agreement, to make it easier for persons to take up and pursue activities as workers and self-employed persons.

7. Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17) ("Directive 77/249") is referred to at point 2 of Annex VII to the EEA Agreement (mutual recognition of professional qualifications).

8. Article 1 of Directive 77/249 reads:

1. This Directive shall apply, within the limits and under the conditions laid down herein, to the activities of lawyers pursued by way of provision of services. …

2. "Lawyer" means any person entitled to pursue his professional activities under one of the following designations: … Germany: Rechtsanwalt.

9. Article 2 of Directive 77/249 reads:

Each Member State shall recognize as a lawyer for the purpose of pursuing the activities specified in Article 1 (1) any person listed in paragraph 2 of that Article.

10. Article 3 of Directive 77/249 reads:

A person referred to in Article 1 shall adopt the professional title used in the Member State from which he comes, expressed in the language or one of the languages, of that State, with an indication of the professional organization by which he is authorized to practise or the court of law before which he is entitled to practise pursuant to the laws of that State.

11. Article 4 of Directive 77/249 reads:

1. Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State.

2. A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes.

…

4. A lawyer pursuing activities other than those referred to in paragraph 1 shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility.

12. Article 5 of Directive 77/249 reads:

For the pursuit of activities relating to the representation of a client in legal proceedings, a Member State may require lawyers to whom Article 1 applies:

– to be introduced, in accordance with local rules or customs, to the presiding judge and, where appropriate, to the President of the relevant Bar in the host Member State;

– to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an "avoué" or "procuratore" practising before it.

13. Article 7 of Directive 77/249 reads:

1. The competent authority of the host Member State may request the person providing the services to establish his qualifications as a lawyer.

2. In the event of non-compliance with the obligations referred to in Article 4 and in force in the host Member State, the competent authority of the latter shall determine in accordance with its own rules and procedures the consequences of such non-compliance, and to this end may obtain any appropriate professional information concerning the person providing services. It shall notify the competent authority of the Member State from which the person comes of any decision taken. Such exchanges shall not affect the confidential nature of the information supplied.

14. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22) ("Directive 2005/36") was incorporated into Annex VII to the EEA Agreement at point 1 by Decision 142/2007 of 26 October 2007 of the EEA Joint Committee (OJ 2008 L 100, p. 70). The Decision entered into force on 1 July 2009.

15. Article 1 of Directive 2005/36 reads:

Purpose

This Directive establishes rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications (referred to hereinafter as the host Member State) shall recognise professional qualifications obtained in one or more other Member States (referred to hereinafter as the home Member State) and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession.

16. Article 2 of Directive 2005/36 reads:

Scope

…

3. Where, for a given regulated profession, other specific arrangements directly related to the recognition of professional qualifications are established in a separate instrument of Community law, the corresponding provisions of this Directive shall not apply.

17. Article 7 of Directive 2005/36 reads:

Declaration to be made in advance, if the service provider moves

1. Member States may require that, where the service provider first moves from one Member State to another in order to provide services, he shall inform the competent authority in the host Member State in a written declaration to be made in advance including the details of any insurance cover or other means of personal or collective protection with regard to professional liability. Such declaration shall be renewed once a year if the service provider intends to provide temporary or occasional services in that Member State during that year. The service provider may supply the declaration by any means.

2. Moreover, for the first provision of services or if there is a material change in the situation substantiated by the documents, Member States may require that the declaration be accompanied by the following documents:

(a) proof of the nationality of the service provider;

(b) an attestation certifying that the holder is legally established in a Member State for the purpose of pursuing the activities concerned and that he is not prohibited from practising, even temporarily, at the moment of delivering the attestation;

(c) evidence of professional qualifications;

(d) for cases referred to in Article 5(1)(b), any means of proof that the service provider has pursued the activity concerned for at least two years during the previous ten years;

(e) for professions in the security sector, where the Member State so requires for its own nationals, evidence of no criminal convictions.

…

18. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) ("Directive 2006/123") was incorporated into Annex X to the EEA Agreement at point 1 by Decision 45/2009 of 9 June 2009 of the EEA Joint Committee (OJ 2009 L 162, p. 23). The Decision entered into force on 1 May 2010.

19. Pursuant to its Article 17(4), Article 16 of Directive 2006/123 on freedom to provide services does not apply to matters covered by Directive 77/249.

National law

20. Pursuant to Article 55(1) of the Lawyers Act (*Rechtsanwaltsgesetz*, LGBl 1993 No 41, as amended), nationals of an EEA State who are entitled to exercise a professional activity as a lawyer in their home State using one of the designations listed in the annex to the Act shall be authorised to exercise their activity as a lawyer in Liechtenstein on a temporary cross-border basis (otherwise known as "European lawyers engaging in the provision of services").

21. However, pursuant to Article 59 of the Lawyers Act, such authorisation is subject to the following set of requirements:

> *(1) A European lawyer engaging in the provision of services shall be supervised by the chamber of lawyers.*
>
> *(2) Prior to the exercise of an activity in Liechtenstein, a European lawyer engaging in the provision of services shall notify the head of the chamber of lawyers of his intention to do so and submit the following evidence:*
>
> > *(a) A certificate evidencing the fact that the service provider lawfully exercises the relevant activity in his home State and that, on the date the certificate is submitted, he is not prohibited, not even on a temporary basis, from the exercise of that activity;*
> >
> > *(b) evidence of his nationality; and*
> >
> > *(c) that he is covered by professional indemnity insurance within the meaning of Article 25.*
>
> *(3) The chamber of lawyers shall confirm receipt of the notification without delay. On request, evidence of the notification shall be provided to the courts or administrative authorities.*
>
> *(3a) Notification shall be renewed once every year if the European lawyer engaging in the provision of services intends in the year in question to provide services in Liechtenstein on a temporary or occasional basis. Furthermore, it shall be renewed immediately, if – with respect to the situation certified – a substantive change has occurred.*
>
> *(4) It shall be the responsibility of the head of the chamber of lawyers*
>
> > *(a) to advise and instruct a European lawyer engaging in the provision of services on matters concerning the professional obligations of a lawyer;*
> >
> > *(b) to supervise the discharge of the obligations to which such persons are subject;*

(c) to prohibit the exercise of the provision of services and, where appropriate, notify the courts or administrative authorities of that fact if the requirements set out in paragraph 2 above are not satisfied or cease to be satisfied;

(d) to notify the competent authority of the home State of decisions taken in respect of that person.[*]

22. Under Liechtenstein law, the payment of legal fees and expenses is regulated by the Lawyers' Fees Act (*Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten*, LGBl 1988 No 9) and by the Lawyers' Fees Regulation (*Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten*, LGBl 1992 No 69).

23. Article 1 of the Lawyers' Fees Act reads:

Scope of the tariff scale

Art. 1

1) In proceedings concerning … civil litigation … lawyers … are entitled … to legal fees pursuant to the following provisions:

2) The provisions of this Act apply, unless otherwise provided for in the following, both as regards the relationship between the lawyer ... and the party represented by him, and as regards the determination of the costs that the opponent must reimburse, also where costs are to be reimbursed by the opponent to a lawyer ... for his own account.

III Facts and procedure

24. The case before the national court concerns a claim for "de-recognition" of a debt (*Aberkennungsklage*).

25. In a letter of 13 August 2012, the defendant raised the issue of whether the plaintiff had sufficient standing to sue.

26. The plaintiff withdrew the action for de-recognition. The withdrawal was formally noted in an order dated 21 August 2012 by the Princely Court. The order was served on the defendant. At the same time, a hearing of the parties scheduled for 12 September 2012 was cancelled. On 3 September 2012, the

[*] In the translation of the request for an Advisory Opinion provided for the purposes of Article 20 of the Statute of the Court, "register" and "registration" were used. In the present Report "notify" and "notification" have been used instead. Those who have submitted written observations have pointed out that "notify" and "notification" are more appropriate translations of the German terms "*melden*" and "*Meldung*" used in the official German version of the Lawyers Act.

defendant submitted its defence to the action for de-recognition, arguing that it should be dismissed and that the plaintiff should pay the costs.

27. By order of the Princely Court of 14 September 2012, the defendant's pleadings, as well as the request for costs, were rejected. The basis for the decision was that the proceedings had been resolved as a result of the withdrawal of the action. Any further documents were therefore out of time and unnecessary. In principle, the plaintiff was to be regarded as the unsuccessful party. However, costs could not be awarded in relation to procedural steps that had taken place after 21 August 2012, or in connection with the letter of 13 August, which had not been required by the court. In any event, under Articles 58 and 59 of the Liechtenstein Lawyers Act, the defendant had to nominate a lawyer from the list of Liechtenstein lawyers with an address for service in Liechtenstein, and to notify in advance the Head of the Liechtenstein Chamber of Lawyers (*Liechtensteinische Rechtsanwaltskammer*) stating the intention to provide services in Liechtenstein.

28. On 24 September 2012, the defendant (now represented by Ritter & Wohlwend Rechtsanwälte, a firm of lawyers based in Liechtenstein), applied for costs amounting to CHF 676,75. The defendant argued that i) it had mandated a Liechtenstein lawyer to represent it at the cancelled hearing on 12 September, ii) the mandated lawyer only became aware of the withdrawal of the action upon being informed by the court of the cancellation of the hearing, and iii) the documents to that effect had only been served on the defendant on 18 September.

29. On 4 December 2012, the decision to reject the request for costs was annulled by the Princely Court of Appeal (*Fürstliches Obergericht*) on the grounds that, *inter alia*, no hearing had been held.

30. A hearing was held by the Princely Court on 6 February 2013. At the hearing, the defendant submitted a new schedule for costs.

31. By order of the Princely Court of 7 February 2013, the defendant was given 14 days to produce its notification to the Liechtenstein Chamber of Lawyers and all the accompanying evidence required by Article 59 of the Liechtenstein Lawyers Act. The defendant was also given 14 days within which to submit observations concerning its claim that it was entitled to costs in accordance with the scale set out in the Lawyers' Fees Act and Regulation.

32. On 26 February 2013, the defendant provided a certificate (dated that day) from the Liechtenstein Chamber of Lawyers to the effect that Mr Zipper of Rechtsanwälte Zipper & Collegen had notified his intention of providing cross-border services as a lawyer in Liechtenstein from 20 February 2013, and that he satisfied the other relevant legal requirements. The defendant also pointed out that, had it been aware of the notification requirement, it would have complied with it prior to the start of proceedings.

33. However, since the defendant had not complied with the requirements laid down in Article 59 of the Lawyers Act at the time the costs had been incurred (in August and September 2012), the Princely Court expressed doubts as to whether the defendant can, as a matter of national law, be entitled to claim costs in accordance with the scale set out in the Lawyers' Fees Act and Regulation. It also queried the impact on this question of the principle of the freedom to provide services enshrined in EEA law, e.g the detailed provisions of Directive 77/248 and, in particular, its Article 7.

34. Consequently, the Princely Court referred the following questions to the Court:

1. **Can a European lawyer bringing proceedings in another EEA State in his own name and not pursuant to the mandate of a third party rely on Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17)?**

2. **Is an obligation on European lawyers to notify the authorities of the host State (as provided for here in Article 59 of the Liechtenstein Lawyers Act (*Rechtsanwaltsgesetz*)) compatible with Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17) and, in particular, with Article 7 of that directive?**

3. **If Question 2 is answered in the affirmative: Having regard to Directive 77/249/EEC, may failure to provide notification in the host State on the part of a European lawyer engaged in the provision of services result in the consequence that the lawyer concerned may not claim lawyers' fees in accordance with the scale of fees provided for in the host State (in Liechtenstein the fees provided for in the Lawyers' Fees Act (*Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten*) and the Lawyers' Fees Regulation (*Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten*))?**

4. **Where a European lawyer engaged in the provision of services has only notified the authorities in the host State at a later date, may this subsequent notification result in the consequence that the lawyer may only claim fees in accordance with the scale of fees provided for in the host State in relation to the period following that notification but not in relation to procedural steps taken prior to that date?**

5. **Having regard to Directive 77/249/EEC, does the answer to Questions 3 and 4 depend on whether, at the start of the**

proceedings, the court of the host State referred the European lawyer engaged in the provision of services to the obligation under the law of that State to notify the authorities?

IV Written observations

35. 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 Liechtenstein Government, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Markus Schneider, Deputy Director, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Hans Stovlbaek and Nicola Yerrell, Members of its Legal Service, acting as Agents.

V Summary of the arguments submitted

The first question

The Liechtenstein Government

36. The Liechtenstein Government observes that Directive 77/249 lays down detailed rules to facilitate the effective provision of services by lawyers. As an instrument of secondary legislation dealing with the free movement of services, Directive 77/249 must be interpreted in light of the general principles enshrined in the EEA Agreement governing the freedom to provide services.[1]

37. According to the Liechtenstein Government, two of those general principles are laid down in Article 36(1) EEA: first, that the provider and the recipient of the service concerned are established in two different Member States,[2] and, second, that the provider and the recipient of the service are two different persons.

38. The Liechtenstein Government submits that, as regards the first principle, the Court of Justice of the European Union ("ECJ") has developed a wide interpretation of the EU provision corresponding to Article 36 EEA.[3] This entails

---

1 Reference is made to Case E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 28.

2 Reference is made to Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 22.

3 Reference is made to Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraphs 9 and 10.

that Article 36 EEA must apply in all cases where a person providing services offers them in a Member State other than the State in which he is established, wherever the recipients of those services may be established.

39. However, as regards the second principle, neither the ECJ nor the Court seems to have departed from the clear wording of Article 36 EEA – the provider and the recipient of the service concerned still have to be two different persons.

40. The facts of the present case are that Rechtsanwälte Zipper & Collegen are at the same time the provider and recipient of the services concerned. The Liechtenstein Government submits that, as a consequence, neither Article 36 EEA nor Directive 77/249 is applicable in the present case.

41. The Liechtenstein Government proposes that the Court should answer the first question as follows:

> *A European lawyer bringing proceedings in another EEA State in his own name and not pursuant to the mandate of a third party cannot rely on Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.*

EFTA Surveillance Authority

42. ESA submits that the first question must be answered in the affirmative where national law allows for self-representation.

43. According to ESA, it is appropriate, first, to establish which directive applies to the cross-border provision of legal services: Directive 77/249, Directive 2005/36 or the Services Directive 2006/123.

44. ESA takes the view that only Directive 77/249 applies. Article 4(1) of that Directive specifically concerns activities relating to the representation of a client in legal proceedings or before public authorities.

45. Conversely, Directive 2005/36, although it concerns, *inter alia*, the mutual recognition of professional qualifications of lawyers and sets out rules on the provision of services, does not apply to the provision of legal services by virtue of its Article 2(3).

46. Directive 77/249 is a separate Community instrument within the meaning of Article 2(3) of Directive 2005/36 that provides for a specific arrangement directly related to the recognition of the professional qualifications of lawyers. Both directives are referred to in Annex VII to the EEA Agreement on the mutual recognition of professional qualifications. Moreover, to consider otherwise would risk depriving Directive 77/249 of its very purpose, i.e. to facilitate the effective pursuit of the activities of lawyers by way of the provision of services.

47. According to ESA, this reading of Article 2(3) of Directive 2005/36 is further supported by Article 17(4) of Directive 2006/123 (the Services Directive). Pursuant to its Article 17(4), Directive 2006/123 explicitly does not apply to matters governed by Directive 77/249.

48. ESA submits that, where an EEA host State's national law allows a lawyer to act before that State's courts or public authorities in his own name, in other words to represent himself, Directive 77/249 should apply. In a legal order in which a lawyer can represent himself rather than seeking the services of a colleague, there is nothing to suggest that that activity would fall outside the scope of activities relating to the representation of a client in legal proceedings within the meaning of Article 4(1) of the Directive.

49. According to ESA, this reading of Article 4(1) of Directive 77/249 is supported by the legal definition of services in Article 37(1) EEA. It is decisive that the services in question are normally provided for remuneration, explicitly including the services provided by the professions, which include lawyers. In ESA's view, legal services of the kind in question in this case (i.e. participation in civil litigation) satisfy both criteria.

50. Whether a lawyer may represent himself in a given EEA State is a matter of national law and, in particular, of forum law. In the absence of harmonisation and since the Contracting Parties enjoy procedural autonomy, EEA law in general, and Directive 77/249 in particular, does not predetermine this question either way as long as European lawyers are not discriminated against compared to their national peers.

51. Whether this is the case under Liechtenstein law is for the referring court to decide.

52. ESA proposes that the Court should answer the first question as follows:

> *Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of the freedom to provide services applies to situations in which a lawyer represents him- or herself in legal proceedings where the national legal order of the host State foresees that lawyers may act on their own behalf.*

European Commission

53. The Commission submits that the key point with regard to whether a lawyer bringing proceedings in an EEA State other than the State in which he is established may rely on the provisions of Directive 77/249 when he is representing himself is that the lawyer is nevertheless acting in a professional capacity as a lawyer. The fact that he, at the same time, is also a party to the proceedings is immaterial – he is both client and lawyer, and simply "wears two different hats".

54. The Commission proposes that the Court should answer the first question as follows:

> *A lawyer bringing proceedings in his own name in an EEA State other than the one in which he is established falls within the scope of Directive 77/249/EEC if he is acting in a professional capacity as a lawyer.*

The second question

The Liechtenstein Government

55. The Liechtenstein Government submits that, since, in its view, Directive 77/249 is obviously not applicable in the present case, an interpretation thereof cannot be considered necessary to enable the national court to give judgment in the case pending before it. Consequently, it is no longer necessary to consider the remaining questions.

56. However, should the Court come to the conclusion that it may rule on questions two to five, the Liechtenstein Government submits the following observations in the alternative.

57. The Liechtenstein Government observes that, in the present case, the service provided by the defendant consists of the representation of a client (the defendant himself) in legal proceedings. Consequently, Article 4(1) and (2) of Directive 77/249 apply.

58. Article 4(1) of Directive 77/249 states that a lawyer must abide by all the conditions laid down in the host Member State for lawyers established in that State, except all the conditions that require residence and/or registration with a professional organisation in the host State.

59. Furthermore, Article 7(2) entrusts the competent authority of the host Member State with a supervisory function in relation to lawyers providing services in that State in terms of the Directive. Supervision of lawyers established in Liechtenstein, and lawyers established in another Member State but effectively pursuing the activities of a lawyer on Liechtenstein territory, is exercised by the Liechtenstein Chamber of Lawyers pursuant to Articles 40(1) and 59(1) of the Lawyers Act.

60. The Liechtenstein Government submits that, in order to be able to exercise effective supervision of lawyers practising in Liechtenstein, the Liechtenstein Chamber of Lawyers must first and foremost know these lawyers.

61. The Liechtenstein Government observes that, pursuant to Article 1b(1) of the Lawyers Act, lawyers established in Liechtenstein are only allowed to pursue the activities of a lawyer once they are registered in the list of Liechtenstein lawyers. Thus, that list provides the Liechtenstein Chamber of Lawyers with

sufficient information about established lawyers to adequately fulfil its supervisory function.

62. However, lawyers established in another EEA State but effectively pursuing the activities of a lawyer in Liechtenstein by way of the provision of services, are neither obliged nor entitled to be registered in the above-mentioned list of Liechtenstein lawyers as mentioned in Article 56 of the Lawyers Act.

63. The Liechtenstein Government submits that Article 59 of the Lawyers Act is intended to ensure equally adequate and effective supervision of lawyers established in another EEA State providing services in Liechtenstein as of lawyers established in Liechtenstein. In its view, the duty to notify under that provision pursues the public interest of guaranteeing adequate and effective supervision of lawyers providing services in Liechtenstein. According to the Liechtenstein Government, it also complies with the principle of proportionality insofar as it is appropriate to ensure the attainment of the objective pursued and does not go beyond what is necessary for its attainment.

64. The Liechtenstein Government adds that this opinion is shared by the Austrian Supreme Court in a ruling on the interpretation of Section 3(1) second sentence of the former Austrian EEA-Lawyers Act 1992, which contained an obligation to notify comparable to that laid down in Article 59(2) of the Liechtenstein Lawyers Act.[4] The currently applicable Austrian law still includes such an obligation to notify.[5]

65. The Liechtenstein Government proposes in the alternative that the Court should answer the second question as follows:

> *An obligation on European lawyers to notify the authorities of the host State (as provided for here in Article 59 of the Liechtenstein Lawyers Act) is compatible with Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services and, in particular, with Article 7 of that Directive.*

EFTA Surveillance Authority

66. ESA submits that the second question should be answered in the negative. In its view, Article 59 of the Lawyers Act goes beyond what it is possible to request from a European lawyer under Directive 77/249.

---

[4] Reference is made to judgment of the Austrian Supreme Court of Justice of 3 November 2003 in case 4Bkd2/03

[5] Reference is made to Section 4(1) second sentence of the Austrian EIRAG (*Europäisches Rechtsanwaltsgesetz*), which reads as follows: "*Vor dem erstmaligen Einschreiten im Sprengel einer Rechtsanwaltskammer haben sie die jeweils zuständige Rechtsanwaltskammer (§ 7 Abs. 7) schriftlich zu verständigen*".

67. ESA observes that Article 1(2) of Directive 77/249 defines a lawyer as any person entitled to pursue his professional activities under certain national designations, which, in the case of Germany, the home State of the defendant in the main proceedings, is the designation *Rechtsanwalt*.

68. Pursuant to Article 2 of Directive 77/249, each Contracting Party shall recognise as a lawyer for the purpose of pursuing services any person listed in Article 1(2) of that Directive.

69. Specifically, Article 4(1) of Directive 77/249 provides that activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host State under the conditions laid down for lawyers established in that State, with the exception of any condition requiring, *inter alia,* registration with a professional organisation in that State.

70. Finally, Article 7(1) of Directive 77/249 sets out that the competent national authority (in Liechtenstein the Head of the Liechtenstein Chamber of Lawyers) may request the person providing the services to establish his qualifications as a lawyer.

71. Conversely, ESA submits, Articles 59(2) and (3)(a) of the Lawyers Act oblige a European lawyer, prior to providing any legal services in Liechtenstein, (i) to make a declaration informing the Liechtenstein Chamber of Lawyers of his intention to do so; (ii) to attach to that notification a certificate evidencing the fact that the European lawyer lawfully exercises the relevant activity in his home State; (iii) to show that, on the date the certificate is submitted, the European lawyer is not prohibited, not even on a temporary basis, from exercising that activity; (iv) to attach evidence of his nationality; (iv) to submit proof that he is covered by professional indemnity insurance; and, where appropriate, (vi) to renew the notification once every year. In ESA's view, this notification obligation exceeds what it is possible to ask of a European lawyer under Directive 77/249.

72. ESA acknowledges that, under Article 7(1) of Directive 77/249, national authorities may request proof of lawyers' status. However, this can in practice be easily done. As many European lawyers carry an identification card issued by the Chamber of Lawyers or Bar Association they are registered with, the exercise is often comparable to that of producing a driver's licence on request in a traffic control. In contrast, ESA continues, Liechtenstein law subjects European lawyers intending to exercise their rights under Article 36 EEA and Directive 77/249 to a systematic prior notification procedure that requires these lawyers to present themselves, on their own motion, to the national authority in writing and to enclose a number of written documents with such declaration, none of which is foreseen under Directive 77/249.

73. ESA asserts that, while such procedure might generally conform with Article 7 of Directive 2005/36, which is not applicable in the circumstances, the prior notification regime does not accord with Directive 77/249.

74. ESA submits that the freedom to provide services under Article 36 EEA entails, in particular, the abolition of any discrimination against a service provider on account of its nationality or the fact that it is established in an EEA State other than that in which the service is to be provided.

75. ESA considers that the procedure set out in Article 59 of the Lawyers Act subjects European lawyers to a regime that is substantially more onerous than the rules that apply to the provision of legal services in purely domestic situations. While national lawyers have to be affiliated to the Chamber of Lawyers, nothing suggests that Liechtenstein lawyers are required to undergo (annual) notification procedures comparable to the ones to which European lawyers are subjected.

76. According to ESA, by virtue of Articles 2 and 4(1) of Directive 77/249, there is no objective difference between the situations of Liechtenstein lawyers and their peers from other EEA States that justifies different treatment in this regard. Thus, ESA concludes, Article 59 of the Lawyers Act gives rise to discrimination against foreign service providers contrary to Article 36 EEA.

77. In that regard, ESA submits that it follows from Article 39 EEA that such a rule may only be justified on grounds of an express derogating provision, such as Article 33 EEA.

78. However, in ESA's view, this is not the case as regards Article 59 of the Lawyers Act. The rules set out in Directive 77/249 cater both specifically and sufficiently for public policy objectives that arise in the context of the provision of cross-border legal services. ESA recalls that, to avoid any confusion, European lawyers must use their domestic professional title as expressed in the language of that State and with an indication of the professional organisation by which they are authorised to practise (Article 3 of Directive 77/249). Furthermore, Article 4(2) of Directive 77/249 provides that the rules of professional conduct of the host Member State must be observed in the pursuit of cross-border legal services, without prejudice to the European lawyer's obligations in the Member State from which he comes. Moreover, the European lawyer is subject to supervision by the competent national authority, which is empowered to take all necessary measures (cf. Article 7(1) and (2) of Directive 77/249).

79. ESA proposes that the Court should answer the second question as follows:

> *Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services precludes a national measure*

such as Article 59 of the Liechtenstein Lawyers Act that obliges a European lawyer, prior to providing any legal services in that EEA State,

i. to make a declaration informing the Liechtenstein Chamber of Lawyers of his or her intention to do so;

ii. to attach to that notification a certificate evidencing the fact that the European lawyer lawfully exercises the relevant activity in his home State;

iii. to show that, at the date the certificate is submitted, the European lawyer is not prohibited not even on a temporary basis from the exercise of that activity;

iv. to attach evidence of his or her nationality;

v. to submit proof that he or she is covered by professional indemnity insurance; and, where appropriate,

vi. to renew the notification procedure once every year.

European Commission

80. The Commission submits that Article 4(1) of Directive 77/249 expressly precludes a host Member State from requiring registration with a professional organisation as a condition for pursuing activities relating to the representation of a client in legal proceedings. The French version of this article similarly refers to "*inscription à une organisation professionnelle*", while the German version is slightly more specific and refers to "*Zugehörigkeit zu einer Berufsorganisation*", i.e. membership of, or affiliation to, a professional organisation. It follows that the host Member State cannot require a lawyer providing services on a temporary basis to "sign up" to the professional body of that Member State. The logic behind this is essentially that he remains subject to the national rules for practising the profession in his home Member State. It is the qualification as a lawyer in the home State that is crucial.

81. According to the Commission, this underlying principle is further evidenced in the terms of Article 7(1) of Directive 77/249, which permits the competent authority of the host Member State to request the person providing the services to establish his qualifications as a lawyer. Accordingly, the authorities of the host Member State may request the lawyer to prove that he is a qualified lawyer entitled to practise in his home Member State. This can, for example, be achieved by means of a certificate or membership card issued by the professional body of the home State.

82. In the present case, Article 59(2) of the Lawyers Act requires a European lawyer engaging in the provision of services to notify the Liechtenstein Chamber of Lawyers of his intention to do so. A certificate showing his qualification to

practise in his home State must be provided, as well as evidence of nationality and professional indemnity insurance.

83. The Commission recalls that it is well-established that national rules that hinder or render less attractive the provision of cross-border services can only be justified by an overriding public interest objective. They must also be appropriate to achieving the objective and not go beyond what is necessary to attain it.[6]

84. In the Commission's view, the key requirement for the temporary cross-border provision of services as a lawyer is qualification in the home Member State. Article 7(1) of Directive 77/249 envisages that the competent authority of the host Member State may request the lawyer to "establish his qualifications". However, in the Commission's view, a universal rule requiring a lawyer in all circumstances to not only provide documentation but also prior notification to the competent authorities cannot be considered proportionate to the legitimate objective of ensuring that he is a qualified lawyer currently entitled to practise.

85. In this regard, the Commission emphasises that Article 5 of Directive 77/249 contains specific safeguards that apply to the representation of a client in court proceedings, in particular the possibility of requiring the lawyer providing services to work with a local lawyer. The public interest objective of ensuring answerability to the judicial authority concerned and the efficient functioning of the justice system[7] is thus already taken into account, and cannot be used to justify an additional and general rule of notification. As regards the protection of clients, this is already achieved by the use of the home title (with an indication of the authorising professional organisation), as part of the background information relevant to the choice of a lawyer.

86. The Commission adds that Article 7 of Directive 2005/36 envisages that Member States may require a cross-border service provider to inform the competent authorities in the host State in advance by means of a written declaration (which may be accompanied by certain documents). However, recital 42 in the preamble to Directive 2005/36 expressly notes that that Directive does not affect the operation of Directive 77/249. In any event, Article 7 of Directive 2005/36 must be read in light of recital 7 in the preamble to that Directive. The recital explains that declaration requirements may only apply where necessary, and without such requirements leading to a disproportionate burden on service providers, or hindering or rendering less attractive the exercise of the freedom to provide services.

87. The Commission also underlines that notification within the sense of Article 7(1) of Directive 2005/36 is in any event purely informative in nature, rather than determinative of the capacity to provide cross-border services. In

---

6 Reference is made, *inter alia*, to *Criminal proceedings against A*, cited above, paragraph 27.

7 Reference is made, *inter alia*, to Case 427/85, *Commission* v *Germany* [1988] ECR 1123, paragraph 27.

contrast, the notification requirement imposed by Article 59(2) of the Lawyers Act appears to be a precondition for the cross-border provision of services as a lawyer in Liechtenstein, since, by virtue of Article 59(4), the Head of the Liechtenstein Chamber of Lawyers has responsibility for prohibiting the exercise of the provision of services if the requirements of Article 59(2) are not complied with.

88. The Commission proposes that the Court should answer the second question as follows:

> *Article 7 of Directive 77/249/EEC precludes a host State from imposing in all circumstances a general prior notification requirement for lawyers providing cross-border services on a temporary basis.*

The third question

The Liechtenstein Government

89. The Liechtenstein Government notes that the possible consequences of failure to notify the competent authority are not set out in detail in the Lawyers Act. This means that the legislator imposed on the competent authority an obligation to decide such consequences on a case-by-case basis after having taken due account of all relevant facts and specificities of the individual case at hand.

90. The Liechtenstein Government observes that, in the present case, the competent authority decided that a refusal to allow the defendant to claim lawyers' fees in accordance with the scale of fees provided for in Liechtenstein was an appropriate consequence of failure to notify to the Chamber of Lawyers.

91. The Liechtenstein Government agrees with this decision. The obligation to notify pursues the public interest purpose of guaranteeing adequate and effective supervision of lawyers providing services in Liechtenstein. Such lawyers should have sufficient knowledge of the Liechtenstein legal system, especially since they will normally pursue activities relating to the representation of clients in proceedings and/or the provision of legal advice to such clients, who rely on the lawyer's expertise. Therefore, ignorance or non-observance of legal provisions by such legally trained persons is particularly serious.

92. In the Liechtenstein Government's view, the protection of clients should always be given adequate consideration and acknowledged by the competent authority when taking its decision. However, because the defendant was acting on his own behalf in the present case, no clients suffered the potentially negative effects.

93. The Liechtenstein Government submits that the decision of the competent authority is appropriate. A contrary view would be in conflict with the sense of justice because it would lead to preferential treatment of a defendant acting

unlawfully, who failed to notify to the (potential) detriment of a plaintiff acting lawfully, and to the defendant then being able to claim lawyers' fees in accordance with the (higher) scale of fees provided for in Liechtenstein.

94. The Liechtenstein Government proposes that the Court should answer the third question as follows:

> *Having regard to Directive 77/429/EEC, a failure to notify the competent authorities in the host State on the part of a European lawyer engaged in the provision of services must result in the consequence that the lawyer concerned may not claim lawyers' fees in accordance with the scale of fees provided for in the host State (in Liechtenstein the fees provided for in the Lawyers' Fees Act (Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten) and the Lawyers' Fees Regulation (Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten).*

EFTA Surveillance Authority

95. ESA submits that, since the national court only posed the third question in the case that the second question is answered in the affirmative, there is no need to answer the third question.

European Commission

96. The Commission observes that the third, fourth and fifth questions concern the consequences that may flow from non-compliance with a notification requirement. This would in principle be a matter for national law.

97. However, the Commission adds that, since such a notification requirement could not in any event be determinative of the right to provide cross-border legal services, any failure to comply could not justify the refusal of a claim for legal fees linked to the provision of such services.

The fourth question

The Liechtenstein Government

98. The Liechtenstein Government sees no grounds for finding that a subsequent notification can result in the consequence that the lawyer may claim fees in accordance with the scale of fees provided for in the host State not only in relation to the period following that notification but also in relation to procedural steps taken prior to that date.

99. According to the Liechtenstein Government, a contrary interpretation could lead to the absurd situation that a lawyer engaged in the provision of services could have benefitted from the favourable conditions in the host EEA State without having been supervised at all by the competent authorities in that State, by notifying these authorities once he was back in his home State.

100. However, once the lawyer engaged in the provision of services has lawfully notified the competent authority in the host EEA State, he should be allowed to claim fees in accordance with the scale of fees provided for in that State for procedural steps taken after the date of notification.

101. The Liechtenstein Government proposes that the Court should answer the fourth question as follows:

> *Where a European lawyer engaged in the provision of services has notified the authorities in the host State only at a later stage, this subsequent notification must result in the consequence that the lawyer may claim fees in accordance with the scale of fees provided for in the host State only in relation to the period following that notification but not in relation to procedural steps taken prior to that date.*

EFTA Surveillance Authority

102. ESA submits that that it is appropriate to address questions four and five together.

103. ESA recalls that the remuneration of a lawyer is a matter governed by national law. In the absence of harmonisation at EEA level, EEA law in general, and Directive 77/249 in particular, does not predetermine this question in any way as long as European lawyers are not discriminated against compared to their Liechtenstein peers.[8]

104. As regards a situation such as in the main proceedings, ESA continues, the pivotal point will be the Liechtenstein rules on the recovery of legal fees and expenses in situations where a lawyer has represented himself. It is for the national court to assess whether those rules entitle a lawyer to claim recovery of legal fees and expenses that he could have claimed if another lawyer had represented him. However, according to ESA, Article 1(2) of the Lawyers' Fees Act would suggest that this is the case.

105. In any event, ESA continues, Article 3 EEA requires national courts to interpret national law as far as possible in conformity with EEA law.[9]

106. In particular, EEA law requires the avoidance of any discrimination on grounds of nationality. The referring court will therefore have to interpret the Lawyers' Fees Act and Regulation in a manner that ensures that European

---

[8] Reference is made to Case C-289/02 *AMOK* [2003] ECR I-15059, paragraph 30, and to the Opinion of Advocate General Mischo in that Case, points 43, 49 and 67.

[9] Reference is made to Case E-13/11 *Granville* [2012] EFTA Ct. Rep. 400, paragraph 52.

lawyers representing themselves are not treated differently from domestic lawyers doing the same.[10]

107. ESA submits that, since Directive 77/249 precludes a national measure such as Article 59 of the Lawyers Act, a lawyer's failure to make a declaration or notification under that provision cannot be a relevant consideration as regards the remuneration of legal services provided within the meaning of Directive 77/249.

108. ESA proposes that the Court should answer the fourth and fifth questions as follows:

> *It is for the referring court to determine in a non-discriminatory application of national law whether a European lawyer representing him- or herself may claim legal fees and expenses that he or she could have claimed as legal fees and expenses if another lawyer had represented him or her.*

The fifth question

The Liechtenstein Government

109. The Liechtenstein Government reiterates that a lawyer providing services in another EEA State should have sufficient knowledge of that State's legal system, especially because he will normally pursue activities relating to the representation of a client in proceedings and/or the provision of legal advice to clients. It is his personal responsibility to comply with the principles and specificities of the legal system of the State in which he intends to provide services.

110. Consequently, the Liechtenstein Government concludes that Liechtenstein courts have no obligation to inform European lawyers engaged in the provision of services in Liechtenstein about their obligation under Liechtenstein law to notify the Liechtenstein Chamber of Lawyers pursuant to Article 59(2) of the Lawyers Act.

---

[10] Reference is made to Article 36 EEA. Compare also the Opinion of Advocate General Mischo in *AMOK*, cited above, point 71.

111. The Liechtenstein Government proposes that the Court should answer the fifth question as follows:

> *The answer to the third and fourth questions does not depend on whether at the start of the proceedings the court of the host State referred the European lawyer engaged in the provision of services to the obligation under the law of that State to notify to the authorities.*

Per Christiansen
Judge-Rapporteur