REPORT FOR THE HEARING

in Case E-9/14

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 Princely Court of Liechtenstein (*Fürstliches Landgericht des Fürstentums Liechtenstein*) in the proceedings concerning

Otto Kaufmann AG

on the interpretation of EEA law with regard to the recording of criminal convictions of legal persons.

I Legal background

EEA law

1. Article 31 EEA reads:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
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> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*
>
> *2. Annexes VIII to XI contain specific provisions on the right of establishment.*

2. Article 36 EEA reads:

> *1. 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.

2. Annexes IX to XI contain specific provisions on the freedom to provide services.

3. Article 83 EEA reads:

Where cooperation takes the form of an exchange of information between public authorities, the EFTA States shall have the same rights to receive, and obligations to provide, information as EC Member States, subject to the requirements of confidentiality, which shall be fixed by the EEA Joint Committee.

4. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services ("Directive 96/71") (OJ 1997 L 18, p. 1) was incorporated into Annex XVIII to the EEA Agreement by Decision of the EEA Joint Committee No 37/98 of 30 April 1998 ("Decision No 37/98") (OJ 1998 L 310, p. 25, and EEA Supplement No 48, p. 260). Decision No 37/98 entered into force on 1 July 1999. The deadline for transposition in the EEA was on the same day.

5. Article 4(2) of Directive 96/71 reads:

Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 3. Such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.

...

6. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ("Directive 2004/18") (OJ 2004 L 134, p. 114) was incorporated with certain adaptations into Annex XVI to the EEA Agreement by Decision of the EEA Joint Committee No 68/2006 of 2 June 2006 ("Decision No 68/2006") (OJ 2006 L 245, p. 22, and EEA Supplement No 44, p. 18). According to information on the EFTA Secretariat website, Decision No 68/2006 entered into force on 18 April 2007. The deadline for transposition in the EEA was on the same day. However, according to Article 2 of the Annex to Decision No 68/2006, the compliance date for Liechtenstein was 18 months later, that is on 18 October 2008.

7. Recital 43 in the preamble to Directive 2004/18 reads:

The award of public contracts to economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering should be avoided. Where appropriate, the contracting authorities should ask candidates or tenderers to supply relevant documents and, where they have doubts concerning the personal situation of a candidate or tenderer, they may seek the cooperation of the competent authorities of the Member State concerned. The exclusion of such economic operators should take place as soon as the contracting authority has knowledge of a judgment concerning such offences rendered in accordance with national law that has the force of res judicata. If national law contains provisions to this effect, non-compliance with environmental legislation or legislation on unlawful agreements in public contracts which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

…

8. Article 45(2) to (4) of Directive 2004/18 reads:

2. Any economic operator may be excluded from participation in a contract where that economic operator:

…

(c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;

…

3. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in paragraphs … or 2… (c)…applies to the economic operator:

(a) as regards paragraphs … 2… (c), the production of an extract from the 'judicial record' or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes showing that these requirements have been met;

…

Where the country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraphs … 2… (c), they may be replaced by a declaration on oath or,

in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes.

4. Member States shall designate the authorities and bodies competent to issue the documents, certificates or declarations referred to in paragraph 3 and shall inform the Commission thereof. Such notification shall be without prejudice to data protection law.

9. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications ("Directive 2005/36") (OJ 2005 L 255, p. 22), was incorporated with certain adaptations into Annex VII to the EEA Agreement by Decision of the EEA Joint Committee No 142/2007 of 26 October 2007 ("Decision No 142/2007") (OJ 2008 L 100, p. 70, and EEA Supplement No 19, p. 70). According to the EFTA Secretariat website, Decision No 142/2007 entered into force on 1 July 2009. The deadline for transposition in the EEA was on the same day.

10. Article 56(2) of Directive 2005/36 reads:[1]

The competent authorities of the host and home Member States shall exchange information regarding disciplinary action or criminal sanctions taken or any other serious, specific circumstances which are likely to have consequences for the pursuit of activities under this Directive …

11. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ("Directive 2006/123") (OJ 2006 L 376, p. 36), was incorporated with certain adaptations into Annex X to the EEA Agreement by Decision of the EEA Joint Committee No 45/2009 of 9 June 2009 ("Decision No 45/2009") (OJ 2009 L 162, p. 23, and EEA Supplement No 33, p. 8). According to the EFTA Secretariat website, Decision No 45/2009 entered into force on 1 May 2010. The deadline for transposition in the EEA was on the same day.

12. Recitals 105 and 111 in the preamble to Directive 2006/123 read:

(105) Administrative cooperation is essential to make the internal market in services function properly. Lack of cooperation between Member States results in proliferation of rules applicable to providers or duplication of controls for cross-border activities, and can also be used by rogue traders

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[1] Directive 2005/36 has been amended several times, most recently by Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 ("Directive 2013/55"). That amendment has consequences for the wording of Article 56(2). However, Directive 2013/55 has not yet been incorporated into the EEA Agreement. Moreover, according to its Article 3, the deadline for transposition of Directive 2013/55 in the EU is 18 January 2016.

to avoid supervision or to circumvent applicable national rules on services. It is, therefore, essential to provide for clear, legally binding obligations for Member States to cooperate effectively.

...

(111) The provisions of this Directive concerning exchange of information regarding the good repute of providers should not pre-empt initiatives in the area of police and judicial cooperation in criminal matters, in particular on the exchange of information between law enforcement authorities of the Member States and on criminal records.

13. Article 33(1) of Directive 2006/123 reads:

Member States shall, at the request of a competent authority in another Member State, supply information, in conformity with their national law, on disciplinary or administrative actions or criminal sanctions and decisions concerning insolvency or bankruptcy involving fraud taken by their competent authorities in respect of the provider which are directly relevant to the provider's competence or professional reliability. ...

National law

14. Pursuant to Section 1(1) of the Act of 2 July 1974 on Criminal Records and the Removal of Convictions from the Records (Criminal Records Act, LR 330), a criminal record shall be kept for the purpose of recording criminal convictions. According to Section 1(2), the responsibility for maintaining the record shall be assigned to an individual judge of the Princely Court. According to the request for an advisory opinion, the decision whether a conviction handed down must be entered on the criminal record is regarded as a judicial activity under Liechtenstein law.

15. Section 2(1) of the Criminal Records Act establishes that all convictions handed down by domestic courts in relation to criminal offences or misdemeanours shall be entered on the criminal record. It is unclear, however, whether the conviction of a legal person must be entered on the criminal record.

II Facts and procedure before the national court

16. By judgment of 23 January 2014, the Princely Court of Liechtenstein convicted Otto Kaufmann AG, a company registered in Liechtenstein, for not transferring to the pension foundation employee and employer contributions to the occupational pension scheme although such were withheld from wages. The sentence was a fine of CHF 700.

17. Subsequently, the judgment was sent for registration to the judge of the Princely Court who maintains the criminal record.

18. The Liechtenstein public prosecutor's office was invited to submit observations on the proposal to enter the conviction on the criminal record. In its reply of 24 February 2014, the prosecutor's office stated its opposition to entering the conviction on the criminal record on the basis that Otto Kaufmann AG is a legal person and not a natural person.

19. On 18 March 2014, the Princely Court decided to seek an advisory opinion from the Court, and referred the following question:

> **Does the EEA Agreement, in particular the provisions on the freedom to provide services and freedom of establishment and/or individual acts of secondary law (for example, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts or Directive 2006/123/EC on services in the internal market, which have both been incorporated into EEA law), require that where national law allows for legal persons to be convicted by a criminal court those convictions must also be clearly recorded, for example, in a criminal record?**

20. The national court observes that there is no international element to the case. However, in its view, the request for an advisory opinion is nevertheless admissible since the question is capable of producing effects which are not confined to Liechtenstein. In this regard, the national court refers to the judgment of the Court of Justice of the European Union ("ECJ") in Case C-367/12 *Sokoll-Seebacher*.[2]

III Written observations

21. 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 Norwegian Government, represented by Torje Sunde, advokat, Office of the Attorney General (Civil Affairs), and Ingunn Skille Jansen, Senior Advisor, Department of Legal Affairs, Ministry of Foreign Affairs, acting as Agents;
- the Netherlands Government, represented by Mielle Bulterman, Head, and Charlotte Schillemans, Staff Member, European Law Division, Legal Affairs Department, Ministry of Foreign Affairs, acting as Agents;

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[2] Reference is made to Case C-367/12 *Sokoll-Seebacher*, judgment of 13 February 2014, published electronically, paragraphs 10 and 11.

- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Janne Tysnes Kaasin, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Adrian Tokar and Karl-Philipp Wojcik, Members of its Legal Service, acting as Agents.

IV Summary of the arguments submitted

The Liechtenstein Government

22. The Liechtenstein Government focuses on those provisions of primary and secondary law which have been explicitly mentioned by the referring court.

23. The Liechtenstein Government submits that Directive 2004/18 does not require that, where national law allows for legal persons to be convicted by a criminal court, those convictions must also be clearly recorded. This can be seen from Article 45(3)(a), which states that the contracting authority shall accept as evidence that an economic operator has not been convicted of an offence concerning his professional conduct not only an extract from the judicial record but also an equivalent document, or a declaration on oath or solemn declaration.

24. Directive 2004/18 thus leaves it to the national legislature not only to allow for legal persons to be convicted, but also to decide whether and, if so, how these convictions will be recorded.

25. According to the Liechtenstein Government, Directive 2006/123 also does not require that, where national law allows for legal persons to be convicted by a criminal court, those convictions must also be clearly recorded.

26. Article 33 of Directive 2006/123 provides for the exchange of information between the EEA States on the good repute of service providers. That provision explicitly mentions the exchange of information on criminal sanctions directly relevant to the service provider's competence or professional reliability. The provision of such information must be in accordance with the national law of the providing EEA State.

27. The Liechtenstein Government submits that, according to the ECJ, the Community legislature has the competence to take measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down in an internal market legal act, such as Directive 2006/123, are fully effective.[3] This explains why the EEA/EFTA States have implemented Directive 2006/123 without any adaptation to Article 33

[3] Reference is made to Case C-176/03 *Commission* v *Council* [2005] ECR I-7879, paragraph 48.

thereof, although justice and home affairs, including criminal law, as a general rule are not covered by the scope of the EEA Agreement.

28. However, the Liechtenstein Government continues, it follows from the wording of Directive 2006/123 that there is no legal obligation to keep available specific types of information. Directive 2006/123 is silent on that point. The Community legislature therefore left it to the Member States to decide upon the type of information on established service providers which it considers necessary to keep available and accessible in conformity with its national law in order to adequately supervise those service providers.

29. According to the Liechtenstein Government, since more specific and clarifying provisions of secondary law governing administrative cooperation lay down no legal obligation to clearly record criminal court convictions of legal persons,[4] it seems highly doubtful that the provisions of primary law may be interpreted to provide for an obligation to clearly record convictions.

30. In the alternative, should the Court conclude that there is an obligation under EEA law to clearly record convictions where national law allows for legal persons to be convicted, the Liechtenstein Government submits that there is, in any event, no obligation, neither in primary nor in secondary law, governing the form of recording. Therefore, there is no obligation explicitly to record convictions in a criminal record.

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

> *The EEA Agreement, in particular the provisions on the freedom to provide services and freedom of establishment and/or individual acts of secondary law (for example, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts or Directive 2006/123/EC on services in the internal market, which have both been incorporated into EEA law) does not require that where national law allows for legal persons to be convicted by a criminal court those convictions must also be clearly recorded, for example, in a criminal record.*

The Netherlands Government

32. In relation to primary EEA law, the Netherlands Government does not see how either Article 31 EEA (freedom of establishment) or Article 36 EEA (freedom to provide services) may give rise to an obligation to record. Neither the text nor the rationale of these provisions requires that the Member States record criminal convictions of legal persons.

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4 Reference is made to recitals 5 and 6 in the preamble to Directive 2006/123.

33. The Netherlands Government observes that Article 83 EEA does contain a reference to cooperation through the exchange of information between public authorities. However, this provision only stipulates that the EFTA States shall have the same rights to receive and obligations to provide information as EU Member States. According to the Netherlands Government, neither the text nor the rationale of either the TEU or the TFEU prescribes an obligation to record.

34. In relation to secondary EEA law, the Netherlands Government submits that recital 43 in the preamble to Directive 2004/18 makes clear that, within the scope of that directive, the exchange of information on criminal convictions is intended to enable contracting authorities to exclude criminals and criminal entities from participating in a tender.

35. According to the Netherlands Government, Article 45 of Directive 2004/18 provides for a clear framework and context whereby such information may be applied in a tendering procedure. However, it cannot be concluded from the wording of Article 45 that it imposes an obligation to record convictions of legal persons. First, it follows from the wording that it depends on the national law of the Member State involved whether information on legal persons must be delivered. Second, the third paragraph of the provision clearly provides for alternatives to an extract from the judicial record, such as a declaration on oath or solemn declaration, which may also suffice.

36. Therefore, the Netherlands Government considers that Directive 2004/18 does not in itself establish an obligation to record convictions of legal persons convicted by a criminal court. It does however impose an obligation to provide relevant information on such criminal convictions without requiring that this should be done through an extract from the judicial record.

37. The Netherlands Government submits that administrative cooperation between Member States is essential to make the internal market in services function properly. This is confirmed by recital 105 in the preamble to Directive 2006/123.

38. Article 33 of Directive 2006/123 obliges a Member State to supply information on the good repute of service providers. In the view of the Netherlands Government, it is clear from the wording of that provision that there is no requirement to record criminal convictions. As it refers to the supply of information "in conformity with their national law", it does not require that convictions must be recorded in a criminal record. Consequently, if national law does not provide for the recording of convictions or prohibits it, Directive 2006/123 will respect this.

39. Furthermore, the Netherlands Government submits that it is clear from recital 111 in the preamble to Directive 2006/123 that the exchange of information on criminal records may occur outside the mechanism provided for in the directive. Although police and judicial cooperation in the EU is not part of

the EEA Agreement, reference is made to Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States.[5] It deals specifically with the issue of exchange of information from the criminal record. However, the obligation of recording and transmitting information is limited to natural persons only.

40. According to the Netherlands Government, it is important to take account of the fact that if the conviction of a legal person has not been noted and registered in a dedicated record, this may hinder the execution of an information request from another Member State. However, it does not make it impossible to supply adequate information. As Article 45(3) of Directive 2004/18 illustrates, there are alternatives to an extract from the judicial record.

41. Article 4(2) of Directive 96/71 concerns cooperation between public authorities in cases of unlawful transnational activities. However, in the view of the Netherlands Government, this provision leaves the level of cooperation to Member States and merely states that certain information on possible unlawful transnational activities should be exchanged. Therefore, it does not require Member States to record criminal convictions of legal persons.

42. Finally, the Netherlands Government refers to Article 56(2) of Directive 2005/36.[6] The Government submits that although this provision relates to the exchange of information on criminal sanctions, it does not require the Member States to actively record criminal convictions. Furthermore, it only applies to natural persons. Therefore, an obligation to record convictions of legal persons cannot be derived from Directive 2005/36.

43. The Netherlands Government proposes that the Court should answer the question as follows:

> *The EEA Agreement, in particular the provisions on the freedom to provide services and freedom of establishment and/or individual acts of secondary law (for example, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts or Directive 2006/123/EC on services in the internal market, which have both been incorporated into EEA law), does not require that where national law allows for legal persons to be convicted by a criminal court those convictions must also be clearly recorded, for example, in a criminal record.*

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5 OJ 2009 L 93, p. 23.

6 The Netherlands Government also refers to Article 56a(1) of Directive 2005/36. This provision was added by Directive 2013/55. As mentioned in footnote 1 above, Directive 2013/55 has not yet been incorporated into the EEA Agreement.

However, Directive 2004/18/EC and Directive 2006/123/EC do require competent authorities of the Member States to provide information on the professional reliability of service providers, which may require the exchange of information on criminal convictions of legal persons. This requirement does not in itself entail an obligation to establish a criminal record for legal persons.

The Norwegian Government

44. The Norwegian Government confines its observations to the question relating to the freedom to provide services and freedom of establishment. In the opinion of the Government, that part of the question must be held inadmissible as hypothetical, since it is clear from the reference for an advisory opinion that there is no cross-border element.

45. The Norwegian Government submits that application of both the chapters of the Agreement on freedom of establishment and freedom to provide services requires a cross-border element. This follows both from the wording of the Agreement[7] and established case law.[8]

46. The Norwegian Government observes that the Court has held that it may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EEA law that is sought is unrelated to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[9] On previous occasions, the Court has found hypothetical questions to be inadmissible.[10]

47. The Norwegian Government submits that, in a case where there is no indication of a cross-border element in the main proceedings, a question related to the interpretation of the freedoms of the Agreement or acts adopted to implement them is by its nature hypothetical and therefore should be found inadmissible.

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[7] Reference is made to Article 31 ("of an EC Member State or an EFTA State in the territory of any other of these States") and Article 36 EEA ("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").

[8] Reference is made, *inter alia*, to Case 115/78 *Knoors* [1979] ECR 399, paragraph 24; Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833, paragraph 9; Case C-60/91 *Batista Morais* [1992] ECR I-2085, paragraph 7; Joined Cases C-225/95 to C-227/95 *Kapasakalis and Others* [1998] ECR I-4239, paragraph 22; Joined Cases C-95/99 to C-98/99 and C-180/99 *Khalil and Others* [2001] ECR I-7413, paragraph 70; and Case C-104/08 *Kurt*, order of 19 June 2008, not published in the ECR, paragraphs 20 and 21.

[9] Reference is made to Case E-13/11 *Granville* [2012] EFTA Ct. Rep. 400, paragraph 20; and, in addition, to Case E-17/11 *Aresbank* [2012] EFTA Ct. Rep. 916, paragraph 44.

[10] Reference is made to Case E-6/96 *Wilhelmsen* [1997] EFTA Ct. Rep. 53, paragraph 40.

48. Were this not the case, the Norwegian Government continues, requests for an advisory opinion could in principle be made in all cases, also those concerning purely internal situations where any connection to EEA rules is absent. This would go beyond the aim of the advisory opinion procedure, which is to provide an interpretation of the Agreement against a factual background. The Court's function is to assist in the administration of justice in the EEA States and not to deliver advisory opinions on general or hypothetical questions which have no bearing on the dispute in the main proceedings.[11]

49. According to the Norwegian Government, it also follows from the case law of the ECJ that questions of interpretation concerning the fundamental freedoms in cases where there is no cross-border element and thus no link between the relevant freedoms and the legal and factual circumstances in the main proceedings are held inadmissible.[12]

50. The Norwegian Government acknowledges that the ECJ, in some cases, has admitted a question relating to a case in which there is no cross-border element present in the main proceedings. The referring court has in that respect referred to *Sokoll-Seebacher*, cited above, paragraphs 10 to 12.

51. However, in the view of the Norwegian Government, the reasoning in *Sokoll-Seebacher* is based on circumstances that differ from those of the present case. The case law cited in paragraphs 10 and 11 of *Sokoll-Seebacher* only concerns the situation where it is reasonably clear that a restriction on intra-EEA trade would be present had only the dispute in the main proceedings concerned a national of another Member State.[13] Moreover, the referring court must also show that the question is actually useful for the dispute in the main proceedings, notwithstanding the absence of a cross-border element.[14]

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[11] Reference is made to Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 32; Case C-478/07 *Budějovický Budvar* [2009] ECR I-7721, paragraph 64; Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 28; and Case C-197/10 *Unió de Pagesos de Catalunya* [2011] ECR I-8495, paragraph 18.

[12] Reference is made to Case C-445/01 *Simoncello and Boerio* [2003] ECR I-1807, in particular paragraph 26, Case C-393/08 *Sbarigia* [2010] ECR I-6337, in particular paragraphs 25, 27 and 28, and Case C-245/09 *Omalet* [2010] ECR I-13771, paragraph 9. Moreover, as regards the free movement of capital, reference is made to Case C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-9021, paragraphs 40 to 47. As regards the interpretation of the former Article 6 TEU, reference is made to Case C-328/04 *Vajnai* [2003] ECR I-8577, in particular paragraph 14. In addition, reference is also made to Case C-27/11 *Vinkov*, judgment of 7 June 2012, published electronically, and to the early case law of Case C-152/94 *van Buynder* [1995] ECR I-3981.

[13] Reference is made to Joined Cases C-159/12 to C-161/12 *Venturini*, judgment of 5 December 2013, published electronically, which is among the case law the ECJ refers to in *Sokoll-Seebacher*, cited above. According to the Norwegian Government, the ECJ clearly distinguishes the circumstances of *Venturini* from those in *Sbarigia*, cited above. In paragraph 27 the ECJ states that in *Sbarigia* "there was nothing to indicate how [the measure] might affect economic operators coming from other Member States".

[14] The Norwegian Government contends that paragraph 12 of *Sokoll-Seebacher*, cited above, should be compared with *Omalet*, cited above, paragraphs 15 to 17.

52. Thus, in the view of the Norwegian Government, it continues to be the main rule that a question related to the interpretation of the freedoms established in the Agreement in a case in which there is no indication of a cross-border element is hypothetical and should be held inadmissible.

53. In the present case, it is clear from the request that there is no cross-border element. Furthermore, according to the Norwegian Government, the referring court has not shown how the national rule in question may constitute a restriction on intra-EEA trade.

54. The Norwegian Government proposes that the Court should answer the question as follows:

> *The request for an advisory opinion is inadmissible, as regards the question relating to the provisions on the freedom to provide services and freedom of establishment.*

The EFTA Surveillance Authority

55. As regards admissibility, ESA submits that the question may be raised whether the Princely Court of Justice must be considered a "court or tribunal" for the purposes of Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") when making a decision concerning an entry on the criminal record, and thus, whether it is entitled to a submit a request for an advisory opinion. This question includes an assessment of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.[15]

56. However, ESA continues, the Court has held that the purpose of Article 34 SCA – to establish cooperation between the Court and the national courts, to be a means of ensuring a homogenous interpretation of EEA law and to provide assistance to national courts in their application of EEA law – does not require a strict interpretation of Article 34 SCA. Furthermore, if there is doubt whether the national court in question exercises a judicial function in the case at hand, the Court has stated that it would run counter to the purpose of Article 34 to declare the request inadmissible.[16]

57. ESA thus assumes that the request is admissible.

58. Turning to the substance of the request, ESA fails to see how the general provisions on the freedom of establishment and the freedom to provide services

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[15] Reference is made to Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561, paragraph 12 and the case law cited.

[16] Reference is made to Case E-23/13 *Hellenic Capital Markets Commission*, judgment of 9 May 2014, not yet reported, paragraphs 33 and 34.

may have a bearing on the question whether EEA law entails a duty on States to record criminal convictions in the context of the present case. If such an obligation does exist, it would have to follow from secondary law.

59. ESA observes that, according to Article 45(2)(c) of Directive 2004/18, an economic operator may be excluded from participation in a public contract if he has been convicted of any offence concerning his professional conduct. This provision is a part of the procedures for administrative cooperation and exchange of information between public authorities in order to avoid the award of public contracts to operators who have participated in criminal organisations or who have been found guilty of corruption, etc.[17] Thus, when an economic operator is participating in a tender, he may be asked to provide evidence to prove that he has not been convicted of any offence concerning his professional conduct.

60. In this respect, ESA continues, Directive 2004/18 lists a number of ways in which an economic operator can provide information on his professional conduct that must be accepted as sufficient evidence by the contracting authority. In accordance with Article 45(3)(a) of this directive, a contracting authority shall accept as sufficient evidence an extract from the judicial record or of an equivalent document issued by a competent judicial or administrative authority. In addition, when the country in question does not issue such documents, a declaration on oath or a solemn declaration before a competent body will also suffice as evidence of the professional conduct of the economic operator.

61. Thus, it cannot be deduced from Article 45(3)(a) of Directive 2004/18 that there is an obligation on States to have a criminal record or similar recording of convictions. This is simply not required in order to produce sufficient evidence of the professional conduct of the economic operator.

62. In ESA's view, nor can such an obligation be deduced from Article 45(4) of Directive 2004/18. This provision obliges EEA States to designate the authorities and bodies competent to issue the documents, certificates or declarations that must be accepted as sufficient evidence of the economic operator's personal conduct. However, the designation of bodies depends in its entirety on the system that the State in question has chosen. The requirement to designate the authorities and bodies competent to issue the relevant documents seems to be more of a practical nature. The States must make it clear which authorities and bodies may assist economic operators when they need to provide evidence of their professional conduct.

63. In conclusion, ESA cannot see that Article 45 of Directive 2004/18 entails a duty on States to record criminal convictions. It is for national law to decide how information on the professional conduct of an economic operator may be provided.

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[17] Reference is made to recital 43 in the preamble to Directive 2004/18 and to the provisions of Chapter VII Section 2 of that directive concerning the criteria for qualitative selection.

64. ESA contends that Directive 2006/123 contains a number of provisions on mutual assistance between EEA States,[18] one of which requires the provision of information at the request of another EEA State. Administrative cooperation between EEA States is essential to make the internal market in services function properly and effectively.[19] In line with the general obligations to provide mutual assistance, Article 33(1) of Directive 2006/123 states that EEA States have an obligation to provide information at the request of a competent authority of another EEA State on criminal sanctions taken vis-à-vis a service provider. Accordingly, EEA States are required to supply information, in conformity with their national law, on disciplinary or administrative actions or criminal sanctions and decisions concerning insolvency or bankruptcy involving fraud which are directly relevant to the provider's competence or professional reliability.

65. However, in ESA's view, Article 33 of Directive 2006/123 does not impose substantive obligations regarding the content of national law. As ESA understands recital 111 in the preamble to Directive 2006/123, the provisions on exchange of information on the good repute of service providers should not be understood as anticipating any further advancement in cooperation in criminal matters, beyond what is already established. In ESA's view, this is also the most obvious way to interpret the reservation contained in the phrase "in conformity with their national law".

66. Accordingly, ESA concludes, Directive 2006/123 does not require that criminal convictions, such as those at issue in the present case, must be recorded. Information on criminal sanctions must be provided on the basis of mechanisms and practices already in place in the EEA States.

67. ESA observes that it has not been able to identify other provisions of EEA law that may be relevant for this case.

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

> *The EEA Agreement does not entail specific requirements as to the recording of convictions in situations where national law allows for legal persons to be convicted by a criminal court.*

The Commission

69. The Commission submits that, at this stage of the proceedings and on the basis of the information presented by the referring court, neither the EEA Agreement's provisions on the freedom of establishment and the freedom to provide services nor the provisions of Directives 2006/123 and 2004/18 impose on a State party to the agreement the requirement to establish the same accurate

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[18] Reference is made to Chapter VI of Directive 2006/13 concerning administrative cooperation.

[19] Reference is made to recital 105 in the preamble to Directive 2006/123.

record of legal persons convicted of criminal offences as has been established in a Member State in relation to natural persons who are service providers.

70. In particular, there is no secondary law which requires Member States to enter criminal sanctions imposed by criminal courts on legal persons into their criminal records (an obligation which may exist for criminal sanctions imposed on natural persons).

71. As regards Directive 2004/18, the Commission observes that Article 45(1) requires economic operators convicted of certain criminal offences (participation in a criminal organisation, corruption, fraud and money laundering) to be excluded from participation in public contracts. Moreover, Article 45(2)(c) allows Member States to exclude an economic operator from participation in a contract where that economic operator has been convicted of any offence concerning his professional conduct by a judgment which has the force of *res judicata* in accordance with national law. In order to implement those exclusions, Article 45(3)(a) obliges Member States to accept extracts from the judicial record or equivalent documents showing no such convictions took place, including convictions of legal persons, if applicable according to the laws of the Member State of establishment.

72. However, Article 45 of Directive 2004/18 does not oblige Member States to issue extracts from the judicial record or equivalent documents, whether in relation to natural or legal persons, since the second subparagraph of Article 45(3) expressly provides for the possibility that a Member State does not issue such documents. By allowing Member States not to issue such evidentiary documents, Article 45 cannot be interpreted as obliging Member States to keep some sort of record of such convictions.

73. For the sake of completeness, the Commission adds that, in the case at hand, the criminal offence at issue concerns neither those criminal offences listed in Article 45(1) of Directive 2004/18 nor the professional conduct of the service provider as mentioned in Article 45(2)(c), but relates instead to its social security obligations. Article 45(2)(e) does refer to failure to comply with obligations relating to the payment of social security contributions as grounds for excluding an economic operator from participation in a contract. However, the second subparagraph of Article 45(3) concerning the issue of evidentiary documents also refers to certificates as regards Article 45(2)(e). Therefore, Article 45 of Directive 2004/18 does not provide for an obligation on the Member State to keep a record in the case at hand since there is no underlying obligation to supply the information in question.

74. The Commission observes that Article 33 of Directive 2006/123 obliges Member States to supply information on criminal sanctions, on disciplinary and administrative actions and on decisions concerning insolvency or bankruptcy involving fraud in respect of service providers taken by their competent authorities. However, the obligation applies only to sanctions, actions and

decisions directly relevant to the provider's competence or professional reliability.

75. According to the Commission, Directive 2006/123 does not require Member States to establish and keep a criminal record for sanctions, actions and decisions directly relevant to the provider's competence or professional reliability where the provider is a legal person.

76. Nevertheless, Article 33 of Directive 2006/123 obliges Member States to keep, also with respect to providers who are legal persons, some kind of record to enable them to comply with the obligations to exchange information provided for as a matter of administrative cooperation. However, the type of record and its handling remains at the Member State's discretion, as long as it ensures that accurate information may be exchanged on an ongoing basis between Member States.

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

> *Neither the EEA Agreement's provisions on the freedom of establishment and the freedom to provide services nor the provisions of Directives 2006/123/EC and 2004/18/EC impose on a party to this agreement to establish the same record of the criminal sanctions of legal persons as this has been established in a Member State for physical persons being service providers.*
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> *However, Article 33(1) of Directive 2006/123/EC should be interpreted as obliging Member States to maintain information about criminal convictions of a legal person where national law allows for criminal conviction of a legal person. Such obligation to maintain information only concerns criminal sanctions directly relevant to the provider's competence or professional reliability. The modality for maintaining such information (type of record, its handling) is a matter for national law.*

Per Christiansen
Judge-Rapporteur