

ORIGINAL

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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

THE EFTA SURVEILLANCE AUTHORITY

represented by
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acting as Agents,

IN CASE E-12/22

Maximilian Maier

in which the Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*) requests the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice concerning Directive 98/5/EC.

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1 INTRODUCTION AND THE FACTS OF THE CASE

1. The present case raises questions concerning the interpretation of Directive 98/5/EC, and the scope of lawyers' right to establish themselves and practice in other EEA States than the one where they obtained their professional qualifications.
2. The appellant, Dr Maximilian Maier ("**the Appellant**"), is an Austrian national, residing in Austria. He is an Austrian lawyer and entered in the register of lawyers in Vorarlberg in Austria. His Liechtenstein law office is located in Gamprin in Liechtenstein. It is not clear from the facts of the case how long the Appellant has practiced and how long he has had his office in Liechtenstein.
3. At his request, the Liechtenstein Bar Association (*Liechtensteinische Rechtsanwaltskammer*) entered him in the register of European lawyers established in Liechtenstein.
4. Following a dispute between the Appellant and the Liechtenstein Bar Association, in particular as to whether the Appellant was authorised to assume the mandates of other Liechtenstein lawyers in the context of legal aid, the Liechtenstein Bar Association on 5 April 2022 decided by Order that:

"It is found, on the basis of Article 62(2)(c) of the Lawyers Act [Rechtsanwaltsgesetz (RAG)], that Dr Maximilian Maier as an established European lawyer is not authorised to accept mandates in the context of legal aid, nor may he assume such mandates as a substitute."
5. In a decision of 28–29 June 2022, the Government of Liechtenstein dismissed the Appellant's appeal against the Liechtenstein Bar Association's Order ("**the Decision**"). In its Decision, the Government of Liechtenstein found, *inter alia*, that Article 5 of Directive 98/5/EC does not represent a complete harmonisation of the rights of lawyers to establish themselves in another EEA State than the one where they obtained their professional qualifications, and that the EEA States may adopt restrictions on the freedom of establishment beyond what Directive 98/5/EC allows for, insofar as such restrictions can be justified.¹

¹ Request for an Advisory Opinion, page 5.

6. The Appellant has lodged an appeal with the Administrative Court challenging that decision. On 23 September 2022, the Administrative Court decided to stay the proceedings in the administrative appeals proceedings and submit a Request for an Advisory Opinion (“**the Request**”) to the EFTA Court.

2 EEA LAW

7. Chapter 2 of the EEA Agreement, Right of Establishment, Article 31 provides:
 - “1. *Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
 - Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*
 2. *Annexes VIII to XI contain specific provisions on the right of establishment.”*
8. Article 33 of the EEA Agreement provides:

“The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.”
9. Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (“**the Establishment Directive**”) was incorporated into the EEA Agreement by Decision No 85/2002 of

the EEA Joint Committee of 25 June 2002, which entered into force on 1 March 2003.²

10. Recital 10 of the Establishment Directive reads:

“(10) Whereas lawyers covered by this Directive should be permitted to give legal advice in particular on the law of their home Member States, on Community law, on international law and on the law of the host Member State; whereas this is already allowed as regards the provision of services under Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services; whereas, however, provision should be made, as in Directive 77/ 249/EEC, for the option of excluding from the activities of lawyers practising under their homecountry professional titles in the United Kingdom and Ireland the preparation of certain formal documents in the conveyancing and probate spheres; whereas this Directive in no way affects the provisions under which, in every Member State, certain activities are reserved for professions other than the legal profession; whereas the provision in Directive 77/249/EEC concerning the possibility of the host Member State to require a lawyer practising under his home-country professional title to work in conjunction with a local lawyer when representing or defending a client in legal proceedings should also be incorporated in this Directive; whereas that requirement must be interpreted in the light of the case law of the Court of Justice of the European Communities, in particular its judgment of 25 February 1988 in Case 427/85, Commission v. Germany;”³

11. Article 1 of the Establishment Directive, entitled “Object, scope and definitions”, provides in relevant parts:

“1. The purpose of this Directive is to facilitate practice of the profession of lawyer on a permanent basis in a self-employed or salaried capacity in a [EEA] State other than that in which the professional qualification was obtained.

2. For the purposes of this Directive:

² OJ 2002 L 266, page 50.

³ Footnotes omitted.

(a) 'lawyer' means any person who is a national of a [EEA] State and who is authorised to pursue his professional activities under one of the following professional titles:

[...]

Austria Rechtsanwalt

[...]

(b) 'home [EEA] State' means the [EEA] State in which a lawyer acquired the right to use one of the professional titles referred to in (a) before practising the profession of lawyer in another [EEA] State;

(c) 'host [EEA] State' means the [EEA] State in which a lawyer practises pursuant to this Directive;

(d) 'home-country professional title' means the professional title used in the [EEA] State in which a lawyer acquired the right to use that title before practising the profession of lawyer in the host [EEA] State;

[...]

(f) 'relevant professional title' or 'relevant profession' means the professional title or profession governed by the competent authority with whom a lawyer has registered under Article 3, and 'competent authority' means that authority.

3. This Directive shall apply both to lawyers practising in a self-employed capacity and to lawyers practising in a salaried capacity in the home [EEA] State and, subject to Article 8, in the host [EEA] State.

4. Practice of the profession of lawyer within the meaning of this Directive shall not include the provision of services, which is covered by Directive 77/249/EEC."

12. Article 2 of the Establishment Directive, entitled "Right to practice under the home-country professional title", provides:

"Any lawyer shall be entitled to pursue on a permanent basis, in any other [EEA] State under his home-country professional title, the activities specified in Article 5.

Integration into the profession of lawyer in the host [EEA] State shall be subject to Article 10."

13. Article 3 of the Establishment Directive, entitled “*Registration with the competent authority*”, provides in the first and second paragraphs:

“1. A lawyer who wishes to practise in a [EEA] State other than that in which he obtained his professional qualification shall register with the competent authority in that State.

2. The competent authority in the host [EEA] State shall register the lawyer upon presentation of a certificate attesting to his registration with the competent authority in the home [EEA] State. It may require that, when presented by the competent authority of the home [EEA] State, the certificate be not more than three months old. It shall inform the competent authority in the home [EEA] State of the registration.”

14. Article 4 of the Establishment Directive, entitled “*Practice under the home-country professional title*”, provides:

“1. A lawyer practising in a host [EEA] State under his home-country professional title shall do so under that title, which must be expressed in the official language or one of the official languages of his home [EEA] State, in an intelligible manner and in such a way as to avoid confusion with the professional title of the host [EEA] State.

2. For the purpose of applying paragraph 1, a host [EEA] State may require a lawyer practising under his home-country professional title to indicate the professional body of which he is a member in his home [EEA] State or the judicial authority before which he is entitled to practise pursuant to the laws of his home [EEA] State. A host [EEA] State may also require a lawyer practising under his home-country professional title to include a reference to his registration with the competent authority in that State.”

15. Article 5 of the Establishment Directive, entitled “*Area of activity*”, provides:

“1. Subject to paragraphs 2 and 3, a lawyer practising under his home-country professional title carries on the same professional activities as a lawyer practising under the relevant professional title used in the host [EEA] State and may, inter alia, give advice on the law of his home [EEA] State, on Community law, on international law and on the law of the host [EEA] State. He shall in any event comply with the rules of procedure applicable in the national courts.

2. [EEA] States which authorise in their territory a prescribed category of lawyers to prepare deeds for obtaining title to administer estates of deceased persons and for creating or transferring interests in land which, in other [EEA] States, are reserved for professions other than that of lawyer may exclude from such activities lawyers practising under a home-country professional title conferred in one of the latter [EEA] States.

3. For the pursuit of activities relating to the representation or defence of a client in legal proceedings and insofar as the law of the host [EEA] State reserves such activities to lawyers practising under the professional title of that State, the latter may require lawyers practising under their home-country professional titles 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' practising before it.

Nevertheless, in order to ensure the smooth operation of the justice system, [EEA] States may lay down specific rules for access to supreme courts, such as the use of specialist lawyers."

16. Article 6 of the Establishment Directive, entitled "Rules of professional conduct applicable", provides:

"1. Irrespective of the rules of professional conduct to which he is subject in his home [EEA] State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host [EEA] State in respect of all the activities he pursues in its territory.

2. Lawyers practising under their home-country professional titles shall be granted appropriate representation in the professional associations of the host [EEA] State.

Such representation shall involve at least the right to vote in elections to those associations' governing bodies.

3. The host [EEA] State may require a lawyer practising under his home-country professional title either to take out professional indemnity insurance or to become a member of a professional guarantee fund in accordance with the rules which that State lays down for professional activities pursued in its territory. Nevertheless, a lawyer practising under his home-country professional title shall be exempted from that requirement if he can prove

that he is covered by insurance taken out or a guarantee provided in accordance with the rules of his home [EEA] State, insofar as such insurance or guarantee is equivalent in terms of the conditions and extent of cover. Where the equivalence is only partial, the competent authority in the host [EEA] State may require that additional insurance or an additional guarantee be contracted to cover the elements which are not already covered by the insurance or guarantee contracted in accordance with the rules of the home [EEA] State.”

17. Article 10 of the Establishment Directive, entitled “*Like treatment as a lawyer of the host [EEA] State*” provides, in relevant parts:

“1. A lawyer practising under his home-country professional title who has effectively and regularly pursued for a period of at least three years an activity in the host [EEA] State in the law of that State including Community law shall, with a view to gaining admission to the profession of lawyer in the host [EEA] State, be exempted from the conditions set out in Article 4(1)(b) of Directive 89/48/EEC, ‘Effective and regular pursuit’ means actual exercise of the activity without any interruption other than that resulting from the events of everyday life.

[...]

3. A lawyer practising under his home-country professional title who has effectively and regularly pursued a professional activity in the host [EEA] State for a period of at least three years but for a lesser period in the law of that [EEA] State may obtain from the competent authority of that State admission to the profession of lawyer in the host [EEA] State and the right to practise it under the professional title corresponding to the profession in that [EEA] State, without having to meet the conditions referred to in Article 4(1)(b) of Directive 89/48/EEC, under the conditions and in accordance with the procedures set out below:

(a) The competent authority of the host [EEA] State shall take into account the effective and regular professional activity pursued during the abovementioned period and any knowledge and professional experience of the law of the host [EEA] State, and any attendance at lectures or seminars on the law of the host [EEA] State, including the rules regulating professional practice and conduct.

(b) The lawyer shall provide the competent authority of the host [EEA] State with any relevant information and documentation, in particular on the matters he has dealt with. Assessment of the lawyer's effective and regular activity in the host [EEA] State and assessment of his capacity to continue the activity he has pursued there shall be carried out by means of an interview with the competent authority of the host [EEA] State in order to verify the regular and effective nature of the activity pursued."

18. Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of the freedom to provide services ("**Directive 77/249/EEC**") was part of the EEA Agreement at the time of signing in 1992 and entered into force in the EEA on 1 January 1994. It became binding upon Liechtenstein upon the entry into force of the EEA Agreement for Liechtenstein on 1 May 1995.

19. Article 4 of Directive 77/249/EEC provides in relevant parts:

"1. Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host [EEA] 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.

[...]

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 [EEA] State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host [EEA] 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 [EEA] 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."

20. Article 5 of Directive 77/249/EEC provides:

“For the pursuit of activities relating to the representation of a client in legal proceedings, a [EEA] 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 [EEA] 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 ‘avoue’ or ‘procuratore’ practising before it.”

21. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (“**the Professional Qualifications Directive**”) was incorporated into the EEA Agreement by Decision 142/2007 of the EEA Joint Committee of 26 October 2007, which entered into force on 1 July 2009.

3 NATIONAL LAW

22. The profession of lawyer in Liechtenstein is regulated by the Lawyers Act (*Rechtsanwaltsgesetz (RAG)*) of 8 November 2013, Liechtenstein State Gazette (*Liechtensteinisches Landesgesetzblatt (LGBI)*) 2013 No 415.

23. The Lawyers Act transposes, *inter alia*, the Establishment Directive, in accordance with Article 1, entitled “*Object and purpose*” which provides in relevant parts:

“1) This law regulates the admission to the profession of lawyer and the practice of the profession of lawyer in Liechtenstein.

2) It serves in particular to implement:

[...]

b) Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the permanent exercise of the legal profession in a Member State other than that in which the qualification was acquired (EEA Collection of Laws: Annex VII -2a .01);”

24. Chapter II of the Liechtenstein Lawyers Act, Liechtenstein Lawyer, Section A, Access to the legal profession, Article 3, entitled “*Prerequisites for exercising the legal profession*”, provides, in relevant parts:

“1) The profession of lawyer may be exercised by anyone who fulfills the requirements pursuant to paragraph 2 and is entered in the list of Liechtenstein lawyers (list of lawyers).

2) Requirements according to paragraph 1 are:

[...]

d) successful completion of the bar exam or aptitude test or exercise of three years of effective and regular activity in accordance with Art. 74 et seq.;”

25. Chapter II, Section B, Rights and Obligations, Article 21, entitled “Substitution”, provides:

“1) If the lawyer is unable to act, he is entitled to substitute another lawyer under statutory liability.

2) In cases of permanent hindrance or longer absence, the substitution must be reported to the Bar Association, which will also inform the courts and administrative authorities.”

26. Chapter III of the Lawyers Act concerns the establishment of lawyers from the European Economic Area in Liechtenstein.

27. Article 59, entitled “Basic principle”, provides:

“1) Nationals of a State which is a party to the Agreement on the European Economic Area (EEA) who are authorised in their home State to practise the lawyer’s profession under any of the professional titles listed in the Annex to this Act, may establish themselves on domestic territory to practise the lawyer’s profession, provided that they are entered in the register of established European lawyers (established European lawyers) upon application.

2) Apart from the rules of ethical conduct applicable in the home State, the established European lawyer shall, with regard to all activities that he or she exercises on domestic territory, be subject to the same rules of professional and ethical conduct as the domestic lawyers.”

28. Article 62, entitled “Professional status”, provides:

“1) Except as provided otherwise, the established European lawyer shall be authorised to engage in the same professional activities as any lawyer entered in the register of lawyers.

2) An established European lawyer shall have the status of a lawyer entered in the register of lawyers. However, he or she is not authorised:

- a) to be elected as an officer of the Chamber of Lawyers;*
- b) to train trainee lawyers;*
- c) to be appointed as a legal aid lawyer, legal aid defence counsel or ex officio defence counsel.”*

29. Article 63, entitled “*Domestic lawyer working in conjunction with the established European lawyer*”, provides:

“1) In proceedings in which the party must be represented by a lawyer or in which a defence counsel is mandatory, an established European lawyer may act as representative or defence counsel of a party only in conjunction with a lawyer entered in the register of lawyers (Einvernehmensrechtsanwalt - domestic lawyer acting in conjunction with the established European lawyer). That lawyer must ensure that the established European lawyer will observe the requirements of proper administration of justice in the course of the representation or defence. [...]”

4 THE QUESTION REFERRED

30. The referring court has asked the EFTA Court the following question:

“Is a national provision, according to which a lawyer, who normally practices his profession in a Member State other than the one in which he obtained his qualification, is not authorised to be appointed as a legal aid lawyer, legal aid defence counsel or public defender, compatible with Directive 98/5/EC?”

5 LEGAL ANALYSIS

5.1 Introductory remarks

31. By its question, the referring court is, in essence, asking whether the right to practice as a lawyer in a different EEA State than the one where the professional qualifications were obtained (“**European lawyer**”) can be restricted beyond what Article 5 of the Directive allows for.

32. More specifically, the referring court is asking whether the exception in Article 62(2) (c) of the Liechtenstein Lawyers Act, barring European lawyers from being

appointed as legal aid lawyers, legal aid defence counsels or public defenders, is compatible with the Directive.

33. It appears to ESA that the same question arises also as regards the other limitations in Article 62(2) of the Liechtenstein Lawyers Act, barring European lawyers from being elected as officers of the Chamber of Lawyers (a) and to train trainee lawyers (b). In that regard, ESA notes that it is not clear from the Request whether these exceptions may also be of relevance for the case at issue in the main proceedings. For the sake of completeness, ESA will therefore briefly address these in Section 5.3 below.

34. As regards the applicability of the Establishment Directive, the question from the referring court appears to be based on the assumption that the Appellant in the present case is covered by the scope of that Directive. It is in this regard stated in the Request that the Appellant is an Austrian lawyer, entered in the register of lawyers in Austria and in the register of European lawyers established in Liechtenstein.⁴ ESA therefore assumes, for the purpose of answering the question from the referring court, that the Appellant is established in Liechtenstein within the meaning of the Directive, as interpreted by the Court of Justice of the European Union (“**the CJEU**”).⁵

35. ESA notes that various directives apply to different aspects of the situation of a lawyer wishing to practice in another EEA State.⁶ Individuals practising as lawyers by way of provision of services in a different EEA State than the one where they obtained their professional qualifications are covered by Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, as opposed to the freedom of establishment,⁷ whereas

⁴ The Request, page 1. The applicability of the Directive seems uncontested by the Liechtenstein Government. For the purposes of the Directive, a “*lawyer*” is a person who is a national of an EEA State and authorised to pursue their professional activities under, for the purposes of the present case, in Austria and Liechtenstein, the title of “*Rechtsanwalt*”, cf. Article 1(2)(a) of the Directive and Article 1 of Decision No 85/2002 of the EEA Joint Committee of 25 June 2002.

⁵ See e.g. Case C-193/05, *Commission v Luxembourg*, EU:C:2006:588, paragraph 39.

⁶ Opinion of Advocate General Sharpston in Case C-431/17, *Monachos Eirinaios*, EU:C:2018:1028, paragraph 34.

⁷ Cf. Article 1(1) of Directive 77/249/EC and Article 1(4) of the Establishment Directive.

the Professional Qualifications Directive applies to lawyers wishing to establish themselves immediately under the host EEA State professional title.⁸

36. The present case concerns the question of whether the Appellant, as an established European lawyer, as is apparent from the Request, must be authorised by the Liechtenstein Bar Association to accept mandates in the context of legal aid or assume such mandates as a substitute. While this issue may also concern which services he is allowed to perform as a lawyer, ESA understands that this limitation arises directly out of his form of permanent establishment in Liechtenstein.⁹ The subject matter of the question referred is therefore the establishment as a lawyer, which is governed by the Establishment Directive.¹⁰ The Professional Qualifications Directive does not affect the operation of the Establishment Directive and is not relevant here.¹¹

37. ESA submits that the limitation in the rights of European lawyers to engage in the same professional activities as Liechtenstein lawyers pursuant to Article 62(2) (c) is contrary to the Establishment Directive, interpreted in light of Article 31 EEA (see Section 5.2 below). ESA further observes that the limitations in the rights of European lawyers to engage in the same professional activities as Liechtenstein lawyers pursuant to Article 62(2) (a) and (b) also appear to be contrary to the Establishment Directive and/or Article 31 EEA (see Section 5.3 below).

5.2 The prohibition on European lawyers being appointed as legal aid lawyers, legal aid defence counsels or public defenders is contrary to Articles 3 and 5 of the Establishment Directive

5.2.1 Introduction

38. According to Article 2, first subparagraph, of the Establishment Directive “[a]ny lawyer shall be entitled to pursue on a permanent basis, in any other [EEA] State under his home-country professional title, the activities specified in Article 5.”

⁸ Recital 42 to the Professional Qualifications Directive and the Opinion of Advocate General Sharpston in Case C-431/17, *Monachos Eirinaios*, paragraph 38, with further references.

⁹ Compare the Opinion of Advocate General Sharpston in Case C-431/17, *Monachos Eirinaios*, paragraph 37: “[...] the proceedings before the referring court concern the refusal of a bar association to register a lawyer who has obtained his professional qualifications in another Member State. The subject matter of the question referred is therefore establishment as a lawyer, which is governed by Directive 98/5, not the freedom to provide legal services.”

¹⁰ Ibid. See also Recital 5 and Articles 1(1) and 2(1) of the Establishment Directive.

¹¹ Recital 42 to the Professional Qualifications Directive.

39. Article 5 of the Establishment Directive sets out in the first paragraph the main rule that *“a lawyer practising under his home-country professional title carries on **the same professional activities as a lawyer practising under the relevant professional title used in the host [EEA] State and may, inter alia, give advice on the law of his home [EEA] State, on Community law, on international law and on the law of the host [EEA] State**”*. (our emphasis)
40. Article 5, second and third paragraphs, set out the exceptions to this main rule, concerning the issuance of deeds, representation or defence of clients in legal proceedings and access to supreme courts.
41. It appears clear that the legal aid activities described in Article 62(2) (c) of the Liechtenstein Lawyers Act is encompassed by the phrase *“professional activities”* in Article 5, first paragraph.

5.2.2 The prohibition on European lawyers being appointed as legal aid lawyers, legal aid defence counsels or public defenders

42. ESA at the outset notes, in accordance with the findings of the CJEU in *Commission v Luxembourg*, that the second and third paragraphs of Article 5 of the Establishment Directive exhaustively set out the permissible exceptions from the right of lawyers practising under their home-country professional title from carrying on the same professional activities as a lawyer practising under the title of lawyer in the host EEA State. The CJEU concluded that:

“[...] Directive 98/5 lays down, in Articles 2 and 5, the principle that European lawyers are entitled to pursue the same professional activities as lawyers practising under the professional title of the host Member State, subject to the exceptions laid down in Article 5(2) and (3).

*In those circumstances, as the Commission submits, **the Member States are not authorised to provide in their national law for any exceptions to that principle other than those set out expressly and exhaustively in Article 5(2) and (3) of Directive 98/5.**”¹² (our emphasis)*

43. Therefore, contrary to the contention of the Liechtenstein Government in its Decision that Article 5 of the Establishment Directive *“does not represent a*

¹² Case C-193/05, *Commission v Luxembourg*, paragraphs 56–57.

complete harmonisation”,¹³ the CJEU has found that Article 5 is fully harmonised as regards the possibilities of restricting the rights of lawyers having obtained their professional qualification in another EEA State from carrying out the same professional activities as lawyers practising under the same title in the host EEA State.

44. ESA notes that the question from the referring court states that the prohibition in Article 62(2) (c) of the Liechtenstein Lawyers Act “*does not appear to be*” based on the Establishment Directive and, further, that the Government in its Decision stated that “*the Member States remain competent to adopt national measures but only if such a limitation of the freedom to provide services, or the freedom of establishment, can be justified*”.¹⁴
45. ESA however submits, in light of the above, that any limitations in the rights of European lawyers to perform the same professional activities as a Liechtenstein “*Rechtsanwalt*”, in accordance with Article 2, first paragraph, and Article 5, first paragraph, of the Establishment Directive, is only permissible insofar as they are covered by one of the exceptions in Article 5, second and third paragraphs, of the Establishment Directive.
46. ESA in this regard submits that the exception in Article 62(2) (c) of the Liechtenstein Lawyers Act goes beyond what is permitted by the exceptions set out in Article 5 of the Establishment Directive and is therefore in breach of Article 5 of that Directive.
47. Article 5, second paragraph, permits, subject to certain conditions, the host EEA State to exclude lawyers practicing under a home-country professional title from the activity of preparing deeds for obtaining title to administer the estates of deceased persons or for creating or transferring interests in land. Further, Article 5, third paragraph, second subparagraph, permits specific rules for access to supreme courts. These exceptions are not at issue here.
48. The only potentially relevant exception is found in Article 5, third paragraph, first subparagraph. It allows for a requirement that, for the pursuit of activities relating to the representation of a client in legal proceedings, and insofar as the law of the host

¹³ The Request, page 5.

¹⁴ The Request, page 5 and 7.

EEA State reserves such activities to lawyers practising under the professional title of the host State, lawyers practicing under their home-country professional title may be required to “*work in conjunction with a lawyer who practices before the judicial authority in question and who would, where necessary, be answerable to that authority or with an ‘avoué’ practising before it.*”¹⁵

49. Even though Article 63 of the Liechtenstein Lawyers Act appears to incorporate the exception in Article 5, third paragraph, first subparagraph of the Establishment Directive, and even though it appears that the objectives advanced by the Government of Liechtenstein (i.e. on the grounds of consumer protection and the proper administration of justice, see page 5–6 of the Request) may be justified by that exception, the Government of Liechtenstein does not seem to rely on that exception when justifying the prohibition on European lawyers assuming the same mandates as lawyers practicing under the Liechtenstein professional title in context of legal aid in accordance with Article 62(2) (c) of the Liechtenstein Lawyers Act.¹⁶
50. At the outset, and insofar as Article 5, third paragraph, of the Establishment Directive is applicable in the present case, ESA notes that the exception merely entails that the national law of the host EEA State may require a lawyer practising under their home-country national title to work *in conjunction* with a lawyer practising under the professional title of the host EEA State and who practices before that judicial authority in the pursuit of activities relating to the representation or defence of a client in legal proceedings.
51. As such, the European lawyer would, also in situations where Article 5, third paragraph, applies, have the right in accordance with the Establishment Directive to pursue activities relating to the representation or defence of a client in legal proceedings *in conjunction* with such a lawyer practising under the professional title of the host EEA State.
52. Insofar as Liechtenstein law does not foresee such possibility for European lawyers, in a situation as described in paragraph 50–51 above, to work in conjunction with a lawyer practising under the professional title of Liechtenstein and practices before

¹⁵ Case C-506/04, *Wilson*, EU:C:2006:587, paragraph 73.

¹⁶ The Request, page 5.

the judicial authority in question, ESA submits that this constitutes a breach of Article 5 of the Establishment Directive.¹⁷

53. ESA further notes, consequently and for the sake of completeness that, insofar as the Establishment Directive prohibits limitations on the rights of lawyers practising in a different EEA State than the one where the professional qualifications were obtained beyond what Article 5 of the Establishment Directive expressly and exhaustively allows for, Liechtenstein law seems to prescribe *additional registration requirements* for European lawyers, contrary also to Article 3 of the Establishment Directive.

54. According to Article 3 of the Establishment Directive, entitled "*Registration with the competent authority*", the competent authority in the host EEA State shall register the lawyer upon presentation of a certificate attesting to his registration with the competent authority in the home EEA State. It is settled case law that Article 3 of the Establishment Directive entails a "*complete harmonisation of the prior conditions for the exercise of the right [the Establishment Directive] confers.*"¹⁸ In *Wilson* the CJEU on this basis went on to hold that:

*"It is thus apparent that presentation to the competent authority of the host Member State of a certificate attesting to registration with the competent authority of the home Member State is the only condition to which registration of the person concerned in the host Member State may be subject, enabling him to practise in the latter Member State under his home-country professional title."*¹⁹

55. The requirement under Article 3(2)(d) of the Liechtenstein Lawyers Act, according to which European lawyers, in order to be authorised to carry out all the professional

¹⁷ The Request, page 3–4 distinguishes between "*acting as a lawyer's representative and his substitute. A lawyer's representative is an agent of the lawyer. He does not act independently. Furthermore, the lawyer is required to duly select, instruct and monitor the representative. In contrast, the substitute replaces rather than represents the lawyer. Consequently, the substitute acts independently.*"

¹⁸ Case C-506/04, *Wilson*, paragraph 66. See also Case C-193/05, *Commission v Luxembourg*, paragraphs 35–36 and Joined Cases C-58/13 and C-59/13, *Torresi*, EU:C:2014:2088, paragraph 38.

¹⁹ Case C-506/04, *Wilson*, paragraph 67. See also Case C-193/05, *Commission v Luxembourg*, paragraphs 37 and 40–41 (discussing that registration as a European lawyer cannot be conditional on a hearing to test language proficiency because the Directive has set the appropriate rules to ensure the protection of consumers and the proper administration of justice) and Joined Cases C-58/13 and C-59/13, *Torresi*, paragraph 39.

activities that a lawyer practising under the Liechtenstein professional title as lawyer is entitled to, must either complete an aptitude test or complete three years of professional activity seems to constitute additional requirements for registration, and is therefore contrary also to Article 3 of the Establishment Directive.

56. For the sake of clarity, ESA does in this respect not argue that an EEA State may not require European lawyers, when they seek to gain admission to the profession of lawyer in the host EEA State, either to have a prior qualification period in accordance with Article 10 of the Establishment Directive or to pass an aptitude test in accordance with the Professional Qualifications Directive. ESA's argument is instead that an EEA State cannot tie the right of a European lawyer to exercise, under their home-country professional title, the same professional activities as a lawyer practicing under the host EEA State professional title, to the presence in a registry.

5.2.3 An absolute conjunction requirement would not be in compliance with Article 5 of the Establishment Directive

57. This conclusion leads to a question: Is the absolute requirement of working in conjunction with a Liechtenstein lawyer, as set out in Article 63 of the Liechtenstein Lawyers Act, in compliance with Article 5, third paragraph, of the Establishment Directive? Article 63 contains a general rule, under which every European lawyer, without any scope for an individual assessment taking into account the knowledge and experience of the specific lawyer, is required to work in conjunction with a lawyer practising under the Liechtenstein professional title in the pursuit of activities relating to the representation or defence of a client in legal proceedings.

58. As held by the CJEU, the option in Article 5, third paragraph, of the Establishment Directive "*compensates for any lack of proficiency on the part of the European lawyer in the court languages of the host [EEA] State.*"²⁰ (our emphasis)

59. ESA submits that the exception in Article 5, third paragraph, in the same vein, in principle, must be applicable in order to compensate for any lack of proficiency on the part of the European lawyer in the national law of the host EEA State, as referred

²⁰ Case C-193/05, *Commission v Luxembourg*, paragraph 43. See also Case C-506/04, *Wilson*, paragraph 73.

to by the Liechtenstein Government in the Decision, or for that matter, any law at issue in the given case.

60. The Establishment Directive was adopted with a view to making it easier for a particular class of migrant lawyers “*to exercise the fundamental freedom of establishment*”.²¹ The provisions of the Establishment Directive must therefore be interpreted in light of the fundamental freedom of establishment, as enshrined in Article 31 EEA.

61. This is also clear from case law on the parallel Article 5 of Directive 77/249/EEC (which is also relevant for the interpretation of the Establishment Directive, see its Recital 10). Thus, in *An Bord Pleanála*, the CJEU recalled that Directive 77/249/EEC “*which contains measures intended to facilitate the effective pursuit of the activities of lawyers by way of provision of services, **must be interpreted, in particular, in the light of Article 56 TFEU***”.²² (our emphasis)

62. *An Bord Pleanála* concerned a provision similar to Article 63 of the Liechtenstein Lawyers Act. The national legislation at stake was characterised by “*the fact that it is not subject to any exceptions to the obligation to work in conjunction with a lawyer who practises before the judicial authority in question.*”²³

63. In *An Bord Pleanála*, the CJEU in that regard held that:

“It should be noted that the obligation, imposed by national legislation, to work in conjunction with a domestic lawyer constitutes a restriction on the freedom of lawyers from other Member States to provide services in so far as it means that the litigant who wishes to use a lawyer established in another Member State will bear additional costs compared to

²¹ Case C-193/05, *Commission v Luxembourg*, paragraph 39.

²² Case C-739/19, *An Bord Pleanála*, EU:C:2021:185, paragraph 19, referring to Case C-427/85, *Commission v Germany*, EU:C:1988:98, paragraphs 11 and 13, where the CJEU interpreted the parallel provision to Article 5, third paragraph, of the Establishment Directive, Article 5 of Directive 77/249/EEC, in light of the freedom to provide services and relevant case law. Article 5 of Directive 77/249/EEC contains, in essence, the same wording: “*For the pursuit of activities relating to the representation of a client in legal proceedings, [an EEA] State may require lawyers to whom Article 1 applies: [...] to work in conjunction with a lawyer who practices 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.*”

²³ Case C-739/19, *An Bord Pleanála*, paragraph 36.

the individual who decides to retain the services of a lawyer established in the Member State of the proceedings concerned.”²⁴ (our emphasis)

64. In the same vein, ESA submits that, insofar as the prohibition in Article 63 of the Liechtenstein Lawyers Act allows for a European lawyer to assume the mandates stated therein *in conjunction* with a domestic lawyer, it constitutes a restriction on the freedom of European lawyers to establish themselves in Liechtenstein because those lawyers are, by virtue of such a rule, deprived of the opportunity to take on cases concerning legal aid on their own.
65. In accordance with settled case law, restrictions on the fundamental freedoms “*can be justified on the grounds set out in Article 33 EEA or by overriding reasons in the public interest, provided that it is appropriate to secure the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain*” it.²⁵
66. In the present case, it follows from the Decision that the Liechtenstein Government justifies the restriction on the grounds of consumer protection and the proper administration of justice.²⁶ Having regard to Article 5, first paragraph, of the Establishment Directive, which explicitly states that the European lawyer may give advice “*on the law of the host [EEA] State*”, these objectives are nonetheless, in accordance with settled case law, in principle capable of being regarded as overriding requirements in the public interest justifying restrictions on the fundamental freedoms, insofar as they do not go beyond what is necessary, such as barring someone from giving such advice when they are competent to do so.²⁷ ESA submits that this in principle also applies to restrictions pursuant to Article 5, third paragraph, of the Establishment Directive.²⁸ As regards the necessity of such a restriction, the CJEU in *An Bord Pleanála* went on to note that:

²⁴ Case C-739/19, *An Bord Pleanála*, paragraph 20.

²⁵ Case E-8/16, *Netfonds Holding ASA m.fl. v Staten v/Finansdepartementet*, [2017] EFTA Ct. Rep., page 163, paragraph 112. See also Case C-739/19, *An Bord Pleanála*, paragraph 24 and Case C-99/16, *Lahorgue*, EU:C:2017:391, paragraph 31.

²⁶ The Request, page 5–6.

²⁷ See e.g. Case C-739/19, *An Bord Pleanála*, paragraph 22 and Case C-99/16, *Lahorgue*, paragraph 34.

²⁸ In Case C-739/19, *An Bord Pleanála*, paragraph 32, it was noted that the parallel exception in Directive 77/249/EEC allows for national provisions requiring a lawyer providing services to work in conjunction with a lawyer who practices before the judicial authority in question in order for him or her to carry out the tasks entrusted to him or her by his or her client, “*in keeping with the proper functioning of justice*”.

"[...] it is clear that such an obligation may become redundant in certain circumstances and, therefore, go beyond what is necessary in order to attain the objective of the proper administration of justice.

*That would be the case, in particular, if the visiting lawyer, by dint of professional experience, were capable of representing the litigant in the same way as a lawyer who practises habitually before the national court concerned. It is for the latter to assess, in the circumstances of the case, whether professional experience in the host Member State is sufficient in order to establish that point."*²⁹

67. ESA submits that the same applies to restrictions on the activities European lawyers can pursue under Article 5, third paragraph, of the Establishment Directive, as interpreted in light of the freedom of establishment.³⁰

68. As regards precisely the objectives of consumer protection and the proper administration of justice, ESA for the sake of completeness notes that such objectives are, according to settled case law from the CJEU, also ensured through other provisions of the Establishment Directive:

*"[...] the exclusion of a system of prior testing of the knowledge, particularly of languages, for European lawyers is, however, accompanied in Directive 98/5 by a set of rules intended to ensure, to a level acceptable in the Community, **the protection of consumers and the proper administration of justice**".*³¹

69. In ESA's view, the proportionality of a measure restricting the freedom of establishment of a European lawyer to operate on equal terms with lawyers operating on the basis of national qualifications on the grounds of consumer protection and the proper administration of justice must be assessed in light of the system under the Establishment Directive, which is designed to protect those objectives to a sufficient degree.

²⁹ Ibid, paragraphs 37–38.

³⁰ Cf. also Recital 10 to the Directive.

³¹ Case C-506/04, *Wilson*, paragraph 71. See also Case C-168/98, *Luxembourg v Parliament and Council*, EU:C:2000:598, paragraph 33 and Case C-193/05, *Commission v Luxembourg*, paragraph 41.

70. Such provisions include, *inter alia*, the requirements of lawyers practicing under their home-country title doing so *under that title* (Article 4, first paragraph) and by making lawyers practicing under their home-country title subject also to the rules of professional conduct of the host EEA State, including the possibility to require European lawyers to take out professional indemnity insurance (Article 6, first and third paragraphs).³²

71. As regards the requirement of Article 4 that lawyers who have obtained their professional qualifications in another EEA State than the one they are established in must practice under their home-country title, the CJEU noted in *Commission v Luxembourg* that the purpose of this requirement is precisely the protection of consumers:

*“Thus, Article 4 provides that a lawyer practising under his home-country professional title is required to do so under that title, so that consumers are informed that the professional to whom they entrust the defence of their interests has not obtained his qualification in the host Member State and that his initial training did not necessarily cover the host Member State’s national law.”*³³ (our emphasis)

72. Practising under the home-country professional title also signals to consumers that the European lawyer does not necessarily have the adequate knowledge, in particular of languages, to deal with all aspects of legal proceedings in the host EEA State.³⁴

73. Additionally, in accordance with Article 6, first paragraph, of the Establishment Directive, which makes lawyers practising under their home-country professional title subject also to the rules of professional conduct in the host EEA State, ESA submits that such rules of professional conduct necessarily require the lawyer, in order to be able to handle the matters before him or her, to have adequate knowledge of the national law, whether of a procedural or substantive nature, of the

³² Case C-168/98, *Luxembourg v Parliament and Council*, paragraphs 34, 36–37 and 43, cf. paragraph 33.

³³ Case C-168/98, *Luxembourg v Parliament and Council*, paragraph 34. See also Recital 9 to the Directive.

³⁴ Case C-506/04, *Wilson*, paragraph 72 and Case C-193/05, *Commission v Luxembourg*, paragraph 42.

host EEA State. This is in accordance with the findings in *Luxembourg v Parliament and Council*, where the CJEU held that:

*"[...] rules of professional conduct applicable to lawyers generally entail [...] an obligation, breach of which may incur disciplinary sanctions, not to handle matters which the professionals concerned know or ought to know they are not competent to handle."*³⁵

74. The CJEU went on to conclude that:

*"The legislature has not abolished the requirement that the lawyer concerned should know the national law applicable in the cases he handles, but has simply released him from the obligation to prove that knowledge in advance."*³⁶

75. The CJEU has likewise held that a lawyer necessarily is required to have sufficient linguistic knowledge:

*"[...] Communication with clients, the administrative authorities and the professional bodies of the host Member State, like compliance with the rules of professional conduct laid down by the authorities of that Member State, requires a European lawyer to have sufficient linguistic knowledge or recourse to assistance where that knowledge is insufficient."*³⁷

76. Furthermore, as noted by the CJEU in *Wilson*, certain international cases and cases where the applicable law is the applicable law of an EEA State *other* than the host EEA State, *"may not require a degree of knowledge of the languages of the latter Member State as high as that required to deal with matters in which the law of that Member State is applicable."*³⁸ For cases under Liechtenstein law, where legal aid is granted to individuals who are unable to pay the costs of the proceedings,³⁹ this could be relevant for, *inter alia*, cases concerning the right to free movement of persons within the EEA.

³⁵ Case C-168/98, *Luxembourg v Parliament and Council*, paragraph 42.

³⁶ *Ibid*, paragraph 43. See also Case C-193/05, *Commission v Luxembourg*, paragraph 39.

³⁷ Case C-506/04, *Wilson*, paragraph 74 and Case C-193/05, *Commission v Luxembourg*, paragraph 44. See also the Opinion of Advocate General Stix-Hackl in Case C-193/05 *Commission v Luxembourg*, EU:C:2006:313, paragraphs 65–66.

³⁸ Case C-506/04, *Wilson*, paragraph 75.

³⁹ The Request, page 2, states that *"In accordance with Liechtenstein procedural law the courts may grant legal aid to any individual who is unable to pay the costs of the proceedings, whether they are civil, criminal, administrative or constitutional law proceedings"*.

77. Moreover, the host EEA State may pursuant to Article 6, third paragraph, require the lawyer practicing under his or her home-country professional title to take out appropriate professional indemnity insurance, which is similarly liable to ensure that a lawyer does not act beyond the scope of his or her professional competence.
78. Therefore, the required compliance with the rules of professional conduct, including the possibility of mandatory professional indemnity insurance coverage, combined with the obligation to practice under the home-country professional title, entails a system under the Establishment Directive which ensures, to a level determined appropriate by the EEA legislator, the protection of consumers and the proper administration of justice in that the lawyer attests the requisite linguistic knowledge and competence about the relevant law applicable in a given case, and can be held liable for the lack thereof.⁴⁰
79. On the basis of the above considerations, ESA submits that Liechtenstein law cannot impose a *general* obligation on European lawyers who are practicing under their home-country professional title to be working in conjunction with a lawyer practicing under the professional title of Liechtenstein in order to be appointed as legal aid lawyers, legal aid defence counsel or public defenders, not taking into account the experience of the particular European lawyer.⁴¹ Such a measure goes beyond what is necessary to ensure consumer protection and attain the proper administration of justice and is therefore contrary to Article 5 of the Establishment Directive, interpreted in light of Article 31 EEA.
80. In light of the above, ESA submits that the right to practice as a lawyer in a different EEA State than the one where the professional qualifications were obtained cannot be restricted beyond what Article 5 of the Establishment Directive allows for, and, accordingly, that the exception in Article 62(2) (c) of the Liechtenstein Lawyers Act, in totally barring European lawyers from being appointed as legal aid lawyers, legal aid defence counsels or public defenders is precluded. Further, insofar as the prohibition in Article 62(2) (c) of the Liechtenstein Lawyers Act opens for the possibility of a European lawyer, pursuant to Article 63, to assume the mandates

⁴⁰ Case C-506/04, *Wilson*, paragraph 71.

⁴¹ See in the same vein the CJEU in Case C-739/19, *An Bord Pleanála*, operative part: “a general obligation to work in conjunction with a lawyer who practises before the judicial authority in question not allowing account to be taken of the experience of the visiting lawyer would go beyond what is necessary in order to attain the objective of the proper administration of justice.”

stated therein *in conjunction* with a domestic lawyer and this does not allow for exceptions which take into account the experience of the particular lawyer, for instance, European lawyers who are fluent in the native language of the host EEA State and/or who have sufficient knowledge in the applicable law, this is also incompatible with the Establishment Directive.

5.3 Other observations: The prohibitions on European lawyers being elected as officers of the Chamber of Lawyers and to train trainee lawyers is contrary to Articles 3 and 5 of the Establishment Directive or Article 31 EEA

81. In light of the above assessment, ESA considers it appropriate to recall that even though, formally, the referring court has limited its questions to the interpretation of the limitation in Article 62(2) (c) of the Liechtenstein Lawyers Act, there are other apparently restricting rules affecting European lawyers in Article 62(2), namely the rule in subparagraph (a) barring them from being elected as officers of the Chamber of Lawyers and the rule in subparagraph (b) barring them from training trainee lawyers. To ESA, these provisions also appear to be contrary to Articles 3 and 5 of the Establishment Directive and/or Article 31 EEA.

82. As noted in paragraph 33 above, it is not clear from the Request whether the exceptions in Article 62(2) (a) and (b) of the Liechtenstein Lawyers Act may also provide an obstacle in practice for the Appellant and which can be of relevance for the main proceedings. Therefore, it may be useful for the Court that ESA provides some brief observations on the compatibility of those provisions with the Directive and Article 31 EEA.

83. In that context, ESA recalls that, according to the Court's settled case law, Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("**SCA**") "*establishes a special means of judicial cooperation*" between the Court, on the one hand, and on the other, the national courts.⁴² The aim of this judicial cooperation is to provide national courts with the necessary interpretation of elements of EEA law to decide the cases before them.⁴³

84. It is further settled case law that:

⁴² See e.g. Case E-16/20, *Q and Others*, judgment of 23 November 2021, paragraph 33.

⁴³ *Ibid.*

*“[I]n order to give assistance to national courts in cases in which they have to apply provisions of EEA law, the Court may extract from all the factors provided by the national court the elements of EEA law requiring an interpretation having regard to the subject-matter of the dispute. The Court may restrict its analysis to the provisions of EEA law that will be of use to the national court, which has the task of interpreting the provisions of national law and determining their compatibility with EEA law”.*⁴⁴

85. Thus, although the referring court has raised a question concerning the interpretation of Article 62(2) (c) of the Liechtenstein Lawyers Act, *“it is incumbent on the Court to give as complete and as useful a reply as possible”*.⁴⁵ Consequently, the specific question raised *“does not preclude the Court from providing the referring court with all the elements of interpretation of EEA law which may be of assistance in adjudicating in the case pending before it,”* regardless of whether the referring court has referred to them in the wording of its question.⁴⁶

86. In that context, ESA considers it appropriate to note that the rule found in Article 62(2) (b) of the Liechtenstein Lawyers Act is in its view contrary to the Directive and/or Article 31 EEA because that provision also restricts the right of European lawyers to pursue the *“same professional activities”* as a Liechtenstein lawyer beyond what Article 5 of the Establishment Directive allows for. ESA in this regard refers to the reasoning as set out in Section 5.2 above concerning Article 62(2) (c) of the Liechtenstein Lawyers Act, which, in ESA’s view, applies equally to Article 62(2) (b). With respect to Article 62(2) (a) it appears to ESA that this provision is contrary to Article 31 EEA.⁴⁷

87. As regards specifically the right to train trainee lawyers, ESA notes that the European lawyer, in accordance with the case law on Article 6, first and third paragraphs concerning compliance with the rules of professional conduct of the

⁴⁴ Ibid, paragraph 34, with further references.

⁴⁵ Ibid, paragraph 35.

⁴⁶ Ibid.

⁴⁷ In accordance with Article 6, second paragraph, of the Establishment Directive, the right of representation in the professional associations of the host EEA State for lawyers practising under their home-country professional title shall involve *“at least”* the right to vote in elections to those associations’ governing bodies. This does not entail that national rules, such as that in Article 62(2) (a) of the Liechtenstein Lawyers Act, does not fall to be assessed as restrictions under, *inter alia*, Article 31 EEA.

host EEA State, and the possibility of mandatory professional indemnity insurance coverage, necessarily only would be able to train trainee lawyers in accordance with their own competence, training, knowledge and experience. Moreover, as in practice, trainee lawyers are not only studying but also performing legal and other activities which can be beneficial for an established legal practice, it appears that a European lawyer is at a disadvantage compared to Liechtenstein lawyers, since he is not able to make use of such resources.⁴⁸

88. In the alternative, should the Court find that training trainee lawyers does not qualify as “*professional activities*” within the meaning of Article 5 of the Establishment Directive, ESA submits that the same result follows from the application of Article 31 EEA, which, as submitted in Section 5.2 above, the provisions of the Establishment Directive must be interpreted in light of. The same is the case for the preclusion in Article 62(2) (a) of European lawyers being elected as officers of the Chamber of Lawyers. In that vein, ESA considers that it must be assessed whether the rules barring European lawyers from being elected as officers of the Chamber of Lawyers and to train trainee lawyers is liable to hinder or make less attractive for those European lawyers the exercise of the freedom of establishment laid down in Article 31.⁴⁹ If so, which *prima facie* appears evident to ESA, those rules hindering the freedom of establishment laid down in Article 31 EEA can be justified only on the grounds set out in Article 33 EEA or by overriding reasons in the public interest, provided that they are appropriate to secure the attainment of the objectives which they pursue and do not go beyond what is necessary in order to attain those objectives.⁵⁰

89. While it is not clear how these restrictions may be justified, ESA considers in this regard that to the extent the objective of the measures in question is consumer protection or the proper administration of justice, the imposition of a measure the aim of which is to compensate for lack of knowledge of national law, and/or proficiency in the court language of the host EEA State on individuals, such as the Appellant in the present case who is a native speaker of that language, rather than

⁴⁸ Trainee lawyers may perform a variety of professional activities in the EEA. See generally e.g. the Opinion of Advocate General Stix-Hackl in Case C- C-313/01 *Morgenbesser*, EU:C:2003:173, paragraph 65, describing that an aspect of the practical training of trainee lawyers in Italy is to provide “*quasi-independent legal advisory services in civil and criminal proceedings*”.

⁴⁹ See e.g. Case E-8/16, *Netfonds*, paragraph 108.

⁵⁰ *Ibid*, para 112.

allowing account to be taken of their individual knowledge and experience, appears to go beyond what is necessary and is therefore not capable of being justified on such grounds.

6 CONCLUSION

Accordingly, the Authority respectfully requests the Court to deliver the following Advisory Opinion:

Directive 98/5/EC must be interpreted as precluding a national provision, according to which a lawyer, who normally practices their profession in an EEA State other than the one in which they obtained their qualifications, is not authorised to be appointed as a legal aid lawyer, legal aid defence counsel or public defender.

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Agents of the EFTA Surveillance Authority