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Court procedural documents

**TO THE PRESIDENT AND MEMBERS
OF THE EFTA COURT**

WRITTEN OBSERVATIONS

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

by **the European Commission** represented by Lorna ARMATI and Mislav MATAIJA, Members of its Legal Service, acting as agents, with an address for service, Greffe contentieux, BERL 1/169, 1049 Brussels, and consenting to service by e-EFTA,

in Case E-12/22

a request for an Advisory Opinion from the *Verwaltungsgerichtshof des Fürstentums Liechtenstein* (Administrative Court of the Principality of Liechtenstein) pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice in the proceedings of

Dr Maximilian Maier

Applicant

on the interpretation of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ L 77, 14.3.1998, p. 36–43; hereafter “Directive 98/5”), incorporated into the EEA Agreement by Decision No 85/2002 of the EEA Joint Committee.

1. INTRODUCTION

1. The request for an advisory opinion concerns the interpretation of Directive 98/5/EC and its compatibility with a national provision prohibiting lawyers established in Liechtenstein under the professional title of their home State on the basis of the provisions of Directive 98/5 to be given mandates in the context of legal aid (including acting as a substitute for a lawyer appointed as a 'legal aid lawyer').
2. Legal aid is granted and financed under the provisions of the laws of the EEA States. No instrument of EEA law deals directly with the question of the appointment of lawyers in the context of legal aid granted in an EEA State. The right to legal aid is, however, guaranteed, for criminal proceedings, by Article 6(3)(c) of the European Convention on Human rights. It may also be required in civil proceedings, under Article 6(1) of that Convention, when this is indispensable for an effective access to court.¹
3. Directive 98/5/EC aims to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. It does so, among other measures, by providing that the same rules of conduct apply to lawyers practicing under their home-country professional title and lawyers practicing under the relevant professional title of the host Member State.

2. LEGAL FRAMEWORK

2.1. EEA legal framework

4. Directive 98/5/CE of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ L 77, 14.3.1998, p. 36–43) was incorporated into the EEA Agreement by Decision No 85/2002 of the EEA Joint Committee.
5. According to its Article 1, paragraph 1,

¹ ECtHR, *Airey v Ireland* (Application no. 6289/73), para. 26.

“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 Member State other than that in which the professional qualification was obtained”.

6. Under the first paragraph of Article 2 of that directive:

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

7. Article 3 of the Directive, entitled « Registration with the competent authority », provides, in its paragraphs 1 and 2 :

« 1. A lawyer who wishes to practise in a Member 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 Member State shall register the lawyer upon presentation of a certificate attesting to his registration with the competent authority in the home Member State. (It may require that, when presented by the competent authority of the home Member State, the certificate be not more than three months old. It shall inform the competent authority in the home Member State of the registration).»

8. Article 5 of the Directive 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 Member State and may, inter alia, give advice on the law of his home Member State, on Community law, on international law and on the law of the host Member State. He shall in any event comply with the rules of procedure applicable in the national courts.

2. Member 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 Member 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 Member 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 Member 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, Member States may lay down specific rules for access to supreme courts, such as the use of specialist lawyers. ».

9. Article 6, paragraph 1, of Directive 98/5, « Rules of professional conduct applicable », stipulates:

« 1. Irrespective of the rules of professional conduct to which he is subject in his home Member 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 Member State in respect of all the activities he pursues in its territory».

10. Several instruments of Union law organise legal aid in cross-border disputes:

- Council directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.
- Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.²

However, none of these directives deals with the question of the appointment of lawyers in the context of legal aid granted in a Member State.

2.2. National legal framework

11. It follows from the request that, in accordance with Liechtenstein procedural law, the courts may grant legal aid to any individual who is unable to pay the costs of

² This text is not of EEA relevance.

the proceedings, whether they are civil, criminal, administrative or constitutional law proceedings, and provide them with a lawyer as part of that legal aid (legal aid lawyer, legal aid defence counsel, public defender).³ The costs of the legal aid lawyer (notably their fee) are, at least temporarily, assumed by the State and paid directly to the legal aid lawyer.

12. The profession of lawyer is regulated by the Lawyers Act (Rechtsanwaltsgesetz (RAG)) of 8 November 2013, Liechtenstein State Gazette (Liechtensteinisches Landesgesetzblatt (LGBl)) 2013 No. 415.
13. The Lawyers Act serves, inter alia, to transpose the relevant directives, in particular Directive 98/5/EC (Article 1(1) of the RAG).
14. Article 28 RAG, concerning the appointment of a lawyer in the context of legal aid, provides that:

“ If the court has decided to instruct a lawyer or if the grant of legal aid includes such assistance, the party shall be entitled to have a lawyer appointed by the bar association.

The board of the Bar Association must act in accordance with fixed rules when appointing the lawyer; they must ensure that lawyers who are members of the Chamber are called upon to act and burdened as equally as possible.”

15. Article 59 RAG provides that:

“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

³ The Commission notes that the relevant rules are to be found, in essence, in Articles 63 to 73 of the Gesetz vom 10. Dezember 1912 über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung) (Code of Civil Procedure), OJ of 1912, number 9. The implementing rules, in Verordnung vom 5. Juli 1994 über den schriftlichen Antrag auf Bewilligung der Verfahrenshilfe und über das Vermögensbekenntnis zur Erlangung der Verfahrenshilfe (Regulation on the written request for legal aid) (OJ of 1994 number, 61), are entirely focussed on the financial status of the applicant.

exercises on domestic territory, be subject to the same rules of professional and ethical conduct as the domestic lawyers”.

16. Article 62 RAG on professional status provides that:

“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”.

17. Article 63 RAG, on domestic lawyers acting in conjunction with the established European lawyer, specifies that

“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”. [...]

18. The *Geschäftsordnung der Liechtensteinischen Rechtsanwaltskammer* (Rules of Procedure of the Liechtenstein Bar Association) of 24 March 2014 contains rules on legal aid.⁴ Chapter VII deals with legal aid and Article 36 concerns the appointment of a lawyer in cases where judicial assistance has been granted.

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[https://www.rak.li/application/files/8816/1883/6650/Geschäftsordnung_der_Liechtensteinischen_Rechtsanwaltskammer.pdf#:~:text=1\)%20Der%20Rechtsanwaltskammer%20obliegt%20die,%C3%9Cberwachung%20der%20Pflichten%20ihrer%20Mitglieder.](https://www.rak.li/application/files/8816/1883/6650/Geschäftsordnung_der_Liechtensteinischen_Rechtsanwaltskammer.pdf#:~:text=1)%20Der%20Rechtsanwaltskammer%20obliegt%20die,%C3%9Cberwachung%20der%20Pflichten%20ihrer%20Mitglieder.)

3. FACTUAL BACKGROUND

19. The following facts, as they result from the request for an advisory opinion, appear relevant to an understanding of the case.
20. The applicant Dr Maximilian Maier is an Austrian national residing in Austria. He is an Austrian lawyer and is entered in the register of lawyers in Vorarlberg, Austria. At his request the Liechtensteinische Rechtsanwaltskammer (Liechtenstein Bar Association) entered him in the register of European lawyers established in Liechtenstein. He is therefore a European lawyer established in Liechtenstein in accordance with Chapter III of the Lawyers Act.
21. Following a dispute between the applicant and the Liechtenstein Bar Association, in particular as to whether the applicant was authorised to assume the mandates of other Liechtenstein lawyers in the context of legal aid, the Liechtenstein Bar Association decided by order of 5 April 2022 as follows:
- 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.*
22. The Government of Liechtenstein dismissed the applicant's appeal on 29 June 2022. The applicant lodged an appeal with the *Verwaltungsgerichtshof des Fürstentums Liechtenstein* (Administrative Court of the Principality of Liechtenstein) challenging that decision.
23. The *Verwaltungsgerichtshof des Fürstentums Liechtenstein* decided to stay proceedings and to request an advisory opinion from the EFTA Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA).

4. THE QUESTIONS REFERRED

24. The *Verwaltungsgerichtshof des Fürstentums Liechtenstein* (the referring court) has referred the following question to the EFTA Court:

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. DISCUSSION OF THE QUESTIONS

25. The question referred for a preliminary ruling concerns the interpretation of the provisions of Directive 98/5 in the context of the appointment of a lawyer in situations where legal aid has been granted, that is to say, where the appointed lawyer is paid (in whole or in part) from public funds for the services provided.
26. This situation is not specifically addressed in any of the instruments of EEA law. Each EEA State remains competent to organise the granting of this aid and the appointment of lawyers in compliance with Union law, as it applies in the EEA.
27. In that context, the request asks whether the exclusion of lawyers established under their home State title on the basis of the provisions of Directive 98/5 (hereinafter, “established European lawyers”) from a system of legal aid, such as that in place in Liechtenstein, complies with the provisions of Directive 98/5. The interpretation of the provisions of Directive 98/5 proposed below therefore takes into account the objective of ensuring access to legal aid while allowing the free movement of lawyers.
28. It is settled case law that Directive 98/5 fully harmonises the prior conditions for the exercise of the right to become established in another EEA State on the basis of the home State professional title. At the same time, this harmonisation is accompanied by a set of rules intended to ensure, to a level acceptable in the Union (and, the Commission submits, in the EEA), the protection of consumers and the proper administration of justice. Thus, for example, the requirement to practice under the home State title is designed to ensure that clients are alerted to the fact that the lawyer does not necessarily have the knowledge adequate to deal with certain cases. Moreover, with regard to representation of parties before courts, the possibility of requiring established European lawyers to work in conjunction with a lawyer who practices before the judicial authority in question may compensate for any lack of proficiency on the part of the former.⁵
29. In accordance with Article 5(1) of Directive 98/5, a lawyer practising under his home-country professional title carries on the same professional activities as a

⁵ Judgment of 19 September 2006 in *Wilson*, C-506/04, EU:C:2006:587, paras 66-72.

lawyer practising under the relevant professional title used in the host Member State. In other words, access is to the profession as practiced in the host State.

30. Article 6(1) of Directive 98/5 provides that irrespective of the rules of professional conduct to which he is subject in his home State, a lawyer practising under his home State professional title shall also be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host State in respect of all the activities he pursues in the territory of the latter. This means, in particular, that established European lawyers will as a general rule be required not to handle matters which they know or ought to know they are not competent to handle.⁶
31. It may therefore be concluded that lawyers established in Liechtenstein under their home State professional title enjoy the same rights of exercise and duties of practice as Liechtenstein lawyers. Established European lawyers carry out the same professional activities as national lawyers and may give legal advice in the law of their home State, in EU or EEA law, in international law and in the law of the host Member State. They shall, in any event, comply with the procedural rules applicable before the national courts.
32. In this context, denying established European lawyers the possibility of being included on the list of lawyers eligible to be appointed in cases where legal aid has been granted appears at first sight to be contrary to the objectives of Directive 98/5, in particular as regards the integration of European lawyers.
33. As the Government of Liechtenstein has pointed out before the referring court, it could be argued that established European lawyers do not in all cases have the necessary expertise to adequately represent individuals in the law of the host State.
34. It could therefore, in the view of the Government, appear disproportionate and contrary to the public interest objective of ensuring the protection of litigants and the proper administration of justice to require that established European lawyers be automatically added, after their registration with the Bar Association of Liechtenstein in accordance with the provisions of Directive 98/5/EC, to the list of lawyers who may be appointed to act in cases in which legal aid has been granted.

⁶ *Ibid.*, para 74.

35. However, as indicated above at paragraph 28, the case law of the CJEU supports the conclusion that the system created in Directive 98/5 acknowledges and addresses the fact that “*the [established European lawyer] does not necessarily have the knowledge adequate to deal with certain cases*”, in particular by requiring use of the home State title as a means of distinguishing them from locally qualified lawyers, and in any event through the application of both home and host State rules on professional conduct, which will invariably require that a lawyer only takes cases that he is competent to deal with.
36. What is more, to the extent that a rule such as the one under examination restricts the access of established European lawyers to a particular aspect of the practice of the profession in Liechtenstein, i.e. the ability to represent the recipient of legal aid, the Commission notes that “*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, enabling him to practise there under his home-country professional title, may be subject*”.⁷
37. It is true that the CJEU has also held that “*a distinction should be drawn between, on the one hand, registration [...] and, on the other, the practice itself of the profession of lawyer*”, noting that the latter “*have not been harmonised and may therefore differ considerably*” from State to State.⁸ However, as indicated above, the rule in question appears to relate more to access than to rules of practice. Indeed, when the CJEU has referred to rules that are subject to an analysis of justification and proportionality, it seems to focus rather on “*rules relating to organisation, qualifications, professional ethics, supervision and liability*”⁹ i.e. the rules that any lawyer practicing in the host State must adhere to.
38. In any event, to the extent that the Government of Liechtenstein seeks to justify the rule in question, the Commission notes that consumer protection and the proper administration of justice are objectives which have been recognised by the CJEU as constituting overriding reasons in the public interest.¹⁰ That said, it must also observe the principle of proportionality, which means that it is suitable for

⁷ Judgment of 7 May 2019 in *Monachos Eirinaios*, C-431/17, EU:C:2019:368, para 27.

⁸ *Ibid.*, paras 30 and 31.

⁹ Judgment of 3 February 2011 in *Ebert*, C-359/09, EU:C:2011:44, para 40

¹⁰ Judgment of 10 March 2021 in *An Bord Pleanála*, C-739/19, EU:C:2021:185, para 22.

securing, in a consistent and systematic manner, the attainment of the objective pursued and does not go beyond what is necessary in order to attain it.¹¹

39. The referring court makes reference to a number of arguments advanced by the Government in that respect.
40. Contrary to the assertions of the Government of Liechtenstein, the Commission understands that the cases in which legal aid may be granted are not necessarily such as to require a greater degree of knowledge or expertise in national law than other cases. Indeed, in principle, any case, including cases where legal representation is not mandatory at all, may be a candidate for the provision of legal aid. It appears, on the basis of the information in the request (section on ‘Relevant provisions of Liechtenstein law’), that the ability of the party to pay is the sole criterion for the award of legal aid. Neither the RAG, nor the legal aid rules of the Liechtenstein Bar Association (*Geschäftsordnung der Liechtensteinischen Rechtsanwaltskammer* of 24 March 2014) appear to take into account the designated lawyer’s specific knowledge, such as whether they are specialised for certain types of cases.
41. It would appear that the rules of the Liechtenstein Bar Association are such that legal aid lawyers are not appointed according to their qualifications and/or areas of specialisation, but rather in accordance with indications of preference on the part of the client or, in the event that those preferences are not followed, by alphabetical order from the list of legal aid lawyers (see Article 36(4) and (5) of the *Geschäftsordnung der Liechtensteinischen Rechtsanwaltskammer* of 24 March 2014). This suggests that it may also happen, in a situation of assignment by alphabetical order, that the designated Liechtenstein lawyer may not have the skills necessary to conduct the case and will, for that reason, decline to be appointed. Indeed, under Article 37(2) of those rules, the designated lawyer has the right to refuse to take over the mandate on particularly important grounds.
42. Concerning the argument that in cases where legal aid is granted, clients have no say in the lawyer appointed, the Commission notes that, according to Article 36(5) of the *Geschäftsordnung der Liechtensteinischen Rechtsanwaltskammer* of 24 March 2014, provided that there is agreement between a lawyer and the party to

¹¹ Judgment of 6 October 2020 in *Commission v Hungary*, C-66/18, EU:C:2020:792, para 178.

whom legal aid has been granted, that lawyer will, as a general rule, be appointed to conduct the case.

43. In this respect, it appears useful to recall that whether the choice is for the party or the Bar Association, the costs will be borne by the State. Indeed, it appears from the request that ensuring that individuals can effectively avail themselves of their right of access to justice is a positive obligation for the State, in accordance with the ECHR and in particular Article 6 thereof. This has an impact on the State budget, but the specific arrangements are within the control of the State and should not be such as to preclude the appointment of an established European lawyer in cases in which the State is bearing the costs via the provision of legal aid. Indeed, even in a situation in which recourse to an established European lawyer will have the consequence of requiring also a Liechtenstein lawyer to work on the case, by virtue of the requirement that the former work in conjunction with a local lawyer, the cost implications should be managed in such a way as to ensure that the rights guaranteed by Directive 98/5 can be effectively exercised.
44. On the basis of the foregoing considerations, it is not clear that the rule is suitable to achieving either of the stated objectives in a consistent and systematic manner.
45. What is more, there may be less restrictive measures available to achieve those objectives. A more proportionate measure guaranteeing the protection of litigants and the proper administration of justice while allowing the integration of European lawyers in compliance with Directive 98/5 could be to provide that such inclusion on a list of lawyers who may be appointed, as part of judicial assistance, is to be made at the request of the European lawyer, coupled with appropriate measures of cost control, and keeping in mind rules of professional conduct requiring that no lawyer should act in a specific case that he or she is not competent to handle.

6. CONCLUSION

58. Accordingly, the Commission has the honour to suggest the following answer to the questions of the referring court:

In the circumstances of the present case, Directive 98/5 must be interpreted as precluding a national provision such as the one under examination, which provides that a lawyer practising his profession in an EEA State other than that in which he obtained his qualification may not be

appointed, as part of judicial assistance, to act for a party to whom legal aid has been granted.