REPORT OF THE **EFTA** COURT **2023**

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REPORT OF THE EFTA COURT 2023

The year 2023 saw a change of composition of the EFTA Court. Judge Per Christiansen, my colleague of many years, was replaced by Michael Reiertsen, a judge at the Borgarting Court of Appeal, who was nominated by the Kingdom of Norway and appointed by common accord of the EFTA States. For a Court composed of three judges, it is self-evident that a change in its composition is a significant event in the life of the Court. I am pleased to note that the Norwegian selection process, albeit after some delay, brought to the Court a highly qualified and respected jurist.

During 2023, 16 new cases were lodged at the Court, which means that the case load is, in a historical perspective, quite close to being at its peak. Of the 16 cases registered in 2023, 12 are requests for an advisory opinion and 4 are infringement proceedings brought by the EFTA Surveillance Authority (ESA) against the EFTA States, incidentally, all four of them concern Norway. These pending cases raise a variety of complex legal issues. To name a few examples, the Norwegian Supreme Court asked numerous questions on measures taken in response to the Covid pandemic and their compatibility with the Citizenship Directive. The Norwegian Supreme Court has also sent a request concerning another aspect of the Citizenship Directive, i.e. how to assess the legality

of a ban on entry imposed on a third country national, who subsequently comes within the personal scope of the Directive.

Following a request from Oslo District Court, the EFTA Court is called for the first time to rule on an issue regarding climate legislation, a field of law in which more cases may probably be expected in the future. The District Court asks how to deal with emission allowances when an airline is going through restructuring, i.e. whether they are to be treated as other claims vis-à-vis the airline. Of the infringement proceedings, I would like to mention that ESA brought to the Court a longstanding dispute between the Authority and the Norwegian Government as to whether Norway has complied with its obligations under EEA law in respect of allowing persons to receive in-patient treatment in other EEA States.

Turning to judgments handed down in 2023, there are two judgments which I believe are worth a special mention. In Stendi the Court was asked to rule on whether the exclusion of profit-making entities from tenders to provide nursing home places in Oslo Municipality was in line with the public procurement rules. First, the Court clarified that providing such nursing home places constituted a service within the meaning of the EEA Agreement and accordingly was within the scope of the procurement

rules. Second, the Court found that the exemption regarding the exercise of official authority did not apply to the contracts at issue, as the operation of nursing homes could not be regarded as being directly and specifically connected therewith. Finally, it was considered to be compatible with the procurement rules to reserve tenders for non-profit organisation, provided that the principle of transparency was complied with and that the activity of the organisations was grounded in the principles of universality and solidarity, inherent to a social welfare system.

In RS the Court concluded that a provision of Liechtenstein tax law was discriminatory and thus in breach of Article 28 EEA. The Liechtenstein Constitutional Court had reached the same conclusion but had suspended the annulment of the law for reasons of legal certainty. The Administrative Court, which requested the advisory opinion, was unsure how to treat this deferral under the terms of EEA law. The EFTA Court concluded that national courts can only in very exceptional cases, for reasons of legal certainty, temporarily maintain the effects of a national rule that is contrary to EEA law, i.e. when those concerned have acted in good faith and when there is a risk of serious difficulties if the annulment were to take effect immediately. As regards the rule under scrutiny in this case, the Court considered that its incompatibility with the free

movement provisions should have been clear from existing and extensive case law on income tax, and EEA/EU law, and accordingly that the strict conditions for maintaining in force a rule incompatible with EEA law were not fulfilled.

As usual the Court held its annual conference in the spring. The keynote speaker this time was Professor Joseph Weiler one of the most eminent scholars of EU law. The title of his address was “Is the Church of European Integration facing a Reformation” where he discussed the evolution and challenges of European legal integration. A very timely topic in the current climate with changes to the architecture of European integration firmly on the agenda.

The year 2024 marks the 30th anniversary of the EEA Agreement and the EFTA Court. To celebrate that the Court will continue the tradition to publish an Anniversary Publication to mark the occasion as well as dedicating its annual conference to the anniversary. It has been both interesting and fascinating to follow the development of the EEA Agreement and the work of its institutions for the last 30 years and in particular to have participated in that development as a Judge and President of the EFTA Court for more than a decade. I find it useful,

on the occasion of the 30th anniversary, to look back and study the perhaps improbable success of the EEA and look ahead to the future of the Agreement. As noted recently by Fredrik Sejersted, the Norwegian Attorney General, the development of the EFTA States relationship with the EU has largely taken place outside the framework of the EEA. As he rightly notes, this seems to take the EEA Agreement for granted, which might have unfortunate consequences. I would add that the 30th anniversary should encourage the EFTA States to reflect on the importance and achievements of the EEA Agreement.

Páll Hreinsson
President

Contents

FOREWORD 5

CASE SUMMARIES 13

Case **E-1/22** – G. Modiano Limited & Standard Wool (UK) Limited v ESA 14

Case **E-5/22** – Christian Maitz v Liechtensteinische Alters- und Hinterlassenenversicherung, Liechtensteinische Invalidenversicherung, and Liechtensteinische Familienausgleichskasse 16

Case **E-4/22** – Stendi AS & Norlandia Care Norge AS v Oslo commune 19

Case **E-9/22** – Verkfræðingafélag Íslands (the Association of Chartered Engineers in Iceland), Stéttarfélag tölvunarfræðinga (the Computer Scientists' Union), and Lyfjafræðingafélag Íslands (the Pharmaceutical Society of Iceland) v the Icelandic State 22

Case **E-11/22** – RS v Fiscal Authority of the Principality of Liechtenstein (Steuerverwaltung des Fürstentums Liechtenstein) 25

Case **E-15/22** – ESA v Norway 28

Case **E-12/22** – Dr Maximilian Maier 31

Case **E-14/22** – The Liechtenstein Chamber of Lawyers v Dr Alexander Amann 34

NEWS AND EVENTS 37

JUDGES AND STAFF 45

2023

Case Summaries

G. Modiano Limited and Standard Wool (UK) Limited

V

EFTA Surveillance Authority

Case E-1/22

(State aid – Norwegian Wool Subsidy Scheme – Action for annulment of a decision of the EFTA Surveillance Authority – Rejection of a complaint – Decision taken at the end of the preliminary examination stage – Statement of reasons – No substantial alteration of existing aid)

Judgment of the Court of 24 January 2023

The case concerned an application brought by G. Modiano Limited and Standard Wool (UK) Limited ("the applicants") for the annulment of the EFTA Surveillance Authority's ("ESA") decision of 9 November 2021 concerning alleged State aid in the Norwegian wool industry subsidy scheme in its entirety.

In the contested decision, ESA had concluded that the scheme constitutes existing aid that was put into effect before the entry into force of the EEA Agreement.

In their application, the applicants sought annulment based on four pleas. First, that ESA erred in law and erred in its assessment when concluding that

the subsidy system constitutes existing aid. Second, that ESA failed to take into account all relevant information submitted by the applicants in their complaint and their letter to ESA of 25 October 2021 and breached its duty to state reasons. Third, that ESA failed to investigate and assess to what extent the companies operating the wool collecting stations received unlawful aid. Fourth, that ESA failed to investigate and assess the adverse competitive effects of the scheme.

The Court dismissed the application in its entirety on substance.

As regards the first plea, the Court found that it had not been demonstrated that the regulatory changes entailed a substantial alteration to the scheme since it was instituted in 1993. On the second plea, the Court noted that the applicants, for a substantive discussion of most of the arguments under that plea, had referred to other documents than the application, primarily to their complaint. The Court therefore found that the application did not comply with the necessary legal requirements. Further, the Court held that the submission that ESA should have collected concrete information concerning how the aid scheme is actually administered in order to assess whether the aid scheme had been altered, did not indicate any incorrect factual basis in ESA's assessment. The Court also noted that it had already addressed, and dismissed, the matter of whether the aid scheme has been altered under the first plea.

On the third plea, the Court observed that it had dealt with the merits of the contested decision in the context of the first plea. Finally, the fourth plea was based on the assertion that the operators of the wool collecting stations derive a competitive advantage from the aid scheme that distorts competition. The Court found that the applicants, had not demonstrated in their application to the requisite legal standard sufficient factual indications for the alleged distortion of the competition that would justify objective doubts or serious difficulties concerning the compatibility of the aid scheme with the functioning of the EEA Agreement and thereby discharge their burden of proof. «

https://eftacourt.int/cases/e-1-22/

Christian Maitz

Liechtensteinische Alters- und Hinterlassenenversicherung, Liechtensteinische Invalidenversicherung and Liechtensteinische Familienausgleichskasse

Case E-5/22

(Social security – Regulation (EC) No 883/2004 – Regulation (EC) No 987/2009 – Residence in a third country – Self-employed person – Applicability of EEA law – Recommendation of the Administrative Commission – Article 3 EEA – Principle of sincere cooperation)

Judgment of the of Court of 24 January 2023

The case concerned questions referred to the Court by the Princely Court of Appeal (*Fürstliches Obergericht*) in regard to the interpretation of Regulation (EC)

No 883/2004 on the coordination of social security systems ("Regulation 883/2004") and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination on social security systems ("Regulation 987/2009").

The case in the main proceedings concerned an appeal brought by Christian Maitz against a decision that declined his request for a form Portable Document ("PD") A1. Mr Maitz is an Austrian national working as a lawyer in Liechtenstein and residing in Switzerland. The Liechtenstein Institutions (AHV-IV-FAK) determined that Mr Maitz's income from his activities in Liechtenstein was liable to mandatory pension and benefits contributions payable in Liechtenstein. Mr Maitz is also a member of the Vienna Bar Association and liable to pay contributions to the Austrian pension institutions. To be exempted from paying contributions in both EEA States, Mr Maitz was required to submit to the Vienna Bar Association a form PD A1 from Liechtenstein as an attestation of the national legislation applicable to him. According to the Liechtenstein Institutions they could not issue a form PD A1 to Mr Maitz since he resides in Switzerland and that accordingly Regulation 883/2004 does not apply to him. In addition, the Liechtenstein Institutions further considered themselves not to be obliged to provide such an attestation by means of a form PD A1. In the appeal proceedings, the Liechtenstein Institutions offered to issue an official attestation in place of a form PD A1.

By its first question, the referring court asked whether it is a condition under Article 2(1) of Regulation 883/2004 that, in addition to being a national of an EEA State and being subject to the legislation of one or more EEA States, a person must also be resident in an EEA State in order to be within the personal scope of that regulation. The Court found that there was no such condition. The referring court further asked whether an agreement concluded by an EEA State with a third country, which aims to extend the scope of application of Regulation 883/2004 to that third country, could change that first answer. The Court held that such an agreement on social security cannot impose the

residence of an individual as a condition deviating from Articles 2(1) and 11 of that regulation.

By its second question, the referring court asked whether an attestation within the meaning of Article 19(2) of Regulation 987/2009 must necessarily be issued by means of form PD A1 in order to produce the legal effects specified in Article 5(1) of that regulation. The Court found that Article 19(2) does not require an attestation to be issued exclusively in the form of a PD A1 in order to produce the legal effects set out in Article 5(1) of that regulation. «

https://eftacourt.int/cases/e-5-22/

Stendi AS and Norlandia Care Norge AS

v

Oslo kommune

Case E-4/22

(Freedom to provide services – Article 36 EEA – Notion of "services"– Article 37 EEA – Article 39 EEA – Article 32 EEA – Exercise of official authority – Public procurement – Directive 2014/24/EU – Public service contract – "ideelle organisasjoner" – Reservation of contracts – Exclusion of profit making operators)

Judgment of the Court of 28 March 2023

The Oslo District Court (*Oslo tingrett*) requested an advisory opinion from the Court concerning the interpretation of Articles 31, 32, 36 and 39 of the Agreement on the European Economic Area ("EEA") and Directive 2014/24/EU on public procurement ("the Directive").

The main proceedings concerned the procurement by Oslo municipality of services relating to the operation of nursing home places. Participation in that procurement procedure is reserved for a form of organisations, which in Norway is referred to as "*ideelle organisasjoner*". Stendi AS and

Norlandia Care Norge AS, as profit-making operators, are thus prevented from participating.

By its first question, the referring court asked whether contracts such as those at issue in the main proceedings were to be regarded as contracts relating to the provision of "services", thus falling within the scope of the Directive. The Court held that medical services provided for consideration fall within the scope of the provisions on the freedom to provide services in Article 36 EEA. A medical service does not cease to be a service within the meaning of Article 37 EEA because it is paid for by a national health service or a system providing benefits in kind. Accordingly, the Court found that a public contract for pecuniary interest providing for the provision of long-term places in nursing homes, in circumstances such as those of the main proceedings, constitutes a contract for the provision of services within the meaning of point (9) of Article 2(1) of the Directive.

By its second question, the referring court essentially asked whether activities involving coercive health care, such as those at issue in the main proceedings, come within the scope of the exception regarding the exercise of official authority in Article 39 EEA, read in conjunction with Article 32 EEA. Under Norwegian law, health personnel are directly authorised to provide coercive health care. The Court held that the activity of operating nursing homes, in circumstances such as those of the main proceedings, cannot be regarded as being directly and specifically connected with the exercise of official authority, even where coercive health care may be provided.

By its third question, the referring court asked whether Articles 31 and 36 EEA and Articles 74 to 77 of the Directive preclude national legislation allowing contracting authorities to reserve the right to participate in tendering procedures relating to health and social services for "*ideelle organisasjoner*". The Court found that Articles 74 to 77 of the Directive must be interpreted as not precluding national legislation which reserves for "*ideelle organisasjoner*" the right to participate in a procedure, involving a competitive bidding process, for the award of public

contracts for the provision of social or other specific services listed in Annex XIV to the Directive, provided that two conditions are fulfilled. First, the legal and contractual framework within which the activity of those organisations is carried out must actually be grounded in the principles of universality and solidarity, which are inherent to a social welfare system, as well as in reasons of economic efficiency and suitability, and contribute effectively to the social purpose and objectives of solidarity and budgetary efficiency on which that system is based. Second, that the principle of transparency, as specified in Articles 75 and 76 of the Directive, is respected. «

https://eftacourt.int/cases/e-4-22/

Verkfræðingafélag Íslands (*the Association of Chartered Engineers in Iceland*), Stéttarfélag tölvunarfræðinga (*the Computer Scientists' Union*), and Lyfjafræðingafélag Íslands (the Pharmaceutical Society of Iceland)

v

the Icelandic State

Case E-9/22

(Council Directive 98/59/EC – Collective redundancies – Obligation to initiate consultations with the workers' representatives – Obligation to notify the competent public authority – Contractual structure of the employment relationship)

Judgment of the Court of 19 April 2023

The Icelandic Court of Appeal (*Landsréttur*) requested an advisory opinion regarding the interpretation of Council Directive 98/59/EC on the approximation of laws of the Member States relating to collective redundancies ("the Directive").

The main proceedings concerned the termination by the National University Hospital (*Landspítali*) of the regular overtime contracts of its technical support unit workers, which were additional to the workers' employment

contracts. The affected workers were offered new temporary contracts covering regular overtime instead. The parties in the main proceedings disagreed on whether the terminations of the overtime contracts constituted collective redundancies under the Icelandic Collective Redundancies Act.

By its first question, the referring court asked whether an employer who intends to terminate contracts with a group of workers covering fixed overtime is required to consult with the workers' representatives and notify the competent public authority in accordance with the Directive. By its second question, the referring court asked whether the employer's obligations cease if the termination of the contracts does not result in the full termination of the workers' employment contracts. By its third question, the referring court asked whether it is of significance for the answers to its first two questions whether the fixed overtime contracts were specifically made in independent contracts that were additional to the workers' employment contracts.

The Court held, first, that the first subparagraph of Article 1(1)(a) of the Directive must be interpreted as meaning that where an employer, unilaterally and to the detriment of the employee, makes significant changes to essential elements of an employment contract for reasons unrelated to the individual employee concerned, that falls within the definition of "redundancy". Second, the Court held that the second subparagraph of Article 1(1) of the Directive must be interpreted as meaning that a notice of amendment, which does not constitute a "redundancy", can be assimilated as such provided the conditions in the second subparagraph of Article 1(1) are met. Third, the consultation procedure under Article 2 of the Directive must be initiated once a strategic or commercial decision compels an employer to contemplate or plan for collective redundancies. Where the decision to amend the employment conditions could help avoid collective redundancies, consultations must begin once the employer intends to make such amendments. Fourth, the first subparagraph of Article 3 of the Directive obliges an employer to notify the competent public authority of any projected collective redundancies, including anticipated redundancies under the first subparagraph of Article 1(1)(a) of the Directive and those assimilated as such under the second subparagraph of Article 1(1) of the Directive.

The Court held that the employer's obligations to initiate the consultation procedure and to notify the competent public authority cannot depend on subsequent events, such as whether the employment contracts are, in fact, terminated. Finally, the Court found that a worker's conditions of employment must be viewed as a whole. Thus, it is irrelevant whether an employee's conditions of employment are stipulated in one contract or over several contracts. «

https://eftacourt.int/cases/e-09-22/

RS

v

Steuerverwaltung des Fürstentums Liechtenstein (*Liechtenstein Tax Administration*)

Case E-11/22

(Article 28 EEA – Free movement of workers – Discrimination between resident and non-resident taxpayers – Tax legislation – Income tax – Equal treatment – Protocol 35 EEA – Principle of sincere cooperation – Principle of equivalence – Principle of effectiveness – State liability)

Judgment of the Court of 4 July 2023

The Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*) requested an advisory opinion from the Court concerning the interpretation of the Agreement on the European Economic Area ("EEA"), in particular Articles 3, 4 and 28.

The main proceedings concerned the tax assessment of RS, a German national residing in Switzerland, for the 2019 tax year when he worked in the Liechtenstein public service. Under the Double Taxation Convention between Switzerland and Liechtenstein, RS was subject to income tax in Liechtenstein in respect of his employment in Liechtenstein.

The Liechtenstein legislation in force during the 2019 tax year had the effect that persons with limited tax liability, like RS, were subject to a higher tax rate for earnings from activity as an employed person carried on in Liechtenstein than tax residents in Liechtenstein. By judgment of 1 September 2020, the Constitutional Court of the Principality of Liechtenstein (*Staatsgerichtshof*) found that the relevant provision in the Liechtenstein Tax Act was unconstitutional and discriminatory. The Constitutional Court annulled the provision as regards the applicant in that case, and deferred the operative date of the provision's *annulment erga omnes* by one year.

The Court understood the referring court's request as seeking the answer to two questions. First, whether Article 28

EEA and/or Article 4 EEA must be interpreted as precluding national legislation, such as that at issue in the main proceedings, by which an EEA State applies a higher rate of taxation to income gained through employment activity in that State by EEA nationals who are not resident for tax purposes in that State, in comparison with persons who are resident for tax purposes in that State. Second, if the first question is answered in the affirmative, whether EEA law must prevail irrespective of any deferral required by national law.

The Court held that the difference in treatment between taxpayers who work in an EEA State but are not resident there and taxpayers who both work and reside in that State, which consists in the former being taxed at a higher rate than the latter, constituted, to that extent, indirect discrimination based on the criterion of residence, contrary to Article 28 EEA. Thus, the Court found that Article 28 EEA must be interpreted as precluding national legislation such as that at issue in the main proceedings, which applies a higher rate of taxation to income gained through employment in that State by EEA nationals who are not resident for tax purposes in that State, compared to those who are resident for tax purposes in that State.

Further, the Court held that Protocol 35 EEA and Article 28 EEA must be interpreted as precluding an EEA State from applying a provision such as that at issue in the main proceedings, which has been deemed incompatible with Article 28 EEA.

Finally, the Court found that individuals such as RS may not be subjected to a higher rate of taxation on the basis of a national measure such as that at issue in the main proceedings. The referring court is required to draw the necessary consequences from the breach of EEA law and, within the scope of its power, grant an effective remedy, including the repayment with interest of any taxes already paid in breach of EEA law. If that is not possible, the EEA State is obliged to provide compensation for loss and damage caused to individuals, such as RS, in accordance with the principle of State liability. «

https://eftacourt.int/cases/e-1122/

EFTA Surveillance Authority

The Kingdom of Norway

Case E-15/22

(Failure by an EFTA State to fulfil its obligations – Failure to comply – Commission Regulation (EC) No 29/2009 – Requirements on data link services for the single European sky)

Judgment of the Court of 12 July 2023

On 7 December 2022, the EFTA Surveillance Authority ("ESA") brought an application seeking a declaration from the Court that Norway had failed to fulfil its obligations under the act referred to in point 66wg of Annex XIII to the Agreement on the European Economic Area ("the EEA Agreement" or "EEA"), namely Commission Regulation (EC) No 29/2009 of 16 January 2009 laying down requirements on data link services for the single European sky ("the Regulation"), as subsequently amended, by failing to ensure that its designated air traffic service provider has the capability to provide and operate the defined data link services to operators for data exchanges in respect of aircraft flying within the airspace under its responsibility by 5 February 2018.

Following a series of correspondence between the parties beginning on 31 May 2018, ESA issued a letter of formal notice on 10 June 2020 in which it concluded that, by not providing and operating all data link services defined in Annex II to the Regulation to all operators of aircraft flying within the airspace that in line with Article 6 of the Regulation are capable of data link communications, Norway had failed to fulfil its obligations under Article 3(1) of the Regulation. Article 7(1) of the Regulation was referred to in the section on the relevant EEA law.

On 12 October 2020, Norway replied to the letter of formal notice. Norway stated inter alia that it agreed with ESA's assessment that the requirements of Article 3(1) and Article 7(1) of the Regulation had not been met within the set deadline.

On 10 November 2021, ESA delivered a reasoned opinion in which it found that, by not providing and operating data link services by 5 February 2018, Norway had failed to fulfil its obligations under Articles 3(1) and 7(1) of the Regulation. Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), ESA required Norway to take the necessary measures to comply with the reasoned opinion within two months of its receipt. On 10 January 2022, the period for compliance with ESA's reasoned opinion expired.

On 15 February 2022, the Norwegian Government responded to ESA's reasoned opinion, citing unreasonable costs, safety concerns, and technical challenges as the reasons behind the delay in implementing the data link services within the two month period set in the reasoned opinion. Norway further submitted that, partly due to the Covid-19 pandemic, the required data link services would not be implemented until 2025 at the earliest. Norway observed that the Norwegian Civil Aviation Authority ("CAA") had considered imposing coercive fines on Avinor ANS for the lack of compliance with the requirement to implement data link communications. However, having regard to all the elements causing the delay in the implementation of the data link services, the CAA had not found that fines would be effective nor dissuasive and, therefore, that any use of fines in this case would be a breach of Article 9 of Regulation (EC)

No 549/2004 as it would not be effective, proportionate or dissuasive.

On 16 November 2022, ESA adopted Decision No 202/22/COL to bring the matter before the Court.

On 13 February 2023, Norway submitted its defence, which was registered at the Court on the same date. Norway did not dispute the facts as set out in ESA's application, and agreed with ESA's presentation of the relevant law. Norway acknowledged that it had failed to fulfil the obligations under Articles 3(1) and 7(1) of the Regulation, and did not contest the declaration sought by ESA. By way of its reply dated 28 February 2023, registered at the Court on the same date, ESA welcomed the fact that Norway requested ESA's application to be declared well founded. ESA noted Norway's submission that compliance is to be achieved through the implementation of a new air traffic management system, with a target implementation date in 2025. ESA reiterated that the circumstances referred to by Norway are the responsibility of the EFTA State and cannot justify a failure to fulfil obligations arising under EEA law. Norway declined the opportunity to submit a rejoinder. On 31 March 2023, the Commission submitted written observations in support of the form of order sought by ESA.

The Court observed that Norway had alleged circumstances in its defence concerning practices or situations prevailing in its domestic legal order. However, such circumstances are the responsibility of the EFTA State and cannot justify failure to observe obligations arising under EEA law. The Court recalled that, although Article 33 SCA does not specify the period within which measures necessary to comply with a judgment must be taken, the interest in the immediate and uniform application of EEA law requires that the process of compliance with a judgment must be commenced immediately and completed as soon as possible.

Therefore, the Court held that, by not providing and operating data link services by 5 February 2018, Norway had failed to fulfil its obligations under Articles 3(1) and 7(1) of Commission Regulation (EC) No 29/2009 of 16 January 2009 laying down requirements on data link services for the single European sky. «

https://eftacourt.int/cases/e-1522/

Dr Maximilian Maier

Case E-12/22

(Freedom of establishment for lawyers – Legal aid – Established European lawyer – Consumer protection – Proper administration of justice – Exhaustive harmonisation – Articles 2 and 5 of Directive 98/5/EC)

Judgment of the Court of 19 October 2023

The Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*) requested an advisory opinion regarding the interpretation of Directive 98/5/EC 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 ("the Directive").

The main proceedings concerned the legal practice of Dr Maier, an Austrian national residing in Austria with law offices in Austria and Liechtenstein.

The Liechtenstein Chamber of Lawyers admitted Dr Maier to their register of established European lawyers in Liechtenstein.

Following a dispute between Dr Maier and the Chamber of Lawyers, in particular as to whether he was authorised to assume mandates of other Liechtenstein lawyers in the context of legal aid, the Chamber of Lawyers issued an order that, on the basis of Article 62(2)(c) of the Liechtenstein Lawyers Act, Dr Maier as an established European lawyer is not authorised to accept mandates in the context of legal aid or to assume such mandates as a substitute. Article 62(2)(c) of the Lawyers Act provides that an established European lawyer is not authorised to be appointed as a legal aid lawyer, legal aid defence counsel or *ex officio* defence counsel. The prohibition on assuming a legal aid mandate as a substitute was justified on the basis that this was necessary to prevent circumvention of the prohibition mentioned above in Article 62(2)(c) of the Lawyers Act.

Dr Maier appealed the order to the Liechtenstein Government, which dismissed Dr Maier's appeal. Dr Maier then brought an appeal against that decision to the Administrative Court, which requested the present advisory opinion.

The Court held that a national rule, which goes further than the exhaustive exceptions provided for in Article 5(2) and (3) of the Directive, prohibiting European lawyers from assuming a legal aid mandate, is incompatible with the Directive. Article 5(1) of the Directive allows the EEA States to provide for certain exceptions from the right of European lawyers to carry out the same professional activities under their home-country title as a lawyer practising under the domestic professional title, which is set out in Article 5(2) and (3) of the Directive. Under Article 5(2), EEA States may exclude the preparation of deeds for obtaining title to administer estates of deceased persons and creating or transferring interests in land from the activities European lawyers are entitled to undertake. Under Article 5(3), EEA States 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 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 Court observed that Article 63 of the Lawyers Act sets out a restriction as provided for in Article 5(3) of the Directive. However, Article 62(2)(c) of the Lawyers Act does not correspond to any of the situations referred to in Article 5(2) or (3) of the Directive and precludes European lawyers from being appointed as legal aid lawyers without exception.

The Court held that the answer to the question referred must be that the Directive must be interpreted as precluding a national provision which prohibits a lawyer, who on a permanent basis practises the profession under the lawyer's home-country professional title in a host EEA State other than the one in which the lawyer obtained the qualification, from being appointed as a legal aid lawyer, legal aid defence counsel or public defender and which thereby goes beyond the exceptions provided for in Article 5(2) and 5(3) of the Directive. «

https://eftacourt.int/cases/e-1222/

The Liechtenstein Chamber of Lawyers

Dr Alexander Amann

Case E-14/22

(Freedom to provide services – Directive 2006/123/EC – Article 24 – Prohibition of total prohibitions on commercial communications by the regulated professions – Prohibition on targeted proactive advertising by lawyers)

Judgment of the Court of 19 October 2023

The case concerned questions referred to the Court by the Princely Court of Appeal (*Fürstliches Obergericht*) regarding the interpretation of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ("the Services Directive"), and in particular its Article 24.

The main proceedings concerned disciplinary proceedings initiated by the Liechtenstein Chamber of Lawyers against Dr Amann, contending that Dr Amann had infringed paragraph 35(1)(c) of the Chamber of Lawyers' profes-

sional Guidelines, which lays down a prohibition against targeted proactive advertising by lawyers. By judgment of 28 June 2022, the Constitutional Court of the Principality of Liechtenstein (*Staatsgerichtshof*) found paragraph 35(1)(c) of the Professional Guidelines to be neither unlawful nor unconstitutional.

The Court held that a prohibition on targeted proactive advertising such as that at issue, must be regarded as a total prohibition of commercial communications contrary to Article 24(1) of the Services Directive, which cannot be justified under Article 24(2). Thus, the Court found that Article 24(1) of the Services Directive must be interpreted as precluding national legislation, such as that in the main proceedings, which in general prohibits the members of a regulated profession, such as the profession of lawyers, from engaging in proactive advertising, where they offer their services to selected (groups of) people who have not themselves expressed an interest in those services.

The Court underlined that such a conclusion did not necessarily entail that other forms of regulation concerning targeted proactive advertising by lawyers would constitute a total prohibition under Article 24(1) of the Services Directive. To the extent that a national regulation of such targeted proactive advertising does not constitute a total prohibition, the rules governing such advertising would have to be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate as stipulated in Article 24(2). «

https://eftacourt.int/cases/e-1422/

EFTA COURT

2023

News and Events

Swearing in of Judge Michael Reiertsen

On 30 June 2023, during a public sitting of the EFTA Court, Mr Michael Reiertsen took the oath as a Judge of the EFTA Court. Judge Reiertsen was nominated by the Kingdom of Norway and appointed by common accord by the EFTA States. The swearing-in ceremony was attended by Presidents and Judges of the European Courts and from the Supreme Court of Norway, as well as by other guests. The ceremony was followed by a reception.

On the same occasion, Judge Per Christiansen stepped down from the EFTA Court bench after serving as a Judge at the EFTA Court for over 12 years.

Annual Spring Conference

The EFTA Court's annual Spring Conference was held in Luxembourg on 15 June 2023 and this year it was on themes in economic law and the EEA and criminal law.

The conference was attended by more than 130 participants, including President and Members of EFTA States' supreme courts, the President and Judges of the European Court of Human Rights, judges and advocates generals of the European Court of Justice, judges of the General Court, ambassadors, civil servants, practitioners and academics. The conference was also streamed via the EFTA Court's website.

President Páll Hreinsson made a welcome speech, followed by the keynote speech by Professor Joseph Weiler, titled "Is the Church of European Integration facing a Reformation" on the evolution and challenges of European legal integration.

The first session was moderated by Lorna Armati, a member of the legal service of the European Commission, focused on "Themes in economic law". Speakers during this session were Professor Vassilis Hatzopoulos, introducing his analysis of the complexities of the case law in this field

under the title "Different Shades of Grey: The concept of "Economic" and the outer boundaries of EU law". He was followed by Judge Suzanne Kingston who spoke about the developments in abuse of dominance before the Union Courts and the EFTA Court and the fact that the number of cases concerning abuse of dominance has significantly increased in the last few years. Both presentations were followed by questions and comments from the audience.

The second session, moderated by Hanna Faksvåg, a Legal Secretary at the EFTA Court, concentrated on the EEA and criminal law. Speakers were Gjermund Mathisen, Partner at Kvale Law Firm (Oslo), discussing the troubled relationship between EEA law and criminal law and Associate Professor Andri Fannar Bergþórsson who gave a talk on more specific aspects of this relationship by addressing the question "Can real transactions constitute market manipulation? – The EFTA Court's judgment in the Beerenberg case" and how real transactions can constitute market manipulation.

The concluding address of the conference was given by Professor Federico Fabbrini on "The War in Ukraine and the future of Europe" where he addressed how the war in Ukraine poses new challenges to European cooperation and integration and has led to both advances and setbacks for European integration.

Other events

Lunchtime-talk with President Francis Delaporte

On 16 November 2023, Francis Delaporte, President of the Administrative Court and Vice-President of the Constitutional Court of Luxembourg, gave the latest in the EFTA Court's series of lunchtime talks entitled "The Reform of the Luxembourg Constitution and the Judiciary".

In his tour de force on the Luxembourg Constitution and the judiciary, President Delaporte put the 2023 Constitution into its historical and legal context. He discussed the independence of the judiciary under the Constitution, the participation of the Grand-Duchy in European integration and the role of the Constitutional Court including access to the court since its foundation in 1995.

Other News and Activities

President Hreinsson, Judge Hammermann and Judge Reiertsen attended several conferences and seminars and gave speeches in the EFTA States during the course of the year.

Visits to the Court

Throughout the year, the Court welcomed numerous groups and individuals interested in learning about the functioning and the activities of the Court.

President Hreinsson, Judges Hammermann and Reiertsen and the Registrar, Ólafur Jóhannes Einarsson, received the Icelandic Prime Minister, Katrín Jakobsdóttir, together with Ambassador Kristján Andri Stefánsson and a delegation, at the Court in September 2023.

In July 2023, President Hreinsson and Judge Hammermann welcomed the Swiss Ambassador, Markus Börlin.

Several judges from the Icelandic Court of Appeal (Landsréttur) visited the Court in May 2023. During their visit, the President and the Registrar gave presentations on various topics in EEA law.

Academics from the University of Bergen visited the Court in November 2023. Several PhD candidates introduced their research and Professor Christian Franklin gave a speech on the exportability of unemployment benefits. In June 2023, research assistants from the University of Oslo came to the Court and received a presentation from Judge Reiertsen.

Other notable visits to the Court included a delegation from the Council of Bars and Law Societies of Europe (CCBE) and several other groups of lawyers and scholars, as well as student groups from universities in the EFTA States and trainees from the EFTA organisations.

During the year of 2023, the Court started preparations for its 30th anniversary in 2024 which will be celebrated with an anniversary conference and the launch of an anniversary publication in the autumn of 2024.

2023

Judges and Staff

Judges and Staff

The members of the Court in 2023 were as follows:

Mr Páll Hreinsson, President (nominated by Iceland)
Mr Bernd Hammermann (nominated by Liechtenstein)
Mr Michael Reiertsen (nominated by Norway)

The judges are appointed by common accord of the Governments of the EFTA States.

Mr Ólafur Jóhannes Einarsson is the Registrar of the Court.

Ad hoc Judges of the Court are:

Nominated by Iceland:
Ms Ása Ólafsdóttir, hæstaréttardómari (Supreme Court Judge)
Mr Gunnar Þór Pétursson, Reykjavik University (Professor)

Nominated by Liechtenstein:
Ms Nicole Kaiser, Rechtsanwältin (lawyer)
Mr Martin Ospelt, Rechtsanwalt (lawyer)

Nominated by Norway:
Mr Ola Mestad, University of Oslo (Professor)
Ms Siri Teigum, Advokat (lawyer)

In addition to the Judges, the following persons were employed by the Court in 2023:

Ms Agnes Lindberg, Legal Secretary
Ms Annette Lemmer, Receptionist/Administrative Assistant
Ms Bryndís Pálmarsdóttir, Administrator
Ms Candy Bischoff, Administrative Assistant
Ms Erica Worsley, Administrative Assistant
Mr Gjermund Fredriksen, Financial Officer
Ms Hanna Faksvåg, Legal Secretary
Mr Hans Ekkehard Roidis-Schnorrenberg, Legal Secretary
Mr Håvard Ormberg, Legal Secretary
Ms Hrafnhildur Mary Eyjólfsdóttir, Personal Assistant
Ms Katie Nsanze, Administrative Assistant
Ms Kerstin Schwiesow, Personal Assistant
Mr Kristján Jónsson, Legal Secretary
Mr Michael-James Clifton, Legal Secretary
Mr Ólafur Ísberg Hannesson, Legal Secretary
Mr Ólafur Jóhannes Einarsson, Registrar
Ms Silje Næsheim, Personal Assistant
Mr Thierry Caruso, Caretaker/Driver

EFTA COURT