



EUROPEAN COMMISSION

Brussels, 28th April 2025
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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 Beata Sasinowska and Nicola Yerrell, members of its Legal Service, with a postal address for service in Brussels at the Legal Service, *Grefte Contentieux*, BERL 1/169, 200 Rue de la Loi B-1049 Brussels, and consenting to service by e-EFTACourt.

In Case **E-1/25**,

concerning an application submitted pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice by the Board of Appeal for Administrative Matters, Liechtenstein, in the case of:

Valair

Appellant

vs

Amt für Volkswirtschaft

(and its successor Amt für Hochbau und Raumplanung)

Defendant

requesting an advisory opinion regarding the interpretation of the act referred to in Point 64a of Annex XIII to the EEA Agreement, namely Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community.

The Commission has the honour to submit the following written observations:

I. FACTS AND PROCEDURE

1. The present request for an advisory opinion originates in the application made on 11th January 2022 by Valair AG (“the Appellant”) for the extension of its existing operating licence for helicopters to cover also fixed-wing aircraft. The Appellant is an undertaking registered in the Liechtenstein commercial register and has its principal place of business at Balzers Heliport in Liechtenstein¹.
2. As is explained at paragraphs 1.1-1.8 of the request for an advisory opinion, the application gave rise to a series of intervening decisions and appeals, primarily on the issue of the authority competent to determine the matter.
3. Finally, by decision of 12th December 2023, the Office of Economic Affairs (“the Defendant”) rejected the application. The detailed reasons for this are set out at paragraphs 1.9.1-1.9.6 of the request for an advisory opinion, to which the Commission would refer.
4. In brief, the Defendant concluded that i) operating licences for air carriers established in Liechtenstein could only be obtained if the operations envisaged were *possible* in light of national geography/infrastructure, which was not the case ii) since the Appellant did not intend to operate fixed-wing aircraft in Liechtenstein, the necessary domestic connection as required by the principle of territoriality for the grant of an operating licence under the Liechtenstein Aviation Act was missing and iii) by reason of the Exchange of Notes between Switzerland and Liechtenstein of 27th January 2003 on cooperation in the field of civil aviation, the relevant provisions of the Swiss Aviation Act requiring the existence of a suitable airfield for the requested operations also applied to the granting of operating licences under the Liechtenstein Aviation Act.

¹ See paragraph 1.10.4 of the request for an advisory opinion.

5. The Appellant appealed against this refusal to the Board of Appeal for Administrative Matters, with its detailed arguments being found at paragraphs 1.10.1-1.10.5² and 1.13.2 of the request for an advisory opinion. By way of summary, the Appellant maintained that: i) under Regulation (EEC) No 2407/92, the State which is competent for the operating licence is also competent for the issue of air operator certificates (AOC) or amendments thereto ii) an undertaking which meets the requirements laid down by Regulation (EEC) No 2407/92 is entitled to receive an operating licence iii) those requirements do not include the existence of an airfield on the domestic territory iv) competence for the granting of the operating licence and/or extension of the AOC lies with the State in which the principal place of business of the undertaking and, if any, its registered office are located (in this case, Liechtenstein) rather than the State in which the operations are to be carried out and v) any other interpretation would render it practically impossible for commercial operators to offer flights using fixed-wing aircraft and thereby directly affect access to the market in services in other EEA States.
6. As is noted in Section 4 of its Order dated 18th December 2024, the Board of Appeal expressed certain doubts as to the correct interpretation and application of EEA law to the appeal, in particular on the question of whether the conditions laid down in Article 4 of Regulation (EC) No 1008/2008 for the grant of an operating licence are exhaustive, or whether a competent licensing authority may impose additional requirements such as that contained in Article 9(3) of the Liechtenstein Aviation Act which requires the intended operations to be possible on the basis of the infrastructure existing in Liechtenstein.
7. In these circumstances, the Board of Appeal decided that it was necessary to stay the proceedings and make a request to the EFTA Court for an advisory opinion.

² The Commission understands the second reference to a paragraph 1.10.3 to be intended to refer instead to a paragraph 1.10.5.

II. THE QUESTIONS

8. The questions referred to the EFTA Court by the Board of Appeal for Administrative Matters of Liechtenstein are as follows:

"1. Does it follow from Article 4 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community or any other EEA provision that the competent licensing authority of a Member State may not impose any further conditions?"

2. If the first question is answered with "no": Is a provision according to which air operator certificates (AOC) and operating licences for flights carrying passengers, cargo and/or mail for remuneration and/or hire are only issued or granted if the intended activities are actually also possible on the basis of the infrastructure existing in Liechtenstein precluded by the objective of establishing an internal aviation market and/or other principles of EEA law?"

3. If the second question is answered with "no": Is Article 9(3) of the Liechtenstein Aviation Act which de facto excludes the issue or granting of air operator certificates (AOC) and operating licences for flights carrying passengers for remuneration and/or hire using fixed-wing aircraft due to the absence of an infrastructure in Liechtenstein, in the sense of airports or airfields, compatible with Article 36 of the EEA Agreement (freedom to provide services)?"

III. THE APPLICABLE LAW

Liechtenstein Law

The Aviation Act of 11th April 2024 LR 748.0 (LGBL 2024 Nr 224)³

9. In accordance with its Article 22, the Aviation Act repealed and replaced the earlier Aviation Act of 2002. (The Commission notes that the application for an operating

³ www.gesetze.li

licence by the Appellant, and the refusal decision of 12th December 2023 by the Defendant pre-dated the entry into force of the new 2024 Aviation Act. However, in light of the discussions in the request for an advisory opinion, and in the absence of any information to the contrary, the Commission is basing itself on the presumption that insofar as relevant to the present proceedings, materially similar provisions applied under the 2002 Aviation Act).

As is stated in its Article 1(1), the Act is intended to regulate civil aviation, and in particular to apply Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community (Article 1(1)(b)(1)), as well as the Exchange of Notes between Switzerland and Liechtenstein of 27th January 2003 on cooperation in the field of civil aviation and related Swiss aviation legislation (Article 1(a)).

Title II of the Aviation Act deals with organisation and competences. In particular, Article 5(4) expressly provides that the Swiss Federal Office of Civil Aviation (BAZL) is responsible for *assessing* whether the requirements for the granting of an air operator certificate (AOC) and operating licence are met (points (a) and (b) respectively). (This is mirrored by points (a) and (b) of Article 11(2) of the Aviation Act which state that the Office of Building Construction (AHR) shall delegate this assessment to BAZL)

In accordance with Article 9(1), the actual decision shall however be taken by the AHR. (The Commission understands that prior to the repeal of the 2002 Aviation Act, this function was instead performed by the Office of Economic Affairs, which is therefore the Defendant in the present proceedings).

Article 9(3) of the Aviation Act further states that air operator certificates and operating licences shall only be granted if the intended operations are actually possible on the basis of the infrastructure existing in Liechtenstein (*“sofern die beabsichtigten Tätigkeiten aufgrund der in Liechtenstein vorhandenen Infrastruktur auch tatsächlich möglich sind”*).

Finally, Article 18(1) provides that appeals against decisions of the AHR may be brought before the Board of Appeal for Administrative Matters within 14 days, whilst Article 18(2) provides for a further right of appeal against decisions of the Board to be brought before the Administrative Court.

EEA and Union Law

10. Chapter 6 of Part III of the EEA Agreement contains a series of provisions on transport, including Article 47(2) which states that “*Annex XIII contains specific provisions on all modes of transport*”.

Chapter VI of Annex XIII governs civil aviation. As is expressly noted in the Preamble (inserted by virtue of Joint Committee Decision No 182/1999 of 17th December 1999⁴), Liechtenstein shall implement the provisions of the acts referred to under subheadings (ii) to (vi) **from 1 January 2002** subject to review by the EEA Joint Committee during 2001. (As the Commission understands the position, this did not result in any further time extension being granted to Liechtenstein for this purpose).

Subheading (ii) is entitled “Market access” and includes Regulation (EC) No 1008/2008 under Point 64a, as inserted by Joint Committee Decision No 90/2011⁵ (with a date for entry into force of 20th July 2011).

Point 64a also includes four express adaptations to the Regulation, regarding its Article 4(f), Article 15 (the rights of Swiss air carriers), Article 16(9) (an addition of regional airports in Iceland and the four northernmost counties in Norway to the requirement of an airport “serving an outermost region”) and Article 25 (participation by the EFTA States in the committee). The first and third of these were introduced by Decision No 90/2011 itself, whilst the second and fourth were inserted subsequently by Decisions No 133/2012 and No 114/2023 respectively.

⁴ OJ L 74, 15.3.2001, page 10.

In the case of Article 4(f), the adaptation reads as follows:

“(a) In Article 4(f) the words “, except as provided for in an agreement with a third country to which the Community is a party;” shall be replaced by the following: “. However, operating licences with legal effects in the entire EEA can be granted on the basis of exceptions to this requirement provided for in agreements with third countries to which the Community or one or more EFTA States are parties, provided the EEA Joint Committee adopts a decision to that effect.”

Regulation (EC) No 1008/2008 ("Regulation 1008/2008")

As is noted in its Article 1, Regulation 1008/2008 regulates *inter alia* the licensing of EEA air carriers. It repealed and replaced Regulation (EEC) No 2407/92 which has been referred to in certain sections of the request for an advisory opinion.

Article 2 is the definitions article, and defines an “operating licence” as “*an authorisation granted by the competent licensing authority to an undertaking, permitting it to provide air services as stated in the operating licence*” (paragraph 1), whilst the “competent licensing authority” means “*an authority of a Member State entitled to grant, refuse, revoke or suspend an operating licence in accordance with Chapter II*” (paragraph 2). An “air operator certificate” is further defined in paragraph 8 as “*a certificate delivered to an undertaking confirming that the operator has the professional ability and organisation to ensure the safety of operations specified in the certificate, as provided in the relevant provisions of Community or national law, as applicable*”.

The key provisions on operating licences are contained in Chapter II of Regulation 1008/2008.

Article 3 lays down the core principles: no undertaking shall be permitted to carry by air passengers, mail or cargo for remuneration or hire unless it has been granted

⁵ OJ L 262, 6.10.2011, page 62.

the appropriate operating licence, whilst an undertaking which meets the requirements of Chapter II shall be entitled to receive an operating licence

Of particular relevance to the present proceedings, Article 4 contains the **conditions** for granting an operating licence, and reads as follows:

“An undertaking shall be granted an operating licence by the competent licensing authority of a Member State provided that:

(a) its principal place of business is located in that Member State;

(b) it holds a valid AOC issued by a national authority of the same Member State whose competent licensing authority is responsible for granting, refusing, revoking or suspending the operating licence of the Community air carrier⁶;

(c) it has one or more aircraft at its disposal through ownership or a dry lease agreement;

(d) its main occupation is to operate air services in isolation or combined with any other commercial operation of aircraft or the repair and maintenance of aircraft;

(e) its company structure allows the competent licensing authority to implement the provisions of this Chapter;

(f) Member States and/or nationals of Member States own more than 50 % of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, [except as provided for in an agreement with a third country to which the Community is a party] (Commission’s underlining – as noted above, this sentence is removed and replaced by the adaptation introduced by Decision No 90/2011);

⁶ The text of Article 4b has been amended by Regulation (EU) 2018/1139 of 4th July 2018, as incorporated into EEA law by Joint Committee Decision No 114/2023, but only with effect from 16th July 2024.

(g) it meets the financial conditions specified in Article 5;

(h) it complies with the insurance requirements specified in Article 11 and in Regulation (EC) No 785/2004; and

(i) it complies with the provisions on good repute as specified in Article 7”.

Article 6 is entitled “Air operator certificate” and states that the granting and validity of an operating licence “*shall be **dependent** on the possession of a valid AOC specifying the activities covered by that operating licence*”. In other words, an operator must hold a valid AOC as a pre-condition in order to be able to obtain an operating licence. (The Commission would add that it is not entirely clear from the facts set out in the request for an advisory opinion whether this condition was met; see however the Appellant’s arguments set out at paragraph 1.10.3).

Further, according to Article 6(2), any modification to the AOC of a Community air carrier shall be reflected, where appropriate, in its operating licence

Finally, Article 8, states that an operating licence shall be valid “*as long as the Community air carrier complies with the requirements of this Chapter*” (Commission’s emphasis).

IV. OBSERVATIONS

Question 1

11. The central question referred by the Board of Appeal is whether Article 4 of Regulation 1008/2008 contains an *exhaustive* set of conditions for the granting of an operating licence.

12. As is stated in its Article 1(1), Regulation 1008/2008 “regulates” the licensing of EEA air carriers. As regards operating licences, these are an essential pre-requisite for performing air operations (Article 3(1)).
13. According to the express wording of the second paragraph of Article 3(1), an undertaking which satisfies the relevant conditions set out in Chapter 2 of the Regulation “**shall be entitled**” to receive an operating licence. Similar language is used in the introductory sentence to Article 4: an undertaking “**shall be granted an operating licence**” provided only that the conditions set out in its paragraphs (a)-(i) are met.
14. This is mirrored, in the negative, by Article 3(2) which prohibits the competent licensing authority from granting an operating licence if those requirements are not met.
15. In the Commission’s view, it follows clearly from the plain wording of Articles 3 and 4 of Regulation 1008/2008 that the conditions for the granting of an operating licence are fully set out in the Regulation, and the licensing authority is accordingly bound to grant a licence if an undertaking complies with those conditions. It would also underline that Chapter 2 of Regulation 1008/2008 contains no reference to any additional elements which may be taken into account by the competent authority as a matter of discretion. The legislator thus chose to restrict the requirements to those expressly listed, by way of contrast with e.g. Article 13(4) of the Regulation which permits the competent authority to attach conditions to an approval of a wet leasing aircraft registered in a third country.
16. This approach was confirmed by the Court of Justice of the European Union at paragraph 48 of its judgment in Case C-628/11, International Jet Management GmbH⁷, which underlined that the conditions for the issue of an operating licence “were *harmonised by Regulation 1008/2008*” (Commission’s emphasis). As the Court further noted, this harmonisation guarantees that an air carrier obtained its

⁷ ECLI :EU :C :2014 :171.

operating licence “*in compliance with the common rules*” and must therefore be recognised by the authorities of the other Member States.

17. As regards specifically the incorporation of Regulation 1008/2008 into Annex XIII of the EEA Agreement, only one adaptation relevant to the licensing conditions set out in its Article 4 was introduced, namely as regards the ownership and control requirements in Article 4f. In other words, no adaptation linked to the national infrastructure or geographical situation of Liechtenstein was included, either in relation to the detailed requirements set out in Article 4 or the general principles in Article 3.
18. Of course, as mentioned by the Board of Appeal at page 15 of its request for an advisory opinion, Joint Committee Decision No 69/2009 of 29th May 2009⁸ which incorporated Regulation (EC) No 300/2008 on common rules in the field of civil aviation security into Annex XIII included an express adaptation to the effect that “*the measures laid down in this Regulation shall not apply to the existing civil aviation infrastructure in the territory of Liechtenstein*”. As was further explained in the 4th recital to the decision, this was linked to the “*specific situation of Liechtenstein resulting from the combined effect of a very small territory, a specific geographical structure as well as from the fact that the total amount of air traffic in Liechtenstein is very limited, that no international regular air services to or from Liechtenstein are available and that the civil aviation structure in Liechtenstein consists of only one heliport*”.
19. Several comments arise from this.
20. Firstly, the Commission would emphasise that the existence of this adaptation to Regulation (EC) No 300/2008 merely serves to reinforce the *absence* of a parallel adaptation in the context of Regulation 1008/2008.

⁸ OJ L 232, 3.9.2009, page 25.

21. Secondly, the Commission would add that an adaptation introduced by a Joint Committee Decision is *specific* i.e. it relates to the legislative measure which forms the subject of the Decision and cannot be presumed to “carry across” to a different legislative measure. Any other conclusion would undermine the institutional mechanisms of the EEA Agreement and in particular the role and functions of the Joint Committee.
22. Thirdly, the legal context and objectives of the two Regulations are in any event very different. On the one hand, Regulation (EC) No 300/2008 (which is included in subheading iv) of Chapter VI of Annex XIII on technical harmonisation and safety) addresses civil aviation security, and includes a series of standards for safeguarding airports and aircraft. On the other hand, Regulation 1008/2008 (which is included in subheading ii) of Chapter VI of Annex XIII on market access) regulates the licensing of air carriers and the right to operate air services, as well as pricing. Whilst the non-existence of an airport in Liechtenstein was clearly decisive in justifying an exclusion from the application of the former, different considerations apply in the context of the EEA-wide licensing system established by Regulation 1008/2008.
23. For all of these reasons, the Commission would conclude that Article 4 of Regulation 1008/2008 establishes an exhaustive list of conditions for the grant of an operating licence, and the competent licensing authority is accordingly precluded from imposing additional conditions such as those at issue in the present proceedings.

Questions 2 and 3

24. In light of its answer to the first question, the Commission would not propose to further address Questions 2 and 3 at this stage of the proceedings.

V. CONCLUSION

25. For the reasons discussed above, the Commission considers that the questions from the Board of Appeal for Administrative Matters of Liechtenstein should be answered in the following sense:

"Article 4 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24th September 2008 on common rules for the operation of air services in the Community should be interpreted as containing an exhaustive list of the conditions for the grant of an operating licence. The competent licensing authority is accordingly precluded from imposing additional conditions such as those at issue in the present proceedings."

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