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**ORIGINAL**

**IN THE EFTA COURT**

**WRITTEN OBSERVATIONS**

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

**THE EFTA SURVEILLANCE AUTHORITY**

represented by  
Kyrre Isaksen, Daniel Vasbeck and Melpo-Menie Joséphidès,  
Department of Legal & Executive Affairs,  
acting as Agents, in

**CASE E-1/25**

***Valair AG***

**v**

***Amt für Volkswirtschaft (Amt für Hochbau und Raumplanung (AHR))***

in which the Board of Appeal for Administrative Matters of the Principality of Liechtenstein requests the EFTA Court to give an advisory opinion, pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, concerning the interpretation and application of Regulation (EC) No 1008/2008 on common rules for the operation of air services.

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## 1 INTRODUCTION AND FACTS OF THE CASE

1. The present written observations were prepared with support from Gunnar Örn Indridason, Senior Legal Officer, of the Internal Market Affairs Directorate of the EFTA Surveillance Authority ('ESA').
2. On 18 December 2024, the Board of Appeal for Administrative Matters of the Principality of Liechtenstein ('the Board') submitted a request for an advisory opinion from the EFTA Court ('the Request') pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('the SCA'). The Request mainly concerns the interpretation and application of Article 4 of Regulation No 1008/2008 on common rules for the operation of air services in the Community<sup>1</sup> ('the Air Services Regulation'), which sets out the conditions for granting an operating licence.
3. ESA notes that Joined Cases E-11/19 and E-12/19 *Adpublisher* were based on requests for advisory opinions from the Board. Hence, the Court has already considered that the Board qualifies as a court or tribunal for the purposes of Article 34 SCA.<sup>2</sup>
4. The case concerns an undertaking, *Valair AG* ('Valair'), which has applied for an operating licence under Article 4 of the Air Services Regulation.<sup>3</sup> According to the Request, the competent authority in Liechtenstein has refused to grant Valair an operating licence for *fixed-wing aircraft*. The competent authority has reasoned that an operating licence can only be obtained subject to the requirement that the operations envisaged are actually also possible on the basis of the infrastructure

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<sup>1</sup> 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 (Recast), OJ L 293, 31.10.2008, p. 3. Incorporated into Point 64a of Annex XIII of the EEA Agreement by Decision of the EEA Joint Committee No 90/2011 of 19 July 2011, OJ L 262, 6.10.2011, p. 62 ('**Decision of the EEA Joint Committee No 90/2011**'). Compliance date in the EEA was 20 July 2011. Point 64a can be found in Chapter VI (Civil Aviation) of Annex XIII, under subheading (ii) *Market access*.

<sup>2</sup> Judgment of 10 December 2020 in Joined Cases E-11/19 and E-12/19 *Adpublisher*. See also judgment of 3 August 2016 in Joined Cases E-26/15 and E-27/15 *Criminal proceedings against B and B v Finanzmarktaufsicht*, paragraph 51.

<sup>3</sup> The Request, paragraph 1.1., refers to the application by Valair seeking to "extend its existing operating licence for helicopters to fixed-wing aircraft". For the purposes of answering the questions set out in the Request, ESA does not consider it of relevance that Valair has already been granted an operating licence for helicopters.

existing on domestic territory.<sup>4</sup> Currently, there is no airport in Liechtenstein. Furthermore, reference is made to an agreement between Liechtenstein and Switzerland, involving a Swiss authority in the assessment of the application.<sup>5</sup>

5. For more information about the facts of the case, reference is made to the Request.

## 2 RELEVANT LAW

### 2.1 EEA Law

6. Recital 18 of the Air Services Regulation reads:

*(18) Since the objective of this Regulation, namely more homogeneous application of Community legislation with regard to the internal aviation market cannot be sufficiently achieved by the Member States because of the international character of air transport, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.*

7. Article 4 of the Air Services Regulation, as amended,<sup>6</sup> and as adapted to the EEA,<sup>7</sup> reads:

#### ***Conditions for granting an operating licence***

*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;*

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<sup>4</sup> Request, paragraphs 1.9.4 and 1.9.5.

<sup>5</sup> Request, paragraphs 1.1 and 1.9.6.

<sup>6</sup> Article 4 was amended by Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, OJ L 212, 22.8.2018, p.1 ('**Regulation 2018/1139**'). It was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 114/2023 of 28 April 2023, OJ L 2023/02294, 9.11.2023, which entered into force on 16 July 2024.

<sup>7</sup> See footnote 8.

- (b) it holds a valid AOC issued in accordance with Regulation (EU) 2018/1139 of the European Parliament and of the Council either by a national authority of a Member State, by several national authorities of Member States acting jointly in accordance with Article 62(5) of that Regulation or by the European Union Aviation Safety Agency;*
- (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) EEA States and/or nationals of EEA States own more than 50 % of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings. However, operating licenses 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.<sup>8</sup>*
- (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.*

8. Article 6 of the Air Services Regulation,<sup>9</sup> as amended, reads:

***Air operator certificate***

*1. 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.*

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<sup>8</sup> Without adaptation, the text of Article 4(f) of the Air Services Regulation reads as follows: “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”.

<sup>9</sup> Article 6 was replaced by Regulation 2018/1139.

2. *Any modification to the AOC of a Community air carrier shall be reflected, where appropriate, in its operating licence.*

*The authority competent for the AOC shall inform the competent licensing authority as soon as possible of any relevant proposed changes to the AOC.*

3. *The authority competent for the AOC and the competent licensing authority shall agree measures to proactively exchange information relevant for the assessment and retention of the AOC and operating licence.*

*That exchange may include, without being limited to, information relating to the financial, ownership or organisational arrangements of the Community air carrier which may affect the safety or solvency of its operations or which may assist the authority competent for the AOC in performing its oversight activities related to safety. Where information is provided in confidence, measures shall be put in place to ensure that the information is appropriately protected.*

3a. *Where it is likely that enforcement action will be necessary, the authority competent for the AOC and the competent licensing authority shall consult each other as soon as possible prior to taking such action, and work together in seeking to resolve the issues before action is taken. Where action is taken, the authority competent for the AOC and the competent licensing authority shall notify each other as soon as possible that action has been taken.*

## **2.2 National Law**

9. Section 9(3) of the Liechtenstein Aviation Act reads:<sup>10</sup>

3) *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.*

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<sup>10</sup> Luftfahrtgesetz (LFG). ESA's translation. In German original: "3) Luftverkehrsbetreiberzeugnisse (AOC) und Betriebsbewilligungen (BB) für Flüge zur gewerblichen Beförderung von Fluggästen, Fracht und/oder Post werden nur ausgestellt bzw. erteilt, sofern die beabsichtigten Tätigkeiten aufgrund der in Liechtenstein vorhandenen Infrastruktur auch tatsächlich möglich sind." Translation by the EFTA Court, Request page 15.

### **3 THE QUESTIONS REFERRED**

10. The Board has referred the following questions:

*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)?*

## 4 ESA'S SUBMISSIONS

### 4.1 Introduction

11. At the outset, ESA would like to briefly set out its understanding of the interplay between the three main EEA legal acts concerning air transport.<sup>11</sup>
12. Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community (the Air Services Regulation) lays down common rules for air carriers operating in the EEA, covering aspects such as operating licences, ownership and control, access to routes, and public service obligations. The aim is to create a liberalised internal aviation market with mutual recognition of licences, ensuring a level playing field and benefiting consumers. The most important licence under this act for this case is an operating licence.
13. Regulation (EC) No 300/2008<sup>12</sup> on common rules in the field of civil aviation security ('**Regulation 300/2008**') establishes common basic standards for safeguarding civil aviation against acts of unlawful interference. While that regulation provides for common standards, EEA States may apply more stringent measures.
14. The Joint Committee Decision<sup>13</sup> incorporating Regulation 300/2008 into the EEA Agreement contains an adaptation in Article 1(1)(d), setting out that the measures laid

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<sup>11</sup> In addition to these three acts, a number of acts concerning civil aviation have been incorporated into Chapter VI of Annex XIII to the EEA Agreement, which contains a sectorial adaptation for Liechtenstein setting out that: "*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.*" Subheadings (ii) to (vi) contain civil aviation acts concerning 'Market access', 'Fares', 'Technical harmonization and safety', 'Consultation procedure' and 'Social harmonization'. The sectorial adaptation for Liechtenstein was originally inserted into Annex XIII by Annex 8 to Decision No 1/95 of the EEA Council of 10 March 1995 on the entry into force of the Agreement on the European Economic Area for the Principality of Liechtenstein, OJ L 86, 20.4.1995, p. 58, and provided a transitional period for Liechtenstein for the implementation until 1 January 2000. The transitional period was extended until 1 January 2002 by Decision of the Joint Committee No 182/1999 of 17 December 1999, OJ L 74, 15.3.2001, p. 10. In recital (2) to that Decision, the Joint Committee stated: "*The review conducted by the EEA Joint Committee in accordance with Chapter VI, Civil Aviation, of Annex XIII to the Agreement has concluded that the specific circumstances in Liechtenstein that justified the transitional period have not changed.*" The transitional period was however not further extended and is no longer relevant.

<sup>12</sup> Regulation 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002, OJ L 97, 9.4.2008, p. 72.

<sup>13</sup> Decision of the EEA Joint Committee No 69/2009 of 29 May 2009, OJ L 232, 3.9.2009, p. 25. Compliance date in the EEA was 1 November 2009. Recital 4 of the Decision sets out the following: "*In view of 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*



down in this regulation shall not apply to the existing civil aviation infrastructure in the territory of Liechtenstein.

15. Regulation (EU) 2018/1139 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency ('**Regulation 2018/1139**') establishes common rules in the field of civil aviation safety and environmental protection and defines the role and tasks of the European Union Aviation Safety Agency ('**EASA**'). The regulation covers a wide range of areas including airworthiness, environmental compatibility, air operations, aerodromes, and air traffic management and air navigation services. It aims to ensure a high and uniform level of safety and environmental protection in civil aviation within the EEA. The most important certificate for this case is the air operator certificate (AOC).

16. According to Article 62 of Regulation 2018/1139, EEA States are required to ensure the independence of the national competent authority and to ensure that those authorities have the necessary resources and capabilities to carry out the tasks assigned to them under the regulation. Article 64 of the regulation provides for a voluntary transfer of those obligations, including the issuance of the AOC, to either EASA or another EEA State.

#### 4.2 Question 1

17. The first question from the Board is open and general. The Board asks if it follows from Article 4 of the Air Services Regulation, or any other EEA provision, that the competent licensing authority may not impose any further conditions for granting operating licences.

18. Article 4 of the Air Services Regulation sets out the conditions for granting an operating licence. An undertaking is to be granted an operating licence by the competent licensing authority of an EEA State provided that all the conditions set out in letters (a) to (i) are fulfilled.

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*Liechtenstein is very limited, that no international regular air services to or from Liechtenstein are available and that the civil aviation infrastructure in Liechtenstein consists of only one heliport, this Regulation should not apply to the existing civil aviation infrastructure in the territory of Liechtenstein."*

19. The Air Services Regulation has been incorporated into the EEA Agreement without any specific adaptations for Liechtenstein concerning the existing civil aviation infrastructure.
20. Article 4(f) of the Air Services Regulation has been adapted by Decision of the EEA Joint Committee No 90/2011 (see paragraph 7 and footnote 8 above). This adaptation does not, however, concern the existence or absence of civil aviation infrastructure in Liechtenstein. It concerns the condition of ownership and control of the applicant undertaking by EEA States and/or nationals, specifically the exceptions to this requirement. The adaptation gives an EFTA State the possibility to grant an operating licence where the requirement of ownership and control is not met, provided that (i) this exception is provided for in an agreement entered into between the EU or one or more EFTA State(s) on the one hand and a third country on the other hand, and (ii) the EEA Joint Committee adopts a decision to that effect.<sup>14</sup> This adaptation mirrors, and adapts to the EFTA States, the exception to Article 4(f) which is available to EU Member States based on agreements with third parties to which the EU is a party. The adaptation of Article 4(f) of the Air Services Regulation does not, however, enable EFTA States to impose further conditions for granting an operating licence than those set out in Article 4 of the Air Services Regulation.<sup>15</sup> ESA therefore submits that the adaptation of Article 4(f) of the Air Services Regulation to Liechtenstein is not relevant in answering the first question, or indeed any of the questions, referred by the Board.
21. Another of the conditions for granting an operating licence, as set out in Article 4(b) of the Air Services Regulation, is that the undertaking holds a valid AOC issued in accordance with Regulation 2018/1139. The purpose of the AOC is to certify that an operator possesses the requisite professional competence and organisational structure to ensure the safety of the specific aviation operations detailed in the certificate. Regulation 2018/1139 has also been incorporated into the EEA Agreement without specific adaptations for Liechtenstein concerning the existing civil aviation infrastructure.

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<sup>14</sup> ESA is not aware of any such Decisions by the EEA Joint Committee.

<sup>15</sup> Additionally, the Request does not provide any information on the ownership and control of Valair, and nothing in the Request indicates that Valair's application for an operating licence was rejected on the basis of its failure to meet Article 4(f) of the Air Services Regulation.

22. Article 3 of the EEA Agreement imposes upon the EFTA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement.<sup>16</sup>
23. Article 7(a) of the EEA Agreement provides that an act corresponding to an EU regulation, referred to in the Annexes to the EEA Agreement or a decision of the EEA Joint Committee, shall as such be made part of the internal legal order of an EFTA State.<sup>17</sup>
24. Article 4 of the Air Services Regulation does not contain a legal basis for imposing further conditions by the EEA States. On the contrary, ESA considers that there are clear indications that the conditions set out in that provision are exhaustive and amount to full harmonisation.
25. First, ESA notes that the title of the Air Services Regulation refers to “common rules for the operation of air services”. Furthermore, recital 18 of the regulation sets out that the objective is “*more homogeneous application of Community legislation with regard to the internal aviation market [ , which] cannot be sufficiently achieved by the Member States because of the international character of air transport, and can therefore be better achieved at Community level*”.
26. Second, in Case C-628/11 *International Jet Management*, the Court of Justice found that:
- Such an operating licence, **the conditions for the issue of which were harmonised by Regulation No 1008/2008**, guarantees that that air carrier obtained it in compliance with the common rules, in particular those concerning safety, and must therefore be recognised by the authorities of the other Member States.*<sup>18</sup>
27. The Air Services Regulation was incorporated into the EEA Agreement without specific adaptations for Liechtenstein, except for the adaptation of Article 4(f) of the Air

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<sup>16</sup> See the judgment of 2 April 2025 in Case E-21/24 *ESA v Iceland*, paragraph 17 and case law cited.

<sup>17</sup> As a monistic state, regulations apply in Liechtenstein as such, once incorporated into the EEA Agreement and in force, without any need for further implementation into national law.

<sup>18</sup> See judgment of 18 March 2014 in Case C-628/11 *International Jet Management*, EU:C:2014:171, paragraph 48 (emphasis added). See also Opinion of AG Bot in the same case, paragraph 45.

Services Regulation which, as noted above, is not relevant in the present case (see paragraph 20 above). Hence, there is no legal basis in the EEA Agreement allowing Liechtenstein to impose further conditions than those set out in Article 4 of the Air Services Regulation.

28. Consequently, ESA submits that Liechtenstein may not impose any further conditions for granting an operating licence than those set out in the regulation. Such further conditions would contradict the objective of harmonisation pursued by the Air Services Regulation, as reflected in recital 18 thereof (see paragraph 25 above) and confirmed by the Court of Justice in *International Jet Management* (see paragraph 26 above).
29. The Request refers to the case law of the Court of Justice, setting out that some provisions of an EU regulation may necessitate, for their implementation, the adoption of measures of application by the Member States.<sup>19</sup>
30. Indeed, it is established case law from the Court of Justice that EU Member States may adopt implementing measures for a regulation provided that they do not thereby obstruct its direct applicability or conceal its nature as an act of EU law; that they specify that they are acting in exercise of a discretion conferred on them under that regulation; and that they adhere to the parameters laid down thereunder. The Court of Justice has also stated that EU Member States are precluded from taking steps intended to alter or affect the scope of the regulation itself.<sup>20</sup>
31. As a general point, in ESA's view, differences between the EU legal order and the EEA Agreement as regards direct effect and applicability cannot justify differences as regards the possibility to adopt *implementing measures to regulations*, as circumscribed by the case law of the Court of Justice.<sup>21</sup> ESA notes that when a regulation has been incorporated into the EEA Agreement and has been made part of the internal legal order as such, the regulation produces the same effect and applicability in an EFTA State as in the EU. Hence, ESA submits that when a regulation

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<sup>19</sup> See judgment of 12 April 2018 in Case C-541/16 *Commission v Denmark*, EU:C:2018:251, paragraph 27.

<sup>20</sup> See judgment of 21 March 2024 in Case C-10/23 *Remia Com Impex*, EU:C:2024:259, paragraph 53 and judgment of 18 June 1970 in Case 74/69 *Hauptzollamt Bremen-Freihafen*, EU:C:1970:58, paragraph 6.

<sup>21</sup> See the judgment of 2 April 2025 in Case E-21/24 *ESA v Iceland*, paragraph 19 and case law cited.

has been incorporated into the EEA Agreement, EFTA States may in the same way as EU Member States adopt implementing measures, provided that they comply with the same conditions set out in the case law cited in paragraph 30 above.

32. In the present case, however, ESA submits that imposing further conditions for granting an operating licence under Article 4 of the Air Services Regulation exceeds adopting implementing measures. Imposing further conditions would in ESA's view entail taking steps intended to alter or affect the scope of the regulation itself.

33. It follows from the above that Article 4 of the Air Services Regulation, as incorporated into the EEA Agreement, must be interpreted as meaning that the conditions for granting an operating licence set out in that provision are exhaustive. The competent licensing authority may not impose any further conditions.

#### **4.3 Question 2**

34. The second question from the Board is formulated in the alternative. As ESA understands it, the Board asks if Liechtenstein can maintain a provision of national law whereby Liechtenstein is not issuing or granting air operator certificates (AOC) and operating licences due to the lack of existing infrastructure in Liechtenstein (*i.e.* in practice, because there are no airports in Liechtenstein).

35. The second question is closely linked to the first question. ESA considers that there will be no need for the Court to answer the second question if it takes the view that, as submitted by ESA, Article 4 of the Air Services Regulation must be interpreted as not permitting EEA States to make the granting of operating licences subject to further conditions not referred to in that provision.

36. In any event, ESA observes that (i) the Air Services Regulation has been incorporated into the EEA Agreement, (ii) it is to be implemented as such, and (iii) there are no specific adaptations for Liechtenstein concerning the lack of infrastructure.

37. The latter is in ESA's view of specific importance. The Joint Committee Decision incorporating the Air Services Regulation could have included an adaptation to the effect that certain parts of the regulation do not apply to Liechtenstein, due to the lack

of infrastructure.<sup>22</sup> Such an adaptation would clearly fall within the competence of the EEA Joint Committee.<sup>23</sup> It would, however, require agreement between the contracting parties.

38. The Court of Justice has held that practical difficulties which appear at the stage when a measure is put into effect cannot permit a Member State unilaterally to opt out of fulfilling its obligations. The EU institutional system provides the Member State concerned with the necessary means to ensure that its difficulties be given due consideration, subject to compliance with the principles of the internal market and the legitimate interests of the other Member States.<sup>24</sup>
39. In ESA's view, the same logic also applies in the EFTA pillar. In a situation where the Joint Committee Decision does not include an adaptation, an EFTA State cannot unilaterally decide to implement a regulation in a manner that restricts the scope of that regulation. This would undermine the decision-making process of the EEA Agreement and result in fragmentation of the internal market.
40. Lastly, ESA notes that the Court has held that a bilateral international agreement cannot affect the obligation of an EEA State to comply with EEA law. Indeed, if the application of a provision of EEA law could be impeded by a measure adopted pursuant to the implementation of such an agreement, this would be contrary to the duty of every EEA State to facilitate the application of that provision of EEA law.<sup>25</sup> Hence, the Exchange of Notes between Switzerland and Liechtenstein on cooperation between the Swiss and Liechtenstein authorities in the field of civil aviation, referred to in the Request, cannot affect the obligation of Liechtenstein to comply with the Air Services Regulation, as incorporated into the EEA Agreement.<sup>26</sup>

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<sup>22</sup> Such an adaptation can inter alia be found in EEA Joint Committee Decision No 69/2009 incorporating Regulation No 300/2008.

<sup>23</sup> Judgment of 9 October 2002 in Case E-6/01 *CIBA*, paragraph 32.

<sup>24</sup> See by analogy judgment of 7 February 1979 in Case 128/78 *Commission v UK*, EU:C:1979:32, paragraphs 9 and 10.

<sup>25</sup> Judgment of 24 January 2023 in Case E-5/22 *Maitz*, paragraph 48.

<sup>26</sup> See the Request, paragraphs 1.1 and 3.2.

#### 4.4 Question 3

41. The third question is again formulated in the alternative, and concerns whether Section 9(3) of the Liechtenstein Aviation Act is in breach of Article 36 of the EEA Agreement on the freedom to provide services. Section 9(3) of the Liechtenstein Aviation Act sets out that air operator certificates (AOC) and operating licences are only to be issued if the intended activities are possible due to the infrastructure available in Liechtenstein.
42. Despite the question being formulated in the alternative, ESA reiterates that according to settled case law, where a matter is regulated in a harmonised manner at EEA level, any national measure thereto must be assessed in the light of the provisions of that harmonising measure and not those of primary EEA law.<sup>27</sup> Hence, ESA submits that it is not necessary for the Court to answer the third question.
43. Notwithstanding this starting point, ESA will provide brief observations as to whether Section 9(3) of the Liechtenstein Aviation Act could constitute a restriction on the freedom to provide services.
44. ESA notes that Article 38 of the EEA Agreement provides, in the same manner as under the TFEU, that the freedom to provide services in the field of transport is to be governed by separate provisions. In the EEA Agreement, those provisions can be found in Chapter 6 as well as in the acts referred to in Annex XIII, which contains specific provisions on all modes of transport. Hence, the acts referred to in Annex XIII to the EEA Agreement regulate the freedom to provide services as regards all modes of transport, including air transport. The Court has however found in Case E-1/03 *ESA v Iceland* that acts referred to in Annex XIII must be interpreted in light of the general principle enshrined in Article 36 of the EEA Agreement.<sup>28</sup>
45. That case concerned the interpretation of Regulation (EEC) No 2408/92, which was one of the predecessors to the Air Services Regulation. It could therefore be examined

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<sup>27</sup> See *inter alia* judgment of 13 December 2001 in Case C-324/99 *DaimlerChrysler AG*, EU:C:2001:682, paragraph 32, judgment of 27 February 2019 in Case C-563/17 *Associação Peço a Palavra*, EU:C:2019:144, paragraph 49 (concerning Regulation No 1008/2008) and judgment of 16 July 2012 in Case E-9/11 *ESA v Norway*, paragraph 72.

<sup>28</sup> See judgment of 12 December 2003 in Case E-1/03 *ESA v Iceland*, paragraph 28.

whether Section 9(3) of the Liechtenstein Aviation Act is liable to make more difficult or render less attractive the provision of intra-EEA flight services.

46. Section 9(3) of the Liechtenstein Aviation Act in practice sets out a rule whereby the competent national authority is prevented from granting an operating licence to an undertaking having its principal place of business in Liechtenstein.
47. Article 36(1) of the EEA Agreement provides that, within the framework of the provisions of the EEA Agreement, there shall be no restrictions on the freedom to provide services within the territory of the Contracting Parties in respect of nationals of EU Member States and EFTA States who are established in an EU Member State or an EFTA State other than that of the person for whom the services are intended.<sup>29</sup> Furthermore, it follows from the wording of Article 36(1) of the EEA Agreement that it does not apply to a situation which is confined in all respects within a single EEA State.<sup>30</sup>
48. ESA notes that it is settled case law that freedom to provide services requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another EEA State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other EEA States, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another EEA State where the latter lawfully provides similar services.<sup>31</sup> Moreover, the freedom to provide services covers not only restrictions laid down by the State of destination but also those laid down by the State of origin. Thus, the freedom to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in other EEA States.<sup>32</sup>
49. According to the Request, Valair has its registered domicile in Liechtenstein and plans to provide the service of commercial transport of air passengers in fixed-wing aircraft

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<sup>29</sup> See judgment of 20 November 2024 in Case E-2/24 *Bygg & Industri Norge AS*, paragraph 45.

<sup>30</sup> See judgment of 16 November 2018 in Case E-8/17 *Kristoffersen*, paragraph 67 and case law cited.

<sup>31</sup> See judgment of 20 February 2001 in Case C-205/99 *Analir*, EU:C:2001:107, paragraph 21.

<sup>32</sup> See judgment of 10 May 1995 in Case C-384/93 *Alpine Investments*, EU:C:1995:126, paragraphs 30-31 and the case law cited; and judgment of 3 December 2020 in Case C-311/19 *BONVER WIN*, EU:C:2020:981, paragraphs 20-22.



on a cross-border basis in various EEA States. Hence, this seems to be a situation where the service provider crosses, or plans to cross, the border in order to offer the services.<sup>33</sup> On that basis, a provision such as Section 9(3) of the Liechtenstein Aviation Act, preventing the authorities from issuing an operating licence, could be liable to impede or render less attractive the provision of those services and therefore constitutes a restriction on the freedom to provide them.

50. ESA however considers that it should be for the referring court (which alone has direct knowledge of the facts of the case and of the arguments put forward by the parties) to determine whether the measures at issue restrict the freedom to provide services guaranteed by Article 36 of the EEA Agreement, or whether any restrictive effects are too uncertain and indirect.<sup>34</sup>

51. Finally, ESA notes that if the measures at issue restrict the freedom to provide services guaranteed by Article 36 of the EEA Agreement, the measures must, in order to nevertheless be compatible with that provision, be suitable, necessary and a proportionate means to attain the objectives they pursue. ESA submits that this would be for the referring court to assess. The Request suggests that the objective of Section 9(3) of the Liechtenstein Aviation Act is not having to spend resources on the assessment and granting of operating licences, in a situation where there are no airports in Liechtenstein.<sup>35</sup> In this regard, ESA limits itself to note that it follows from settled case law that an EEA State cannot plead internal situations to justify a failure to comply with the obligations arising under EEA law. Furthermore, an EEA State may not plead practical or administrative difficulties in order to justify a breach.<sup>36</sup>

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<sup>33</sup> See judgment of 20 November 2024 in Case E-2/24 *Bygg & Industri Norge AS*, paragraph 50.

<sup>34</sup> See judgment of 20 November 2024 in Case E-2/24 *Bygg & Industri Norge AS*, paragraph 57.

<sup>35</sup> Request, paragraph 4.3, page 18, referring (with reference to preparatory legislative works) to the argument that the development of comprehensive administrative structures in Liechtenstein for the supervision of an extraterritorial economic activity would be disproportionate.

<sup>36</sup> By analogy, see judgment of 19 June 2015 in Case E-19/14 *ESA v Norway*, paragraph 48 and judgment of 7 February 1979 in Case 128/78 *Commission v UK*, EU:C:1979:32, paragraph 11.

## 5 CONCLUSION

Accordingly, ESA respectfully submits that the Court should answer the questions as follows:

1. The conditions for granting an operating licence set out in Article 4 of Regulation (EC) No 1008/2008, as incorporated into the EEA Agreement, are exhaustive. The competent licensing authority may not impose any further conditions.
2. In a situation, such as in the present case, where the Joint Committee Decision does not include an adaptation, an EFTA State cannot unilaterally decide to implement Regulation (EC) No 1008/2008 in a manner that would require an adaptation. Furthermore, a bilateral international agreement, such as the Exchange of Notes between Switzerland and Liechtenstein on cooperation between the Swiss and Liechtenstein authorities in the field of civil aviation, cannot affect the obligation of an EEA State to comply with EEA law.
3. Where a matter is regulated in a harmonised manner at EEA level, in this case by Article 4 of Regulation (EC) No 1008/2008, a national measure which concerns such a harmonised matter must be assessed in the light of the provisions of the harmonising measure and not those of primary EEA law.

Kyrre Isaksen

Daniel Vasbeck

Melpo-Menie Joséphidès

Agents of the EFTA Surveillance Authority