

EFTA Court
1 rue du Fort Thüngen
L-1499 Luxembourg

Vaduz, 28 April 2025

To the President and Members of the EFTA Court

Written Observations

submitted pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court by the

Government of the Principality of Liechtenstein

represented by Dr. Andrea Entner-Koch, Director of the EEA Coordination Unit (*Leiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein*) and Samuel Barwart, Legal Officer of the EEA Coordination Unit (*Juristischer Mitarbeiter der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein*), acting as agents of the Government of the Principality of Liechtenstein,

in Case E-1/25

Valair AG v Amt für Volkswirtschaft (Amt für Hochbau und Raumplanung)

in which the Board of Appeal for Administrative Matters of the Principality of Liechtenstein (*Beschwerdekommision für Verwaltungsangelegenheiten des Fürstentums Liechtenstein*; hereinafter referred to as the 'Board of Appeals') has requested 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.

The Government of the Principality of Liechtenstein (hereinafter referred to as the 'Liechtenstein Government') has the honour to submit the following observations:

I. Questions referred to the EFTA Court

The Board of Appeals has stayed its proceedings in order to refer the following questions to the EFTA Court:

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 for the issuance or granting of air operator certificates and/or operating licences?
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 issuance 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)?

II. Factual background of the case

1. As regards the facts of the case at hand, the Liechtenstein Government would like to refer to the summary of facts provided by the Board of Appeals in its request for an advisory opinion and add the following facts:
2. On 11 January 2022 the applicant submitted the first request to extend its existing operating license for helicopters to fixed-wing aircraft to the competent administrative authorities in Liechtenstein. It is unequivocally clear that the applicant has no intention of using this extended operating license to operate a fixed-wing aircraft in or from Liechtenstein territory, as this is currently not possible due to Liechtenstein's geography (for more details please see Chapter IV on the Factual Framework) and will most likely remain impossible on the territory of Liechtenstein due to the geographical realities. The Liechtenstein operating license – if Liechtenstein would issue such licenses – would (and could) only be used to operate a fixed-wing aircraft outside of Liechtenstein's territory and the aircraft would (and could) never be stationed in Liechtenstein but always abroad.

III. Legal framework

3. As regards the legal framework applicable to the case at hand, the Liechtenstein Government would like to refer to the summary of the legal framework relevant to answer the questions referred for a preliminary ruling as laid down by the Board of Appeals in its request for an advisory opinion.
4. In its following written observations, the Liechtenstein Government will refer to the subsequent legal framework and acts:

EEA Agreement

5. Article 31 of the EEA Agreement concerns the freedom of establishment and refers to a situation in which a person pursues a professional activity on a stable and continuous basis.
6. Article 36 of the EEA Agreement on the contrary concerns the freedom to provide services. It prohibits restrictions on service providers established in one EEA state from offering services in another EEA state. This principle ensures that businesses and individuals can provide services across borders freely under the same conditions as domestic providers, fostering an open and competitive internal market.
7. In the same manner as stipulated in the Treaty on the Functioning of the European Union (hereinafter referred to as 'TFEU'), Article 38 of the EEA Agreement states that the freedom to provide services in the transport sector is regulated by separate provisions within the EEA Agreement, specifically Chapter VI of the EEA Agreement.
8. Chapter VI of the EEA Agreement regulates the freedom to provide services in the field of transport. It establishes that transport services are governed by specific provisions. This chapter aligns EEA transport rules with those of the EU, ensuring coherence in areas such as road, rail, air, and maritime transport.

Treaty on the Functioning of the European Union

9. Article 56 TFEU prohibits restrictions on the freedom to provide services within the EU for nationals of EU Member States who are established in another EU Member State. It ensures that service providers can operate across borders without undue barriers, subject to justified exceptions based on public policy, security, or health.
10. Article 58 TFEU specifies that the free movement of services in the transport sector is governed by specific provisions within the Treaty. This means that while the general principles of service freedom apply, transport services are regulated separately under Title VI TFEU, ensuring sector-specific legal frameworks that account for the unique

characteristics of transport activities.

Regulation (EC) No 1008/2008

11. 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 Community¹ (hereinafter referred to as 'Air Services Regulation') was incorporated into Annex XIII Chapter VI of the EEA Agreement by Decision of the EEA Joint Committee No 90/2011 of 19 July 2011².
12. The Air Service Regulation provides the economic framework for air transport in the EEA setting out the rules on:
 - the grant and oversight of operating licences of EEA air carriers,
 - market access,
 - aircraft registration and leasing,
 - public service obligations,
 - traffic distribution between airports and
 - pricing.
13. Reference is made to Article 4 which defines the conditions for granting an operating licence to air carriers.

Luftfahrtgesetz (Civil Aviation Act)

14. The *Gesetz vom 15. Mai 2002 über die Luftfahrt* (hereinafter 'Luftfahrtgesetz')³ regulates and serves the implementation and enforcement of the regulations applicable to civil aviation within the European Economic Area, in particular Annex XIII, Chapter VI of the EEA Agreement.
15. The Luftfahrtgesetz underwent a complete revision in 2024. The Luftfahrtgesetz (LFG)

¹ OJ L 293, 31.10.2008, p. 3.

² OJ L 262, 6.10.2011, p. 62.

³ LGBl-Nr. 2003.039.

of 11 April 2024 (hereinafter ‘Luftfahrtgesetz neu’)⁴ has been in force since June 1, 2024. However, since the underlying case occurred before the Luftfahrtgesetz neu came into effect, the assessment and further considerations are based on the previous Luftfahrtgesetz

IV. Contextual Framework

16. In this brief, it is set forth that Liechtenstein’s aviation infrastructure has unique characteristics which distinguish it from the aviation infrastructure of any other EEA States, thereby rendering it unparalleled.
17. In particular, it is important to note that on Liechtenstein territory no infrastructure is in place and will probability never be in place that would facilitate the take-offs and/or landings of fixed-wing aircrafts. The main reason for this is the geography of Liechtenstein, which offers little to no space for a corresponding infrastructure, a combined result of the small size of the country and its vast mountainous terrain.⁵ In the course of the parliamentary process to create the first Luftfahrtgesetz in the year 2002 it was also clearly stated and agreed on by the legislator that there is and will be no intention in the future to increase the importance of the topic “Luftfahrt” (“aviation”) in Liechtenstein beyond the current situation . At that time there was only the one helicopter base in the outskirt area of the municipality of Balzers. The political position has not changed.
18. This fact makes Liechtenstein unique in the EEA, as no other EEA State is entirely devoid of the infrastructure required to support the take-offs and landings of fixed-wing aircraft.⁶ This complete absence and geographical improbability of the establishment of such facilities underscores the uniqueness of Liechtenstein's aviation infrastructure, setting it apart from all other EEA States. The specific situation of Liechtenstein is reflected accordingly in various adaptations and amendments within the EEA aviation

⁴ LGBL-Nr. 2024.224.

⁵ <https://service.geo.llv.li/>.

⁶ The only aviation infrastructure on Liechtenstein territory is the Heliport Balzers, which only allows for take-off and landing of helicopters.

sector.⁷

19. It is against this background – which will subsequently be further elaborated – that the applicable legal acts in this area and in particular the Air Services Regulation must be understood.
20. The need to take account of these particularities was already evident with the accession of Liechtenstein to the EEA in 1995 when Liechtenstein was granted a transitional period in the field of civil aviation until the end of 1999, which was later extended until 1 January 2002. Since the transitional period was not extended beyond 1 January 2002, the at the time being newly enacted *Luftfahrtgesetz* of 2003 implemented the EEA aviation acquis applicable to Liechtenstein, focusing on investigation of civil aviation accidents and incidents, the mutual acceptance of personnel licences for the exercise of functions in civil aviation as well as the outsourcing of aviation law expertise within the framework of bilateral administrative agreements with Switzerland.
21. Since then, EU aviation legislation has evolved significantly, and the aviation market has been progressively liberalised. Moreover, a coherent system has been established covering airports, aviation safety, environmental standards, security and market access. Throughout the process of incorporating this EU legislation in the field of civil aviation into the EEA Agreement, the specific situation of Liechtenstein - and the resulting limitations arising therefrom - has been continuously taken into account and reflected in several decisions of the EEA Joint Committee (Joint Committee Decision), for example in:
 - Joint Committee Decision No 67/2006⁸ incorporating Regulation (EC) No

⁷ It may be noted for the sake of completeness that the geographical situation of Liechtenstein significantly limits the possible establishment of transport infrastructure in general, such as shipping or railway infrastructure.

⁸ OJ L 245, 07.09.2006, 9. 18, 'This Regulation shall not apply to Liechtenstein.'

549/2004⁹, 550/2004¹⁰, 551/2004¹¹ and 552/2004¹²;

- Joint Committee Decision No 69/2009¹³ incorporating Regulation (EC) No 300/2008¹⁴;
- Joint Committee Decision No 27/2012¹⁵ incorporating Commission Regulation (EU) No 255/2010¹⁶;
- Joint Committee Decision No 64/2012¹⁷ incorporating Directive 2009/12/EC¹⁸,
- Joint Committee Decision No 122/2007¹⁹ incorporating Regulation (EC) No 1107/2006²⁰.

22. It is hereby acknowledged that the unique circumstances of Liechtenstein have been duly considered by the Contracting Parties of the EEA. It is further understood that obligations shall only be imposed in respect of those air services which, by virtue of the existing infrastructure, can realistically and effectively be provided within the territory of the Liechtenstein. Accordingly, the system is predicated upon this very assumption. This framework further encompasses the wide range of obligations and rights that would ordinarily be imposed on operators within an EEA State. However, due to the

⁹ Regulation 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky (the framework Regulation) (OJ L 96, 31.3.2004, p. 1).

¹⁰ Regulation (EC) No 550/2004 of the European Parliament and of the Council of 10 March 2004 on the provision of air navigation services in the single European sky (the service provision Regulation) (OJ L 96, 31.3.2004, p. 10).

¹¹ Regulation (EC) No 551/2004 of the European Parliament and of the Council of 10 March 2004 on the organisation and use of the airspace in the single European sky (the airspace Regulation) (OJ L 96, 31.3.2004, p. 20).

¹² Regulation (EC) No 552/2004 of the European Parliament and of the Council of 10 March 2004 on the interoperability of the European Air Traffic Management network (the interoperability Regulation) (OJ L 96, 31.3.2004, p. 26).

¹³ OJ L 232, 3.9.2009, p.25, '*The measures laid down in this Regulation shall not apply to the existing civil aviation infrastructure in the territory of Liechtenstein*'.

¹⁴ 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, 09.04.08, p. 72).

¹⁵ OJ L 161, 21.06.2012, p. 33, '*This Regulation shall not apply to Liechtenstein*'.

¹⁶ Commission Regulation (EU) No 255/2010 of 25 March 2010 laying down common rules on air traffic flow management (OJ L 080, 26.03.2010, p. 10).

¹⁷ OJ L 207, 2.8.2012, p. 44, '*This Directive shall not apply to Liechtenstein*'.

¹⁸ Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (OJ L 070, 14.03.2009, p. 11).

¹⁹ OJ L 047, 21.02.2008, p. 47, '*The measures laid down in this Regulation shall not apply to the existing civil aviation infrastructure within the territory of Liechtenstein*'.

²⁰ Regulation 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (OJ L 204, 26.07.2006, p.1).

non-existing relevant infrastructure, Liechtenstein is expressly exempt from numerous obligations.

23. All of this clearly shows that due account has always been taken of the specific geography of Liechtenstein and the fact that air services are provided only in exceptionally limited cases, no international regular air services to or from Liechtenstein are available and the civil aviation infrastructure in Liechtenstein consists of one single heliport. Furthermore, it clearly demonstrates that the unique situation of Liechtenstein and the incomparability to the situation of any other EEA State was accepted and endorsed by the Contracting Parties of the EEA Agreement and the system set up within the aviation sector in the EEA reflects this common understanding; the common understanding Liechtenstein – in accordance with the principle of good faith – has legitimately relied on.

V. Legal analysis

First Question: Regulation (EC) No 1008/2008

24. By its first question, the Board of Appeals asks whether it follows from Article 4 of Regulation (EC) No 1008/2008 ('Air Services Regulation') or any other EEA provision that the competent licensing authority of an EEA State may not impose any further conditions.
25. In the view of the Liechtenstein Government, the requirement that the planned activity of the undertaking is practically feasible on the basis of the existing infrastructure in Liechtenstein does not constitute a 'further condition' beyond the Air Services Regulation. Rather, this requirement is an inherent aspect of the EEA aviation framework itself – as will be demonstrated below – and, by extension, is implicitly embedded in said regulatory framework. The availability of necessary infrastructure serves as a fundamental prerequisite that naturally delineates the scope and applicability of the Air Services Regulation.
26. Consequently, the practical feasibility of carrying out the activity is inherently factored

into the regulatory design, ensuring that the obligations set forth are both logically consistent and contextually appropriate.

27. This is further underlined by the aim of the Air Services Regulation, whose primary objective is to mitigate competitive distortions and promote market efficiency but also reinforce the safety of air services, and protect consumer interests.²¹ To achieve this, it establishes standards for the operation of air transport services throughout the EEA, including provisions for the licensing of EEA air carriers and the enhancement of price transparency.
28. In order to obtain and maintain a valid operating licence, EEA air carriers must fulfil several conditions, including the following: they must have their principal place of business in the EEA State issuing the operating licence; they must hold a valid Air Operator Certificate (hereinafter referred to as 'AOC'); they must have access to one or more aircraft either through ownership or a dry lease agreement; they must establish a corporate structure that allows the competent authority to implement the provisions governing operating licences; they must ensure that the majority of their ownership and effective control is held by EEA States and/or their nationals; they must meet a number of financial requirements designed to ensure their financial stability.
29. Failure to comply with these conditions may ultimately result in the suspension or withdrawal of the operating licence.²² This of course based on the assumption - respectively the provisions governing operating licences require - that the competent licensing authorities monitor compliance with these requirements.²³
30. Furthermore, it is important to bear in mind that an operating licence not only confers aeronautical rights and obligations on the air carrier, but also grants e.g. unrestricted market access to the EEA. However, as elaborated in Chapter IV, not all legal acts granting rights and imposing obligations to air carriers with an operating license for the

²¹ https://transport.ec.europa.eu/document/download/70b26864-96af-43bc-b82b-6565606c2a59_en?filename=swd020190295.pdf, page 4

²² *ibid.*, page 148.

²³ *ibid.*, page 5.

EEA are applicable to Liechtenstein, as Liechtenstein is exempt from them. Therefore, if Liechtenstein issued a corresponding operating license to an undertaking based in Liechtenstein for aviation services that cannot be carried out domestically, various rights granted and obligations imposed to all air carriers based in an EEA State other than Liechtenstein would not be applicable to the air carrier in Liechtenstein.

31. For example, Liechtenstein, and therefore air carriers with an operating license from Liechtenstein, are – based on Regulation (EC) No 300/2008²⁴ as incorporated into the EEA-Agreement – completely exempt from the Regulation. This Regulation establishes safety requirements not only for airports but also for air carriers rendering services at airports. Accordingly, it must be assumed that air carriers established within Liechtenstein, for instance, are not required to implement a security program according to the Regulation. Such a scenario would constitute a significant security risk and allow for the circumvention of the regulatory provisions.
32. Furthermore, Liechtenstein, and therefore air carriers with an operating license from Liechtenstein, are – based on Regulation (EC) 1107/2006²⁵ as incorporated into the EEA-Agreement – completely exempt from this Regulation. The Regulation generally imposes obligations on airport operators concerning the rights of disabled persons and persons with reduced mobility when travelling by air. However, the Regulation also includes requirements for air carriers to provide assistance to the airport operators or to train their staff, among other things. However, as Liechtenstein is exempt from the Regulation, it must be considered inapplicable to air carriers operating under a Liechtenstein licence. If Liechtenstein would be obliged to issue operating licenses for fixed-wing aircraft, this would result once more in the circumvention of the regulatory provisions, which does not serve anyone's interests.

²⁴ 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, 09.04.08, p. 72) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 69/2009 of 29 May 2009 (OJ L 232, 03.09.09, p. 25).

²⁵ Regulation 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (OJ L 204, 26.07.06, p. 1) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 122/2007 of 28 September 2007 (OJ L 47, 21.02.08, p. 47).

33. Moreover, the non-existent infrastructure for take-offs and/or landings of fixed-wing aircrafts has also been taken into account in other areas within the Emission Trading System (hereinafter referred to as 'ETS'), further underscoring the Contracting Parties' recognition that Liechtenstein is in a unique situation which requires a tailored application of its obligations. For instance, Article 1 paragraph 2 lit. b of the Joint Committee Decision No 152/2012²⁶ incorporating Directive 2009/29/EC²⁷ amending Directive 2003/87/EC²⁸ so as to improve and extend the greenhouse gas emission allowance trading system of the Community²⁹. The Joint Committee Decision provides that "[...]at the time of incorporation of the Directive [2009/29/EC, which is 27 July 2012; EN], Liechtenstein does not have any aviation activities as defined in the Directive operating on its territory. Liechtenstein will comply with the Directive when relevant aviation activities take place on its territory;" Thus, if a competent authority in Liechtenstein were to grant an operating licence to an air carrier that fulfils the conditions of Article 4 of Regulation (EC) No 1008/2008 but does not perform – due to the lack of corresponding infrastructure – aviation activities falling within the scope of Directive 2003/87/EC as amended by Directive 2009/29/EC on the territory of Liechtenstein, the ETS for aviation would not apply to the air carrier. This would not only create an unintentional loophole in the ETS but also lead to a competitive advantage for the air carrier in question.

34. These observations clearly demonstrate that the presence of an infrastructure is not merely a 'further condition' within the framework of the specific legislative act, but rather an integral component of the system itself. The Air Services Regulation presupposes that such an infrastructure exists and functions effectively, as it forms the

²⁶ OJ L 309, 08.11.12

²⁷ Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ L 140, 05.06.09, p. 63).

²⁸ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32–46) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 146/2007 of 26 October 2007 (OJ L 100, 10.04.08, p. 92).

²⁹ Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community (OJ L 140, 5.6.2009, p. 63–87).

basis on which the regulatory framework operates. Without the necessary infrastructural elements in place, the practical application and meaningful implementation of the Regulation would be compromised. Consequently, any attempt to apply the Regulation in a context where the fundamental infrastructure is absent would be inherently flawed, undermining the regulation's objectives related to safety, efficiency, and market coherence.

Second Question: Internal Aviation Market and/or other principles of EEA Law

35. With its second question, the Board of Appeals inquires whether a provision according to which AOCs and operating licences for flights carrying passengers, cargo and/or mail for remuneration and/or hire are exclusively issued or granted if the intended activities are actually possible on the basis of the infrastructure existing in the State issuing or granting the AOC or license is precluded by the objective of establishing an internal aviation market and/or other principles of EEA law. This second question is only to be answered if the first question is answered in the negative.
36. Due to the fact that the conditions for granting an AOC according to Regulation (EU) 2018/1139³⁰ as well as Commission Regulation 965/2012³¹ were not part of the first question and therefore the question whether or not infrastructure existing in the State is an indispensable condition for granting an AOC according to the EASA Regulation as well as Commission Regulation 965/2012 has not been answered, the Liechtenstein Government's following observations focus on the issuing of operating licenses.
37. The Liechtenstein Government respectfully submits the following considerations and

³⁰ 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, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 (hereinafter referred to as 'EASA Regulation') (OJ L 212, 22.08.18, p.1) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 114/2023 of 28 April 2023 (OJ L, 2023/02294, 09.11.23).

³¹ Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (hereinafter referred to as 'Regulation 965/2012') (OJ L 296, 25.10.12, p.1) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 147/2013 of 15 July 2013 (OJ L 345, 19.12.13, p. 16).

proposes the subsequent response for the EFTA Courts consideration concerning the internal aviation market:

38. In 1986, the Member States of the European Union undertook a commitment to the establishment of an internal market in the field of aviation. This initiative formed part of a broader objective to achieve a unified internal market encompassing all economic sectors as enshrined in the provisions of the Single European Act.
39. The freedom to provide intra-EU air services constitutes a fundamental principle underpinning the EU's intervention in the aviation market. This freedom was intended to facilitate the completion of the internal aviation market, thereby generating substantial economic gains and benefits for consumers. The relevant provisions aimed to create a level playing field through the adoption of common rules and the removal of restrictions on multiple designation, and the gradual introduction of cabotage rights. These measures were designed to promote the development of the EU air transport sector and to enhance the quality of services provided to users. Concurrently, the EU's regulatory framework pursues the highest attainable standards in the areas of safety, security, environmental protection, and passenger rights, including price transparency and oversight of the financial soundness of air carriers.³²
40. In pursuit of this objective, the EU legislator has exercised the competence conferred by the Treaty — now Article 100(2) TFEU — to liberalise air transport and to progressively establish the internal aviation market through the adoption of secondary legislation.
41. Liechtenstein is part of the internal aviation market and is committed and obliged to the implementation and application of the relevant provisions in accordance with its institutional capacities and the existing infrastructure, as recognised by the Contracting Parties of the EEA. Liechtenstein hereby ensures the objectives of the EEA internal aviation market especially related to safety, efficiency and market coherence.

³² Evaluation, https://transport.ec.europa.eu/document/download/70b26864-96af-43bc-b82b-6565606c2a59_en?filename=swd020190295.pdf, page 145-146

42. The question regarding other principles of EEA law will be addressed under question three.

Third Question: Freedom to provide services

43. With its third question, the Board of Appeals asks whether de facto exclusion of issuance or granting of an AOC and/or an operating licence 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, is compatible with Article 36 of the EEA Agreement.

44. Due to the fact that the conditions for granting an AOC according to the EASA Regulation as well as Commission Regulation 965/2012 were not part of the first question and therefore the question, whether or not an infrastructure existing in the State is an indispensable condition for granting an AOC according to the EASA Regulation as well as Commission Regulation 965/2012 was not answered, the following observation of the Liechtenstein Government focus on the issuance of operating licenses.

45. Article 36 of the EEA Agreement mandates the elimination of all restrictions on both the active provision and the passive reception of services within the EEA with respect to nationals of EEA States who are established in an EEA State other than the one in which the services are rendered.

46. Article 38 of the EEA Agreement provides that the freedom to provide services in the field of transport shall be subject to the provisions set forth in Chapter 6 of Part III of the EEA Agreement.³³

47. Accordingly, where harmonization has taken place in the area of transport, priority must be given to the secondary legislation. In order to interpret and further define these provisions, the Court of Justice of the European Union (hereinafter referred to as

³³ Evaluation, https://transport.ec.europa.eu/document/download/70b26864-96af-43bc-b82b-6565606c2a59_en?filename=swd020190295.pdf, page 145-146

‘Court of Justice’) and the EFTA Court invoke the principles applicable to the freedom to provide services. This approach is particularly pertinent when the secondary provisions resemble or refer to freedom to provide services according to Article 56/57 TFEU (or Article 36 of the EEA Agreement), or even expressly provide for the realization of free movement of services in the relevant field.³⁴

48. The Air Services Regulation is designed to establish the conditions for applying the principle of the freedom to provide services in the field of air transport. This is also evident from the case-law of both the Court of Justice and the EFTA Court³⁵ concerning the predecessor Regulation No 2408/92³⁶.
49. Accordingly, it is required to examine whether the national legislation in question is liable to restrict the freedom to provide services within the EEA.³⁷ This includes the application of any national legislation resulting in making it increasingly difficult to render the cross-border provision of services between multiple EEA States than domestic provision of services, i. e. within one EEA State, irrespective of any discrimination on grounds of nationality or residence.
50. Therefore, a measure which is likely to prohibit or otherwise impede the provision of services between EEA States, as compared to the provision of services exclusively within one EEA State, is considered to be a restriction of the freedom to provide service.³⁸
51. Due to the fact that take-off and/or landing of fixed-wing aircrafts is not possible in Liechtenstein, the air service of such aircrafts, however, is not more difficult between

³⁴ Grabitz/Hilf/Nettesheim, Kommentar I, Art. 58 AEUV, para. 4 et. seq.

³⁵ Judgment of the Court of Justice of 6 February 2003, *Georgios Stylianakis v Elliniko Dimosio*, C-92/01, ECLI:EU:C:2003:72, paragraph 22; Judgment of the EFTA Court of 12 December 2003, *EFTA Surveillance Authority v The Republic of Iceland*, E-01/03, [2003] EFTA Ct. Rep. 143, paragraph 28.

³⁶ Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8).

³⁷ Judgment of the EFTA Court E-01/03, paragraph 28.

³⁸ Judgment of the Court of Justice of 25 July 1991, *Manfred Säger v Dennemeyer & Co. Ltd.*, C-76/90, ECLI:EU:C:1991:331, paragraph 12; Judgment of the Court of Justice of 20 February 2001, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v Administración General del Estado*, C-205/99, paragraph 21; Judgment of the EFTA Court E-01/03, paragraph 28.

EEA States than the ones purely in Liechtenstein. Accordingly, Liechtenstein neither imposes heavier burdens on foreign undertakings, either legally or in practice, nor does it render cross-border service provision more difficult than the domestic situation.³⁹

52. Consequently, the Liechtenstein air transport legislation, or more specifically the condition that the planned aviation activity of the undertaking is practically feasible based on the existing infrastructure within Liechtenstein does not restrict the freedom to provide services.
53. Should this Court nonetheless ultimately conclude that a restriction exists, such a restriction would, in any event, be fully justified.
54. In principle, a restriction on the freedom to provide services can be justified on grounds of public interest such as the protection of public security, especially aviation safety and security, as well as consumer protection. The European aviation safety framework is based on a set of shared safety rules covering all key areas of aviation including airworthiness, aircrew, aerodromes, air operations and the provision of air navigation services.
55. In particular, considering that upon the issuance of an operating license according to the Air Services Regulation, the undertaking is authorised to offer its services throughout the entire EEA, safety and security concerns are of utmost importance.
56. These objectives are pursued in accordance with the principle of proportionality, which requires that any measures taken must be appropriate and necessary. The requirement that only undertakings capable of carrying out their services on the basis of the existing aviation infrastructure may be approved serves to ensure effective regulatory oversight, guarantees the availability of the necessary knowledge and expertise, and ensures that only those operators who meet the high regulatory standards are granted an operating license. The condition serves the purpose of hazard prevention and

³⁹ Judgment of the Court of Justice of 8 September 2005, *Mobistar SA v Commune de Fléron and Belgacom Mobile SA v Commune de Schaerbeek*, C-544/03 and C-545/03, paragraph 31-34.

preventive control, enabling the ex-ante assessment of certain activities or projects which, according to established experience, are regularly associated with particular risks in order to determine any potential hazards prior to their commencement. The fact that licenses for services operating in the name of Liechtenstein on the basis of existing and accessible infrastructure in Liechtenstein have been issued showcases that the national measures do not go beyond what is absolutely necessary.

57. Subsequently, the requirement that the planned aviation activity of the undertaking is practically feasible due to the existing infrastructure within Liechtenstein to issue an operating licence for flights carrying passengers for remuneration and/or hire using fixed-wing aircraft is fully compatible with Article 36 of the EEA Agreement.

VI. Conclusions

Following the observations above, the Liechtenstein Government considers that the questions referred to the EFTA Court for an advisory opinion should be answered as follows:

- (1) The condition that the necessary infrastructure for air transport services is actually in place may be required by Liechtenstein, as this is the only way for the regulatory framework to function efficiently as intended by the Contracting Parties to the EEA Agreement. The existence of relevant infrastructure is thus no 'further condition' but rather an integral component of the aviation framework itself. Consequently, any attempt to apply the Regulation in a context where the infrastructure is absent would undermine the regulation's objectives.
- (2) A provision according to which operating licences for flights carrying passengers, cargo and/or mail for remuneration and/or hire are issued or granted only if the intended activities are actually possible on the basis of the infrastructure existing in Liechtenstein is not precluded by the objective of establishing an internal aviation market and/or other principles of EEA law.

- (3) Article 9(3) of the Liechtenstein Aviation Act, which de facto excludes the issuing or granting of operating licences for flights carrying passengers for remuneration and/or hire using fixed-wing aircraft due to the lack of an infrastructure in Liechtenstein, in the sense of airports or airfields, is compatible with Article 36 of the EEA Agreement (freedom to provide services).

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