

## TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

The EFTA Court Registry  
1, Rue du Fort Thüngen  
L-1499 Luxembourg

Submitted via the e-EFTACourt portal

### WRITTEN OBSERVATIONS

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

#### **Appellant**

represented by Dr. Thomas Wiedl, Attorney at Law and Mag. Vivianne Auer, Attorney at Law,  
Ospelt & Partner Attorneys at Law Ltd., Landstrasse 99, 9494 Schaan, Principality of Liechten-  
stein

in

#### **CASE E-1/25**

In accordance with the request of the EFTA Court dated 28 February 2025, Case E-1/25, and  
in accordance with Article 20 of the Statue and Article 97 of the Rules of Procedure of the  
EFTA Court, the Appellant herewith lodge the following

### **WRITTEN OBSERVATIONS**

with the EFTA Court:

## Table of contents

1. FACTS OF THE CASE .....	4
2. NATIONAL AND EUROPEAN LEGAL FRAMEWORK.....	7
2.1. National Framework.....	7
2.1.1. Exchange of notes of January 27, 2003 between Switzerland and Liechtenstein concerning the cooperation between the Swiss and Liechtenstein authorities in the field of civil aviation .....	7
2.1.2. Liechtenstein Aviation Act of May 15, 2002 (hereinafter “Aviation Act 2002”) ..	9
2.1.3. Liechtenstein Aviation Act of April 11, 2024 (hereinafter “Aviation Act 2024”)..	9
2.1.4. Report and motions (“Bericht und Antrag“, “BuA“) .....	13
2.1.5. Jurisdiction of the Constitutional Court of Liechtenstein.....	13
2.1.6. Jurisdiction of the Administrative Court of Liechtenstein .....	14
2.2. European Framework.....	14
2.2.1. Agreement on the European Economic Area (EEA) .....	14
2.2.2. Protocol 35 to the EEA Agreement on the implementation of EEA rules .....	15
2.2.3. Council Regulation (EEC) No 2407/92 of the Council of the European Communities of 23 July 1992 on licensing of air carriers .....	15
2.2.4. 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).....	16
2.2.5. 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 “Regulation No 2018/1139”).....	18
<b>3. ON THE QUESTIONS REFERRED .....</b>	<b>20</b>
<b>3.1. First Question.....</b>	<b>20</b>
3.1.1. Direct Applicability of Community Law under Article 7 EEA .....	20
3.1.1.1. Extension of Conditions set forth in Article 4 of Regulation No 1008/2008 .....	20
3.1.1.2. Inadmissibility of a unilateral extension of the conditions set forth in Article 4 of Regulation No 1008/2008.....	22
3.1.1.3. The AOC Requirement .....	28
3.1.1.4. Conclusion .....	30
<b>3.2. Second Question.....</b>	<b>31</b>
3.2.1. Effet utile and Legal Certainty .....	31
3.2.1.1. Effet utile.....	31
3.2.1.2. Legal Certainty .....	34
3.2.2. Structural Coherence and Equal Treatment Across Sectors.....	35
3.2.3. The Rule of Law .....	37
3.2.4. Conclusion .....	39
<b>3.3. Third Question .....</b>	<b>40</b>
<b>4. CONCLUSION .....</b>	<b>46</b>

## 1. FACTS OF THE CASE

- (1) In order to avoid duplication, reference is made to the facts of the case as presented by the Board of Appeal for Administrative Matters.

However, the relevant points shall be addressed briefly:

- (2) Valair AG (hereinafter the “**Appellant**”) is a public limited company under Liechtenstein law, registered in the Liechtenstein commercial register under the number FL-0002.570.668-3 with its headquarter in Balzers, Liechtenstein since 2017. It maintains not only its statutory seat, but also its actual operational base in Liechtenstein, as its administrative, financial and managerial functions are carried out there. On 11 January 2022 it applied to the **Office of Building Construction and Spatial Planning** (AHR) to extend its existing operating licence for helicopters to fixed-wing aircraft.
- (3) The application was rejected on 10 February 2022 on the grounds that the Liechtenstein authorities wouldn’t be competent but rather the Swiss Federal Office of Civil Aviation (BAZL, hereinafter “**BAZL**”) by virtue of the Exchange of Notes between Switzerland and Liechtenstein on cooperation between the Swiss and Liechtenstein authorities in the field of civil aviation 2003 (“hereinafter “**Exchange of Notes**”).<sup>1</sup>
- (4) The Appellant lodged an appeal on March 3, 2022 in which the opposite opinion was expressed. The Liechtenstein Government rejected the appeal on 20 September 2022, which led to an appeal against its decision with the Administrative Court (hereinafter “**VGH**”) on 6 October 2022.
- (5) On 3 March 2023, the Administrative Court (VGH) upheld the appeal and endorsed the Applicant’s legal view that the Liechtenstein authorities were indeed competent, with the responsibility lying not with the ABI, but with the Office of Economic Affairs (AVW).

---

<sup>1</sup> See below section 2.1.1.

- (6) Subsequently, on 12 December 2023, the AVW once again rejected the Appellant's applications. The AVW stated that the conditions for granting an operating license were not stipulated in the Aviation Act 2002, but that to be determined by the BAZL. The AVW further elaborated that although no statement had been made by the BAZL at the time of the decision, it was nevertheless unable to grant the operating license **"because of the law"** (*our emphasis added*). It further outlined that, although the Aviation Act 2002 did not stipulate any specific requirements for the granting of operating licences, a licence could nevertheless only be issued if the intended operations were feasible within the country based on the existing infrastructure. **Thus, the AVW acknowledged that the legislator had omitted to codify this requirement, but nevertheless considered it to be applicable.**
- (7) In addition, the AVW argued that, pursuant to the Exchange of Notes, the Swiss Aviation Act would also apply, referring in particular to Article 27 (2) (a) of the Swiss Aviation Act, which would require the existence of a suitable airfield as a precondition for granting an operating licence. This argument is already entirely unfounded, as since 2011 the BAZL has no longer required proof of usage rights at the aerodrome designated as the site of flight operations, and, according to the BAZL, the conflicting provision under Article 27(2)(a) is to be repealed at the next available opportunity.<sup>2</sup>
- (8) Although the AVW advanced legal arguments of a rather unconventional nature, it failed to specify the legal basis for its conclusions. In this context, it should be stressed, that the Exchange of Notes provides for precisely the opposite, namely that Swiss law applies pursuant to Section I of the Exchange of Notes only insofar as EEA law does not apply.<sup>3</sup>
- (9) The Appellant subsequently appealed against this decision to the Liechtenstein Government, challenging it in its entirety. In doing so, the Appellant relied on the explicit wording of Article 6 (1) of the Aviation Act 2002, which provides that the AVW is responsible for granting operating licences and, pursuant to para. 2, must have the

---

<sup>2</sup> See Circular of the BAZL to all Swiss air operators holding a licence for commercial passenger transport dated 24 June 2011 (**Legal Exhibit No 1**).

<sup>3</sup> See below para. 12.

requirements for their issuance assessed by the BAZL.<sup>4</sup> It further elaborated, that this allocation of responsibilities is also reflected in Article 9 (f) of Regulation 2407/92 and that the Appellant fulfils all the conditions set out in Article 3 (2) of Regulation 2407/92 necessary to obtain an operating licence, thereby precluding Liechtenstein from exercising any discretion to introduce additional requirements.

- (10) Apparently, it was evident to the Liechtenstein Government that there was no sufficient legal basis for the requirement of such an “infrastructure” under the applicable Aviation Act 2002. This is clearly demonstrated by the fact that, following the Appellant’s challenge, the Liechtenstein Government introduced a new Aviation Act, which entered into force on 1 June 2024, and specifically included Article 9 (3) to formally establish such a requirement.<sup>5</sup> The targeted nature of this legislative amendment becomes particularly apparent in light of the fact that Article 9 (3) does not fit coherently within the overall structure of the new Aviation Act, but rather constitutes an isolated provision aimed at retroactively justifying the refusal of the Appellant’s application.
- (11) Due to national legislative reforms, the Liechtenstein Government was competent only under the earlier legal framework, whereas competence now lies with the Board of Appeal for Administrative Matters (hereinafter “VBK”). Accordingly, the VBK decided to stay the present appeal proceedings and to refer the questions specified in its order to the EFTA Court in Luxembourg for an advisory opinion.

---

<sup>4</sup> See below section 2.1.2.

<sup>5</sup> See below section 2.1.3.

## 2. NATIONAL AND EUROPEAN LEGAL FRAMEWORK

### 2.1. National Framework

#### 2.1.1. Exchange of notes of January 27, 2003 between Switzerland and Liechtenstein concerning the cooperation between the Swiss and Liechtenstein authorities in the field of civil aviation<sup>6</sup>

- (12) The Exchange of Notes was concluded on 27 January 2003. Due to the Principality of Liechtenstein's membership to the European Economic Area and the EEA law applicable, it replaced the Exchange of Notes between Switzerland and Liechtenstein from 1950.

The following was standardized under Section I.:

*The Government of the Principality of Liechtenstein agrees that Swiss aviation legislation shall be applied in the territory of the Principality of Liechtenstein by the competent Swiss authorities, unless EWR-law applies due to the Principality of Liechtenstein's membership to the European Economic Area (EEA) and Liechtenstein jurisdiction arises as a result.*

*(...)*

*The tasks reserved for a federal authority under applicable Swiss law consist primarily of the following:*

- 1. the technical assessment of aerodrome projects and the issuing of regulations for the ground organisation;*
- 2. the registration of Liechtenstein aircraft in the Liechtenstein Aircraft Register kept at the Swiss Federal Office of Civil Aviation and in the Swiss Aircraft Register;*
- 3. the technical inspection and certification of the airworthiness of Liechtenstein aircraft and aircraft accessories;*
- 4. the regulation and supervision of air traffic control, including the organisation of airspace, the designation of service providers, the creation of aeronautical charts, the provision of aeronautical data and the management of aeronautical radio frequencies on the basis of national and international law applicable in Switzerland;*
- 5. the ordering of administrative, aviation police measures and the aviation police monitoring of Liechtenstein aviation in liaison with the local aviation police bodies;*

---

<sup>6</sup> Exchange of Notes between Switzerland and Liechtenstein concerning the co-operation between the Swiss and Liechtenstein authorities in the field of civil aviation of 27 January 2003 (**Legal Exhibit No 2**).

6. *the reporting to the Liechtenstein criminal authorities of violations of flight police regulations that are to be prosecuted, whereby the provisions of Art. 27-32 of the Swiss-Liechtenstein Customs Union Treaty of 29 March 1923 must be observed for the procedure;*
7. *the administrative investigation and technical evaluation of aircraft accidents and incidents.*

Pursuant to Section II. the following applies:

*The following has been agreed for the clearest possible differentiation of the mutual rights and obligations arising from the application of Swiss aviation legislation in the territory of the Principality of Liechtenstein for the competent Liechtenstein and federal authorities:*

1. *Insofar as Swiss aviation legislation provides for the conferral of sovereign rights (licence for commercial air transport by regular air traffic routes, licence for the establishment and operation of aerodromes serving public transport), the Government of the Principality of Liechtenstein is the final granting authority. However, the Government of the Principality of Liechtenstein will contact the federal awarding authority and refrain from granting a licence if the federal awarding authority deems that the conditions for granting a licence are not met. The possible economic impairment of Swiss aerodrome or air transport companies does not give the federal licensing authority any reason not to recommend the granting of a licence.*  
(...)

- (13) Thus, it was clearly agreed under Section I. of the Exchange of Notes that Swiss aviation legislation would be applied in the territory of the Principality of Liechtenstein by the competent Swiss authorities, insofar as this does not contravene EEA law.
- (14) Moreover, it was stipulated that several tasks are reserved for the Swiss authorities, consisting primarily of the ensuring of the technical assessment, inspection and certification of aircraft, their airworthiness and the safety of the airspace.



- (15) This results in the division of competences when it comes to the granting of an operating licence. Therefore, the respective Swiss authority (BAZL) is competent for the assessment and monitoring of the requirements for the granting of an operating licence, whereas the respective Liechtenstein authority AHR is competent for the actual granting of the operating licences. Prior to doing so, however, the AHR must request an evaluation from the BAZL to determine whether the necessary conditions have been met.

**2.1.2. Liechtenstein Aviation Act of May 15, 2002 (hereinafter “Aviation Act 2002”)**

- (16) When the Appellant applied to extend its existing operating licence on 11 January 2022, the legal requirements for the operating permit were stipulated in Article 6 of the Aviation Act of May 15, 2002, which was entitled as “licensing procedure” and read as follows:

- 1) The operating permit is issued by the Office for Economic Affairs.*
- 2) The Office for Economic Affairs shall have the prerequisites for issuing the operating permit verified by the Swiss Federal Office of Civil Aviation (BAZL).*
- 3) The operating permit may be subject to conditions.*

**2.1.3. Liechtenstein Aviation Act of April 11, 2024 (hereinafter “Aviation Act 2024”)**

- (17) As previously indicated, since the beginning of the procedure, the Liechtenstein Aviation Act of May 2002 was replaced by the new Aviation Act, which was entered into force on 1 June 2024. As a result, the additional requirement of “actual infrastructure” has now been incorporated into national law, specifically in Article 9 (3) of the Liechtenstein Aviation Act 2024.

To the present case, in the Appellant’s view, the following Articles of the Aviation Act 2024 are of relevance:

***Article 1 “Subject matter and purpose”***

- 1) This Act regulates civil air traffic and serves in particular to implement:*
- (...)

*b) the legislation applicable in accordance with Annex XIII Chapter VI points ii to vi of the EEA Agreement, in particular:*

*1. Regulation (EC) No. 1008/2008 on common rules for the operation of air services in the community;<sup>7</sup>*

### **Article 2 “Applicable Law”**

*Unless otherwise provided for in this Act, the following applies to the sector of civil aviation:*

- a) the provisions of the Exchange of Notes of 27 January 2003 between Switzerland and Liechtenstein on cooperation between the Swiss and Liechtenstein authorities in the field of civil aviation (Exchange of Notes) and the administrative agreements based thereon;*
- b) the Swiss aviation legislation applicable on the basis of the Exchange of Notes.*

### **Article 3 “Responsible Authorities”**

*The following shall be entrusted with the implementation of this Act and the law applicable pursuant to Art. 2:*

- a) the Swiss Federal Office of Civil Aviation (BAZL);*
- b) the Office for Structural Engineering and Spatial Planning (AHR);*
- c) the Swiss Transportation Safety Investigation Board (SUST).*

### **Section B. BAZL**

#### **Article 5 “Responsibilities”**

- 1) In accordance with the Exchange of Notes, the BAZL undertakes duties to implement the applicable aviation law on behalf of the competent Liechtenstein authorities.*
- 2) The BAZL is responsible in particular for*
  - a) the issuing of licenses to training organizations (ATO);*
  - b) the supervision of declared activities;*
  - (...)*
  - i) the registration of Liechtenstein aircraft in the Swiss aircraft register;*

---

<sup>7</sup> Incorporated into the EEA Agreement because of EEA Joint Committee Decision No 90/2011 of 19 July 2011, see section 2.2.4.

*k) the monitoring of the airworthiness of Liechtenstein aircraft and aircraft accessories as well as the issuing of on-board documents;*

*l) the supervision of technical operations for the continuing airworthiness and maintenance of Liechtenstein aircraft and the issuing of authorizations for maintenance personnel;*

*(...)*

*n) the issuing of approvals for protective measures in air traffic;*

*o) the organization of the civil aviation search and rescue service;*

*(...)*

*3) In performing the tasks under para. 2, the BAZL shall take the associated supervisory measures.*

*4) The BAZL is also responsible for examining the requirements for:*

*a) issuing air operator's certificates (AOC);*

*b) issuing operating licenses (BB) for flights for the commercial carriage of passengers, freight and/or mail;*

*c) issuing licenses for unmanned aircraft.*

## **Section C. AHR**

### **Article 9 “Responsibilities”**

*1) The AHR is the national authority responsible for implementing aviation legislation. In particular, it is responsible for:*

*a) Issuing air operator certificates (AOC);*

*b) Granting operating authorizations (BB) for flights carrying passengers, cargo, and/or mail for commercial purposes;*

*c) Depending on the criteria for the Exchange of Notes, fulfilling the tasks as the coordination center between the responsible Liechtenstein and Swiss authorities in the enforcement of the law applicable pursuant to Art. 2;*

*d) Representing Liechtenstein in international working groups and committees;*

*e) Granting permits for unmanned aircraft as well as exemption permits concerning geographical areas pursuant to Art. 15 of the Implementing Regulation (EU) 2019/9477;*

- f) *Granting permits (Diplomatic Clearances) for the landing of foreign military and other state aircraft within the territory of the Principality of Liechtenstein;*
- g) *Submitting opinions to the government chancellery in the context of issuing flight permits with an aviation law-related reference;*
- h) *Providing administrative support to the SUST in the event of a security investigation pursuant to Art. 13;*
- i) *Concluding administrative agreements in the field of civil aviation;*
- k) *Supervising and ordering administrative measures as well as imposing administrative sanctions to enforce the legal provisions applicable under Annex XIII Chapter VI points ii to vi of the EEA Agreement after prior consultation with the BAZL;*
- l) *Providing information on aviation law.*

*2) After prior consultation with the BAZL, the AHR may take over tasks pursuant to Art. 5 para. 2, provided that it is necessary for the enforcement of the legal provisions applicable under Annex XIII Chapter VI points ii to vi of the EEA Agreement.*

*3) **Air operator certificates (AOC) and operating licenses (BB) for flights for the commercial carriage of passengers, cargo, and/or mail are only issued or granted if the intended activities are actually possible based on the existing infrastructure in Liechtenstein.** (Our emphasis added.)*

## **Article 11 “Procedure”**

*(...)*

*2) The AHR has the BAZL examine the requirements for:*

- a) issuing air operator's certificates (AOC);*
- b) issuing operating licenses (BB) for flights for the commercial carriage of passengers, freight and/or mail;*
- c) issuing authorizations for unmanned aircraft; and*
- d) issuing other decrees and orders to enforce the legal provisions applicable under Annex XIII, Chapter VI, points ii to vi of the EEA Agreement after prior consultation with the BAZL.*

## Section D. Safety Investigation Authority

### *Article 13 “Responsibilities”*

*The STSB (SUST) is the investigative authority responsible for Liechtenstein in accordance with Art 4 of Regulation (EU) No 996/2010 and performs the relevant tasks specified in this Regulation.*

#### **2.1.4. Report and motions (“Bericht und Antrag”, “BuA”)**

- (18) In Liechtenstein, there are several ways to introduce legislative proposals. On the one hand, the parliament itself can introduce a bill, on the other hand, the government can also introduce these bills. This is also the most common case in practical terms. The government prepares the draft legislation, consults experts and submits the draft legislation together with a reasoned report (hereinafter “**BuA**”) to Parliament, which then decides whether to pass it.

Accordingly, the Aviation Act 2024 was introduced by means of the BuA 122/2023.<sup>8</sup>

In the following, reference is made to the respective relevant explanatory notes of the BuA.

#### **2.1.5. Jurisdiction of the Constitutional Court of Liechtenstein**

- (19) The violation of the fundamental rights can be asserted before the Jurisdiction of the Constitutional Court of Liechtenstein (hereinafter “**StGH**”). Generally, the StGH is the constitutional court of Liechtenstein and final arbiter on questions of constitutional law. It reviews whether international and national regulations, but also governmental acts comply with the Liechtenstein Constitution. Its decisions cannot be overruled by any other domestic court.

In the following sections, reference will be made to the relevant case law of the StGH.

---

<sup>8</sup> Excerpts of Report and Proposal (BuA) 122/2023 (**Legal Exhibit No 3**).

### 2.1.6. Jurisdiction of the Administrative Court of Liechtenstein

- (20) The VGH is the highest tribunal for administrative law disputes and serves as the final instance.

In the following sections, reference will be made to the relevant case law of the VGH.

## 2.2. European Framework

- (21) It should be recalled that Liechtenstein became a member of the EEA on 1 May 1995. The EEA unites the 27 Member States of the European Union (EU) and the three EEA/EFTA states (Liechtenstein, Iceland and Norway), whereby the nationals of all EEA Member States have the right to make use of the free movement of goods, persons, services and capital ("four fundamental freedoms"), which is also stated in the EEA Agreement.

### 2.2.1. Agreement on the European Economic Area (EEA)

#### ***Article 7 EEA Agreement***

*Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:*

- (a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;*
- (b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.*

#### ***Article 36 EEA Agreement***

- 1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*
- 2. Annexes IX to XI contain specific provisions on the freedom to provide services.*

### **Article 98 EEA Agreement**

*The Annexes to this Agreement and Protocols 1 to 7, 9 to 11, 19 to 27, 30 to 32, 37, 39, 41 and 47, as appropriate, may be amended by a decision of the EEA Joint Committee in accordance with Articles 93 (2), 99, 100, 102 and 103.*

#### **2.2.2. Protocol 35 to the EEA Agreement on the implementation of EEA rules**

*(...)*

*For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.*

#### **2.2.3. Council Regulation (EEC) No 2407/92 of the Council of the European Communities of 23 July 1992 on licensing of air carriers**

##### **Article 3 para. 2 of the Regulation (EEC) No 2407/92**

*2. An undertaking meeting the requirements of this Regulation shall be entitled to receive an operating licence. Such licence does not confer in itself any rights of access to specific routes or markets.*

##### **Article 9 “Air operator’s certificates (AOC)”**

*1. The granting and validity at any time of an operating licence shall be dependent upon the possession of a valid AOC specifying the activities covered by the operating licence and complying with the criteria established in the relevant Council Regulation.*

*2. Until such time as the Council Regulation referred to in paragraph 1 is applicable, national regulations concerning the AOC, or equivalent title concerning the certification of air transport operators, shall apply.*

##### **Article 10**

*1. For the purposes of ensuring safety and liability standards an air carrier using an aircraft from another undertaking or providing it to another undertaking shall obtain prior approval for the operation from the appropriate licensing authority. The conditions of the approval shall be part of the lease agreement between the parties.*

*2. A Member State shall not approve agreements leasing aircraft with crew to an air carrier to which it has granted an operating licence unless safety standards equivalent to those imposed under Article 9 are met.*

**2.2.4. 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)**

- (22) By decision of the EEA Joint Committee No 90/2011 of July 19, 2011 amending Annex XII (Transport) of the EEA Agreement, the 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 (hereinafter **“Regulation No 1008/2008”** or **“Regulation”**) was incorporated into the Agreement subject to adaptations under Article 1 (1) of the Decision.
- (23) The conditions for the granting of an operating license are set forth in Chapter II of the Regulation No 1008/2008 and, in particular, under Article 4.
- (24) It shall be stressed that, in relation to the conditions for the granting of operating licences under Chapter II of the Regulation No 1008/2008, only Article 4 (f) is subject to an adaptation. Article 4 (f) requires that Member States and/or nationals of Member States must own more than 50% of the undertaking and effectively control it, either directly or indirectly; the adaptation allows for exceptions based on agreements with third countries, provided that the EEA Joint Committee adopts a corresponding decision. This adaption, however, is evidently unrelated to any requirement concerning the availability of national aviation infrastructure as foreseen in Article 9 (3) of the Aviation Act 2024.
- (25) Apart from this adaptation concerning Article 4 (f), no other exceptions or adaptations were made to Article 4 or to Chapter II of the Regulation. Regulation No 1008/2008, as adapted, is therefore applicable in Liechtenstein.



(26) **Recital 2**

*In order to ensure a more efficient and consistent application of Community legislation for the internal aviation market a series of adjustments to the current legal framework is required.*

**Recital 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.*

**Article 3 “Operating licence”**

*1. No undertaking established in the Community shall be permitted to carry by air passengers, mail and/or cargo for remuneration and/or hire unless it has been granted the appropriate operating licence.*

*An undertaking meeting the requirements of this Chapter shall be entitled to receive an operating licence.*

*2. The competent licensing authority shall not grant operating licences or maintain them in force where any of the requirements of this Chapter are not complied with.*

*3. Without prejudice to any other applicable provisions of Community, national, or international law, the following categories of air services shall not be subject to the requirement to hold a valid operating licence:*

*(a) air services performed by non-power-driven aircraft and/or ultralight power-driven aircraft; and*

*(b) local flights.*

**Article 4 “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;*
- (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 carrier;*
- (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;*
- (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.*

**2.2.5. 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 “Regulation No 2018/1139”)**

- (27) By decision of the EEA Joint Committee No 114/2023 of 28 April 2023 amending Annex II (Technical regulations, standards, testing and certification) and Annex XIII (Transport) of the EEA Agreement, the Regulation (EC) No 2018/1139 was incorporated into the Agreement. The Regulation No 2018/1139 is therefore applicable in Liechtenstein.

## **Chapter 1. Principles**

### **Article 1 “Subject matter and objectives”**

1. *The principal objective of this Regulation is to establish and maintain a high uniform level of civil aviation safety in the Union.*

### **Article 6 “European Plan for Aviation Safety”**

1. *The Agency, in close collaboration with Member States and relevant stakeholders as provided for in the second subparagraph of Article 5 (2), shall develop, adopt, publish, and subsequently update at least on a yearly basis a European Plan for Aviation Safety. Based on the assessment of relevant safety information, the European Plan for Aviation Safety shall identify the main safety risks affecting the European aviation safety system and set out the necessary actions to mitigate those risks.*
2. *The Agency, in close collaboration with Member States and relevant stakeholders as provided for in the second subparagraph of Article 5 (2), shall document in a dedicated safety risk portfolio the safety risks referred to in paragraph 1 of this Article and monitor the implementation of related mitigation actions by the parties concerned, including, where appropriate, by setting safety performance indicators.*
3. *The European Plan for Aviation Safety shall specify, taking into account the objectives set out in Article 1, the level of safety performance in the Union. The Commission, the Agency and the Member States shall jointly aim to achieve that level of safety performance.*

### 3. ON THE QUESTIONS REFERRED

#### 3.1. First Question

*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?*

##### 3.1.1. Direct Applicability of Community Law under Article 7 EEA

##### 3.1.1.1. Extension of Conditions set forth in Article 4 of Regulation No 1008/2008

- (28) According to Article 9 (3) of the Aviation Act 2024 AOCs and operating licenses for flights for the commercial carriage of passengers shall only be issued if the intended activities are actually realizable based on the infrastructure available in Liechtenstein. According to the underlying BuA 122/2023 the term “infrastructure” is to be understood as “airports and airfields”.<sup>9</sup>

As a preliminary remark, it must be emphasized that, given the absence of any airport or airfield for fixed-wing aircraft in Liechtenstein, **this interpretation effectively renders it impossible for the Appellant —and indeed for any commercial provider of fixed-wing aircraft services based in Liechtenstein—to obtain an operating license or an AOC.** Unsurprisingly, this outcome aligns with the Liechtenstein Government’s expressly stated intention to prevent the issuance of such licenses for commercial providers of fixed-wing aircraft services, as reflected in its position that:

*“Purely strategic decisions regarding the choice of a company’s domicile within the country, only in order to gain access to traffic rights in the European Economic Area or Switzerland without actually commencing operations in Liechtenstein, should*

---

<sup>9</sup> See BuA 122/2023, p. 24: “Infrastructure therefore includes both airports and airfields.” (Legal Exhibit No 3).

*not be promoted in principle and in particular also not for the area of fixed-wing aircraft.”<sup>10</sup>*

- (29) As previously stated under the EEA legal framework the conditions for the granting of an operating license are set forth Chapter II of the Regulation No 1008/2008 and in particular, in its Article 4.<sup>11</sup>
- (30) This provision requires, in essence, that the applicant has its principal place of business in the licensing state, holds a valid air operator certificate (AOC), owns or dry-leases aircraft, demonstrates financial fitness, maintains adequate insurance, is effectively controlled by EU/EEA nationals, and enjoys good repute. Thus, Article 4 focus exclusively on legal, financial, and operational capabilities of the air carrier and by no means on physical infrastructure of the licensing state. Consequently, **Article 4 does not require that the licensing state must have an airport or airfield in order for an operating license to be granted.**<sup>12</sup>
- (31) Thus, the condition pursuant to Article 9 (3) of the Aviation Act 2024 constitutes a clear extension, hence, an additional condition to the requirements outlined in Article 4 of Regulation No 1008/2008. On a further note, this opinion is presumably also shared by the Liechtenstein Government, since BuA 122/2023 explicitly states that, with respect to the Aviation Act 2024, *“in many areas no further national implementing provisions are required due to the directly applicable regulations”*.<sup>13</sup>

---

<sup>10</sup> See BuA 122/2023, p. 58: *“Purely strategic decisions regarding the choice of a company’s domicile within the country, only in order to gain access to traffic rights in the European Economic Area or Switzerland without actually commencing operations in Liechtenstein, should not be promoted in principle and in particular also not for the area of fixed-wing aircraft.”* (Legal Exhibit No 3).

<sup>11</sup> See above para. 23.

<sup>12</sup> See above para. 26.

<sup>13</sup> See BuA 122/2023, Recital 1.4, p. 9f: *“In addition, the relevant EEA legal acts have evolved from directives with national implementation requirements to directly applicable regulations. This change has had a direct impact on the structure of the Aviation Act as national implementing provisions are no longer required in many areas due to the directly applicable regulations.”* (Legal Exhibit No 3).

### 3.1.1.2. Inadmissibility of a unilateral extension of the conditions set forth in Article 4 of Regulation No 1008/2008

- (32) A unilateral “extension” of the conditions stipulated in Article 4 of Regulation No 1008/2008 by Liechtenstein is inadmissible for the following reasons:
- (33) The aim of the EEA Agreement is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules. The Agreement is thus, intended to create a homogenous European Economic Area so that the internal market is extended to the EFTA States.<sup>14</sup>
- (34) Accordingly, pursuant to Article 7 EEA, legal acts referred to or contained in the annexes to this Agreement or in the decisions of the Joint EEA Committee are binding on the contracting parties and shall be incorporated into or must be transposed into their domestic law. In this regard, pursuant to Article 7 (a) of the EEA Agreement, EEA legal acts which comply with an EEC regulation are to be incorporated as such into domestic law and thereby displace national Liechtenstein law.<sup>15</sup>
- (35) Therefore, Regulations within the meaning of Article 7 of the EEA Agreement are not only directly applicable in Liechtenstein,<sup>16</sup> but Article 7 EEA presuppose, at least implicitly, the primacy of transposed EEA law over the domestic law of the EEA/EFTA States. This also

---

<sup>14</sup> See Joined Cases E-2/17 and E-3/17 Efta Surveillance Authority [2017], EFTA Ct. Rep. 38, para. 59; Case E-1/16 *Synnøve Finden* [2016] EFTA Ct. Rep. 931, para. 55.

<sup>15</sup> Compare *Bussjäger*, Legal Questions of the Priority and Applicability of EEA Law in Liechtenstein, LJZ 4/06, 140. (Legal Exhibit No 4).

<sup>16</sup> Compare StGH 1995/014, decisive reason 2.1., “principle of the direct effect”: “The EEA law—as is the case with public international law in general—enjoys direct effect in the Principality of Liechtenstein. In other words, from the moment it enters into force it is directly applicable domestically as international law, without any special act of national transposition. EEA rules are “self-executing” to the extent that their purpose is to confer rights on, and impose obligations upon, individuals and undertakings and the provisions in question are unconditional and sufficiently precise to be applied by courts and administrative authorities to specific cases. Conversely, where, correctly interpreted, an EEA provision requires implementing measures through domestic legislation, it is not directly applicable (“non-self-executing”). In particular, Regulations within the meaning of Article 7 EEA Agreement/Article 189(2) of the EC Treaty are directly applicable, whereas Directives within the meaning of Article 7 EEA Agreement/Article 189(3) of the EC Treaty are binding only as to the result to be achieved for the Member States to whom they are addressed, leaving the choice of form and methods to the national authorities and thus—ordinarily—do not have direct effect.” (Legal Exhibit No 5).

results from the Protocol 35 to the EEA Agreement which states that “for cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases”.<sup>17</sup>

- (36) Thus, the Liechtenstein Administrative Court held that if a conflict of regulations can’t be solved by interpretation compliant with European Law, it is assumed that the confliction national regulation must be overruled.<sup>18</sup>
- (37) Similar, under EU and EEA law, the principles of *effet utile* and exhaustive harmonisation provide that a member state cannot oppose its domestic regulations or practices to override the regulation.<sup>19</sup> Even the establishment of binding interpretative rules is denied.<sup>20</sup>
- (38) Nonetheless, it must be noted that, in contradistinction to EU Member States, EU Regulations must undergo incorporation into the EEA Agreement for them to be

---

<sup>17</sup> Protocol 35 to the EEA Agreement; *Hoch*, The Liechtenstein Constitutional Court and the Primacy of EEA Law, 114. (Legal Exhibit No 7).

<sup>18</sup> Compare StGH 1998/61, Decisive Reason 3.1: “It must be asked whether, against this background, the StGH has effectively been deprived of the power to review the constitutionality of Article 9 (4) of the Due Diligence Act (*SorgfaltspflichtG*). After all, a finding that a statutory provision based on EEA law is unconstitutional would in practice amount to giving the Constitution—and hence national law—precedence over EEA law. That would, at least implicitly, conflict with Article 7 of the EEA Agreement, which provides that EEA law is, for the Contracting Parties, an integral and binding part of their domestic legal order or must be so incorporated. In Protocol 35 to the EEA Agreement, the EFTA States undertake, in the event of any conflict between EEA provisions and national law, to introduce—if necessary—legislation to ensure that the EEA provisions prevail. Although the EEA Agreement did not, unlike the European Communities treaties, create a supranational community, the homogeneous economic area envisaged by the Agreement (Preamble, para. 4) presupposes uniform application of EEA law in all Contracting States (see Daniel Thürer, *Liechtenstein and the international legal order*, *Archive of international law* 36/2 (1998) 98 [112 ff.]). On the other hand, the primacy of EEA law over national law must have its limits where fundamental principles or the core content of the fundamental rights guaranteed by the national Constitution would be affected. But since the law of the European Community—and thus also EEA law—recognises fundamental rights, and in particular the European Convention on Human Rights, such a conflict is unlikely ever to arise in practice.”; Bussjäger, Legal Questions of the Priority and Applicability of EEA Law in Liechtenstein, LJZ 4/06, 142. (Legal Exhibit No 4). (Legal Exhibit No 6).

<sup>19</sup> Compare the judgment of 17 May 1972 in *Leonesio v. Ministry for Agriculture and Forestry of the Italian Republic*, C-93/71, ECLI:EU:C:1972:39, para. 22; see Joined Cases E-2/17 paras. 65 *et seq.* and E-3/17 Efta Surveillance Authority [2017], EFTA Ct. Rep. 38, para. 59; Case E-1/16 *Synnøve Finden* [2016] EFTA Ct. Rep. 931, para. 55., also, Bievert in *Becker/Hatje/Schoo/Schwarze* (eds.), EU Commentary<sup>4</sup> (2018), Article 288 TFEU, para. 21; (Legal Exhibit No 8).

<sup>20</sup> Compare the judgment of 31 January 1978, *Fratelli Zerbone v. Italian Finance Administration*, C-94/77, ECLI:EU:C:1978:17, para. 27.

rendered directly applicable in EFTA Member States. This is standardized, among other things, in Article 98 of the EEA Agreement, which stipulates that the original annexes of the Agreement may be amended by the decision of the Joint Committee.<sup>21</sup> Thereby, the concerned States do not necessarily have to adopt all the provisions of a regulation, but can also make adaptations and exceptions. Those adaptations and exceptions, however, must be incorporated into the corresponding Joint's Committee's decision.

- (39) As previously stated, Regulation No 1008/2008 was incorporated into the EEA Agreement by decision of the Joint Committee No 90/2011 of July 19, 2011. Crucially, other than the adaptation regarding Article 4 (f) of Regulation No 1008/2008, which does not concern requirements regarding national aviation structure,<sup>22</sup> an exception or adaptation by Liechtenstein in relation to Article 4 or in general, Chapter II of the regulation, cannot be found. **Consequently, Chapter II of the Regulation No 1008/2008 concerning the granting of operating licenses, is, apart from Article 4 (f), applicable in Liechtenstein without any exceptions or adaptations.**
- (40) On a further note, this legal conclusion is also fully supported by the administrative practice in Liechtenstein over the past two decades:
- (41) Ever since the introduction of the original Aviation Act in 2002, the existence of physical infrastructure, such as airfields and airports, has never been regarded as a requirement for the granting of an operating licence or AOC.
- (42) The relevant BuA from 2002 merely provides that the former competent authority "DZL", within the framework of an administrative agreement with the BAZL, must examine the conditions for issuance according to EEA law and potentially apply additional Swiss criteria, provided they are EEA-compatible.<sup>23</sup>

---

<sup>21</sup> See above section 2.2.1.

<sup>22</sup> 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>23</sup> See BuA 15/2002, p. 14: *"The operating licence is issued by the DZL. In accordance with para. 2, the DZL – within the framework of an administrative agreement with the BAZL – has to examine the requirements for the issuance. When examining the requirements under EEA law, additional Swiss criteria may be added on the basis of the Exchange of Notes, insofar as these are EEA-compatible in the form of special national requirements". (Legal Exhibit No 9).*



- (43) Nowhere did it require the review or existence of national aviation infrastructure. It is therefore incomprehensible why, after more than twenty years, such an infrastructure requirement would suddenly become necessary. This abrupt change not only contradicts the uniform application of EEA law, but also highlights the arbitrary and disproportionate nature of the new condition introduced by Article 9 (3) of the Aviation Act 2024.<sup>24</sup>
- (44) Turning to EU jurisprudence, in the *Leonesio* case, the ECJ explicitly addressed the question of whether, where the conditions laid down in an EU regulation are fulfilled, an individual (in that case, a farmer) may directly invoke the regulation to claim a right against the competent Member State authority—without that authority being permitted to impose any additional requirements. The ECJ held that, insofar as asserted vis-à-vis the state, such rights arise directly upon satisfaction of the conditions laid down in the regulation, without their application being subject to national implementing provisions other than those which may be required under the regulation itself.<sup>25</sup> It follows that any national measure that alters or expands the scope of a regulation is inadmissible.
- (45) Accordingly, the ECJ outlined in its considerations that if Italy’s argument – namely, that additional national licensing requirements must be fulfilled alongside the conditions laid down in the regulation – were to succeed, Italian farmers would be placed at a disproportionately greater disadvantage compared to their counterparts in other Member States. This in turn, would represent a fundamental breach of the principle of the uniform application of the regulation throughout the Community.<sup>26</sup>
- (46) The consequences would be even more severe in the present case: If an additional requirement such as that now laid down in Article 9 (3) Aviation Act 2024 were deemed

---

<sup>24</sup> See also above para. 10, where the Appellant demonstrated that the Liechtenstein Government, recognising the absence of any sufficient legal basis for an infrastructure requirement under the former Aviation Act 2002, specifically introduced Article 9(3) of the Aviation Act 2024. As shown, this provision does not fit coherently into the overall structure of the new Aviation Act and was evidently targeted at retroactively justifying the refusal of the Appellant’s application.

<sup>25</sup> Compare the judgment of 17 May 1972, *Leonesiov. Ministry for Agriculture and Forestry of the Italian Republic*, C-93/71, ECLI:EU:C:1972:39, recital 2.

<sup>26</sup> Compare the judgment of 17 May 1972, *Leonesio v. Ministry for Agriculture and Forestry of the Italian Republic*, C-93/71, ECLI:EU:C:1972:39, paras. 21/23.

permissible, air carriers based in Liechtenstein offering commercial passenger transport with fixed-wing aircraft would not only face a disproportionately greater disadvantage compared to companies in other Member States. On account of the absence of a feasible airport in Liechtenstein and the resulting impossibility of obtaining an operating license or an AOC, **their competitiveness would be entirely eliminated.**

- (47) Furthermore, Regulation No 1008/2008 itself also leaves no national leeway for an additional licensing provision such as Article 9 (3) of the Aviation Act 2024:
- (48) A closer examination of Regulation No 1008/2008 reveals that its very structure and purpose leave no room for Member States to impose additional licensing conditions such as those introduced by Article 9 (3) of the Aviation Act 2024. The objective of the Regulation is clearly set out in its recitals. Recital 2 highlights the need for a more “efficient and consistent application” of EU legislation governing the internal aviation market, while Recital 18 stresses that this objective “cannot be sufficiently achieved by the Member States” acting individually. It must therefore be pursued at Union level. The Regulation No 1008/2008, it continues, adheres to the principle of proportionality, ensuring it does “not go beyond what is necessary” to achieve this harmonised framework.
- (49) Regulation No 1008/2008 thus aims to create a harmonised, competition-based legal regime for the licensing and operation of air carriers throughout the European Union and the EEA. It replaces diverging national approaches with a centrally governed system that enables undertakings which meet the EU/EEA-wide conditions to access the market across all Member States without being hindered by additional domestic hurdles.
- (50) This internal logic of harmonisation is most visible in Chapter II of the Regulation, which governs the granting of operating licenses:
- (51) Pursuant to Article 3 (2), second subparagraph, of Regulation No 1008/2008, an undertaking meeting the requirements of Chapter II “shall be entitled” to receive an operating licence. The phrasing „shall be entitled“ unequivocally already confers a legal

entitlement upon undertakings fulfilling the specified criteria, thereby excluding any margin of discretion for the competent authority.

- (52) Article 4 of Regulation No 1008/2008 subsequently sets out the conditions for such entitlement. The provision is consequently as well phrased in obligatory terms—"shall be granted"—and lists exhaustively the material requirements.<sup>27</sup> These criteria are clearly defined and leave, without an adaption or exception incorporated into the corresponding Joint's Committee's decision, no opening for Member States to impose additional requirements not envisaged by the Regulation itself.
- (53) As stated above, notably absent from this list is any requirement regarding the physical infrastructure, *i.e.*, the existence of an airport or airfield, in the licensing Member State.
- (54) This omission is neither an accident nor capable of being filled by national law. The Regulation's design is evident in its objective and pre-determined criteria for licensing. These criteria are to be applied uniformly across all Member States, regardless of the infrastructural feasibility of operations within the licensing state. Air services are transnational by nature; the legal framework reflects this by focusing on the air carriers legal, operational, and financial capability—not on national geographic or topographic conditions.
- (55) This reading is further reinforced by the internal structure of Regulation No 1008/2008 itself. While **Chapter III** and **Chapter IV** contain certain provisions that expressly allow for national discretion in specific areas—such as Article 16 on public service obligations or Article 19 on traffic distribution rules—**Chapter II**, which governs the conditions for the granting of operating licences, is, as a matter of principle, exhaustively harmonised. Whilst Articles 13 (3) and (4) grant a narrowly defined margin of discretion concerning specific wet lease agreements irrelevant for the case at hand, this limited exception merely underscores that the general conditions for the granting of operating licences set forth in Article 4 are fully and exhaustively harmonised. In particular, Chapter II does not permit Member States to introduce additional substantive requirements beyond those

---

<sup>27</sup> See above section 2.2.4.

expressly enumerated, nor to base refusals on infrastructural or territorial considerations.

- (56) In sum, the structure, language, and purpose of Regulation No 1008/2008 all confirm that **Chapter II and, in particular, Article 4 of the Regulation constitute an exhaustively harmonised regime for the granting of operating licences**. Unlike other provisions in the Regulation, it affords no national margin of discretion.
- (57) In the Joined Cases E-2/17, *Ferskar kjötvörur ehf v Iceland* and E-3/17 *ESA v Iceland*, the EFTA Court held that where secondary EEA law fully harmonises a subject matter, EEA States are strictly precluded from introducing additional national requirements, even where invoked grounds of justification laid down in primary EEA Law such as the precautionary principle.<sup>28</sup> In the present case, this applies *a fortiori*, as the additional requirement introduced by Article 9 (3) of the Liechtenstein Aviation Act 2024 does not even aim to protect grounds by virtue of Primary EEA Law, but rather pursues administrative convenience and strategic economic interests.<sup>29</sup>
- (58) Accordingly, any attempt by a Member State, including Liechtenstein, to impose additional conditions such as infrastructure requirements is incompatible with Regulation No 1008/2008 and violates Liechtenstein's obligations under the EEA Agreement—specifically, under Article 7 (a) and Protocol 35, which mandate that EEA regulations be applied in full and prevail over conflicting national provisions.

#### 3.1.1.3. The AOC Requirement

- (59) Among the conditions set forth in Article 4 of Regulation No 1008/2008 for the granting of an operating licence, the possession of a valid AOC is listed as a prerequisite (Article 4 (b)). As defined in Article 2 (8) of the Regulation, an AOC is a certificate issued by a competent authority of a Member State, certifying that the operator itself possesses the

---

<sup>28</sup> See the judgement of 1 February 2016 in *Ferskar kjötvörur*, E-17/15 paras. 65-67.

<sup>29</sup> See below paras. 72 *et. seq.*

technical competence and organisational structure necessary to ensure safe operations in accordance with applicable safety legislation.

- (60) In practice, this means that commercial flight operations must be certified by a competent authority which evaluates a range of operator-specific criteria. These include technical and organisational capability, crew qualifications, internal safety and maintenance procedures, and the existence of a Safety Management System (SMS) capable of proactively identifying hazards and mitigating safety risks. In Liechtenstein, pursuant to Article 5 (4) (a) of the Aviation Act 2024 the technical assessment of the requirements for issuing an AOC is carried out by the BAZL, whereas the formal granting of the AOC rests with the competent Liechtenstein authority (AHR) as set forth in Article 9 (1) (a) of the Aviation Act 2024.<sup>30</sup>
- (61) However, Article 9 (3) of the Aviation Act 2024 provides that both the operating license and the AOC shall only be issued if the intended activities are “actually realisable based on the existing infrastructure” in Liechtenstein, *i.e.*, that a feasible airport or airfield exists.<sup>31</sup> Hence, Article 9 (3) of the Aviation Act 2024 also ties the grant of an AOC not to operator-specific criteria but to the existence of national infrastructure.
- (62) Such a requirement is clearly impermissible. As demonstrated above, Chapter II of Regulation No 1008/2008 sets out a harmonised licensing system, within which the AOC is a required element.
- (63) It is not an instrument of national aviation infrastructure planning, but rather a safety-related certification based solely on operator-specific criteria. None of these criteria relate to the physical or geographical conditions of the licensing state.
- (64) Nowhere in Regulation No 1008/2008—nor in its recitals—is there any indication that the existence of an airport or airfield within the territory of the licensing state constitutes

---

<sup>30</sup> This division of responsibilities is based on Section II of the Exchange of Notes, under which Liechtenstein retains the authority to issue operating licences and AOCs, but must consult the Swiss licensing authority and refrain from granting a licence where the latter finds that the requirements are not met.

<sup>31</sup> See above para. 28.

a precondition for the issuance of an AOC. It also deviates from uniform practice in all other EU and EEA Member States as well as Switzerland, none of which require the existence of national infrastructure as a precondition for granting an AOC.<sup>32</sup>

- (65) As established above under section 3.1.1.2, the imposition of an infrastructure requirement such as feasible airports and airfields as a condition for granting an operating license constitutes an inadmissible deviation from the legal framework laid down in Article 4 of Regulation No 1008/2008.
- (66) This legal conclusion must apply with equal force to the granting of an AOC, which is intrinsically linked to the operating license under Chapter II of the Regulation No 1008/2008. The AOC, like the operating license, is governed by harmonised standards intended to assess the operator's technical and organisational fitness, not the territorial availability of infrastructure in the licensing state. To introduce such an infrastructure-based limitation—either directly at the AOC stage or indirectly through its linkage to the operating license—would subvert the very purpose of the Regulation's exhaustive harmonisation and hence, unlawfully restrict access to the internal aviation market.

#### 3.1.1.4. Conclusion

- (67) Taken as a whole, the current analysis demonstrates that Regulation No 1008/2008—by virtue of its direct applicability and exhaustive harmonisation, closely linked as well with the principle of primacy of EEA Law and *effet utile*, — precludes Member States from introducing any additional or supplementary conditions beyond those expressly laid down in its provisions. This applies with particular clarity to Article 4, which sets out an exhaustive list of criteria for the granting of an operating licence and leaves no discretion for Member States to impose further substantive requirements, whether directly or indirectly. The same holds true for the issuance of an AOC, which is functionally and legally inseparable from the operating licence under the Regulation. Any deviation from this harmonised framework—especially one that results in the systematic exclusion of

---

<sup>32</sup> See below para. 93 *et. seq.*

entire categories of operators, such as commercial fixed-wing aircraft operators based in Liechtenstein—not only undermines the internal coherence of the Regulation, but also constitutes a breach of Liechtenstein’s obligations under the EEA Agreement.

### 3.2. Second Question

*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?*

#### (68) Preliminary Remarks on the Second Question

Before turning to the second question, it must be noted that its examination is closely linked to the considerations already addressed under the first question. Although several fundamental principles of EEA law have been briefly outlined in that context (*i.e.* the principles of direct applicability, exhaustive harmonisation, and *effet utile*), the second question serves to further elaborate and deepen the analysis of principles affected by the restrictions set forth in Article 9 (3) of the Aviation Act.

#### 3.2.1. Effet utile and Legal Certainty

##### 3.2.1.1. Effet utile

(69) The application of Article 9 (3) of the Aviation Act 2024 would clearly contravene the Principle of *effet utile* according to which **Community law must be interpreted in a manner that ensures its practical effectiveness.**<sup>33</sup>

(70) As outlined various times, in the Liechtenstein Government’s view the term “infrastructure” as defined in Article 9 (3) of the Aviation Act 2024 refers to airports and

---

<sup>33</sup> See, to this effect, the judgment of 26 July 2011 in *Clauder*, E-4/11, para. 48; compare StGH 1998/61, Decisive Reason 3.1. (Legal Exhibit No 6), see FN 16; first evident in the judgment of 04 July 1963, *Federal Republic of Germany v Commission*, C-24/62.

airfields.<sup>34</sup> However, due to the topological conditions and the potential scarcity of suitable areas that conflict with the construction of taxiways for fixed-wing aircraft, the construction of airports for fixed-winged aircraft in Liechtenstein is merely not possible.<sup>35</sup>

- (71) Consequently, the interpretation of “infrastructure” as (feasible) airports and airfields effectively renders it impossible for the Appellant and any commercial provider of fixed-wing aircraft services based in Liechtenstein, to obtain an operating license or an AOC.
- (72) This, however, was according to the BuA 122/2023 precisely the aim of Article 9 (3) of the Aviation Act 2024:

*“In order to effectively supervise such an extraterritorial economic activity of a company domiciled in Liechtenstein, Liechtenstein would have to establish comprehensive administrative structures, which – if they could be accomplished within a reasonable period of time - would in any case prove to be disproportionate. (...) As there is no landing site for so-called fixed-wing aircraft in Liechtenstein **due to the topography, these provisions can only apply to helicopter flights.**”*<sup>36</sup> (Our emphasis added).

- (73) In the same vein, it must be added, that even though the Liechtenstein Government attempts to tie this to issues related to the supervision of extraterritorial economic activity, the true purpose of the provision is stated unambiguously on page 58 of the BuA 122/2023:

*“Purely strategic decisions regarding the choice of a company’s domicile within the country, only in order to gain access to traffic rights in the European Economic Area or Switzerland without actually commencing operations in Liechtenstein, should*

---

<sup>34</sup> See e.g. above para. 28.

<sup>35</sup> Accordingly, Liechtenstein, in fact, has only a single take-off and landing site for helicopters.

<sup>36</sup> See BuA 122/2023, p. 22. (Legal Exhibit No 3).



*not be promoted in principle and in particular also not for the area of fixed-wing aircraft.”<sup>37</sup>*

- (74) At the latest, it becomes evident that the reasoning, according to which Liechtenstein would need to supervise extraterritorial economic activity and therefore establish additional administrative structures (allegedly a disproportionate measure), is a mere pretext, when the Liechtenstein Government itself, in context of justifying the broad competences of the BAZL under the new Aviation Act 2024, sets out the following on page 25 of the BuA 122/2023:

*“In particular, extensive financial and human resources would also have to be made available in order to equip a separate aviation authority with the necessary specialized personnel. (...) **By continuing its cooperation with Switzerland in the area of civil aviation, Liechtenstein can continue to perform its tasks efficiently and, in a resource-saving manner with the necessary expertise.**”<sup>38</sup>* (our emphasis added).

- (75) This clearly shows that the necessary supervision in Liechtenstein is already ensured through the delegation of extensive competences to the BAZL, and that Liechtenstein itself fully recognises that no new administrative structures or additional resources are required to maintain access to operating licences.
- (76) Hence, it is unmistakably clear that the **true purpose of Art 9 (3) of the Aviation Act 2024 is to prevent undertakings like the Applicant’s from using a Liechtenstein domicile to access EEA or Swiss traffic rights for fixed-winged aircraft.**
- (77) It follows, that Article 9 (3) of the Aviation Act 2024 deprives fixed-wing aircraft service providers based in Liechtenstein of any realistic possibility to obtain an operating licence or AOC, thereby nullifying the rights conferred under Regulation No 1008/2008. As this outcome was deliberately intended by the Liechtenstein legislator and is structurally

---

<sup>37</sup> See BuA 122/2023, p. 58. (Legal Exhibit No 3).

<sup>38</sup> See BuA 122/2023, p. 30. (Legal Exhibit No 3).

impossible to overcome due to the country's topography, **the provision evidently violates the principle of *effet utile* and is thus incompatible with EEA law.**

#### 3.2.1.2. Legal Certainty

- (78) Likewise, the provision infringes the fundamental principle of legal certainty, which is an essential element of the EEA legal order. Directives must be implemented into the national legal orders of the EEA States with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. EEA States must ensure full application of directives not only in fact but also in law.<sup>39</sup>
- (79) As regulations, contrary to directives, are directly applicable, the principle of legal certainty is even more important. With the additionally created condition of “infrastructure” for the issuing of an AOC, the clarity that is necessary to satisfy the requirements of legal certainty is undermined.
- (80) As already outlined, Article 9 (3) of the Aviation Act 2024 introduces an additional and vague condition of “infrastructure” for the issuance of an AOC and operating licence, thereby depriving fixed-wing operators of a realistic possibility to obtain these rights.<sup>40</sup>
- (81) Moreover, the Government’s justification for this requirement—allegedly the need to supervise extraterritorial economic activity—is, as previously shown, inconsistent with its own acknowledgment that the necessary supervision is already ensured through cooperation with the BAZL. Consequently, Article 9 (3) of the Aviation Act 2024 lacks the clarity, transparency, and consistency required under the principle of legal certainty and is also therefor incompatible with EEA law.

---

<sup>39</sup> See, to this effect, E-3/15 LGU of 2 October 2015, para. 33.

<sup>40</sup> See, e.g., above paras. 69 *et seq.*

### 3.2.2. Structural Coherence and Equal Treatment Across Sectors

- (82) It is established case law that legal rules and regulatory frameworks across comparable economic sectors must be applied in a coherent and non-discriminatory manner, unless objective and proportionate reasons justify differential treatment. This stems from the general principle of equality under EEA law and is closely linked to the prohibition of arbitrary distinctions and hidden restrictions to the four freedoms. The ECJ held that Member States may not adopt measures in one sector that contradict the regulatory logic or internal market principles applicable in another, comparable field without objective justification.<sup>41</sup>
- (83) In the present case, the introduction of a domestic infrastructure requirement for fixed-wing air carriers under Article 9 (3) of the Aviation Act 2024 must be assessed not only in light of Regulation No 1008/2008 and its exhaustive harmonisation, but also with regard to its coherence with the treatment of other transport-related sectors under Liechtenstein law.
- (84) In this context it is crucial to emphasize, that undertakings registered in Liechtenstein regularly engage in personnel leasing to shipping companies operating in the European inland waterway transport sector even though no national shipping infrastructure, such as operational port facilities, exists in Liechtenstein.
- (85) In its judgment in Case E-1/21 (ISTM), the EFTA Court confirmed, by way of inverse reasoning, that such business models may fall within the scope of Liechtenstein law, provided that the undertaking exercises genuine economic activity in Liechtenstein. While the Court emphasised the importance of actual establishment and central administration, it notably did not consider the absence of domestic infrastructure to be a legal obstacle. As a result, it must be deemed possible—under certain conditions—for a company registered and operating from Liechtenstein to lend its personnel to shipping

---

<sup>41</sup> Compare, by way of example, *Commission v Italy*, C-110/05, ECLI:EU:C:2009:66, para. 60 ff.

companies in other European countries. No sector-specific infrastructure requirement was addressed, let alone imposed, in that decision.<sup>42</sup>

- (86) Against this backdrop, it is important to highlight that the Appellant maintains not only its statutory seat, but also its actual operational base in Liechtenstein. The undertaking is effectively managed from Liechtenstein, and its administrative, financial and managerial functions are carried out locally. It therefore satisfies the criteria for genuine establishment under both national and EEA law and is clearly distinguishable from formal or purely nominal entities.
- (87) The analogy with inland navigation was also raised during the legislative process by the Liechtenstein Chamber of Commerce. The Government dismissed the comparison, claiming that civil aviation was not comparable to “modern, global” inland shipping due to the absence of a shipping register in Liechtenstein.<sup>43</sup> However, this distinction lacks substance: both sectors are governed by sophisticated and dynamic legal frameworks, including Directive (EU) 2017/2397 of the European Parliament and of the Council of 12 December 2018 on the recognition of professional qualifications in inland navigation as well as the Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport. There is no objective justification for applying a domestic infrastructure requirement solely to aviation.
- (88) This comparison highlights the structural inconsistency of introducing such a requirement exclusively for the aviation sector, *i.e.* undertakings who are commercially providing fixed-

---

<sup>42</sup> See the judgment of 14 December 2021, *ISTM vs. Liechtensteinische AHV-IV-FAK*, E-1/21, para. 29.

<sup>43</sup> See BuA 122/2023, p. 23, 24: *“In this context, the Chamber of Commerce also lists the following additional questions (with the Liechtenstein Government’s comments in italics below each question): (...) The question arises as to why there are companies in Liechtenstein that have their registered office in Liechtenstein according to the extract from the commercial register and lend their personnel to shipping companies in the European inland waterway transport sector, in particular inland waterway transport on the Rhine, although actual operation in the shipping sector is not possible in Liechtenstein. The government does not believe that anything can be gained from this comparison. The staff leasing industry is not comparable with modern, global civil aviation. Moreover, there is no shipping register in Liechtenstein, which means that no ship sails under the Liechtenstein flag. Although there are companies based in Liechtenstein that send personnel on ships, the situation is not comparable with the civil aviation sector.”* (Legal Exhibit No 3).

winged aircraft services. If cross-border operations without domestic infrastructure are permissible in analogous, equally regulated sectors under EU/EEA law, then the infrastructure criterion introduced by Article 9 (3) of the Aviation Act 2024 must be deemed both serious concerns as to its proportionality and internal consistency with the EEA's fundamental freedoms and harmonized regulatory framework.

- (89) Furthermore, Article 9 (3) of the Aviation Act 2024 applies exclusively to undertakings offering flights for the **commercial carriage of passengers**, cargo and/or mail. It follows that the requirements stipulated therein, do not apply to undertakings offering **non-commercial flights** with fixed-wing aircraft. Thus, without any objective justification, a distinction is drawn between commercial and non-commercial providers, even though both categories are equally affected by the absence of airports or airfields in Liechtenstein. This selective application of the infrastructure requirement constitutes an arbitrary differentiation and infringes the principle of equal treatment under EEA law.

### 3.2.3. The Rule of Law

- (90) The EFTA States share the fundamental European values such as freedom, equality and the rule of law.<sup>44</sup> Similar and corresponding to the principles already set out herein, the rule of law, enshrined in Article 2 of the Treaty on European Union, guarantees the uniform application of EU law across all Member States, creating a predictable environment for people and businesses. In this sense, this also applies to the EFTA states and is particularly important with regard to the establishment of an internal aviation market.
- (91) Already in 1994, the EFTA Court had to address the rule of law. Among other things, the question arose how to interpret the expression "court or tribunal" in Article 34 of the

---

<sup>44</sup> Compare EEA EFTA Comment on the European Commission's proposal for a Regulation of the European Parliament and of the European Council establishing the Rights and Values Programme of 4 March 2019, Ref. 18-4256, p. 1 Executive Summary and Support of the objectives of the Programme "1".

Surveillance and Court Agreement. The EFTA Court pointed out that the rule of law must be borne in mind when interpreting the term. In that context, it stated:

*“It is intended as a means of ensuring a uniform interpretation of the EEA Agreement and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of the EEA Agreement. That purpose must also be taken into account in interpreting the expression “court or tribunal”.*<sup>45</sup>

- (92) The reform of Article 9 (3) of the Aviation Act in 2024 created additional conditions which, as previously demonstrated, find no support in Article 4 of Regulation No 1008/2008. Consequently, such additional requirements cannot be found within the legal frameworks of other EU/EEA Member states.
- (93) By way of example, a legal comparison with Austria shows that such “infrastructure” is, not at all considered in the context of issuing an AOC. Moreover, Austria has not been enacted any additional legislation but instead the website of the responsible Austrian authority for air traffic control and air safety (Austro Control GmbH) refers to the fact, that the decision of an AOC solely relies on Regulation No 1008/2008.<sup>46</sup>
- (94) In Germany, § 20 of the Air Traffic Act (LuftVG) regulates the issuing of an operating license, explicitly referring to Regulation No 1008/2008. In this context, § 20 para 2. LuftVG sets forth that a license shall be denied if the applicant or other responsible parties are deemed “unreliable”, a criterion that is already fully addressed by Article 4 (i) of Regulation No 1008/2008. This further shows that Regulation No 1008/2008 must be applied strictly and uniformly across Member States.<sup>47</sup>
- (95) To summarize, it can therefore be said that such conditions have not been standardized in the Member States of the European Union, to which Regulation No 1008/2008 applies equally, which is why the reform of Article 9 (3) of the Aviation Act 2024 contradicts the

---

<sup>45</sup> See, to this effect, E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* of 16 December 1994, para. 25.

<sup>46</sup> See Austro Control, Fixed Wing, Initial issue AOC  
[<https://www.austrocontrol.at/jart/prj3/ac/main.jart?rel=en&content-id=1420599199679>].

<sup>47</sup> See [[https://www.gesetze-im-internet.de/luftvg/\\_\\_20.html](https://www.gesetze-im-internet.de/luftvg/__20.html)].

practical and effective implementation of Article 4 of Regulation No 1008/2008. By imposing non-standardized prerequisites that have no basis in the Regulation No 1008/2008, the reform undermines the rule of law's core requirement of legal certainty and predictable, equal treatment across all EEA and EU States.

- (96) On a sidenote, according to Swiss aviation law, it is not even necessary for an airline to prove that it has the right to use the landing stripes in order to obtain an operating license. The responsible authority, the BAZL, informed all Swiss air operators of this in a letter dated 24.06.2011.<sup>48</sup> It therefore seems incomprehensible why there should be an actual infrastructure for the issuing of an AOC if not even the authorization to use such an infrastructure is required for the issuing.

#### 3.2.4. Conclusion

- (97) For all the above reasons, the provision pursuant to Article 9 (3) of the Aviation Act 2024 in its present form clearly constitutes an inadmissible extension of Regulation No 1008/2008, and due to *effet utile*, legal certainty, structural coherence and equal treatment across sectors, the primacy of EEA law and the rule of law, it is precluded by EEA law and must not be applied by national authorities to the present matter.<sup>49</sup>

---

<sup>48</sup> See Circular of the BAZL to all Swiss air operators holding a licence for commercial passenger transport dated 24 June 2011 (Legal Exhibit No 1).

<sup>49</sup> Compare VGH 2013/093, Decisive Reason 4. b): “In the Principality of Liechtenstein, EEA law generally enjoys primacy over national statutory law (StGH 1998/60). EEA law takes precedence over national law in the sense that it must be applied even against any national provision that conflicts with it (see Bussjäger, *Legal Questions of the Priority and Applicability of EEA law in Liechtenstein*, LJZ 4/06, p. 142). If such a conflict of norms cannot be resolved by an interpretation conforming to European law, the conflicting national provision is effectively «disapplied»; (Legal Exhibit No 10); compare StGH 2013/196, Decisive Reason 3.4.: “The result is therefore a conflict between EEA law—which requires the effective recovery of unlawfully granted aid—and domestic law, which provides no procedural basis for such recovery. In view of the primacy of EEA law, the court of first instance cannot be accused of arbitrariness for, after the legislature remained inactive, relying on the principle of effectiveness of European law (see recital 11 of the contested decision) and ultimately invoking Article 14 (3) of Protocol 3 to the EEA Agreement as the procedural basis for the contested recovery order, thus effectively ensuring the primacy of EEA law. Nor does the fact that Article 14 (3) of Protocol 3 to the EEA Agreement is, by its wording, addressed to the Member States alter this conclusion, since that does not preclude its direct applicability.” (Legal Exhibit No 11).

### 3.3. Third Question

*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)?*

- (98) Even assuming, *arguendo*, that Regulation No 1008/2008 would give room for discretion concerning the restrictions set forth in Article 9 (3) of the Aviation Act 2024, such restrictions would nonetheless infringe upon the freedom to provide services as enshrined in Article 36 of the EEA Agreement.
- (99) On a general note, the freedom to provide services includes the elimination of any discrimination against a service provider on the basis of nationality or the fact that the provider is established in a different EEA member state other than the one in which the service is to be established.<sup>50</sup>
- (100) Further, however, the prohibition on restricting the freedom to provide services also includes the prohibition of the freedom in the country of origin. Therefore, an undertaking may rely on the freedom to provide services against the State in which it is established if services are provided for recipients in another Member State.<sup>51</sup>
- (101) The Appellant has its operational seat in Liechtenstein and plans to provide the service of commercially transporting passengers in fixed-wing aircraft in an evident cross-border manner in various EEA Member States. Thus, its offer is directed at service recipients in other Member States.

---

<sup>50</sup> See *Einarsson* in *Arnesen/Fredriksen/Graver/Mestad/Vedder*, Agreement on the European Economic Area [2018], Article 36, para. 4; see the judgment of 25 April 2012, *Granville Establishment and Volker Anhalt, Melanie Anhalt and Jasmin Barbaro, née Anhalt*, E-13/11, para. 38.

<sup>51</sup> See *Holoubek* in EU Commentary<sup>4</sup>, Articles 56 and 57 TFEU, para. 34 (Legal Exhibit No 8); compare the judgment of 10 May 1995, *Alpine Investments BS vs. Minister of Finance*, C-384/93, ECLI:EU:C:1995:126, para. 39.



- (102) But even in the absence of a cross-border situation, a restriction of the rights provided for in Chapter III of Directive 2006/123 would not be possible.<sup>52</sup> In the *Cad Mellano* case, the Court clarified that although Chapter III of Directive 2006/123 presupposes a cross-border element, restrictions affecting the exercise of the freedom to provide services are nonetheless subject to strict scrutiny under primary law. Thus, even absent a cross-border situation, national measures remain bound by the fundamental principles of non-discrimination and proportionality laid down in the EEA Agreement and the Treaty on the Functioning of the European Union.
- (103) Should Article 9 (3) of the Aviation Act 2024 be applied or interpreted in such a way that providers that intend to offer flights with fixed-wing aircraft are effectively prevented from obtaining an operating license together with an AOC in Liechtenstein (meaning that it is *de facto* excluded from offering the service in EEA Member States), the access to the market of services in those Member States would be directly affected. As a consequence, this restriction would be capable of hindering access to the provision of services within the EEA.<sup>53</sup>
- (104) According to well settled case law, a restriction on the freedom to provide services is only compatible with the law if several cumulative conditions are met: the measure must be applied in a non-discriminatory manner, be justified by compelling reasons of general interest, be suitable to achieve the intended aim, and not exceed what is necessary to achieve that objective.<sup>54</sup>
- (105) As regards the first criterion, it must be assumed that Article 9 (3) of the Aviation Act 2024 entails indirect discrimination, as it exempts undertakings offering private flights with fixed-wing aircraft from its scope. Accordingly, it draws a distinction between undertakings offering commercial flights and those offering private flights with fixed-wing aircraft, without any objective justification. Given that undertakings offering private

---

<sup>52</sup> Compare the judgement of 7 November 2024, *Cad Mellano*, C-503/23, EU:C:2024:933, para 50.

<sup>53</sup> Compare the judgment of 10 May 1995, *Alpine Investments BS vs. Minister of Finance*, C-384/93, EU:C:1995:126, para. 31.

<sup>54</sup> Compare e.g. the judgment of 30 November 1995, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, C-55/94, ECLI:EU:C:1995:411, para. 37.

flights are likely closely connected to important Liechtenstein nationals who are the ultimate beneficial owners of such aircraft, and that the BuA 122/2023 provides no explanation for their exemption, it must be inferred that the differentiation is, at least in effect, based on considerations linked to nationality.

- (106) In any case, there are no compelling reasons of general interest justifying the restrictions set forth in Article 9 (3) of the Aviation Act 2024.
- (107) As previously stated, the Liechtenstein Government attempts to justify the restriction by arguing that commercial air services would necessarily be provided outside Liechtenstein due to topological constraints, and that supervising such extraterritorial activities would require the introduction of comprehensive administrative structures — a measure allegedly disproportionate. However, general administrative difficulties are insufficient to justify a restriction on fundamental freedoms.<sup>55</sup> Moreover, the mere absence of infrastructure (i.e., feasible airfields and airports) constitutes only a factual limitation, not a compelling reason of general interest.
- (108) But even if the Liechtenstein Government’s argumentation were capable to demonstrate a compelling general interest, such an interest is not present in the case at hand, as, in fact, the establishment of new administrative structures is not required:
- (109) Due to the Exchange of Notes administrative and supervisory burdens in civil aviation have been substantially reduced in Liechtenstein. This bilateral agreement laid the legal foundation for delegating essential technical, operational, and supervisory tasks to the competent Swiss authorities.<sup>56</sup> Building upon this Treaty, Article 5 of the Aviation Act 2024 now formally entrusts the Swiss Federal Office of Civil Aviation (BAZL) with extensive supervisory and operational responsibilities on behalf of the Liechtenstein authorities.

---

<sup>55</sup> Compare the judgment of 25 July 1991, *Manfred Säger v. Denemeyer & Co. Ltd*, C-76/90, ECLI:EU:C:1991:331, para. 20; compare the judgment of 31 March 1993, *Dieter Kraus vs. Land Baden-Württemberg*, C-19/92, ECLI:EU:C:1993:125, para. 35.

<sup>56</sup> Exchange of Notes, LGBI. 2003 No 40; see above section 2.1.1.

- (110) These include, *inter alia*, the licensing of training organisations (ATO), the supervision of declared aviation activities, the registration of Liechtenstein aircraft in the Swiss aircraft register, and the monitoring of the airworthiness and maintenance of such aircraft. In addition, the BAZL is responsible for issuing approvals for protective measures in civil aviation, organising the civil aviation search and rescue service, and examining the conditions for the issuance of AOCs and operating licences for commercial air services.<sup>57</sup>
- (111) Hence, through the delegation of these tasks to the BAZL, Liechtenstein ensures comprehensive technical and operational oversight without the need to establish its own independent administrative structures.
- (112) Consequently, the Liechtenstein Government itself acknowledges that this institutional setup was established precisely to avoid the need for Liechtenstein to allocate extensive financial and personnel resources. Thus, stating in the BuA that the **aim of such broad delegation of competences to the BAZL under the new Aviation Act 2024 is to prevent Liechtenstein from having to provide “extensive financial and personnel resources to equip its own aviation authority with the necessary specialized personnel.”**<sup>58</sup> (Our emphasis added). It subsequently outlines that with continued cooperation with Switzerland in the field of civil aviation, **“Liechtenstein can continue to perform its tasks efficiently and resourcefully with the required expertise”**.<sup>59</sup> (Our emphasis added).
- (113) In addition, the European Union Aviation Safety Agency (EASA) ensures uniform safety and environmental standards across the EU and associated EEA states, including Liechtenstein.<sup>60</sup> The responsibilities of EASA encompass ensuring safety oversight and providing support to countries in areas such as air operations and air traffic management, while also promoting safety standards on both EEA and global levels.<sup>61</sup> Furthermore, under Article 13 of the Aviation Act 2024, the Swiss Transportation Safety Investigation

---

<sup>57</sup> See above section 2.1.3.

<sup>58</sup> See above para. 74.

<sup>59</sup> *Ibid.*

<sup>60</sup> See Regulation No 2018/1139, Articles 1, 6; Decision of the EEA Joint Committee No 114/2023.

<sup>61</sup> See European Union, EASA, What it does [[https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/european-union-aviation-safety-agency-easa\\_en](https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/european-union-aviation-safety-agency-easa_en)].

Board (STSB, German: SUST) is responsible for investigating aviation accidents and incidents, thereby ensuring systemic safety improvements.

- (114) Against this background, there is evidently no necessity for Liechtenstein to establish additional administrative structures.
- (115) Finally, the inconsistency of the Liechtenstein Government’s argument becomes even apparent withing Article 9 (3) of the Aviation Act 2024 itself. As stated above, the restriction introduced by Article 9 (3) applies exclusively to undertakings, who are offering commercial flights with fixed-wing aircraft, whereas undertakings offering private flights with such aircraft — who, due to the same topographical conditions, also cannot perform operations within Liechtenstein — remain unaffected.
- (116) This selective application reveals that the alleged need for extensive additional administrative resources is merely a pretext. As evidenced by the Liechtenstein Government’s own statements the true objective of Article 9 (3) of the Aviation Act 2024 is to prevent “purely strategic decisions” regarding the choice of corporate domicile aimed at gaining access to traffic rights in the EEA or Switzerland,<sup>62</sup> rather than addressing any genuine administrative burden.
- (117) An argument of “purely strategic decisions”, however, cannot justify restrictions on freedom in the country of origin. The exercise of the freedom in the country of origin and the freedom to provide services cannot, as such, be considered abusive. Therefore, the freedom to provide services cannot be generally restricted.<sup>63</sup>
- (118) It follows that, since no, or at most, only minimal additional supervisory structures would need to be established in Liechtenstein, the restrictions set forth in Article 9 (3) Aviation Act 2024 are neither suitable nor necessary for reducing the administrative burden in Liechtenstein.

---

<sup>62</sup> See paras. 64 *et seq.* and BuA 122/2023, p. 58. (Legal Exhibit No 3).

<sup>63</sup> See *Holoubek* in EU Commentary<sup>4</sup>, Articles 56 and 57 TFEU, para. 116 (Legal Exhibit No 8).

- (119) Nevertheless, should the Court consider that an undue additional burden would arise for Liechtenstein, such a burden could readily be addressed through an expansion of the existing cooperation with the Swiss Federal Office of Civil Aviation (BAZL). Thereby, ensuring adequate supervision of commercial providers of fixed-wing aircraft without necessitating the creation of national infrastructure.
- (120) Hence, the *de facto* practical impossibility for Liechtenstein-based operators of commercial flights with fixed-wing aircraft to obtain the necessary licences, and their resulting exclusion from the EEA market, would eventually also constitute a manifestly disproportionate response to any potential administrative burden.
- (121) For all these reasons, the Appellant submits that Article 9 (3) of the Aviation Act 2024 must be regarded as an inadmissible restriction of the freedom to provide services.

#### 4. CONCLUSION

Accordingly, the Appellant proposes that the Court responds to the Request for an Advisory Opinion as follows:

- I. It follows 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. Therefore questions 2 and 3 didn't have to be addressed.

If the first question is answered with no:

- II. 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 are precluded by the objective of establishing an internal aviation market and other principles of EEA law.

If the second question is answered with no:

- III. Article 9 (3) of the Liechtenstein Aviation Act 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, is not compatible with Article 36 of the EEA Agreement (freedom to provide services).

Schaan, 28. April 2025

Valair AG