JUDGMENT OF THE COURT
10 November 2014

(Admissibility – Exchange of information on convictions of legal persons – Freedom to provide services – Freedom of establishment – Directive 2004/18/EC – Directive 2006/123/EC)

In Case E-9/14,

Otto Kaufmann AG

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Liechtenstein (*Fürstliches Landgericht des Fürstentums Liechtenstein*) on the interpretation of EEA law with regard to the recording of criminal convictions of legal persons,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur) and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having regard to the written observations of the Liechtenstein Government, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents; the Netherlands Government, represented by Mielle Bulterman, Head, and Charlotte Schillemans, Staff Member, European Law Division, Legal Affairs Department, Ministry of Foreign Affairs, acting as Agents; the Norwegian Government, represented by Torje Sunde, advokat, Office of the Attorney General (Civil Affairs), and Ingunn Skille Jansen, Senior Advisor, Department of Legal Affairs, Ministry of Foreign Affairs, acting as Agents; the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Janne Tysnes Kaasin, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents; and the European Commission ("the Commission"), represented by Adrián Tokár and Karl-Philipp Wojcik, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Liechtenstein Government, represented by Thomas Bischof; ESA, represented by Janne Tysnes Kaasin and Xavier Lewis; and the Commission, represented by Adrián Tokár, at the hearing on 1 October 2014,

gives the following

Judgment

I Facts and procedure

1 By judgment of 23 January 2014, the Princely Court of Liechtenstein ("the Princely Court") convicted Otto Kaufmann AG, a company registered in Liechtenstein, for failing to transfer employee and employer contributions to an occupational pension scheme. Otto Kaufmann AG was sentenced to a fine of CHF 700. The judgment was sent for registration onto the criminal record to the designated judge of the Princely Court who maintains the Liechtenstein criminal record.

2 The designated judge invited the public prosecutor's office to submit observations on whether to enter the conviction of Otto Kaufmann AG onto the record. The prosecutor's office opposed the entry of the conviction on the criminal record on the basis that Otto Kaufmann AG is not a natural person.

3 By letter registered at the Court on 25 March 2014, the Princely Court made a request for an advisory opinion on the following question:

> *Does the EEA Agreement, in particular the provisions on the freedom to provide services and freedom of establishment and/or individual acts of secondary law (for example, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts or Directive 2006/123/EC on services in the internal market, which have both been incorporated into EEA law), require that where national law allows for legal persons to be convicted by a criminal court those convictions must also be clearly recorded, for example, in a criminal record?*

4 The requesting court observes that there is no cross-border element to the case. However, in its view, the request for an advisory opinion is nevertheless admissible since the issue raised is capable of producing effects not confined to Liechtenstein. The national court refers in that context to Case C-367/12 *Sokoll-*

Seebacher, judgment of 13 February 2014, published electronically, paragraphs 10 and 11.

5 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

II Legal background

EEA law

6 Article 31 EEA reads:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*
>
> *2. Annexes VIII to XI contain specific provisions on the right of establishment.*

7 Article 36 EEA reads:

> *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.*

8 Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

> *The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.*

Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.

…

9 In asking whether the EEA Agreement imposes an obligation to record convictions of legal persons, the requesting court has mentioned Articles 31 and 36 EEA. Furthermore, as examples of secondary law, the requesting court has mentioned Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ("Directive 2004/18") (OJ 2004 L 134, p. 114), and Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ("Directive 2006/123") (OJ 2006 L 376, p. 36).

10 Furthermore, the Netherlands Government has introduced in its written observations as additional examples Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services ("Directive 96/71") (OJ 1997 L 18, p. 1), and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications ("Directive 2005/36") (OJ 2005 L 255, p. 22).

11 As explained in the Report for the Hearing, these directives are all part of the EEA Agreement.

12 Article 45(2)(c) of Directive 2004/18 provides that an economic operator who has been convicted of any offence concerning his professional conduct shall be excluded from participating in a public contract. As evidence that an economic operator has not been subject to such a conviction, the requesting EEA State shall, pursuant to Article 45(3) of Directive 2004/18, accept from the requested EEA State "the production of an extract from the 'judicial record' or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes showing that these requirements have been met …". Where the State in question does not issue such documents or certificates, "they may be replaced by a declaration on oath or, in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes".

13 Article 33(1) of Directive 2006/123 provides that EEA States shall, at the request of another EEA State, "supply information, in conformity with their national law, on disciplinary or administrative actions or criminal sanctions and decisions concerning insolvency or bankruptcy involving fraud taken by their competent

authorities in respect of the provider which are directly relevant to the provider's competence or professional reliability".

14 Article 4(2) of Directive 96/71 and Article 56(2) of Directive 2005/36 provide for a similar exchange of information between EEA States in the fields covered by those directives.

National law

15 Pursuant to Section 1(1) of the Act of 2 July 1974 on Criminal Records and the Removal of Convictions from the Records (*Gesetz über das Strafregister und die Tilgung gerichtlicher Verurteilungen; LR 330*) ("Criminal Records Act"), a register shall be kept for the purpose of recording criminal convictions. According to Section 1(2), the responsibility for maintaining the record shall be assigned to a judge of the Princely Court. As explained in the request for an advisory opinion, the decision whether a conviction must be entered on the criminal record is considered a judicial activity under Liechtenstein law.

16 Section 2(1) of the Criminal Records Act establishes that all convictions handed down by domestic courts in relation to criminal offences or misdemeanours shall be entered on the criminal record. It is unclear, however, whether the conviction of a legal person must be entered on the criminal record.

III Admissibility

Observations submitted to the Court

17 In its written observations, ESA has questioned whether the Princely Court can be considered a court or tribunal for the purposes of Article 34 SCA when making a decision concerning an entry onto the criminal record, and accordingly, whether it is entitled to request an advisory opinion. However, having regard to Case E-23/13 *Hellenic Capital Markets Commission*, judgment of 9 May 2014, not yet reported, paragraphs 33 and 34, ESA assumes that the request is admissible.

18 This issue was not raised in any other participants' written observations. However, at the oral hearing, the Commission shared ESA's doubts on this point. It submitted that whether an activity is judicial for the purposes of Article 34 SCA must be determined according to EEA law and not on the basis of national law.

19 According to the Norwegian Government, it follows from the wording of the EEA Agreement and case law that the application of Articles 31 and 36 EEA requires a cross-border element. It appears from the reference itself that this condition is not fulfilled in the present case. The Norwegian Government contends therefore that the part of the question that relates to Articles 31 and 36 EEA is hypothetical and should be found inadmissible.

20 Were this not the case, the Norwegian Government continues, a request for an advisory opinion could in principle be made also in cases concerning purely internal situations, without any connection to EEA rules. This would go beyond the aim of the advisory opinion procedure, which is to provide an interpretation of EEA law against a factual background. The Court should assist in the administration of justice in the EEA States. It should not deliver advisory opinions on hypothetical questions without any bearing on the dispute in the main proceedings.

21 The Norwegian Government acknowledges that the Court of Justice of the European Union ("ECJ") in *Sokoll-Seebacher*, cited above, paragraphs 10 to 12, admitted a question relating to a case without a cross-border element in the main proceedings. However, the reasoning in *Sokoll-Seebacher* is based on circumstances that differ from those of the present case. That case concerned a situation where it was reasonably clear that a restriction on intra-EEA trade would be present if the dispute in the main proceedings had concerned a national of another EEA State. The Norwegian Government adds that a referring court must also show that a response is actually useful for the resolution of the dispute in the main proceedings, notwithstanding the absence of a cross-border element.

22 In the present case, it appears from the request that no cross-border element is involved. Furthermore, the Norwegian Government observes that it has not been shown how the national rule in question may constitute a restriction on intra-EEA trade. The Norwegian Government therefore proposes that the part of the question relating to Articles 31 and 36 EEA be dismissed as inadmissible.

23 The question of inadmissibility due to the lack of a cross-border element in the case was not raised in other written observations. However, at the oral hearing, ESA concurred with the Norwegian Government's view that the part of the question relating to Articles 31 and 36 EEA is inadmissible. ESA nonetheless assumed that the part of the question relating to secondary EEA law is admissible.

24 The Commission, also at the oral hearing, took the view that even where all the factual aspects are confined to one EEA State, the case may fall within the Court's jurisdiction under the advisory opinion procedure provided that the national rules at issue are capable of imposing restrictions on intra-EEA trade. The Commission had doubts, however, whether the situation in *Sokoll-Seebacher* is comparable to the present case. In the Commission's view, it does not appear obvious that the national rules at issue are capable of affecting intra-EEA trade.

25 In addition, the Commission observed that there is no indication that the authorities of another EEA State have requested Liechtenstein to provide information on Otto Kaufmann AG. It is therefore uncertain whether the directives referred to in the national court's question are applicable at all in this case.

Findings of the Court

26 Under Article 34 SCA, any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers it necessary to enable it to give judgment.

27 However, a national court or tribunal may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. In other words, a national body may be classified as a court or tribunal within the meaning of Article 34 SCA when it is performing judicial functions, whereas, when it is exercising other functions, for example of an administrative nature, it may not be so classified (see *Hellenic Capital Markets Commission*, cited above, paragraph 32).

28 The Court recalls that the purpose of Article 34 SCA is to establish cooperation between the Court and the national courts and tribunals in order to ensure homogeneous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law. Accordingly, this purpose does not require a strict interpretation of the terms court and tribunal. The same applies to the question of whether a requesting body exercises a judicial function, in particular when its decisions are not subject to judicial review. The procedure under Article 34 SCA is determined on the basis of EEA law. The Court has no competence to interpret national rules. It must nevertheless include national rules in its assessment of the situation. In case of doubt, it would run counter to the purpose of Article 34 SCA to declare the reference inadmissible (see *Hellenic Capital Markets Commission*, cited above, paragraphs 33 and 34).

29 When dealing with the applicability of Article 34 SCA, it is incumbent on the EEA States to take the necessary steps to ensure, within their own territory, that the provisions of EEA law are implemented into national law in their entirety. The decision pending before the national court, whether to enter a conviction onto the criminal record, is a task that under Liechtenstein law is assigned to a judge at the Princely Court. EEA law may affect such a decision. If, under the legal system of an EEA State, national courts are assigned such a task, it is imperative, in order to ensure the proper functioning of EEA law, that the Court should have an opportunity to address the issues of interpretation arising out of such proceedings.

30 As a result of the foregoing, the Court finds that, in proceedings pursuant to Section 2(1) of the Criminal Records Act, the Princely Court performs a judicial function for the purposes of Article 34 SCA.

31 The Court notes that national legislation is capable of falling within the scope of the provisions relating to the fundamental freedoms of the EEA Agreement to the extent that it applies to situations connected with trade between EEA States. Even if the factual aspects of a specific situation are confined to one EEA State,

an interpretation of EEA law, such as that relating to the fundamental freedoms, may still be useful to the extent that the national legislation at issue is capable of producing effects which are not confined to one EEA State (compare *Sokoll-Seebacher*, cited above, paragraphs 10 and 11).

32 The question referred seeks to establish whether EEA law imposes an obligation to record a conviction by a criminal court of a legal person. In the present case, the legal person convicted is a company registered in Liechtenstein. It is not inconceivable that a company registered in another EEA State could be convicted by a Liechtenstein court. Nor is it inconceivable that the authorities of another EEA State could request from Liechtenstein information on the criminal record of legal persons. Thus, an interpretation of EEA law is useful since the national legislation at issue is capable of producing effects which are not confined to one EEA State.

33 Where a national court or tribunal submits a question concerning the interpretation of EEA law, the Court is in principle bound to give a ruling. It follows that questions concerning EEA law enjoy a presumption of relevance. However, the Court may not rule on a question referred by a national court where it is quite obvious that the interpretation of EEA law sought is unrelated to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted (see Case E-13/11 *Granville Establishment* [2012] EFTA Ct. Rep. 400, paragraphs 19 to 20, and case law cited).

34 In the situation at hand, the national judge has to take a decision whether to enter a conviction of a legal person onto the criminal record. In doing so, he is obliged to comply with EEA law. Should EEA law entitle other EEA States to obtain information about convictions of a legal person, that information could properly be based on an entry on a criminal record. The requirements of EEA law must be assessed when deciding whether to enter convictions onto a criminal record. It follows from this that the question concerning the decision's compatibility with EEA law is not purely hypothetical.

35 The Court therefore concludes that the question referred by the Princely Court is admissible.

IV Substance

Observations submitted to the Court

36 The Liechtenstein Government submits that Directive 2004/18 does not require that, where national law allows for legal persons to be convicted by a criminal court, those convictions must also be clearly recorded. This can be seen from Article 45(3)(a) of that directive. Directive 2004/18 leaves it to the national legislature not only to allow for legal persons to be convicted but also to decide whether and, if so, how these convictions will be recorded.

37 According to the Liechtenstein Government, Directive 2006/123 does not require that, where national law allows for legal persons to be convicted by a criminal court, those convictions must also be clearly recorded. Article 33 of Directive 2006/123 merely provides for the exchange of information between the EEA States on the good repute of service providers and leaves it to the individual EEA State to decide upon the type of information on established service providers which it considers necessary to keep available and accessible in conformity with its national law in order to adequately supervise those service providers.

38 According to the Liechtenstein Government, since more specific and clarifying provisions of secondary law governing administrative cooperation lay down no legal obligation to clearly record criminal court convictions of legal persons, it seems highly doubtful that the provisions of primary law may be interpreted to provide for an obligation to clearly record convictions.

39 In relation to primary EEA law, the Netherlands Government does not see how either Article 31 EEA (freedom of establishment) or Article 36 EEA (freedom to provide services) may give rise to an obligation to record. Neither the text nor the rationale of these provisions require that the EEA States record criminal convictions of legal persons.

40 In relation to secondary EEA law, the Netherlands Government considers that Directive 2004/18 does not in itself establish an obligation to record convictions of legal persons convicted by a criminal court. It does however impose an obligation to provide relevant information on such criminal convictions without requiring that this should be done through an extract from the judicial record.

41 The Netherlands Government submits that, although Article 33 of Directive 2006/123 obliges an EEA State to supply information on the good repute of service providers, it is clear from the wording of that provision that there is no requirement to record criminal convictions.

42 In the view of the Netherlands Government, furthermore, neither Article 4(2) of Directive 96/71 nor Article 56(2) of Directive 2005/36 requires EEA States to record criminal convictions of legal persons.

43 ESA fails to see how the general provisions on the freedom of establishment and the freedom to provide services may have a bearing on the question whether EEA law entails a duty on States to record criminal convictions in the context of the present case. If such an obligation does exist, it would have to follow from secondary law.

44 According to ESA, it cannot be deduced from Directive 2004/18 that there is an obligation on EEA States to have a criminal record or similar recording of convictions. It is for national law to decide how information on the professional conduct of an economic operator may be provided.

45 ESA further contends that Directive 2006/123 does not require that criminal convictions, such as those at issue in the present case, must be recorded. Information on criminal sanctions must be provided on the basis of mechanisms and practices already in place in the EEA States.

46 The Commission submits that, at this stage of the proceedings and on the basis of the information presented by the referring court, neither the EEA Agreement's provisions on the freedom of establishment and the freedom to provide services nor the provisions of Directive 2006/123 and Directive 2004/18 impose on a State party to the agreement the requirement to establish the same accurate record of legal persons convicted of criminal offences as has been established in an EEA State in relation to natural persons who are service providers.

47 In particular, there is no secondary law which requires EEA States to enter criminal sanctions imposed by criminal courts on legal persons onto their criminal records (an obligation which may exist for criminal sanctions imposed on natural persons).

48 Nevertheless, Article 33 of Directive 2006/123 obliges EEA States to keep, also with respect to providers who are legal persons, some kind of record to enable them to comply with the obligations to exchange information provided for as a matter of administrative cooperation. However, the type of record and its handling remains at the EEA State's discretion, as long as it ensures that accurate information may be exchanged on an ongoing basis between EEA States.

Findings of the Court

49 The referring court asks, in essence, whether upon the basis of the EEA Agreement or secondary law, for instance Directive 2006/123 or Directive 2004/18 as incorporated into the EEA Agreement, it is necessary to record in any way whatsoever criminal convictions of legal persons, and, if so, in a particular form, for instance in a criminal record.

50 The Court notes that an obligation to record convictions of legal persons does not follow from Article 31 or 36 EEA. These provisions prohibit unjustified restrictions on the freedom of establishment and the freedom to provide services. If anything, it would be the recording of such a conviction, and not the failure to record, that could amount to a restriction. Consequently, there is no legal basis for concluding that Article 31 or 36 EEA imposes an obligation to record convictions of legal persons.

51 The requesting court has made reference to Directive 2004/18 and Directive 2006/123 as examples of potentially relevant secondary law. However, these directives do not require EEA States to enter criminal sanctions imposed by criminal courts on legal persons onto their criminal records.

52 Article 45(1) of Directive 2004/18 excludes economic operators convicted of certain criminal offences (participation in a criminal organisation, corruption,

fraud and money laundering) from participating in a public contract. Article 45(2)(c) of the same Directive allows EEA States to exclude an economic operator from participation in a contract if he has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct. Pursuant to Article 45(3)(a) of Directive 2004/18, EEA States shall accept extracts from the judicial record or equivalent documents as sufficient evidence that no such conviction took place.

53 In the case before the referring court, the criminal offence relates to the undertaking's social security obligations. While Article 45(2)(e) of Directive 2004/18 does refer to failure to comply with obligations relating to the payment of social security contributions as grounds for excluding an economic operator from participation in a contract, Article 45 of Directive 2004/18 does not oblige EEA States to issue extracts from the judicial record or equivalent documents, whether in relation to natural or to legal persons, since the second subparagraph of Article 45(3) of the Directive expressly anticipates the possibility that an EEA State does not issue such documents, providing instead that such evidence may be replaced by a declaration on oath or a solemn declaration. Article 45 of Directive 2004/18 therefore does not oblige an EEA State to keep a record in the case at hand since there is no underlying obligation to supply the information in question.

54 Directive 2006/123 does not require EEA States to establish and keep a criminal record for sanctions, actions and decisions directly relevant to the provider's competence or professional reliability where the provider is a legal person.

55 Nevertheless, Article 33 of Directive 2006/123 obliges EEA States to keep, also with respect to providers who are legal persons, some kind of record of criminal sanctions, disciplinary and administrative actions and decisions concerning insolvency or bankruptcy involving fraud taken by their competent authorities, in accordance with national law, in respect of service providers but only to the extent necessary to comply with the administrative cooperation obligations specified in relation to exchange of information. However, these obligations relating to exchange of information refer only to sanctions, actions and decisions directly relevant to the provider's competence or professional reliability, in order to ensure the supervision of providers and the services they provide, in so far as these are governed by the Directive.

56 This means that both the type of record and its handling remain at the discretion of the EEA State in question, so long as this meets the purpose of ensuring possible future exchanges of information between EEA States.

57 The answer to the question from the referring court must therefore be that the EEA Agreement does not require that convictions by a criminal court of legal persons be clearly recorded. However, provisions such as Article 45 of Directive 2004/18 and Article 33 of Directive 2006/123 require EEA States to provide information upon request from another EEA State on convictions relevant to the

competence and professional reliability of legal persons. The framework for the maintenance and handling of such information is a matter for national law.

V Costs

58 The costs incurred by the Liechtenstein, Netherlands and Norwegian Governments, ESA and the Commission, which have all submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Princely Court, any decision on costs concerning those proceedings is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the *Fürstliches Landgericht des Fürstentums Liechtenstein*, hereby gives the following Advisory Opinion:

Articles 31 and 36 of the EEA Agreement do not require that a criminal conviction of a legal person be clearly recorded. Provisions such as Article 45 of Directive 2004/18/EC and Article 33 of Directive 2006/123/EC may require an EEA State to provide information, upon request from another EEA State, on convictions relevant to the competence and professional reliability of legal persons. However, these Directives leave the maintenance and handling of relevant information to national law.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 10 November 2014.

Gunnar Selvik
Registrar

Carl Baudenbacher
President