JUDGMENT OF THE COURT

3 October 2007[*]

(Lawyers' freedom to provide services – Council Directive 77/249/EEC – Article 7 EEA – Protocol 35 EEA – principles of primacy and direct effect – conforming interpretation)

In Case E-1/07,

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 *Fürstliches Landgericht* (Princely Court of Justice), Liechtenstein, in criminal proceedings against

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concerning the interpretation of the rules on the freedom to provide services in the European Economic Area (EEA), and in particular Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services,

[*] Language of the Request: German.

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson (Judge-Rapporteur) and Henrik Bull, Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

– The Republic of Iceland, represented by Sesselja Sigurðardóttir, First Secretary and Legal Officer, Ministry for Foreign Affairs, acting as Agent;

– the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director of the EEA Coordination Unit, acting as Agent;

– the Kingdom of Norway, represented by Pål Wennerås, advocate, Office of the Attorney General (Civil Affairs) and Ivar Alvik, senior adviser, Ministry of Foreign Affairs, acting as Agents;

– the EFTA Surveillance Authority (ESA), represented by Lorna Young, Officer, and Per Andreas Bjørgan, Senior Officer, Legal and Executive Affairs, acting as Agents; and

– the Commission of the European Communities (the Commission), represented by Hans Christian Stovlbaek and Nicola Yerrell, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Republic of Iceland, represented by its Agent Martin Eyjolfsson, the Principality of Liechtenstein, represented by its Agent Dr Andrea Entner-Koch, the Kingdom of Norway, represented by its Agent Pål Wennerås, ESA, represented by its Agent Lorna Young and the Commission, represented by its Agent Nicola Yerrell, at the hearing on 26 June 2007,

gives the following

Judgment

I Facts and procedure

1 By a letter dated 31 January 2007, registered at the Court on 7 February 2007, *Fürstliches Landgericht* submitted two questions for an Advisory Opinion in a criminal case pending before it against A (hereinafter the "Defendant").

2 The Defendant was charged on 19 December 2006 with a series of criminal offences in breach of the Liechtenstein Criminal Code (*Liechtensteinisches Strafgesetzbuch*), namely the inflicting of bodily harm to another person (a German national resident in Austria, hereinafter the "victim"), causing damage to his property, permanent removal of his property and suppression of documents that belonged to him.

3 The victim requested to be associated with the criminal proceedings as a private intervener (*Privatbeteiligter)*, claiming damages to the sum of 500.00 EUR. This request was made on his behalf by an Austrian lawyer practising from Austria and registered with the Committee of the Vorarlberg Bar as a "Rechtsanwalt". The lawyer was listed in neither the register of Liechtenstein lawyers, nor the register of European lawyers established in Liechtenstein. Moreover, he has not taken an aptitude test pursuant to Article 54 et seq. of the Liechtenstein Lawyers Act (*Liechtensteinisches Rechtsanwaltsgesetz*).

4 Since the Austrian lawyer had neither taken an aptitude test nor appointed a local lawyer to act in conjunction with him before *Fürstliches Landgericht*, that court has to make a decision whether or not to require him under Article 57a of the Liechtenstein Lawyers Act to appoint a local lawyer to act in conjunction with him.

5 Fürstliches Landgericht referred the following questions to the Court:

1. Is a provision such as that of Article 57a of the Liechtenstein Lawyers Act (Rechtsanwaltsgesetz), according to which, in proceedings in which a party is represented by a lawyer or a defending counsel must be engaged, the European lawyer providing services must call in a local lawyer to act in conjunction with pursuant to Article 49 of the Liechtenstein Lawyers Act, compatible with the provisions of the EEA Agreement relating to the freedom to provide services (Article 36(1) of the EEA Agreement), and in particular with Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, and specifically with the second indent of Article 5 thereof?

2. *In case the EFTA Court answers the first question in the negative: may a provision of national law such as that of Article 57a of the Liechtenstein Lawyers Act which fails appropriately to transpose into national law a directive adopted in pursuance of Article 7 litra b of the EEA Agreement, such as the directive mentioned in Question 1, nevertheless be applied in a State which is a Contracting Party to the EEA Agreement?*

II Legal background

National Law

6 According to Section 32 of the Liechtenstein Code of Criminal Procedure (*Liechtensteinische Strafprozessordnung*), any person who sustains damage to his rights, owing to a crime or an offence that must compulsorily be prosecuted, may associate himself with the criminal proceedings as a private intervener by virtue of his claims under private law. Under Section 34 of the Code of Criminal Procedure, a private intervener may either conduct his own case or use an agent. The Code of Criminal Procedure does not include provisions to the effect that only lawyers can act as agents for a private intervener.

7 Article 55 of the Liechtenstein Lawyers Act lays down the basic principle that EEA nationals who are entitled to act professionally as lawyers in their State of origin are temporarily permitted to practice their profession in Liechtenstein on a cross-border basis. However, Article 57a of the Liechtenstein Lawyers Act requires a European lawyer providing services in Liechtenstein to act in conjunction with a local lawyer under certain circumstances. That provision reads as follows:

> *In proceedings in which the party is represented by a lawyer, or a defending counsel must be engaged, the European lawyer providing services shall act in conjunction with a local lawyer pursuant to Article 49 of the Liechtenstein Lawyers Act. This requirement shall not apply if the European lawyer providing services has passed the aptitude test (Articles 54 et seq.).*

8 Failure by a lawyer to comply with the requirement of Article 57a of the Liechtenstein Lawyers Act would be failing to comply with a professional obligation, which might constitute a disciplinary offence under Article 31(1) of the Liechtenstein Lawyers Act. Moreover, the lawyer would not be entitled to remuneration under the Legal Agents Remuneration Scale Act (*Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten*) as he would, according to paragraph 2 of Article 49 of the Liechtenstein Lawyers Act, be deemed not to be acting as a lawyer.

9 Article 49 of the Liechtenstein Lawyers Act reads as follows:

1) In proceedings in which the party is represented by a lawyer or in which a defending counsel must be engaged, the established European lawyer may act as the representative or defending counsel of a party only in conjunction with a lawyer included in the register of lawyers (a lawyer acting in conjunction). (…)

2) (…) Procedural acts for which evidence of the conjunction situation has not been furnished at the time when they are performed shall be deemed not to have been performed by a lawyer. (…)

EEA Law

10 36(1) EEA reads:

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.

11 According to Article 37(1)(d) EEA, the notion of "services" includes the "activities of the professions".

12 Article 37(2) EEA states that without prejudice to the provisions of Chapter 2 (right of establishment), "the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals."

13 According to Article 39 EEA, the provisions of *inter alia* Article 30 EEA shall apply to the matters covered by Chapter 3 (services) of the Agreement. According to Article 30 EEA, the Contracting Parties shall take the necessary measures, contained in Annex VII to the Agreement in order to make it easier for persons to take up and pursue activities as workers and self-employed persons.

14 According to its Article 1, Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (hereinafter "the Directive", OJ 1977 L 78, p. 17), referred to at point 2 of Annex VII EEA on mutual recognition of professional qualifications, applies to the activities of lawyers pursued by way of provision of services.

15 A “lawyer” is defined in Article 1(2) of the Directive as any person entitled to pursue his professional activities under certain national designations, which, in the case of Austria, includes the designation of “Rechtsanwalt”.

16 According to Article 2 of the Directive, each Contracting Party shall recognise as a lawyer for the purpose of pursuing services any person listed in Article 1(2) of the Directive.

17 Article 4(1) of the Directive provides that activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host State under the conditions laid down for lawyers established in that State, with the exception of any condition requiring residence, or registration with a professional organisation, in that State.

18 Pursuant to Article 4(2) of the Directive the rules of the professional conduct of the host State must be observed, without prejudice to the lawyer’s obligations in his home State.

19 Article 5 of the Directive reads:

For the pursuit of activities relating to the representation of a client in legal proceedings, a Member State may require lawyers to whom Article 1 applies:

- (…);

- to work in conjunction with a lawyer who practices before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an "avoué" or "procuratore" practising before it.

20 Article 3 EEA reads:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

Moreover, they shall facilitate cooperation within the framework of this Agreement.

21 Article 7 EEA reads:

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.

22 Protocol 35 to the EEA Agreement on the implementation of EEA rules reads:

Whereas this Agreement aims at achieving a homogeneous European Economic Area, based on common rules, without requiring any Contracting Party to transfer legislative powers to any institution of the European Economic Area; and

Whereas this consequently will have to be achieved through national procedures;

Sole Article

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.

23 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 in so far as is necessary for the reasoning of the Court.

III Findings of the Court

The first question

24 By its first question, the referring court essentially asks whether Article 36(1) EEA and the Directive preclude a Contracting Party from requiring that in court proceedings in which a party to the case is represented by a lawyer, or a defending counsel must be engaged, a lawyer from another EEA State who has not passed the national aptitude test must provide his or her service in conjunction with a lawyer who is included in the national register of lawyers (hereinafter "national lawyer").

25 The Principality of Liechtenstein, ESA and the Commission, referring to Cases 427/85 *Commission* v *Germany* [1988] ECR 1123 and C-294/89 *Commission* v *France* [1991] ECR I-3591, submit that a lawyer from another Contracting Party providing services cannot be obliged to work in conjunction with a national lawyer in proceedings for which the national legislation does not make representation by a lawyer mandatory.

26 Article 36(1) EEA prohibits any restriction on the free movement of services. Pursuant to Article 37(2) EEA, the person providing a service may temporarily pursue the activity in the State where the service is provided under the same conditions as are imposed by that State on its own nationals.

27 The freedom to provide services is one of the fundamental principles of the EEA Agreement. It may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and businesses operating in the territory of the State where the service is provided. Furthermore, the rules must be appropriate for securing the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it (see Case 279/80 *Webb* [1981] ECR 3305, at paragraph 17 and Case C-205/99 *Analir and Others* [2001] ECR I-1271, at paragraph 25).

28 The Directive lays down more detailed rules with respect to the provision of services by lawyers. As stated in its preamble, it contains measures intended to facilitate the effective pursuit of the activities of lawyers by way of provision of services. The Directive must be interpreted in light of the general principles enshrined in the EEA Agreement governing the freedom to provide services.

29 Article 4(1) of the Directive provides that the activity of representing a client in legal proceedings in another EEA State must be pursued under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organisation, in that State. Article 4(2) of the Directive provides that the rules of professional conduct of the host State must be observed in the pursuit of those activities.

30 Article 5 of the Directive enables the EEA States to require lawyers from other EEA States representing a client in legal proceedings to work in conjunction with a national lawyer. The scope of this exemption from the main rule of the Directive, as interpreted in light of the general principles of the EEA Agreement referred to in paragraph 27 above, is limited to circumstances where considerations relating to the public interest justify the obligation for a lawyer to work in conjunction with a national lawyer. Such considerations do not exist in court proceedings for which representation by a lawyer is not mandatory (see for comparison Cases 427/85 *Commission* v *Germany*, at paragraph 14 and 294/89 *Commission* v *France*, at paragraph 19). Therefore, a provision of national law that requires lawyers from other EEA States to work in conjunction with a national lawyer in court proceedings for which representation by a lawyer is not mandatory infringes Article 36(1) and the Directive.

31 In light of the above, the answer to the first question must be that a provision of national law, according to which, in court proceedings in which a party is

represented by a lawyer or a defending counsel must be engaged, a lawyer from another EEA State providing services must call in a national lawyer to act in conjunction with him or her, does not fall under Article 5 of the Directive and is incompatible with Article 36(1) EEA and the Directive if it requires the appointment of a national lawyer in cases where representation by a lawyer is not mandatory.

The second question

32 The second question from the national court is whether a provision of national law such as that of Article 57a of the Liechtenstein Lawyers Act, which fails appropriately to transpose into national law a directive adopted in pursuance of Article 7 litra b of the EEA Agreement, may nevertheless be applied by a court of a State which is a Contracting Party to the EEA Agreement. An answer to the second question is requested should the answer to the first question be in the negative.

33 In this context, the second question can also be formulated as follows: does the EEA Agreement require that a provision of a directive that has been made part of the EEA Agreement be directly applicable and take precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law?

34 As a preliminary remark, the Court notes that it is not for it to assess under the advisory opinion procedure whether national law is compatible with EEA law. In a case such as the one at hand, this assessment must be made by the national court on the basis of the Court's answer to the first question. In this respect, it is noted that there is no reference to the main Agreement in the second question. Reference to Article 36(1) EEA is, however, made in the first question from the national court. From the Court's answer to that question, it follows that to require a lawyer from another EEA State to work in conjunction with a national lawyer in proceedings where representation by a lawyer is not mandatory, constitutes a violation not only of Directive 77/249/EEC but also of Article 36(1) of the main Agreement.

35 It has been submitted by the Principality of Liechtenstein that under the Liechtenstein constitutional system, a Treaty ratified by the Principality is as such part of the national legal order, and the request from the national court makes it clear that Article 36(1) is applicable as such in Liechtenstein law. The second question would therefore seem to be of practical importance only if the referring court should come to the conclusion that even taking into account Article 36(1) EEA, that court is unable to rule that the foreign lawyer in the case at hand does not have to be assisted by a national lawyer.

36 The Republic of Iceland, the Principality of Liechtenstein and the Kingdom of Norway, as well as ESA, submit that the EC law principles of direct effect and primacy are not a part of EEA law. In that regard, reference is made to Protocol 35 EEA and Article 7 EEA as well as to case law of the Court. It is submitted that Protocol 35 EEA is to be understood to the effect that EEA rules are only to be accorded priority over national rules in so far as the EEA rules have been implemented into national rules, and as such conflict with other national rules. Furthermore, Protocol 35 EEA only concerns provisions that are framed in a manner capable of creating rights and are unconditional and sufficiently precise. Finally, all those who submitted observations to the Court expressed the view that national courts should, as far as possible, interpret national rules in such a way as to ensure conformity with the relevant EEA rules.

37 The EEA Agreement is based on the objectives of establishing a dynamic and homogeneous European Economic Area and of ensuring individuals and economic operators equal treatment and equal conditions of competition, as well as adequate means of enforcement (see Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, at paragraphs 49 and 57, hereinafter "*Sveinbjörnsdóttir*"). The EEA Agreement is an international treaty *sui generis* that contains a distinct legal order of its own. The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and objective of the EEA Agreement goes beyond what is usual for an agreement under public international law (see *Sveinbjörnsdóttir*, at paragraph 59 and Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, at paragraph 25, hereinafter "*Karlsson*").

38 The EEA Agreement establishes a particular system of means and mechanisms in order to achieve the abovementioned objectives. Article 7 EEA and Protocol 35 EEA are part of this system. Article 7 EEA stipulates that Acts referred to or contained in Annexes to the EEA 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. Protocol 35 EEA obliges the EFTA States to introduce, if necessary, a statutory provision to the effect that, under their national legal order, implemented EEA rules prevail in cases of possible conflict with other statutory provisions.

39 Moreover, it is inherent in the objectives of the EEA Agreement referred to in paragraph 37 above, as well as in Article 3 EEA, that national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law. Consequently, they must apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule.

40 It follows from Article 7 EEA and Protocol 35 EEA that the EEA Agreement does not entail transfer of legislative powers. In *Karlsson*, the Court held this to mean that EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts (see *Karlsson*, at paragraph 28). This applies to all EEA law, including provisions of a directive such as the one at issue. Furthermore, this entails that EEA law does not require that non-implemented EEA rules take precedence over conflicting national rules, including national rules which fail to transpose the relevant EEA rules correctly into national law.

41 It follows from the above that, in cases of conflict between national law and non-implemented EEA law, the Contracting Parties may decide whether, under their national legal order, national administrative and judicial organs can apply the relevant EEA rule directly, and thereby avoid violation of EEA law in a particular case. It also follows that the Contracting Parties may decide on which administrative and judicial organs they confer such a power. However, even Contracting Parties which have introduced principles of direct effect and primacy of EEA law in their internal legal order remain under an obligation to correctly transpose directives into national law.

42 Furthermore, the Court notes that in cases of violation of EEA law by a Contracting Party, the Contracting Party is obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability which is an integral part of the EEA Agreement, if the conditions laid down in *Sveinbjörnsdóttir*, at paragraphs 62 et seq. and *Karlsson*, at paragraphs 25 and 37–48, are fulfilled. Finally, ESA has the power under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice to bring a case concerning a violation of EEA law before the EFTA Court.

43 In light of the above, the answer to the second question must be that the EEA Agreement does not require that a provision of a directive that has been made part of the EEA Agreement is directly applicable and takes precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law.

IV Costs

44 The costs incurred by the EEA Contracting Parties, ESA and the Commission which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before *Fürstliches Landgericht*, any decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by *Fürstliches Landgericht* hereby gives the following Advisory Opinion:

1. **A provision of national law, according to which, in court proceedings in which a party is represented by a lawyer or a defending counsel must be engaged, a lawyer from another EEA State providing services must call in a national lawyer to act in conjunction with him or her, does not fall under Article 5 of Council Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services, referred to at point 2 of Annex VII EEA, and is incompatible with Article 36(1) EEA and the Directive if it requires the appointment of a national lawyer in cases where representation by a lawyer is not mandatory.**

2. **The EEA Agreement does not require that a provision of a directive that has been made part of the EEA Agreement is directly applicable and takes precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law.**

Carl Baudenbacher Thorgeir Örlygsson Henrik Bull

Delivered in open court in Luxembourg on 3 October 2007.

Skúli Magnússon
Registrar

Carl Baudenbacher
President