

Brussels, 18 December 2019

Case No: 79187

Document No: 1099797

Decision No: 097/19/COL

## **REASONED OPINION**

**delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Liechtenstein's failure to comply with the judgment of the EFTA Court in Case E-19/15 regarding the Liechtenstein Trade Act**

## 1 Introduction

On 10 May 2016, the EFTA Court delivered its judgment in Case E-19/15 regarding the Liechtenstein Trade Act.<sup>1</sup> In the judgment, the EFTA Court declared that Liechtenstein had breached its obligations arising from Articles 9, 10, 13 and 16 of Directive 2006/123/EC (“the Services Directive”)<sup>2</sup>, as adapted to the EEA Agreement under its Protocol 1:

- a) by maintaining in force Article 7 of the Liechtenstein Trade Act which sets up a prior authorisation scheme for undertakings intending to establish themselves in Liechtenstein;
- b) by maintaining in force Article 8(1) of the Liechtenstein Trade Act in so far as it imposes conditions that are not clear and unambiguous for granting prior authorisation for undertakings wishing to establish themselves in Liechtenstein, namely the conditions to have the necessary personnel and to have an adequate command of the German language;
- c) by failing to ensure that the conditions for the prior authorisation laid down by the Liechtenstein Trade Act do not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the service provider is already subject in another EEA State;
- d) by failing to ensure that the procedure and formalities concerning the prior authorisation under the Liechtenstein Trade Act are clearly laid down; and
- e) by maintaining in force Article 21 of the Liechtenstein Trade Act which requires undertakings to notify in advance their intention to provide cross-border services in Liechtenstein.

In addition, the EFTA Court declared that to the extent that the services covered by the Liechtenstein Trade Act fall outside the scope of the Services Directive, as adapted to the EEA Agreement under its Protocol 1, Liechtenstein had breached its obligations arising from Articles 31 and 36 of the EEA Agreement:

- a) by maintaining in force Article 7 of the Liechtenstein Trade Act; and
- b) by maintaining in force Article 21 of the Liechtenstein Trade Act.

## 2 Correspondence

By letter dated 30 June 2016 (Doc No 810515), the EFTA Surveillance Authority (“the Authority”) requested information from the Liechtenstein Government on how Liechtenstein intended to comply with the EFTA Court’s judgment.

The Liechtenstein Government responded by letter dated 1 September 2016 (Doc No 816366). In its reply, Liechtenstein stated that it had taken due note of the “clear and unequivocal judgment” of the EFTA Court and that it intended to adapt Liechtenstein trade legislation to bring it in line with EEA law. Liechtenstein further highlighted that an in-depth revision of the trade sector was required in order to

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<sup>1</sup> Case E-19/15 *EFTA Surveillance Authority v the Principality of Liechtenstein* [2016] EFTA Ct. Rep. 435.

<sup>2</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36), incorporated into the EEA Agreement at point 1 of Annex X to the EEA Agreement by Decision of the EEA Joint Committee No 45/2009 of 9 June 2009.

establish compliance with the judgment. This revision would fundamentally alter the existing system and would require a lot of time and resources.

The case was discussed at the package meeting in Liechtenstein on 11 and 12 May 2017. As a follow-up to the meeting, Liechtenstein committed to providing the Authority with an indicative deadline for the first draft of the new Trade Act.

In November 2017, the Liechtenstein Government provided the Authority with the draft amendments to the Liechtenstein Trade Act. A meeting was subsequently set up to discuss the draft in Brussels on 27 November 2017. At the meeting, representatives of the Liechtenstein Government and of the Authority discussed the proposed amendments and how they could ensure compliance with EEA law. Liechtenstein presented a tentative timeline for the legislative process, entailing entry into force of the amendments in April 2019 at the earliest.

Through informal correspondence on 28 February 2018 (Doc No 906377), the Liechtenstein Government provided the Authority with the draft Government Bill regarding the complete revision of the Liechtenstein Trade Act and confirmed that the public consultation was open until 30 April 2018.

By letter dated 7 March 2018 (Doc No 848037), the Authority issued a letter of formal notice to Liechtenstein. In its letter, the Authority pointed to the timeline and that entry into force of the amendments was not foreseen before April 2019. The Authority acknowledged that an in-depth revision of the trade legislation would require time, but found that the Liechtenstein Government had had sufficient time to take the measures necessary to comply with the EFTA Court's judgment.

By letter dated 8 May 2018 (Doc No 912678), the Liechtenstein Government replied to the Authority's letter of formal notice. Reference was made to the public consultation for the draft Government Bill, which had resulted in 29 replies. Furthermore, the Liechtenstein Government reiterated its previously communicated timeline and confirmed that the revision would be presented as planned to the Liechtenstein Parliament for a first reading in autumn 2018.

Through informal correspondence in December 2018 (Doc No 1044803), the Liechtenstein Government informed the Authority that the first reading in parliament could not take place before the end of the year due to complex legal clarifications following the public consultation and internal legal scrutiny. However, work was underway and the plan was to present the Government Bill for its first parliamentary reading in March or April 2019.

At the package meeting in Liechtenstein on 26 and 27 March 2019, the case was discussed on ministerial level. The Authority was informed that the first reading could not take place as planned and would have to be postponed.

Through informal correspondence on 21 August and 25 November 2019 (Docs No 1084253 and 1099791), the Authority was informed by Liechtenstein that there are still delays in the legislative process. The Liechtenstein Government confirmed that the Government Bill has not yet been adopted and stated that there is currently no clear timetable for the planned amendment of the Liechtenstein Trade Act.

### 3 Relevant EEA law

According to Article 33 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”), the EFTA States concerned shall take the necessary measures to comply with the judgments of the EFTA Court.

### 4 The Authority’s assessment

The EFTA Court handed down its judgment in Case E-19/15 on 10 May 2016. The Liechtenstein Government has expressed a clear intention to amend the Liechtenstein trade legislation in order to comply with the judgment and EEA law. In its correspondence with the Authority, Liechtenstein has emphasised that the revision would require a lot of time and resources and presented a timeline entailing entry into force of the amendments in April 2019 at the earliest.

The Authority found the proposed timeline unsatisfactory and formally communicated this in its letter of formal notice to Liechtenstein in March 2018. However, the timeline was not changed and the legislative process has since been subject to several delays. In the latest correspondence between Liechtenstein and the Authority on 25 November 2019, Liechtenstein confirmed that it no longer has a clear timetable for the planned amendment of the Liechtenstein Trade Act.

According to Article 33 SCA, the EFTA States are required to take necessary measures to comply with the judgments of the EFTA Court.

The EFTA Court has held that although Article 33 SCA does not specify when the measures necessary to comply with a judgment must be taken, the interest in the immediate and uniform application of EEA law requires that the process of compliance with a judgment must begin immediately and be completed as soon as possible.<sup>3</sup>

The Court has further held that circumstances concerning provisions, practices or situations prevailing in its domestic legal order are the responsibility of the EFTA State and cannot justify failure to observe obligations arising under EEA law.<sup>4</sup>

As more than 3.5 years have passed since the EFTA Court handed down its judgment, the Authority is of the view that the Liechtenstein Government has had sufficient time to take the measures necessary to adapt the Trade Act to bring it into conformity with the requirements of the Services Directive and Articles 31 and 36 of the EEA Agreement.

The Authority therefore considers that by failing to take the measures necessary to comply with the judgment of the EFTA Court in Case E-19/15, Liechtenstein has failed to fulfil its obligations under Article 33 SCA.

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<sup>3</sup> Case E-4/16 *EFTA Surveillance Authority v the Kingdom of Norway* [2016] EFTA Ct. Rep. 917, paragraphs 27 and 28.

<sup>4</sup> Case E-19/14 *EFTA Surveillance Authority v the Kingdom of Norway* [2015] EFTA Ct. Rep. 300, paragraph 48.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Liechtenstein the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that, by failing to comply with the judgment of the EFTA Court in Case E-19/15 regarding the Liechtenstein Trade Act, Liechtenstein has failed to fulfil its obligations under Article 33 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Liechtenstein to take the measures necessary to comply with this reasoned opinion within *three months* of its receipt.

Done at Brussels, 18 December 2019

For the EFTA Surveillance Authority

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