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Case No: 74942

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Decision No: 458/15/COL

EFTA SURVEILLANCE
AUTHORITY

Icelandic Ministry for Foreign Affairs
Rauðarárstígur 25
IS-150 Reykjavík
Iceland

Dear Sir or Madam,

Subject: Letter of formal notice to Iceland concerning EEA nationality and residence requirements as regards branch managers, managing directors, board members and founders of undertakings laid down in certain Icelandic legislative acts

1 Introduction

By letter of 22 January 2014¹, the EFTA Surveillance Authority (“the Authority”) informed the Icelandic Government that it had opened an own initiative case regarding EEA nationality and residence requirements in Iceland.

The main purpose of the case is to examine whether the requirements imposed by Articles 3(2-3), 66(2) and 140(1) of Act No 2/1995 on Public Limited Companies (*lög um hlutafélög*, “Act No 2/1995”); Articles 3(2-3), 42(2) and 114(1) of Act No 138/1994 on Private Limited Companies (*lög um einkahlutafélög*, “Act No 138/1994”); Articles 14 and 54(6) of the Act on Insurance Activities No 56/2010 (*lög um váttryggingastarfsemi*, “Act No 56/2010”); Article 10 of Act No 34/1991 on Investment by Non-residents in Business Enterprises (*lög um fjárfestingu erlendra aðila í atvinnurekstri*, “Act No 34/1991”); and Article 15(2) of Act No 33/1999 on Foundations Engaging in Business Operation (*lög um sjálfseignarstofnanir sem stunda atvinnurekstur*, “Act No 33/1999”), comply with the EEA Agreement.

2 Correspondence

By the above mentioned letter of 22 January 2014, the Authority sent Iceland a request for information, inviting the Icelandic authorities to provide certain clarifications as concerns the EEA nationality/residence requirements of natural persons in Act No 2/1995 on Public Limited Companies, Act No 138/1994 on Private Limited Companies, Act 56/2010 on Insurance Activities, Act No 34/1991 on Investment by Non-residents in Business Enterprises and Act No 33/1999 on Foundations Engaging in Business Operation.

On 27 June 2014, Iceland replied to the Authority’s request for information.² In its reply, Iceland, *inter alia*, argues that when an EEA citizen resides in a country outside the EEA

¹ Document No 696547.

² Document No 712613.

the citizen does not enjoy all the same rights as if the citizen resides within the EEA. When the citizen returns and resides within the EEA the rights under EEA law will again be applicable and remain with the citizen. Therefore the requirement of residence within the EEA does not constitute a restriction to the EEA Agreement.

The case was discussed at the package meeting in Reykjavík on 19 May 2014. At the meeting the Authority's representatives drew attention to Case C-299/02 *Commission v. Netherlands*.³

By letter of 31 October 2014, Iceland replied to the Authority's follow up letter to the package meeting.⁴ In its reply, the Icelandic Government expressed the view that the residence and nationality requirements are necessary, suitable and appropriate for ensuring that the aim pursued is achieved.

The case was discussed at the package meeting in Reykjavík on 27 May 2015. At the meeting, the representatives from the Icelandic Government reiterated the viewpoint expressed in the Government's letter of 31 October 2014.

3 Relevant national law

3.1 Act No 2/1995 on Public Limited Companies⁵

Article 3(2-3) of Act No 2/1995, which contains a residence requirement for at least half of the natural persons who are founders of a Public Limited Company, reads as follows:

"The founders of a Public Limited Company shall be no fewer than two. The majority of the founders shall be resident in this Country, but half of them in case the number of founders be even, unless the Minister [or he to whom he conveys his power] 1) grant an exemption therefrom. The condition concerning residence does not, however, apply to citizens of the States being parties to the Agreement on the European Economic Area, provided that the citizens concerned be resident in an EEA State. Neither does the condition concerning residence apply to citizens of States being parties to the Convention Establishing the European Free Trade Association or to the Faroese who are resident in an EEA State, a State being a party to the Convention Establishing the European Free Trade Association or in the Faroe Islands. In such incidents evidence of citizenship and residence must be submitted.

The founders may be individuals, the Icelandic State and its institutes, Municipalities and their institutes, registered Limited Companies, registered Co-operative Societies, other registered Companies with limited liability, registered partnership Companies, registered syndicates and freehold institutes which are subject to official supervision. The Minister [or he to whom he conveys his power] 1) may grant an exemption from the conditions of the present paragraph. The aforementioned Companies and establishments resident in an EEA State, a State being a party to the European Free Trade Association or the Faroese Islands may,

³ Case C-299/02 *Commission v. Netherlands* [2004] ECR I-9761.

⁴ Document No 728098.

⁵ The translation of the Act used here may be found at <http://eng.atvinnuvegaraduneyti.is/laws-and-regulations/nr/nr/7336>. Note that the translation does not include the most recent amendments to the Act.

however, be founders without an exemption. In such incidents evidence of residence must be submitted."

Article 66(2) of Act No 2/1995 states:

"Managers and at least half of the Directors shall be resident in this Country, unless a Minister [or he to whom he conveys his power] 1) grant an exemption therefrom. Condition of residence does, however, not apply to citizens of the States being parties to the Agreement on the European Economic Area, provided that the citizens concerned be resident in an EEA State. The condition concerning residence does not, however, apply to citizens of the States being parties to the Agreement on the European Economic Area, the Convention Establishing the European Free Trade Association or to Faroese, provided that the parties concerned be resident in an EEA State, a State being a party to the Convention or in the Faroe Islands. In such incidents evidence must be given of citizenship and residence."

Article 140(1) of Act No 2/1995 states:

"One or more Branch Managers shall head a branch. A Branch Manager shall be of legal age and in control of his financial affairs. In other respects there apply the provisions of the present Act respecting Managers concerning residence et al., as appropriate."

3.2 Act No 138/1994 on Private Limited Companies⁶

Article 3(2-3) of Act No 138/1994, which contains an EEA residence requirement for natural persons who are founders of a Private Limited Company, reads as follows:

"A founder, if he is alone, or at least one founder if there are more of them, shall be resident in this Country, unless the Minister [or he to whom he conveys his power] 1) grant an exemption therefrom. The condition of residence does not, however, apply to the citizens of the States being parties to the Agreement on the European Economic Area, provided that the citizens concerned be resident in an EEA State. Neither does the condition of residence apply concerning citizens of States being parties to the Convention Establishing the European Free Trade Association or the Faroese resident in an EEA State, a State being a party to the Convention or the Faroe Islands. In such instances evidence of citizenship and residence must be produced."

Founders may be individuals, the Icelandic State and its institutes, Municipalities and their institutes, registered Public Limited Companies, registered Co-operative Societies, other registered Companies with limited liability, registered partnership Companies, registered syndicates and freehold institutes which are subject to official supervision. The Minister [or he to whom he conveys his power] 1) may grant an exemption from the conditions of the present paragraph. The aforementioned Companies and establishments resident in an EEA State, a State being a party to the Convention Establishing the European Free Trade Association or the Faroe Islands may, however, be founders without an exemption. In such instances evidence of residence must be submitted."

⁶ The translation of the Act used here may be found at <http://eng.atvinnuvegaraduneyti.is/laws-and-regulations/nr/nr/7343>. Note that the translation does not include the most recent amendments to the Act.

Article 42(2) of Act No 138/1994 states:

“The Managers and at least half of the Directors shall be resident in this Country. In case of one Director the condition of residence applies to him and it also applies to one out of two Directors. The Minister [or he to whom he conveys his power] 1) may grant an exemption from the condition. Condition of residence does, however, not apply to the citizens of the States being parties to the Agreement on the European Economic Area, provided that the citizens concerned be resident in an EEA State. Neither does the condition of residence apply to citizens of States being parties to the Convention Establishing the European Free Trade Association or the Faroese resident in an EEA State, a State being a party to the Convention or the Faroe Islands. In such instances evidence must be given of citizenship and residence.”

Article 114(1) of Act No 138/1994 states:

“One or more Branch Managers shall head a branch. A Branch Manager shall be of legal age and in control of his financial affairs. In other respects there apply the provisions of the present Act respecting Managers concerning residence et al., as appropriate.”

3.3 Act on Insurance Activities No 56/2010⁷

Article 14 of Act No 56/2010 states:

“Save as specified in this Chapter, the provisions of Chapter II of the Act respecting Public Limited Companies, No. 2/1995, as amended, shall apply to the establishment of an insurance undertaking.”

The preparatory works to Article 14 states that the provision concurs with Article 3 of Act No 2/1995.⁸

Article 54(6) of Act No 56/2010, *inter alia*, states:

“Members of the Board shall be resident in a Member State or in a State which is a member of the Organisation for Economic Co-operation and Development (OECD). The Managing Director shall be a resident of a Member State. The Financial Supervisory Authority may grant exemptions from the residence requirements.”

3.4 Act No 34/1991 on Investment by Non-residents in Business Enterprises⁹

Article 10 of Act No 34/1991 states the following:

“The managers and a majority of the members of the board of directors in Icelandic enterprises must be domiciled in Iceland regardless of the equity share, voting rights, or other control held by non-residents. However, this shall not apply to

⁷ The translation of the Act used here may be found at <http://en.fme.is/media/utgefid-efni/56-2010-IS-EN-UNOFFICIAL.pdf>. Note that the translation does not include the most recent amendments to the Act.

⁸ See Parliamentary Report A [Alþingistiðindi A] of 2009-2010, p. 58-59. Available at: <http://www.althingi.is/altext/pdf/138/s/0254.pdf>

⁹ The translation of the Act used here may be found at <http://eng.atvinnuvegaraduneyti.is/laws-and-regulations/nr/nr/7448>. Note that the translation does not include the most recent amendments to the Act.

citizens of member states of the European Economic Area, provided that such citizens are residents of an EEA member state. The Minister of Commerce may grant citizens of other states exemption from this provision.

If special legislation providing for Icelandic citizenship or residence in Iceland by management, effective at the time this Act takes effect, applies to a specific investment in Iceland, the citizens of member states of the European Economic Area who are resident in an EEA state shall be regarded as conforming to the conditions of citizenship or residence provided for in such special legislation.”

3.5 Act No 33/1999 on Foundations Engaging in Business Operations¹⁰

Article 15(2) of Act No 33/1999 states:

“Managers and at least half of the members of the Board of Directors shall be resident in this country, unless the Minister permits an alternative arrangement or this result from international obligations. The condition of residence does not apply to the citizens of the Member States of the Agreement on the European Economic Area, provided that the parties concerned be residents of an EEA State. The condition of residence does not apply either to the citizens of the States being Members of the Agreement on the European Economic Area, the Convention Establishing the European Free Trade Association or the Faroese, provided that the parties concerned be residents of an EEA State, a Member State of the Establishing Convention or the Faroe Islands. In such instances evidence of citizenship shall be produced.”

4 Relevant EEA law

Article 31 of the EEA Agreement on the right of establishment provides that:

“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 [...] 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.[...]”

Article 34 of the EEA Agreement extends the right of establishment to companies and provides that:

“Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States. [...]”

¹⁰ The translation of the Act used here may be found at <http://eng.atvinnuvegaraduneyti.is/laws-and-regulations/nr/nr/7346>. Note that the translation does not include the most recent amendments to the Act.

The *General Programme for the abolition of restrictions on freedom of establishment*, adopted by the Council on 18 December 1961, is referred to at point 2 of Annex VIII to the EEA Agreement as adapted to the EEA Agreement by Protocol 1 thereto.¹¹ Referring to companies or firms where only their registered office is within the Community (their central administration or principal place of business being situated outside the Community), the General Programme made the freedom to set up a secondary establishment subject to the further condition that their activity must show ‘a real and continuous link with the economy of a Member State’ but it expressly stated that such a link must not be one of nationality, whether of the members of the company or firm, or of the persons holding managerial or supervisory posts therein, or of the holders of the capital.¹²

Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (‘the Eleventh Directive’) relates to branches of companies with share capital.¹³

Article 2(1) of the Eleventh Directive lists the documents and particulars that must be disclosed in the Member State where a branch is established. According to Article 2(1)(e) of the Eleventh Company Law Directive, information about the appointment, termination of office and particulars of the persons who are authorised to represent the company in dealings with third parties and in legal proceedings must be disclosed. These can either be persons who can represent the company as a lawful company organ or member thereof, or alternatively persons who are permanent representatives of the company in respect of the activities of the branch. In the latter case there should be an indication of the extent of their powers.

Article 47(2) of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)¹⁴ refers to the cases of disqualification of individuals from serving on corporate organs of a public limited-liability company.

Article 28(1) of the EEA Agreement provides that the freedom of movement for workers shall be secured among EU Member States and EEA EFTA States.

As regards free movement of workers, more specific rules are set out in *Regulation No 492/2011 on freedom of movement for workers within the Union* (‘Regulation No 492/2011’).¹⁵ Article 1(1) of Regulation No 492/2011 states that: “Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.”

¹¹ OJ, English Special Edition, Second Series (IX), p. 7.

¹² See the fourth indent in Title I of the General Programme, ‘Beneficiaries’.

¹³ Act referred at point 8 of Annex XXII to the EEA Agreement (*Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State* (OJ 1989 L 395, p. 36)).

¹⁴ Act referred to at point 10a of Annex XXII to the EEA Agreement (*Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)*) as adapted to the EEA Agreement by Protocol 1 thereto (OJ L 294, 10.11.2001, p. 1).

¹⁵ Act referred to at point 2 of Annex V to the EEA Agreement (*Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union*) as adapted to the EEA Agreement by Protocol 1 thereto (OJ L 141, 27.5.2011, p.1).

5 The Authority's assessment

5.1 Introduction

The Authority observes that Articles 66(2) and 140(1) of Act No 2/1995 on Public Limited Companies; Articles 42(2) and 114(1) of Act No 138/1994 on Private Limited Companies; Article 10 of Act No 34/1991 on Investment by Non-residents in Business Enterprises and Article 15(2) of Act No 33/1999 on Foundations Engaging in Business Operation contain a general requirement stating that the branch manager, managing director and/or at least half of the board members shall be residents of Iceland. This requirement is, however, not applicable to citizens of EEA States as long as they reside in such a State. These provisions thus contain an EEA nationality and residence requirements.

At least half of the founders are further subject to an EEA residence requirement pursuant to Article 3(2) in Act No 2/1995 and Act No 138/1994, and Article 14 of Act No 56/2010. Article 54(6) of Act No 56/2010 further contains a residence requirement for board members and managing directors of an insurance undertaking.

The Authority submits that the conditions laid down by the above mentioned provisions breach Article 31 of the EEA Agreement in the following ways:

- By preventing a company or firm of an EEA State from establishing a connection with the legal system of Iceland, in particular by transferring its central administration or by participating in the formation of a new company or firm (i.e., by interfering with primary establishment);
- By preventing nationals of EEA States from setting up and acting as directors of companies in Iceland (i.e., by interfering with primary establishment);
- By restricting the possibility for companies of other EEA States to pursue activities from Iceland through agencies, branches or subsidiaries (i.e. by interfering with secondary establishment).

The Authority is also of the opinion that a residence requirement such as set out in the above provisions also contain a restriction of Article 28 of the EEA Agreement.

5.2 Existence of a restriction of Article 31 EEA

In the Authority's view, the nationality and residence requirements imposed by the Icelandic rules restrict the freedom of establishment for companies and EEA nationals.

The right of establishment under Article 31 EEA – which, according to Article 34 of the EEA Agreement, is guaranteed to companies as well as to EEA nationals – precludes any national measure liable to hinder the exercise of this right, even if the measure at issue is being applied without discrimination based on nationality.¹⁶

The Authority recalls that Article 34 EEA puts companies or firms formed in accordance with the law of an EEA State and having their registered office, central administration or principal place of business within the EEA in the same position as nationals of the EEA States so far as freedom of establishment is concerned. As the Court of Justice of the

¹⁶ Case C-299/02 *Commission v Netherlands*, cited above, paragraph 15; and Case C-140/03 *Commission v Greece* [2005] ECR I-3177, paragraph 27.

European Union (“the CJEU”) has held, it is the corporate seat in the sense of Article 54 of the Treaty on the functioning of the European Union (TFEU) that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons.¹⁷

In its letter of 27 June 2014, the Icelandic Government argues that the provisions in question do not constitute a restriction of the freedom of establishment. Firstly, the Government argues that single market policies, such as the freedom of establishment, apply inside the EEA. The Government argues that when an EEA citizen resides in a country outside the EEA the citizen does not enjoy all the same rights as if the citizen resides within the area.

In this regard, the Authority notes that any constraints as to territoriality referred to by Article 31 EEA concern the place of primary and secondary establishment and not the place of residence for any of the natural persons involved in the company seeking secondary establishment.

With regard to companies, it is true that the chapter of the Agreement relating to the freedom of establishment does not contain any provision which extends the scope of its provisions to situations involving a national of a third State established outside the EEA. Its provisions cannot therefore be relied on by a company established in a third State.¹⁸ However, it does not follow from any provision of EEA law that the origin of the persons who are in charge of companies resident in the EEA affects the right of those companies to rely on the freedom of establishment.

The freedom of establishment granted by EEA law to the companies or firms referred to in Article 34 EEA cannot be limited or affected by the nationality of the persons who have certain powers within the company.¹⁹ The status of an EEA company is based on the location of the corporate seat and the legal order where the company is incorporated, not on the nationality and/or residence of its founders, managers, directors or board members.²⁰ The same consideration applies in respect of the freedom to establish a principal place of business.

The judgment in *Commission v Netherlands*,²¹ for example, illustrates this point. In this case the CJEU ruled that EU/EEA nationality requirements imposed on the shareholders or managers of a company who are exercising their freedom of movement are indeed a restriction of the right of establishment.

¹⁷ See Case 270/83 *Commission v France* [1986] ECR 273, paragraph 18; Case 79/85 *Segers* [1986] ECR 2375, paragraph 13; Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraphs 19 to 21; Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 13; Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 20; and Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 20.

¹⁸ Case C-80/12 *Felixstowe Dock and Railway Company and Others*, EU:C:2014:200, paragraph 39; Case C-452/04 *Fidium Finanz* EU:C:2006:631, paragraph 25.

¹⁹ Under Title I of the General Programme (“Beneficiaries”) it is observed with respect to secondary establishment that removal of the restrictions on the right of establishment will take place for the benefit of companies within the meaning of Article 48 “provided that, where only the seat prescribed by their statutes is situated within the Community or in an overseas country or territory, their activity shows a real and continuous link with the economy of a Member State or of an overseas country or territory; such link shall not be one of nationality, whether of the members of the company or firm, or of the persons holding managerial or supervisory posts therein, or of the holders of the capital”.

²⁰ See for example Case C-80/12 *Felixstowe Dock and Railway Company and Others*, cited above, paragraphs 39-42.

²¹ Case C-299/02 *Commission v Netherlands*, cited above.

The Court, recalling that, pursuant to Article 54 TFEU, the right to freedom of establishment is guaranteed also to companies “formed in accordance with the legislation of a Member State and having their registered office, central administration or principal place of business within the Community”,²² found that the Dutch law at stake was incompatible with EU law because of its effect of restricting the freedom of secondary establishment of shipping companies.²³

The Court reasoned, in paragraph 19 of the judgment, that:

“In this case, the ship registration scheme has the effect of restricting the freedom of establishment of shipowners. When shipowner companies wishing to register their ships in the Netherlands do not satisfy the conditions in issue, their only course of action is to alter the structure of their share capital or of their boards of directors; and such changes may entail serious disruption within a company and also require the completion of numerous formalities which have financial consequences. Likewise, shipowners must adjust their recruitment policies in order to ensure that their local representatives are not nationals of a State which is not a Member State of the Community or of the EEA.”

In its letter of 31 October 2014, the Icelandic Government argued that, contrary to the situation in *Commission v Netherlands*, the Icelandic measures only restrict nationals from setting up and acting as directors of companies (i.e., by interfering with primary establishment) whereas the Dutch measures could affect both already established companies and secondary establishments (branches and subsidiaries). It is specifically stated, on page 3 of the letter that: *“The act of registering a ship in the Netherlands could result in serious disruption within a company and require the completion of numerous formalities with financial consequences etc. This is not the case in Iceland.”*

The Authority cannot subscribe to these arguments. The Icelandic requirement to meet those further conditions places a restriction on companies of other EEA States to transfer its central administration to Iceland, if they do not satisfy the conditions in issue. In such situations their only course of action is to alter the structure of their present management or of their boards of directors. The CJEU has held that such changes “may entail serious disruption within a company and also require the completion of numerous formalities which have financial consequences,”²⁴ The requirement also places a restriction on companies of other EEA States wishing to pursue activities from Iceland through agencies, branches or subsidiaries, as they may not choose the management or branch manager freely. It is clear that any such restriction will restrict the right of establishment since it will prevent a company appointing the person it prefers.

In addition, the effect of the link to the EEA residence is that nationals of EEA States are discouraged from setting up and acting as founders directors of companies in Iceland.

Therefore, a residence and/or nationality requirement such as set out in the above mentioned provisions amounts to a restriction to the freedom of establishment as laid down in Article 31 of the EEA Agreement.

Additionally, the Authority considers that the obligation, which follows from Articles 66(2) and 140(1) of Act No 2/1995 on Public Limited Companies and Articles 42(2) and 114(1) of Act No 138/1994 on Private Limited Companies, to submit evidence of citizenship and

²² Case C-299/02 *Commission v Netherlands*, cited above, paragraphs 15 and 16

²³ Case C-299/02 *Commission v Netherlands*, cited above, paragraphs 19.

²⁴ Case C-299/02 *Commission v Netherlands*, cited above, para 19.

residence for the branch manager, managing director and/or the board is incompatible with Article 2 of the Eleventh Directive 89/666/EEC. Article 2(1) of the Directive lists the documents and particulars that must be disclosed, and Article 2(2) lists the additional information that may be required by the Member State where registration takes place.

According to Article 2(1)(e) of the Eleventh Directive, information about the appointment, termination of office and particulars of the persons who are authorised to represent the company in dealings with third parties and in legal proceedings must be disclosed. In the latter case there should be an indication of the extent of their powers. Information about the citizenship and residence of the persons representing the company/branch is not specified in the exhaustive list in Article 2 of the Directive.²⁵ It follows that such a disclosure obligation is contrary to the Eleventh Directive.

By its letter of 31 October 2014, Iceland stated that the Minister of Industry and Commerce may grant an exemption from the requirement of residence. The procedure for applying for such an exemption is fairly easy and not too burdensome for those who wish to establish a company in Iceland if the foreseen structure does not comply with the legal requirements.

In this regard, the Authority notes that it is established case-law that rules which contain an obligation to obtain authorisation are liable to deter or even prevent economic operators from other member States from pursuing their activities in the host member State through a fixed place of business.²⁶ Such authorization requirements are thus, by their very nature, restrictive.

5.3 Existence of a restriction of Article 28 EEA

It could also be mentioned that the residence requirement for the members of the management board, the executive management of companies and branch representatives falls not only under the scope of Article 31 of the EEA Agreement but also under that of Article 28 thereof.

Furthermore, Article 1(1) of Regulation No 492/2011 provides that “[a]ny national of a Member State shall, **irrespective of his place of residence**, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State.”

Depending on the actual circumstances²⁷ persons in the above-mentioned management positions might also be under the direction of other persons (for instance, the owners of the company) and, thus, in a relationship of subordination, which is an essential characteristic of an employment relationship according to the settled case-law of the CJEU,²⁸ unless the manager is not at the same time the owner or sole shareholder of the respective company.²⁹ This interpretation is further reinforced by the judgment in *Clean Car Autoservice*,³⁰ where

²⁵ The Eleventh Directive exhaustively regulates the company law disclosure requirements which EEA States can impose on branches covered by the Directive, as confirmed by the ECJ in Case C-167/01, *Inspire Art*, [2003] ECR I-10155, para. 69-70.

²⁶ Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraphs 34, 35 and 38.

²⁷ See e.g. Case C-3/87 *The Queen v Ministry of Agriculture, Fisheries and Foods, ex parte Agegate Ltd.*, [1989] ECR 4459, paragraph 36.

²⁸ Case 66/85 *Lawrie-Blum*, [1986] ECR 02121, paragraph 17; Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 34; Joined cases C-151/04 and C-152/04 *Nadin* [2005] ECR I-11203 paragraph 31.

²⁹ Case C-107/94 *Asscher* [1996] ECR I-3089, paragraphs 25 and 26.

³⁰ Case C-350/96 *Clean Car Autoservice GesmbH* [1998] ECR I-2521.

a residence requirement for managers of undertakings has been examined by the CJEU under Article 39 EC (now Article 45 TFEU) and it has been found incompatible with the freedom of movement of workers.

The Icelandic residence requirements might also affect persons in the concerned management positions who are in a dependent work relation. Although the Icelandic Government in its letter of 27 June 2014 has argued that Article 28 EEA would not be applicable, the Authority has not been able to verify that none of the founders, the members of management or branch representatives could be regarded as workers.³¹ The reasoning with regard to Article 31 of the EEA Agreement applies equally to the existence of a restriction under Article 28 of the EEA Agreement.

Based on this reasoning, the Authority therefore concludes that a residence requirement such as set out in the above provisions also contain a restriction of Article 28 of the EEA Agreement for which the Authority does not see any arguments for justification.

5.4 Possible Justifications

By its letter of 27 June 2014, Iceland contends that the aim pursued by residence requirements in the acts in question is one of public interest, i.e. to carry out surveillance and protection.

The Icelandic Government points out that legislation and surveillance are similar in all EEA States and that judgments against the founders and the leaders of companies, for example regarding liability for damages, can be carried out within the EEA, but enforcement is much more difficult outside the area. Therefore the residence condition increases the prospects of jurisdiction being effectively exercised. The Government claims that the residence requirements also help fight economic crime, as it is much more difficult, if not impossible, to investigate economic crimes when all the management of a company resides in a country outside the EEA, where it is in reality impossible for Icelandic authorities reach them.

The Government emphasises that the requirement in question cannot be replaced by less restrictive measures which would be equally effective in ensuring that the aim pursued is achieved. The Government stresses that the requirements extend only to a certain proportion of founders and directors of companies and that there is no minimum time limit on residency. Moreover, the Icelandic Government may grant an exemption to the residence requirements in all cases.

Therefore, the Icelandic Government is of the opinion that the residence requirements are necessary, suitable and appropriate to secure public interests.

The CJEU has made it clear that the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organisation, qualifications, professional ethics, supervision and liability.³² However, these conditions must satisfy the proportionality requirement.³³

³¹ Case C-337/97 *C.P.M. Meeusen* [1999] ECR I-3289, paragraph 15, and Case C-107/94 *Asscher*, cited above, paragraph 26.

³² Case C-55/95 *Gebhard* [1995] ECR I-4165, paragraphs 35-37.

³³ Case C-55/95 *Gebhard*, cited above, paragraph 37.

In this regard, the Authority notes that the CJEU, in referring to the requirements of residence within the EEA, has held that “[a]s regards the argument that [...] a person whose residence is outside the Community or one of the States Parties to the Agreement on the European Economic Area cannot properly undertake the day-to-day management for which the director of a [...] company is responsible, it is appropriate to recall once again that the possibility for a State to exercise its jurisdiction over a person depends primarily on his practical accessibility and not on his residence.”³⁴

Furthermore, the EFTA Court has consistently held that a residence requirement is neither suitable or necessary to achieve these objectives as there seem to be less restrictive and more appropriate means to attain those goals. Thus, in the view of the EFTA Court, neither the compliance with the national legislation by the managing director or by a member of the managing board, nor the control of such compliance by the public authorities would seem to be dependent on the physical presence of the managing director or of the board member, and it would seem to be even less dependent on their place of residence.³⁵

In this regard, the EFTA Court noted that, while the physical presence of the managing director does not guarantee that public authorities get the information they require, it is fully possible for a managing director to provide all necessary information without being physically present. More appropriate and less restrictive means of ensuring compliance with national legislation could, for instance, consist of periodic reporting requirements or obligations to make available specified and relevant information at the registered office of the company.³⁶

Furthermore, the EFTA Court has found that the residence requirement is neither necessary to assist the administration of justice, nor to ensure the execution of civil judgments or enforce administrative and criminal sanctions. Referring to the judgments of the CJEU in *Clean Car Autoservice*³⁷ and *Commission v Spain*³⁸ the EFTA Court argued that other less restrictive means, such as serving notice of fines at the registered office of the undertaking employing the manager and ensuring that those fines will be paid by requiring a guarantee to be provided beforehand would make it possible to ensure that the manager can be served with notice of any such fines imposed upon him and that they can be enforced against him.³⁹

This view is further supported by the Opinion of Advocate General Fennelly in the *Clean Car* case where he concludes that “[i]t would thus be less restrictive for the national authorities simply to impose directly a condition of effective involvement [...] and to leave it up to the manager to decide, in the light of geographical and other circumstances, how to reconcile his residence with this condition.”⁴⁰

Lastly, the Authority observes that Article 10 of Council Regulation No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) specifically requires that SE

³⁴ Case C-299/02 *Commission v Netherlands*, cited above, paragraph 37.

³⁵ Case E-2/01 *Dr. Franz Martin Pucher* [2002] EFTA Court Report 44, paragraphs 32 and 33, Case E-3/98 *Herbert Rainford-Towning* [1998] EFTA Court Report 205, paragraph 34 and Case E-8/04 *EFTA Surveillance Authority v The Principality of Liechtenstein*, paragraphs 26 and 27.

³⁶ Case E-2/01 *Dr. Franz Martin Pucher*, cited above, paragraph 35, and Case E-3/98 *Herbert Rainford-Towning*, cited above, paragraph 34.

³⁷ Case C-350/96 *Clean Car Autoservice GesmbH*, cited above, paragraph 36.

³⁸ Case C-114/97 *Commission v Spain* [1998] ECR I-6717.

³⁹ Case E-3/98 *Herbert Rainford-Towning*, cited above, paragraph 35 and Case E-2/01 *Dr. Franz Martin Pucher*, cited above, paragraphs 37 and 38.

⁴⁰ Opinion of General Advocate Fennelly in Case C-350/96 *Clean Car Autoservice GesmbH*, cited above, paragraph 30, last sentence.

companies are treated in every EEA State as public limited liability companies. Article 47(2) of the SE Regulation refers to the cases of disqualification of individuals from serving on corporate organs of a public limited-liability company. This provision only refers to the provisions of national legislation to define the cases of disqualification for individuals from serving on corporate organs of a public limited-liability company. Residence within the EEA and/or EEA nationality is not one of them.

The Icelandic Government has not provided any legitimate objectives to justify the EEA nationality requirement in the contested acts.

As regards such EEA nationality requirement, the Authority would like to observe that in Case C-299/02 *Commission v. Netherlands*,⁴¹ the CJEU rejected the Dutch argument that the EEA nationality condition considerably increased the prospects of jurisdiction being effectively exercised, stating that *“the possibility for a State to exercise its jurisdiction over a person depends primarily on the practical accessibility of the person concerned and not on his nationality. That test is already met when the management of the ship must be carried out from a place of business in the Netherlands by a person authorised to represent the shipowner.”*⁴²

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force EEA nationality and/or residence requirements in Articles 3(2-3), 66(2) and 140(1) of Act No 2/1995 on Public Limited Companies; Articles 3(2-3), 42(2) and 114(1) of Act No 138/1994 on Private Limited Companies; Articles 14 and 54(6) of the Act on Insurance Activities No. 56/2010; Article 10 of Act No 34/1991 on Investment by Non-residents in Business Enterprises; and Article 15(2) of Act No 33/1999 on Foundations Engaging in Business Operation, Iceland has failed to fulfil its obligations arising from Articles 31 and 28 of the EEA Agreement, Article 2 of the Eleventh Directive 89/666/EEC and Article 1(1) of Regulation (EU) No 492/2011 *of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union*.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Icelandic Government submits its observations on the content of this letter *within two months* of its receipt.

⁴¹ Case C-299/02 *Commission v. Netherlands*, cited above.

⁴² Case C-299/02 *Commission v. Netherlands*, cited above, paragraph 26.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Icelandic Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority


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