REPORT FOR THE HEARING
in Case E-1/09

APPLICATION to the Court 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 in the case between the

EFTA Surveillance Authority

and

The Principality of Liechtenstein

seeking a declaration that by requiring the members of the management board and of the executive management of banks established in Liechtenstein to be, by reason of their residence, in a position to actually and unobjectionably perform their functions and duties, and by requiring a residence, wherefrom he is in a position to fulfil his tasks, actually and on a regular basis, for lawyers, patent lawyers, auditors and trustees, the Principality of Liechtenstein has failed to fulfil its obligations under the EEA Agreement, in particular Articles 28 and 31 thereof.

I Introduction

1. The case concerns the compatibility with Articles 28 and 31 EEA, on the free movement of workers and the freedom of establishment, of a series of provisions laid down in Liechtenstein law, imposing a form of residence requirement for members of the management board and the executive management of banks as well as for lawyers, patent lawyers, auditors and trustees, respectively.

2. The contested provisions are not, the Parties agree, directly discriminatory on grounds of nationality. Rather, the case goes to whether the provisions are indirectly discriminatory and for that reason constitute restrictions on the freedoms laid down in Articles 28 and/or 31 EEA and, if so, whether the restrictions are justified.

II Legal background

EEA law

3. Article 28 EEA reads:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
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> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*
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> *3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
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> *(a) to accept offers of employment actually made;*
>
> *(b) to move freely within the territory of EC Member States and EFTA States for this purpose;*
>
> *(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
>
> *(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.*
>
> …

4. 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…*

National law[1]

5. Article 25 of the Liechtenstein Banking Act, as amended by the Act of 23 May 2007, reads:

> *The members of the management board and of the executive management must, by reason of their residence, be in a position to fulfil their functions and duties, actually and unobjectionably.*

6. Article 29(3) of the Banking Ordinance of 22 April 1994 to the Banking Act reads:

> *The foreseen persons must, considering their further obligations and their residence, be in a position to perform, unobjectionably, their duties in the bank or financial institution.*

7. According to amending Acts of 23 May 2007, Articles 1(1)(d) of the Lawyers Act, 1(2)(d) of the Patent Lawyers Act, 1(2)(d) of the Auditors Act and 1(2)(d) of the Trustees Act, provide that the authorities may grant a licence to take up and pursue the relevant profession only to an applicant who:

> *by reason of his residence, is in a position to fulfil his tasks, actually and on a regular basis.*

8. A similar clause has been introduced in Articles 31(2)(c) of the Patent Lawyers Act, 32(2)(c) of the Auditors Act and 36(2)(c) of the Trustees Act, allowing establishment in Liechtenstein only if the applicant provides proof of:

> *a residence, wherefrom he is able to fulfil his tasks, actually and on a regular basis.*

III Pre-litigation procedure leading to the Application

9. In the wake of the 1 July 2005 judgment in Case E-8/04 *ESA* v *Liechtenstein*,[2] in which the former Liechtenstein residence requirement for at least one member of the management board and one member of the executive management of a bank established on Liechtenstein territory was found incompatible with Article 31 EEA, the Liechtenstein Government, on 4 July 2006, submitted a Bill to the *Landtag* (the Liechtenstein Parliament), proposing that this residence requirement be abolished.

10. At the same time, following a reasoned opinion from the EFTA Surveillance Authority (hereinafter "ESA"), the Liechtenstein Government also

[1] Translations of national provisions are unofficial, based on translations contained in the Application and revised in line with later suggestions by the parties.

[2] Case E-8/04 *ESA* v *Liechtenstein* [2005] EFTA Ct. Rep. 46.

submitted to the *Landtag* another four Bills, proposing that similar residence requirements for lawyers, patent lawyers, auditors and trustees be abolished as well.

11. After amendments introduced in the course of the legislative process, five Acts were adopted by the *Landtag* on 23 May 2007 and entered into force 26 July 2007. The amendments entailed reintroducing a form of residence requirement, although different from the one previously judged upon by the EFTA Court and from those contained in the earlier Liechtenstein legislation.

12. On 5 December 2007, ESA issued two letters of formal notice to Liechtenstein in which ESA held the new requirements relating to residence to be contrary to EEA law. One letter was related to bank management, the other to lawyers, patent lawyers, auditors and trustees. The Liechtenstein Government replied by two letters dated 6 and 28 March 2008, respectively, disputing ESA's view.

13. In light of the Liechtenstein replies to the letters of formal notice, ESA issued two reasoned opinions on 16 July 2008, requesting that Liechtenstein take the necessary measures to comply with the reasoned opinions within three months. The Liechtenstein Government replied to these reasoned opinions by two letters of 5 November 2008, also disputing ESA's view.

14. On 3 February 2009, ESA lodged an Application commencing this action at the Court.

IV Forms of order sought by the parties

15. The EFTA Surveillance Authority requests that the Court declare that:

1. By requiring the members of the management board and of the executive management of banks established in Liechtenstein to be, by reason of their residence, in a position to actually and unobjectionably perform their functions and duties, the Principality of Liechtenstein has failed to fulfil its obligations under the EEA Agreement, in particular Articles 28 and 31 thereof,

2. By requiring a residence, wherefrom he is in a position to fulfil his tasks, actually and on a regular basis, for lawyers, patent lawyers, auditors and trustees the Principality of Liechtenstein has failed to fulfil its obligations under the EEA Agreement, in particular Article 31 thereof,

3. The Principality of Liechtenstein bear the costs of these proceedings.

16. The Principality of Liechtenstein requests the Court to:

1. Dismiss the Application as unfounded.

2. Order the Applicant to bear the costs of the proceedings.

V Written procedure before the Court

17. Written arguments have been received from the parties:

- the EFTA Surveillance Authority, represented by Bjørnar Alterskjær, Deputy Director, and Florence Simonetti, Officer, Department of Legal & Executive Affairs, acting as Agents;
- the Principality of Liechtenstein, represented by Dr. Andrea Entner-Koch, Director, and Sabine Tömördy, Deputy Director, EEA Coordination Unit, acting as Agents.

18. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the Commission of the European Communities, represented by Enrico Traversa, Legal Adviser, and Ion Rogalski, member of its Legal Service, acting as Agents.

VI Summary of the pleas in law and arguments

The EFTA Surveillance Authority

The ambit of Article 31 EEA on freedom of establishment

19. As a reaction to arguments put forward by Liechtenstein, ESA submits that it does not see how the contested provisions could fall outside the ambit of Article 31 EEA on freedom of establishment. For one thing, ESA contends that the question of "establishment" within the meaning of that Article has nothing to do with personal residence. Moreover, ESA also opposes any argument that the concept of establishment contains a qualitative condition according to which a person is only established within a given EEA State when that State finds that he is able to perform his functions in a satisfactory manner.

Restrictions on the freedom of establishment

20. Whereas the contested provisions do not explicitly require that the necessary residence be in a particular territory, ESA assumes that residence in Liechtenstein will always meet the requirements. It is further assumed that, depending on the application by Liechtenstein authorities, the requirements may also be fulfilled in cases of residence outside Liechtenstein.

21. With reference to case law of the EFTA Court and the Court of Justice of the European Communities (hereinafter "ECJ"),[3] ESA argues that, generally, residence requirements are indirectly discriminatory and constitute restrictions on free movement.

22. ESA details why this is also the case with the presently contested provisions. The effect of their link to personal residence is that nationals of other EEA States, statistically speaking, are put at a disadvantage as compared to most Liechtenstein nationals when seeking to become members of the management board or the executive management of a bank established in Liechtenstein; and equally when seeking to establish themselves as lawyers, patent lawyers, auditors or trustees in Liechtenstein. According to ESA, this is so as Liechtenstein residents in any event will fulfil the relevant requirement, while non-residents might not. ESA also argues that in several cases regarding lawyers, the ECJ has found residence requirements to constitute indirect discrimination.[4]

23. Furthermore, ESA submits that the residence requirement laid down in the Banking Act places a restriction on banks wishing to establish themselves in Liechtenstein. Such banks are restricted in their freedom to choose the members of their management and, if relocating to Liechtenstein, may be forced to change their present management.

24. For all the residence requirements at issue, ESA submits that they would still constitute restrictions even if Liechtenstein authorities were to apply the requirements in a manner allowing residence in most EEA countries. Certain persons would still either be excluded from the activities in question, in Liechtenstein, or would have to move in order to be allowed the exercise of their rights under Article 31 EEA. Indeed, ESA argues, the contested provisions would be both discriminatory and restrictive unless they were completely devoid of content, allowing residence not only in all EEA States, but in fact all over the world. This is so as the provision in Article 31 EEA ensures the right for any EEA citizen to establish himself in an EEA State even if he resides in a third country.

25. Further, the fact that the contested provisions are related to whether members of the management of a bank, lawyers, patent lawyers, auditors and trustees are in a position to perform their functions in a satisfactory manner cannot, in ESA's view, imply that the national legislation at hand does not constitute any restriction.

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[3] Cases E-3/98 *Rainford-Towning* [1998] EFTA Ct. Rep. 205, at paragraphs 27 and 29; E-2/01 *Pucher*[2002] EFTA Ct. Rep. 44, at paragraphs 18–19; C-279/93 *Schumacker* [1995] ECR I-225, at paragraph 28; C-237/94 *O'Flynn* [1996] ECR I-2617, at paragraphs 20–21; E-3/05 *ESA* v *Norway* [2006] EFTA Ct. Rep. 102, at paragraph 56; C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, at paragraph 12; C-42/02 *Lindman* [2003] ECR I-13519, at paragraph 22; C-439/99 *Commission* v *Italy* [2002] ECR I-305, at paragraph 22; and C-190/98 *Graf* [2000] ECR I-493, at paragraph 23.

[4] Reference is made to Cases C-145/99 *Commission* v *Italy* [2002] ECR I-2235, at paragraphs 25–28; and 107/83 *Klopp* [1984] ECR 2971, at paragraphs 18–19.

26. The same goes, ESA argues, for the contested provisions possibly being intended not to regulate anything but the conditions under which such activities are to be carried out.

27. In this respect, ESA submits, firstly, that the requirement to treat Liechtenstein nationals and other EEA nationals as well as domestic and foreign undertakings in an equal manner applies not only to the taking up of an activity, but also to the conditions for further pursuing it.

28. Secondly, ESA submits that the provisions at issue in the Lawyers Act, Patent Lawyers Act, Auditors Act and Trustees Act do seem intended to regulate not only how these activities are to be carried out but also the access to such positions.

29. Thirdly, with respect to the management of banks, ESA also refers to the judgment of the EFTA Court concerning the previous, and somewhat different, residence requirement in the Liechtenstein Banking Act.[5] ESA submits that the EFTA Court decided this case without considering whether the said requirement was limiting the right to take up a management function in a bank in Lichtenstein or simply intended to regulate the conditions under which such a function is to be carried out.

No justification

30. At the outset, ESA notes how the ECJ has accepted that the taking-up and pursuit of certain self-employed activities may be conditioned upon compliance 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. Such national measures must be applied in a non-discriminatory manner, they must be suitable for securing the attainment of the objective they pursue and they must not go beyond what is necessary in order to do so.[6]

31. In relation to the contested provisions in the Banking Act and the Banking Ordinance, ESA agrees with Liechtenstein that the need to safeguard the reputation of financial markets has been recognised as a legitimate aim in the banking sector that is particularly sensitive from the perspective of consumer protection. In particular, it is necessary to protect consumers against the harm which they could suffer through banking transactions effected by institutions whose managers do not have the necessary professional qualifications or integrity.[7] Further, in order to safeguard both consumer protection and the Liechtenstein economy, in which banking plays a fundamental role, it is necessary to prevent improper management. ESA also notes that the Advocate

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[5] I.e. Case E-8/04 *ESA* v *Liechtenstein*, cited above.

[6] Reference is made to Case C-55/94 *Gebhard* [1995] ECR I-4165, at paragraphs 35–37.

[7] Reference is made to Case C-222/95 *Parodi* [1997] ECR I-3899, at paragraph 22.

General in *Clean Car Autoservice* considered it a legitimate objective to require that managers of certain businesses be in a position to act as such in the business and exercise a real rather than a formal role.[8] Similarly, several Directives made part of the EEA Agreement and relating to financial services require that persons of sufficient repute and experience "effectively direct the business".[9]

32. The disagreement with Liechtenstein, ESA maintains, is only on whether the requirements relating to personal residence are suitable, necessary and proportionate in order to ensure the performance of effective and "unobjectionable" management. ESA submits that the link to private residence is in all respects alien both to secondary legislation in the financial sector, made part of the EEA Agreement, and to a proper construction of Article 31 EEA.

33. As for the contested provisions in the Acts on Lawyers, Patent Lawyers, Auditors and Trustees, respectively, ESA notes that the preparatory works contain no information on possible reasons except for the wish to ensure a certain link to Liechtenstein. Still, ESA does not dispute the legitimacy of the aims later invoked by Liechtenstein, namely that in order to protect consumers, persons authorised under Liechtenstein law and using national titles shall be sufficiently integrated in the national legal order; and that due to the fundamental role of the said professions in the national economy, such professionals must adhere to high quality standards and artificial or abusive arrangements cannot be tolerated. What ESA fails to see, however, is how the requirements relating to personal residence could be suitable, necessary and proportionate for attaining these aims.

34. Turning to a proportionality assessment, ESA contends, first and foremost, that the contested provisions are disproportionate as they go beyond what is necessary in order to reach their purported objectives.

35. As for the banking sector, ESA has not seen reasons for taking personal residence into account in relation to all board members and all members of the executive management. Neither has ESA seen reasons for doing so even in relation to a single member of the board or of the executive management.[10]

36. With regard to residence clauses for lawyers, patent lawyers, auditors and trustees being adopted to exclude harmful and abusive conduct in the markets

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[8] Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521, Opinion of the Advocate General, at point 30.

[9] Reference is made to Article 11(1) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, OJ L 177, 30.6.2006, p. 1, referred to at point 14 of Annex IX to the EEA Agreement; and Article 9(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145, 30.4.2004, p. 1, referred to at point 30 of Annex IX to the EEA Agreement.

[10] ESA further refers to Cases C-299/92 *Commission* v *Netherlands* [2004] ECR I-9761, at paragraph 37; and *Clean Car Autoservice*, cited above, at paragraph 36.

concerned, ESA claims Liechtenstein has not described the nature or type of abuse which it sought to discourage, so as to allow an assessment of the suitability of such residence clauses. Nor has Liechtenstein substantiated, ESA claims, that the risk of abusive conduct is influenced by the place of residence.

37. For all concerned sectors, ESA further considers that the existence of modern telecommunication techniques such as email, telephone, fax and electronic signature implies that being physically present at a particular work place at all times is no longer necessary. Moreover, modern means of transport, such as (high-speed) trains and aircraft would seem to provide a connection from countries at considerable distance from Liechtenstein in situations where presence at the work station is necessary. ESA states that, despite a request to do so, Liechtenstein has not provided examples of situations where a given personal residence would by itself entail that the manager concerned would not be able to perform his duties in a proper manner.

38. Also in the context of a proportionality assessment, ESA expresses the opinion that the contested provisions must be deemed unjustifiable under Article 31 EEA due to their vagueness and lack of transparency with regard to their scope.

39. In this respect, ESA submits that even where a residence requirement would, in principle, be appropriate for the attainment of a legitimate aim the requirement would still only be compatible with the rules on free movement if "its application by the national authorities […] rest[s] on clear criteria known in advance".[11] Where that is not the case, the national measure will, for that reason alone, fail the requirement of proportionality.

40. ESA further argues that in order to satisfy the combined requirements of proportionality and legal certainty, it is essential that individuals may benefit from a clear and precise understanding of their rights and obligations, enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before national courts.[12] Therefore, it is not merely a general goal but an absolute requirement for compatibility with EEA law that national rules restricting free movement "should be worded unequivocally".[13]

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[11] Case C-138/02 *Collins* [2004] ECR I-2703, at paragraph 72. Reference is also made to Case C-158/07 *Förster*, judgment of 18 November 2008, at paragraph 56, not yet published.

[12] Reference is made to Cases 29/84 *Commission* v *Germany* [1985] ECR 1661, at paragraph 23; 363/85 *Commission* v *Italy* [1987] ECR 1733, at paragraph 7; C-59/89 *Commission* v *Germany* [1991] ECR I-2607, at paragraph 18; C-236/95 *Commission* v *Greece* [1996] ECR I-4459, at paragraph 13; C-483/99 *Commission* v *France* [2002] ECR I-4781, at paragraph 50; C-463/00 *Commission* v *Spain* [2003] ECR I-4581, at paragraphs 74–75; C-54/99 *Église de scientologie* [2000] ECR I-1335, at paragraph 22; C-478/01 *Commission* v *Luxembourg* [2003] ECR I-2351, at paragraph 20; and C-370/05 *Festersen* [2007] ECR I-1129, at paragraph 43.

[13] Case C-478/01 *Commission* v *Luxembourg*, cited above, at paragraph 20.

41. ESA maintains that in *Festersen*, the ECJ considered that a Danish circular stating that exemptions from a residence requirement should be strictly limited to "exceptional cases" and, moreover, applied "restrictively" did not inform individuals in a sufficient manner about the specific and objective situations in which a derogation could be granted or refused.[14] Such vagueness did not enable individuals to identify the extent of their rights and obligations resulting from the EC Treaty and thus a system of that nature was declared contrary to the principle of legal certainty. As a consequence, the residence requirement could not be considered proportionate to the objective pursued.

42. The background for this case law, ESA submits, is a recognition that non-transparency in itself implies that the provision concerned gives rise to a risk of abuse and discrimination.[15] Transparency in legal provisions is seen as a corollary of the principle of equal treatment, in the sense that it precludes any risk of favouritism or arbitrariness on the part of an authority.[16] Indeed, with regard to administrative authorisation schemes, the ECJ has ruled that, in order to be justified, they must be based on "objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily".[17]

43. ESA submits that the contested provisions in the Liechtenstein Banking Act and Banking Ordinance do not live up to these standards. The provisions give neither banks wishing to establish themselves in Lichtenstein nor persons intending to take on a position as a member of the management board or the executive management of a bank any operable and clear criteria as to the place of an acceptable residence. Neither preparatory works nor other sources make it clear whether the intention is to give the provisions a broad or a restrictive scope. Basically, it is not possible for the relevant undertakings to foresee whether the fact that one or more board members are resident in e.g. Stockholm, Athens or Hamburg will entail that the company is not allowed to establish itself in Liechtenstein unless some or all members concerned change their residence. Nor is it possible to foresee whether a change of residence to a particular place closer to Liechtenstein, e.g. Vienna or Munich, would suffice.

44. Furthermore, ESA has been unable to obtain information as to whether the guiding criterion will be the distance in kilometres from Liechtenstein or the travel time from residence to work place. Also, in the latter case, it remains unknown what the relevant benchmark would be, in e.g. a number of hours, and why so.

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[14] *Festersen*, cited above, at paragraphs 43–44.

[15] Reference is made to Cases C-231/03 *Coname* [2005] ECR I-7287, at paragraph 19; and C-300/01 *Salzmann* [2003] ECR I-4899, at paragraphs 46–47 and 52.

[16] Reference is made to Case C-496/99 P *Succhi di Frutta* [2004] ECR I-3801, at paragraph 111.

[17] Case C-56/01 *Inizan* [2003] ECR I-12403, at paragraph 57.

45. Similarly, ESA notes that the wording of the provisions does not distinguish between various management tasks, and thus seems to apply equally to, for instance, human resources managers and financial managers. The wording thus gives no guidance, ESA argues, as to whether the assessment will in fact be the same in relation to these different functions.

46. ESA further notes that, according to Liechtenstein, the competent national authority shall take into account the material and geographical scope of business activities and the organisation of the bank or financial institution when determining the suitability of a place of residence. Whereas Liechtenstein has argued that it is necessary to have some discretion in assessing each individual case, no arguments have been submitted for why it would not be possible to remove, or at least substantially reduce, any uncertainty by clarifying what the residence requirements mean. No guidelines have been issued on how the said discretion is to be applied. Besides, ESA states, the scope of business activities of a bank may change over the years, leading to further uncertainty as to whether the residence requirements are fulfilled at any given time.

47. The same considerations apply, ESA submits, to the contested provisions in the Acts on lawyers, patent lawyers, auditors and trustees.

48. Also with respect to these provisions, ESA notes, Liechtenstein has argued that discretion is necessary in assessing each individual case and that the Financial Market Authority would have to decide, depending on the professional portfolio of the lawyer, patent lawyer, auditor or trustee whether a place of residence outside Liechtenstein would allow an applicant to fulfil his tasks in Liechtenstein, actually and on a regular basis. Liechtenstein has further stated that changes in a professional's portfolio would have to be notified. In ESA's view, however, this confirms that it is not foreseeable whether one's place of residence is acceptable for establishment in Liechtenstein. ESA further notes that Liechtenstein has not presented arguments for why it would not be possible to remove any uncertainty by clarifying what the residence requirements mean.

49. Finally, ESA notes the information from Liechtenstein that no professional or manager has yet been rejected due to residence. ESA considers, however, that this does not offset the lack of transparency in the residence requirements and the legal uncertainty that this entails, which may notably deter EEA nationals or undertakings from exercising their freedom of establishment in Liechtenstein.

50. In conclusion, ESA submits that regardless of how strictly the residence requirements in the contested provisions are interpreted in practice, the lack of clarity in itself implies that the provisions are unjustifiable and therefore contrary to Article 31 EEA and the principle of legal certainty.

Corresponding application of Article 28 EEA on free movement of workers

51. ESA argues that the residence requirements in Article 25 of the Banking Act and Article 29(3) of the Banking Ordinance also affect persons in the concerned management positions who are in a dependent work relation. It is contended that at least some of the executive managers of a bank might be considered as workers within the meaning of Article 28 EEA. In so far, ESA submits that the reasoning above, with regard to both the existence of a restriction and possible justification under Article 31 EEA, applies correspondingly.

52. ESA relies on the essential feature of an employment relationship being that "for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration".[18] Moreover, it is submitted, in particular, that "[t]he question whether a given relationship falls outside such an employment relationship must be answered in each case on the basis of all the factors and circumstances characterising the arrangements between the parties, such as, for example, the sharing of the commercial risks of the business, the freedom for a person to choose his own working hours and to engage his own assistants".[19]

53. ESA has been unable to establish that no member of the "executive management" of banks could be regarded as a worker. ESA questions e.g. to what extent a head of human resources may act independently. Such a manager, it is submitted, necessarily works under the supervision of a higher manager or of the owners or management board of the bank. Moreover, it is not contested that executive managers work for the owners of the bank and receive remuneration in return. The sharing of the commercial risks of the business would appear to be limited, at least for some members of the executive management.

The Principality of Liechtenstein

The ambit of Article 31 EEA on freedom of establishment

54. Liechtenstein distinguishes the present case from the cases relating to freedom of establishment and free movement of workers which the EFTA Court and the ECJ have decided upon.[20] The contested provisions, it is submitted, neither require residence in a certain territory nor do they intend to solve problems of jurisdiction. Rather, these provisions merely regulate the pursuit of certain activities in Liechtenstein, posing certain demands as to how members of

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[18] Reference is made to Case C-456/02 *Trojani* [2004] ECR I-7573, at paragraphs 15–16.

[19] Reference is made to Case 3/87 *Agegate* [1989] ECR 4459, at paragraph 36. Further reference is made to Cases 53/81 *Levin* [1982] ECR 1035, at paragraph 16; 344/87 *Bettray* [1989] ECR 1621, at paragraphs 15–16; C-188/00 *Kurz* [2002] ECR I-10691, at paragraph 32; C-107/94 *Asscher* [1996] ECR I-3089, at paragraph 26; and C-337/97 *Meeusen* [1999] ECR I-3289, at paragraph 15.

[20] Particular mention is made of *Rainford-Towning*, cited above; *Pucher*, cited above; and *Clean Car Autoservice*, cited above.

the management of a bank, lawyers, patent lawyers, auditors and trustees must perform their functions.

55. Freedom of establishment is contrasted with the freedom to provide services under Article 36 EEA. On this background, Liechtenstein argues that a professional who, by reason of his personal residence, is not able to fulfil his tasks in a satisfactory manner on the territory of his establishment is, in fact, not established. Thus, it is argued, that person is not entitled to benefit from the freedom of establishment under Article 31 EEA.

56. In placing the present case outside the ambit of Article 31 EEA, Liechtenstein further argues that what this Article allows is for an EEA national to participate on a stable and continuous basis in the economic life of a Member State other than his State of origin. The essence of the freedom of establishment is "the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period".[21] For bank managers, lawyers, patent lawyers, trustees and auditors, Liechtenstein submits, this presupposes a certain physical presence at the place of business.[22] Bank managers must be personally accessible and, in order to be effectively involved in their business, lawyers, patent lawyers, auditors and trustees, must be physically present on a regular basis.

57. In this context, Liechtenstein also points to the Directive on e-commerce, according to which the presence and use of technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider.[23]

58. In conclusion, Liechtenstein argues that the contested provisions merely set out requirements constituting a *conditio sine qua non* for establishment in Liechtenstein. Thereby, individuals and companies are prevented from improperly or fraudulently benefiting from EEA law.

No restriction on the freedom of establishment

59. Should the EFTA Court consider the case at hand to fall within the ambit of Article 31 EEA, Liechtenstein further submits that the national provisions in question do not constitute restrictions on the freedom of establishment under this Article.

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[21] Reference is made to Case C-221/89 *Factortame II* [1991] ECR I-3905, at paragraph 20.

[22] Further reference is made to the opinion of the Advocate General in *Factortame II*, cited above, at paragraphs 56 and 58.

[23] Reference is made to Article 2(c) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17.7.2000, p. 1.

60. Firstly, Liechtenstein argues that other EEA nationals are not put at a disadvantage as compared to Liechtenstein nationals – the contested provisions do not discriminate on grounds of nationality, neither directly nor indirectly. The provisions at issue do not require residence in a certain territory, unlike the residence requirements judged upon in *Rainford-Towning* and *Pucher*, cited above. Rather, residence is referred to as a criterion for assessing effective establishment. Taking account of the size of Liechtenstein, it is added that, with a view to effective establishment, residence in the neighbourhood of Liechtenstein is, in general, equally appropriate as residence in Liechtenstein. It is also added that depending on the actual function, even residence at a greater distance could be acceptable. As regards banks, the residence requirement is assessed with respect to the management body as a whole and not its individual members. The decisive criterion, it is submitted, is that at least one competent person can be on the spot immediately, in case of a crisis.

61. Secondly, Liechtenstein argues that the contested provisions do not impede the right to take up professional activity in Liechtenstein but only regulate the conditions under which such activity is to be carried out. The argument is made with particular reference to Article 31 EEA subjecting other EEA nationals' freedom of establishment to "the conditions laid down for its own nationals by the law of the country where such establishment is effected". According to Liechtenstein, the contested national provisions entail that the professional in question must be able and willing to integrate into the Liechtenstein economic and legal order. Liechtenstein contends that this does not affect other EEA nationals more than Liechtenstein nationals. The fact that persons resident in Liechtenstein (or in a frontier region) might be able to adapt more quickly than others to national standards of an establishment is, according to Liechtenstein, a consequence of the existence of different national legal orders and cannot be interpreted as an obstacle to access to the Liechtenstein market.

Justification

62. Liechtenstein claims that even if the contested provisions would constitute restrictions, they would in any event be justified.

63. Firstly, Liechtenstein submits that the contested provisions pursue legitimate objectives. The provisions of the banking legislation reflect the need to ensure that persons in the upper management of a bank are accessible and have a certain bond with the financial market. The provisions for lawyers, patent lawyers, auditors and trustees, referred to as "other financial intermediaries" are similar.

64. Liechtenstein maintains that the main purpose of the provision in Article 25 of the Banking Act is to ensure the functioning of the banking sector by preventing improper management and artificial arrangements. The intention is to protect the banking sector against harm which could result from an absent management, meaning that there is no competent person who, in case of a crisis,

could be on the spot in due time. It is noted, in this context, that the Directive relating to the taking up and pursuit of the business of credit institutions requires that there are at least two persons who "effectively direct the business".[24] Liechtenstein further notes that the need to safeguard the reputation of financial markets is a legitimate aim and that the banking sector is particularly sensitive from the perspective of consumer protection.[25]

65. Banking plays a fundamental role in the Liechtenstein economy. For that reason, Liechtenstein argues, companies in the banking sector need a high level of security, supervision and, especially, managerial quality. The argument is set against the background of the worldwide financial crisis and it is pointed out that if banks in Liechtenstein were to fail, this would be most harmful for the country's reputation and would seriously endanger its economic system.

66. Similarly, Liechtenstein maintains, the main purpose of the provisions setting out residence requirements for lawyers, patent lawyers, trustees and auditors is to ensure that consumers are protected against harm they could suffer following advice given by professionals who are not effectively established in Liechtenstein. Especially where activities, such as those at issue, involve complex legal issues and are governed by numerous specific rules, consumers must be able to trust that persons authorised under national law and using national professional titles are sufficiently integrated into the Liechtenstein legal order. Further, it is argued that persons who are not willing to participate effectively in the Liechtenstein market cannot be regarded as possessing the necessary professional and personal competence.

67. Moreover, Liechtenstein notes that the work of lawyers, patent lawyers, trustees and auditors plays an important role in the Liechtenstein economy, in particular with a view to services provided on the financial market. It is therefore legitimate that these professionals must adhere to high quality standards and that artificial or abusive arrangements cannot be tolerated.

68. In sum, Liechtenstein sees the contested provisions as a "requirement of effective establishment", protecting not only creditors, clients and employees but also contributing to the functioning of the Liechtenstein economy.

69. Secondly, Liechtenstein submits that the contested provisions are proportionate means in pursuit of their legitimate objectives. According to Liechtenstein, effective establishment or operation of business implies a certain degree of physical presence.

70. Liechtenstein maintains that the activities of the professionals at issue cannot be pursued just by e-mail or telephone communication. According to

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[24] Reference is made to Article 11(1) of Directive 2006/48/EC, cited above.

[25] Reference is made to Cases C-384/93 *Alpine Investments* [1995] ECR I-1141, at paragraph 44; *Parodi*, cited above, at paragraph 22; and *Pucher*, cited above, at paragraph 23 [*sic*].

Liechtenstein, efficient control and supervision require actual business involvement and the knowledge of local circumstances. Problems normally cannot be anticipated at a distance. In order to plan ahead, one needs to be familiar with the workflow of the business. Especially in the financial market, there are often situations requiring immediate action on the spot. Moreover, trust building measures require regular personal communication, not only with clients and employees but also with national authorities. This is especially so for the activities of lawyers, patent lawyers, trustees and auditors which are carried out in a relationship of trust.

71. Practical accessibility is, even in times of modern means of communication, Liechtenstein claims, more problematic and insecure the more distant the physical location of a person. It is argued that even the EFTA Court has recognised that "a manager residing at a considerable distance from the place at which the undertaking exercises its trade would normally find it more difficult to act effectively in the business than a person whose place of residence is nearer to the place of business".[26] It thus cannot be denied, Liechtenstein claims, that residence – defined as the centre of living – is an appropriate criterion to assess whether a person is in a position to act properly and whether he exercises a real rather than a merely formal role.

72. Besides this, Liechtenstein argues, residence is only one of the criteria used to assess whether the activities in question can be effectively pursued in Liechtenstein. Article 29 of the Banking Ordinance stipulates that the members of the management also must possess the necessary professional qualifications. With regard to the required management skills, the competent authority (the Financial Market Authority) considers *inter alia* the factual and geographic business circle as well as the organisation of the bank. Moreover, it considers further responsibilities, such as additional managing functions in other companies, as well as the integrity of the person in question. The relevant Acts on lawyers, patent lawyers, auditors and trustees stipulate that the professional in question also must possess the necessary professional qualifications and integrity. Furthermore, the Financial Market Authority considers whether the infrastructure used in Liechtenstein is appropriate in order to properly carry out the business.

73. Further, Liechtenstein maintains that a requirement that the economic activity in question be carried out actually and unobjectionably, respectively actually and on a regular basis, which is assessed on the basis of clear criteria such as professional qualification, integrity, appropriate infrastructure, further responsibilities *and residence* cannot be regarded as vague and non-transparent. On the contrary, the same requirement *without* defined criteria such as residence would be much vaguer.

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[26] *Rainford-Towning*, cited above, at paragraph 36.

74. Moreover, pointing to the requirement of "sound and prudent" management set out in the Directive relating to the taking up and pursuit of the business of credit institutions, Liechtenstein argues that not every law providing authorities with a certain discretion can be declared as arbitrary or discriminatory.[27]

75. Rather, Liechtenstein submits, the discretion offered by the residence requirements allows the Financial Market Authority to take account of specific circumstances in the individual case. In this respect, it is submitted that the Authority considers whether: (i) the business can effectively be operated in Liechtenstein; (ii) the national authorities can find, at any time, a competent person at the place of business who is able to take the necessary decisions; and (iii) the relevant person is able, even in unpredictable circumstances, to be at the place of business in due time.

76. "Accessibility" will, according to Liechtenstein, essentially depend on the distance between the residence and the place of business, the duration of commuting, the quality of traffic routes and the available means of transport and communication. It is apparent that a further clarification of these criteria, e.g. a maximum distance, could not reflect the specific circumstances of the individual case and would unnecessarily restrict the freedom of establishment. In that respect, even if residence and place of business are far apart in kilometres, accessibility can be given due to fast means of transport.

77. In each case, Liechtenstein submits, the Financial Market Authority will have to make a careful assessment of the ability to effectively pursue the relevant business in Liechtenstein. Here, the Authority must act with the utmost diligence, as an authorisation under national law also signalises to clients and other stakeholders that the bank, lawyer, patent lawyer, trustee or auditor, is properly established in Liechtenstein.

78. Liechtenstein further notes that decisions by the Financial Market Authority must be reasoned and are subject to appeal.

79. Additionally, it is noted that since the entry into force of the new, contested provisions, no applicant has been rejected due to residence. According to Liechtenstein, this illustrates that the provisions are not applied restrictively.

80. To Liechtenstein, it appears that ESA would accept a requirement of effective involvement in the business, absent a residence requirement. In this regard, Liechtenstein finds it sufficient to submit that, with a view to freedom of establishment, a condition regarding working hours would be more onerous for the individual than just requiring a suitable residence. Besides, it is argued that it would be almost impossible for the Financial Market Authority to effectively supervise such a condition.

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[27] Reference is made to Article 12(2) of Directive 2006/48/EC, cited above.

Non-applicability of Article 28 EEA on free movement of workers

81. Liechtenstein contends that members of the management of a bank are not workers and that, consequently, Article 28 EEA is not applicable in the case at hand. It is argued that the functions and duties of members of the management board or the executive management of a bank are not carried out in the context of a relationship of subordination. Unlike workers, who act "under direction", the members of the management act independently and on their own responsibility. In general, how a company is managed has major implications for its functioning, as management comprises planning, organising, resourcing, leading and controlling an organisation. This goes also for banks, where the management supervises the activities of the bank and gives guidance to subordinates. The management of the bank determines the organisation, decides on human and technological resources and carries the main responsibility for planning and controlling the budget.

82. In addition, particular reference is made to Article 44(2)(f) of the EC Treaty. According to Liechtenstein, this provision implies that management has to be considered in the framework of establishment. Under this provision, restrictions on the freedom of establishment, including the entry of certain personnel into certain "managerial or supervisory posts", shall be progressively abolished. It thus appears, Liechtenstein argues, that the founding fathers of the EC Treaty were of the opinion that the activities of the management belong to the freedom of establishment and not to the free movement of workers.

83. Finally, reference is made to Case E-8/04 *ESA* v *Liechtenstein*, cited above, where the EFTA Court assessed the previous residence requirement in Article 25 of the Liechtenstein Banking Act under Article 31 EEA only. Liechtenstein submits that during the proceedings of that case, neither ESA nor the Commission argued that also Article 28 EEA could be applicable.

The Commission of the European Communities

The ambit of Article 31 EEA on freedom of establishment

84. The arguments put forward by the Commission reflect the understanding of EEA law that the contested provisions do fall within the ambit of Article 31 EEA on freedom of establishment.

Restrictions on the freedom of establishment

85. The Commission agrees with ESA in that the contested provisions constitute restrictions in the freedom of establishment. It is underlined, in particular, that the residence requirements have the effect of putting nationals of other EEA States at a disadvantage as compared to Liechtenstein nationals, as persons not complying with those residence requirements are, in the majority of

cases, foreigners. Further reference is made to case law of both the EFTA Court and the ECJ.[28]

No justification

86. Turning to justification, the Commission summarises relevant case law of the EFTA Court.[29] It is submitted that this case law is fully consistent with that of the ECJ, which has also ruled in several cases that a condition of residence in the host Member State in order to be appointed as manager of an undertaking amounts to indirect discrimination on grounds of nationality, contrary to Articles 39 and 43 of the EC Treaty.[30] Further, it is also settled case law that such a residence requirement constitutes an unjustified restriction, in particular on the freedom of establishment, when imposed upon members of regulated professions wishing to exercise their activity in the host Member State.[31]

87. The Commission argues that although the current residence requirements are formally different from those previously analysed by the EFTA Court, in the sense that the current provisions do not explicitly refer to Liechtenstein territory, the actual change in substance is insignificant. The new legal requirements in regard to residence, which are currently worded in more general terms, have in fact the same declared purpose as before, namely to ensure the efficient operation of banks and of professional activities by means of an increased physical presence at the place of business. In order to serve this objective, the Commission would expect the residence requirements to be interpreted narrowly by Liechtenstein authorities, allowing for very few cases involving residence outside Liechtenstein. The Commission sees the Statement of Defence submitted by Liechtenstein confirming such an approach, under which normally only residence in Liechtenstein or in the neighbourhood of its territory will suffice.[32]

88. Further, the Commission argues that even in the absence of any indication in regard to the actual interpretation of the residence requirements by Liechtenstein authorities, the wording in the contested provisions is, as pointed

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[28] Cases *Rainford-Towning*, cited above, at paragraphs 27 and 29–30; *Pucher*, cited above, at paragraphs 18 and 24; E-8/04 *ESA* v *Liechtenstein*, cited above, at paragraphs 16–18; *Clean Car Autoservice*, cited above, at paragraph 27; Schumacker, cited above, at paragraph 28; *Klopp*, cited above, at paragraph 19; C-106/91 *Ramrath* [1992] ECR I-3351, at paragraphs 20–21; C-145/99 *Commission* v *Italy*, cited above, at paragraph 28; and C-162/99 *Commission* v *Italy* [2001] ECR I-541, at paragraph 20.

[29] Reference is made to Cases E-8/04 *ESA* v *Liechtenstein*, cited above, at paragraphs 23–24, 26–27 and 29–30, *Pucher*, cited above, at paragraphs 32–33, 35 and 37–38; and *Rainford-Towning*, cited above, at paragraphs 34–35.

[30] Reference is made to Cases C-221/89 *Factortame II*, cited above, at paragraph 32; *Clean Car Autoservice*, cited above, at paragraphs 27–30 and 36; C-114/97 *Commission* v *Spain* [1998] ECR I-6717, at paragraphs 44–48; and C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, at paragraphs 31–34. Further reference is also made to *Alpine Investments*, cited above, at paragraph 44.

[31] Reference is made to Cases C-131/01 *Commission* v *Italy* [2003] ECR I-1659; C-145/99 *Commission* v *Italy*, cited above; and C-162/99 *Commission* v *Italy*, cited above.

[32] Reference is made to paragraph 12 of the Statement of Defence.

out by ESA, so vague and unclear that it could not be considered, in any case, a proportional restriction on the freedoms guaranteed by the EEA Agreement. The residence requirements, with the current wording, leaves to Liechtenstein authorities wide discretionary powers, liable to result in discriminatory application of the relevant national legislation in contravention of Articles 28 and 31 EEA.

89. The Commission submits that in order to be proportionate, a residence requirement must be applied by the national authorities on the basis of clear criteria known in advance.[33] Also, as held by the ECJ in regard to prior administrative authorisation schemes, for such a scheme to be justified even though it derogates from a fundamental freedom, it is necessary that it is based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily.[34] Thus, a system that does not indicate the precise and objective circumstances in which prior authorisations will be granted or refused, so as to enable individuals to be aware of the extent of their rights and obligations deriving from the Treaty, must be regarded as contrary to the principle of legal certainty.[35] As set out by the ECJ, "the principles of legal certainty and the protection of individuals require, in areas covered by Community law, that the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed".[36]

90. Lastly, on justification, the Commission submits that as regards the suitability of the residence requirements at issue for securing attainment of the objectives pursued and the proportionality thereto, Liechtenstein seems not to have advanced arguments different from those already considered by the EFTA Court in previous cases, or by the ECJ in relevant case law. Therefore, the Commission considers that the findings of the EFTA Court and the ECJ with regard to the lack of suitability and proportionality of a residence requirement for the exercise of the freedom of establishment are equally valid in the present case.

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[33] Reference is made to Cases *Collins*, cited above, at paragraph 72; and *Förster*, cited above, at paragraph 56.

[34] Reference is made to Cases C-169/07 *Hartlauer*, judgment of 10 March 2009 not yet published, at paragraph 64; C-56/01 *Inizan* [2003] ECR I-12403, at paragraph 57; and C-157/99 *Smits and Peerboms* [2001] ECR I-5473, at paragraph 90.

[35] Reference is made to Cases C-483/99 *Commission* v *France*, cited above, at paragraph 50; C-463/00 *Commission* v *Spain*, cited above, at paragraphs 74–75; C-370/05 *Festersen*, cited above, at paragraph 43; and C-54/99 *Église de scientologie*, cited above, at paragraphs 21–22.

[36] Case C-478/01 *Commission* v *Luxembourg* [2003] ECR I-2351, at paragraph 20. Further reference is made to Case C-306/91 *Commission* v *Italy* [1993] ECR I-2133, at paragraph 14.

Corresponding application of Article 28 EEA on free movement of workers

91. The Commission supports the conclusion reached by ESA, whereby Article 28 EEA is applicable in the case at hand. It is argued that, depending on the actual circumstances, members of the management board and of the executive management of banks might also be under the direction of other persons, e.g. the owners of the company, and thus in a relationship of subordination, which under the case law of the ECJ is an essential characteristic of an employment relationship, unless the manager is not at the same time the owner or sole shareholder of the respective company.[37] This interpretation is further reinforced by the judgment in *Clean Car Autoservice*, cited above, where a similar residence requirement for managers was examined under Article 39 of the EC Treaty and found incompatible with the freedom of movement for workers under that provision.

Conclusion

92. In conclusion, and with particular reference to the case law of the EFTA Court and the ECJ, as cited above, the Commission supports the declaration sought by ESA.

Henrik Bull
Judge-Rapporteur

[37] Reference is made to Cases *Agegate*, cited above, at paragraph 36; 66/85 *Lawrie-Blum* [1986] ECR 2121, at paragraph 17; C-268/99 *Jany and Others* [2001] ECR I-8615, at paragraph 34; (Joined Cases) C-151/04 and C-152/04 *Nadin and Others* [1995] ECR I-11203, at paragraph 31; and *Asscher*, cited above, at paragraph 26.