



JUDGMENT OF THE COURT

22 February 2002*

(Right of establishment – Residence requirement for at least one board member of a domiciliary company)

In Case E-2/01

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein) for an Advisory Opinion in the appeal against the decision of the Government of the Principality of Liechtenstein by

Dr Franz Martin Pucher

on the interpretation of Articles 4, 31 and 33 of the EEA Agreement.

THE COURT,

composed of: Thór Vilhjálmsson, President, Carl Baudenbacher and Per Tresselt (Judge-Rapporteur), Judges,

Registrar: Lucien Dedichen

having considered the written observations submitted on behalf of:

– the Complainant, Dr Franz Martin Pucher, representing himself;

* Language of the request: German.

- the Government of Liechtenstein, represented by Beatrice Hilti, Deputy Director, EEA Coordination Unit;
- the Government of Iceland, represented by Anna Jóhannsdóttir, Legal Officer, Ministry of Foreign Affairs, acting as Agent;
- the Government of Norway, represented by Helge Seland, Assistant Director General, Ministry of Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority, represented by Michael Sánchez Rydelski and Elisabethann Wright, Officers, Legal & Executive Affairs, acting as Agents;
- the Commission of the European Communities, represented by John Forman and Maria Patakia, Legal Advisers, Legal Service, acting as Agents.

having regard to the Report for the Hearing,

having heard the oral arguments of the Complainant, Dr Franz Martin Pucher, the Government of Liechtenstein, represented by Christoph Büchel, the EFTA Surveillance Authority and the Commission of the European Communities at the hearing on 16 November 2001,

gives the following

Judgment

I Facts and procedure

- 1 By an order dated 12 March 2001, registered at the Court on 14 March 2001, the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein made a Request for an Advisory Opinion in the appeal against the decision of the Government of the Principality of Liechtenstein by Dr Franz Martin Pucher (hereinafter, the “Complainant”).
- 2 The Complainant is an Austrian national residing in Feldkirch, Austria. He is admitted to practise in Liechtenstein as a professional trustee; and is the manager of a Liechtenstein trust company with its seat in Liechtenstein. His application for a permanent residence permit in Liechtenstein was refused by Liechtenstein authorities in accordance with the EEA Joint Committee Decision 191/1999 Amending Annexes VIII (Right of establishment) and V (Free movement of workers) to the EEA Agreement (OJ 2001 L 74, p. 29).
- 3 On 29 September 1999, the Complainant applied to the Liechtenstein Amt für Finanzdienstleistungen (Financial Services Office) for an authorisation to serve

as the qualified member of the board of directors of a domiciliary company, as referred to in Article 180a of the *Personen- und Gesellschaftsrecht* (Act on Persons and Companies) of 20 January 1926, as amended (hereinafter, the “Persons and Companies Act”). The Amt für Finanzdienstleistungen refused to grant the authorisation applied for, essentially on the grounds that the Complainant, at that time, was residing in Austria, and therefore, did not fulfil the requirement of permanent residence in Liechtenstein, as set out in Article 180a of the Persons and Companies Act.

- 4 The Complainant lodged a complaint with the Government of Liechtenstein, requesting that the decision of the Amt für Finanzdienstleistungen be rescinded and the authorisation be granted. The Government of Liechtenstein dismissed the complaint by a decision of 19 September 2000.
- 5 The Complainant filed an appeal against that decision with the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein). In the proceedings pending before the Verwaltungsbeschwerdeinstanz, the Complainant has raised issues concerning the compatibility of the residence requirement in Article 180a of the Persons and Companies Act with the EEA Agreement.
- 6 The Verwaltungsbeschwerdeinstanz decided to request an Advisory Opinion from the EFTA Court on the following questions:
 1. *Does the residence requirement imposed by Article 180a(1) of the Persons and Companies Act constitute overt or covert discrimination on grounds of nationality within the meaning of Article 4 EEA, alternatively, does that residence requirement constitute a restriction on the freedom of establishment provided for by Article 31 EEA?*
 2. *If the answer to question 1 is in the affirmative: is the discrimination or restriction justified on public-interest grounds, in particular those of public policy and/or public security (see Article 33 EEA)?*
- 7 Reference is made to the Report for the Hearing for a detailed account of the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

II Legal background

EEA law

- 8 The questions submitted by the national court concern the interpretation of Articles 4, 31 and 33 EEA.

9 Article 4 EEA reads as follows:

“Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

10 Article 31 EEA reads as follows:

“1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

2. Annexes VIII to XI contain specific provisions on the right of establishment.”

11 Article 33 EEA reads as follows:

“The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.”

National law

12 Article 180a of the Persons and Companies Act reads as follows:

“1. At least one board member of a legal entity, having authority to manage and represent the same, must be a national of an EEA State permanently residing in Liechtenstein and admitted to practise in Liechtenstein as a lawyer (Rechtsanwalt), legal agent (Rechtsagent), professional trustee (Treuhandler) or auditor (Wirtschaftsprüfer).

2. The same status shall be deemed to be held by persons residing in Liechtenstein who possess evidence of educational and/or training qualifications corresponding to the requirements laid down in paragraph (1) and recognised by the Government pursuant to statute or international treaty, whose fixed, main employment is with a lawyer, legal agent, professional trustee, accountant, trust company, firm of auditors or bank and who pursue their activities in such employment within the meaning of paragraph (1). Aliens who are not nationals of an EEA State shall be required to possess a permit allowing them to settle in Liechtenstein.

3. The obligation imposed in paragraph (1) shall not apply to legal entities which are required under the Gewerbegesetz (Law on Trades and Businesses) or some other special statute to have a qualified business manager.”

- 13 The member of the board of directors of a legal entity who fulfils the requirements in Article 180a(1) is often referred to as the qualified board member of that entity.
- 14 The Persons and Companies Act differentiates between two different types of companies incorporated under Liechtenstein law, namely Liechtenstein companies not carrying out business in Liechtenstein (domiciliary companies) and Liechtenstein companies doing business in Liechtenstein (active companies). Only the qualified board member of the former is subject to the residence requirement in Article 180a.

III Findings of the Court

The first question

- 15 By its first question, the national court essentially seeks to ascertain whether a requirement in the national law of an EEA State that at least one member of the board of directors of a domiciliary company, having authority to manage and represent that company, must be permanently residing in that State, constitutes discrimination within the meaning of Article 4 EEA, or a restriction on the freedom of establishment within the meaning of Article 31 EEA.
- 16 Article 31 EEA, which the Court finds must be examined first, provides for the abolition of all restrictions on establishment between the EEA States. The freedom of establishment includes, inter alia, the right of nationals of the EEA States to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the EEA State of establishment with respect to its own nationals.
- 17 The contested residence requirement is formulated in general terms, and does not distinguish between Liechtenstein nationals and nationals of other EEA States. It applies to all domiciliary companies incorporated under Liechtenstein law, and to all EEA nationals admitted to practise one of the professions required to serve as the qualified board member, *viz.* a lawyer, legal agent, professional trustee, or auditor. There is no overt discrimination in this respect.
- 18 However, it is settled case-law that the rules of equal treatment prohibit not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, achieve in practice the same result (see Case E-3/98 *Rainford Towning* [1998] EFTA Court Report 205, at paragraph 27).
- 19 The EFTA Court and the Court of Justice of the European Communities have consistently held that national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of

other EEA States, as non-residents are in the majority of cases foreigners (see *Rainford-Towning*, cited above, at paragraph 29 and Case C-279/93 *Schumacker* [1995] ECR I-225, at paragraph 28).

- 20 On that basis, the Court found in *Rainford-Towning*, cited above, at paragraph 30, that a requirement that a national of another EEA State must reside in the State concerned in order to be appointed managing director of a active company exercising trade, constitutes indirect discrimination contrary to Article 31 EEA. The residence requirement at issue in the present case requires one, unspecified, board member of a domiciliary company, having authority to manage and represent that company, to be permanently residing in Liechtenstein. No restrictions with regard to residence are placed on other members of the board.
- 21 However, the residence requirement for the qualified board member of a domiciliary companies has the corresponding effect of placing nationals of other EEA States engaged in the specified professions at a disadvantage compared with Liechtenstein nationals engaged in those professions.
- 22 The Court notes from the information presented to it, that an important part of the profession of trustees in Liechtenstein is their engagement in the administration of Liechtenstein companies, in particular as a board member. Lawyers, legal agents, professional trustees and auditors practising their professions in Liechtenstein, and having their permanent residence in another State, may not function as the qualified board member of a domiciliary company, and in that respect, the residence requirement constitutes a restriction on the ability to act as a trustee. That restriction appears more likely to be of consequence for nationals of other EEA States than for Liechtenstein nationals.
- 23 Furthermore, the Court considers that, in addition to the abovementioned restrictions on the exercise of the specified professions, the contested residence requirement may also entail certain restrictions on nationals of other EEA States seeking to set up and manage a domiciliary company in Liechtenstein.
- 24 It must therefore be concluded that a residence requirement such as the one at issue in the main proceedings, constitutes indirect discrimination contrary to Article 31 EEA.
- 25 That being so, it is not necessary to examine whether a national provision such as that contested in the main proceedings, is contrary to the general prohibition of discrimination on grounds of nationality set out in Article 4 EEA; as that provision applies independently, only to situations governed by EEA law for which the EEA Agreement lays down no specific rules prohibiting discrimination (see Case E-1/00 *Íslandsbanki-FBA*, judgment of 14 July 2000, not yet reported, at paragraphs 35 and 36).
- 26 The answer to the first question must therefore be that a national provision such as that at issue in the main proceedings, requiring that at least one member of the board of directors of a domiciliary company, having authority to manage and

represent same, must be permanently residing in that State, constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

The second question

- 27 By its second question, the national court asks whether the residence requirement at issue may be justified under Article 33 EEA on grounds of public interest, in particular those of public policy and/or public security.
- 28 The Government of Liechtenstein has argued that the contested residence requirement is objectively justified under Article 33 EEA, and therefore, not contrary to the freedom of establishment provided for in Article 31 EEA. According to the Government of Liechtenstein, the over-all public policy objective pursued is the maintenance of the functioning and good reputation of the Liechtenstein financial services sector. That sector is based inter alia on the liberal rules of the Persons and Companies Act with regard to the incorporation of domiciliary companies. By requiring the qualified board member to be permanently residing in Liechtenstein, the prevention of abuses of those liberal rules is facilitated. The Government of Liechtenstein has argued that the greater likelihood of the board member being present in Liechtenstein, ascribed to the residence requirement, will assist the administration of justice, simplify the execution of civil law judgments, and facilitate the enforcement of administrative and criminal sanctions.
- 29 In view of the rejection by the Court of similar arguments put forward in *Rainford-Towning*, cited above, the Government of Liechtenstein submits that there are relevant differences between the situation underlying that case and the present case. The former case concerned active companies, whereas the instant case relates exclusively to domiciliary companies. Due to the liberal rules of the Liechtenstein company law, domiciliary companies are particularly susceptible to abuses, and require more stringent control.
- 30 As a preliminary point, the Court notes that there is, in principle, nothing in the EEA Agreement that prevents Liechtenstein from maintaining a liberal company law system. However, that system must operate within the limits of EEA law. It must be organised to function so as not to conflict with the rules of the EEA Agreement on the freedom of establishment, including Articles 31 and 33 EEA.
- 31 Article 33 EEA provides for derogation from the fundamental principle of freedom of establishment. Its application must therefore be strictly interpreted. In order to fall within the scope of Article 33 EEA, and thereby escape the application of Article 31 EEA, the contested residence requirement must fulfil the following conditions: it must pursue an objective of public interest as provided for in Article 33 EEA; it must be appropriate for securing the attainment of the objective pursued; and it must be objectively necessary and

proportionate to that objective (see, Case 352/85 *Bond van Adverteerders v Netherlands State* [1988] ECR 2085, at paragraphs 33 and 36).

- 32 The Court acknowledges that protecting the functioning and good reputation of the financial services sector is a legitimate public policy objective (see, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, at paragraph 44). The Court also acknowledges that securing compliance with national legislation, assisting the administration of justice, facilitating the execution of civil judgments, and enforcing administrative and criminal sanctions are important elements in order to achieve that objective. The Court has noted the argument that domiciliary companies may require other control measures than active companies. However, there is nothing in the information presented to the Court that supports the finding that the residence requirement for a qualified board member of a domiciliary company is a suitable and necessary measure to attain those objectives. There seem to be less restrictive and more appropriate means to achieve those goals.
- 33 In the view of the Court, the residence requirement is neither suitable nor necessary to ensure the compliance with national legislation by a company or a board member, or for the effective control of such compliance by the public authorities. The realisation of those objectives would not appear to be dependent on the physical presence or the place of residence of the board member. Similar observations were made in *Rainford-Towning*, cited above, at paragraph 34. Based on the information before it, the Court considers that the findings with regard to a managing director of active companies in that case are equally valid with regard to a qualified board member of domiciliary companies in the present case.
- 34 Even absent the contested residence requirement, the governing provision would continue to set strict standards for the representation of a domiciliary company in its relations with the Liechtenstein authorities. Only members of certain professions having been admitted to practise their profession in Liechtenstein, are eligible. The provision presupposes that a person so designated have broad powers. The professional qualifications of any such person will have been scrutinized by Liechtenstein authorities in connection with the initial admission to practise. The trust placed in those persons, both by the owners of a company and by the Liechtenstein authorities, requires them to carry out their duties with a high degree of professional competence and integrity. If this trust is abused, the Liechtenstein authorities will presumably have the possibility to take corrective measures.
- 35 In particular, as regards the control by public authorities, the Court notes that while, on the one hand, the physical presence or residence in Liechtenstein of a board member does not guarantee that public authorities are provided with the information they require, it is, on the other hand, possible for a board member to provide all necessary information without being physically present or resident there. More appropriate and less restrictive means of monitoring and controlling of the activities of domiciliary companies could, for example, comprise periodic

reporting requirements, or an obligation to make available specified and relevant information at the registered office of the company.

- 36 For these reasons, the Court finds that considerations relating to the compliance with national legislation and the effective control of such compliance cannot be held to justify the imposition of a residence requirement in derogation of Article 31 EEA.
- 37 Furthermore, the Court considers that the residence requirement is neither suitable nor necessary to assist the administration of justice, ensure the execution of civil judgments or enforce administrative and criminal sanctions. In *Rainford-Towning*, cited above, at paragraph 35, the Court rejected the argument that the residence requirement was necessary to enforce criminal sanctions against a managing director of an active company. The Court considers that finding also to be applicable to a qualified board member of a domiciliary company.
- 38 As regards the formal aspects of the administration of justice, the Court notes that legislation could be enacted to ensure that any claim or writ instituting proceedings in civil or administrative matters, or any charge or indictment in criminal matters may be served at the registered office of a company.
- 39 As regards the execution of civil law judgments, the Court acknowledges that certain complications may arise since Liechtenstein is not party to the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1988 L 319, p. 9). The Court observes that, if such complications were of vital concern in relation to the public policy objective pursued, accession to this instrument would constitute one remedy. Moreover, the Court recognizes that litigation or execution in foreign jurisdictions often involves costs and complications that will not arise in the domestic jurisdiction. However, the encouragement of cross-border activity is a fundamental objective of the EEA Agreement; and, whenever such activity gives rise to litigation, the enforcement of judgments must often be sought within the jurisdiction of another EEA State. The situation with regard to claims relating to the operations of domiciliary companies in Liechtenstein is therefore not exceptional.
- 40 Likewise, a residence requirement does not in itself ensure that the qualified board member of a domiciliary company will be present for any civil proceedings instituted against him, or that his means, or those of the company, will be adequate to satisfy a judgment against him or the company.
- 41 For these reasons, the Court finds that considerations relating to the administration of justice in civil matters cannot be held to justify the imposition of a residence requirement in derogation of Article 31 EEA.
- 42 As regards the enforcement of administrative and criminal sanctions, the Court considers that there are other, less restrictive means of attaining that objective. Notice of fines may be served at the registered office of the company. The

payment of such fines may be ensured by requiring that the company or the board member provide a guarantee beforehand (see *Rainford-Towning*, cited above, at paragraph 35 and Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521, at paragraph 36). Considering the relative size of the territory of Liechtenstein, it stands to reason that criminal proceedings against a domiciliary company or the qualified board member of such a company, as well as enforcement of any sanctions, will not infrequently depend on collaboration with other States within the framework of mutual assistance in criminal matters. The imposition of a residence requirement for a qualified board member of a domiciliary company would therefore, in the Court's view, not constitute an adequate, necessary or proportionate measure in furtherance of the objective pursued.

- 43 Since the specific considerations discussed above cannot be accepted as justifying derogation from Article 31 EEA, the overall objective of protecting the functioning and good reputation of the financial services sector must also be dismissed as justification. That objective was stated as the desired result of the practical effects resulting from each of the specific considerations, and not as a separate basis for justification.
- 44 The Court notes that the Government of Liechtenstein has not invoked any grounds of public security, in an attempt to justify the contested residence requirement.
- 45 The Court concludes from the foregoing that the residence requirement at issue cannot be justified under Article 33 EEA.
- 46 The answer to the second question must therefore be that a provision of the national law of an EEA State, such as that at issue in the main proceedings, requiring that at least one member of the board of directors of a domiciliary company, having authority to manage and represent same, must be permanently residing in that State, is not justified on grounds of public policy and/or public security within the meaning of Article 33 EEA.

IV Costs

- 47 The costs incurred by the Government of Liechtenstein, the Government of Iceland, the Government of Norway, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein by an order of 12 March 2001, hereby gives the following Advisory Opinion:

- 1. A provision of the national law of an EEA State, such as that at issue in the main proceedings, requiring that at least one member of the board of directors of a domiciliary company, having authority to manage and represent same, must be permanently residing in that State, constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.**
- 2. Such a national provision cannot be justified on grounds of public policy and/or public security within the meaning of Article 33 EEA.**

Thór Vilhjálmsson

Carl Baudenbacher

Per Tresselt

Delivered in open court in Luxembourg on 22 February 2002.

Lucien Dedichen
Registrar

Thór Vilhjálmsson
President