



REPORT FOR THE HEARING
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 Martin Franz Pucher

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

I. Introduction

1. By an order dated 12 March 2001, registered at the Court on 14 May 2001, the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein) made a Request for an Advisory Opinion in the appeal against the decision of the Government of the Principality of Liechtenstein by Dr Martin Franz Pucher (hereinafter the “Complainant”).

2. The dispute before the Verwaltungsbeschwerdeinstanz concerns the compatibility with the EEA Agreement of a Liechtenstein provision requiring that at least one board member of a legal entity must be permanently residing in Liechtenstein.

II. Legal background

EEA law

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

4. 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.”

5. 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.”

6. 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

7. The national legislation contested before the Verwaltungsbeschwerdeinstanz is the *Personen- und Gesellschaftsrecht vom 20. Jänner 1926* (Act on Persons and Companies of 20 January 1926, hereinafter the “Persons and Companies Act”), as amended.

8. 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 (Treuänder) 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.”*¹

III. Facts and procedure

9. The Complainant, Dr Martin Franz Pucher, is an Austrian national residing in Feldkirch, Austria. It appears from the Request for an Advisory Opinion from the Verwaltungsbeschwerdeinstanz that the Complainant is admitted to practise in Liechtenstein as a trustee, and that he is the manager of a Liechtenstein trust company with its seat in Liechtenstein. Liechtenstein authorities have refused to grant the Complainant a permanent residence permit in Liechtenstein.

10. As stated in the Request for an Advisory Opinion, the Complainant, on 29 September 1999, applied to the Liechtenstein Amt für Finanzdienstleistungen (Financial Services Office) for an authorisation pursuant to Article 180a of the Persons and Companies Act. The Financial Services Office 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.

11. The Complainant filed a complaint with the Government of Liechtenstein, asking for the decision of the Financial Services Office to be rescinded and for the authorisation to be granted. The Government of Liechtenstein rejected the complaint by a decision of 19 September 2000.

12. The Complainant lodged an appeal against that rejection before the Verwaltungsbeschwerdeinstanz. 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.

13. The Verwaltungsbeschwerdeinstanz decided to submit a Request for an Advisory Opinion to the EFTA Court.

¹ The translation has been adjusted from the text that appears in the translation of the Request for an Advisory Opinion from the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein.

IV. Questions

14. The following questions were referred to the EFTA Court:

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

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)?

V. Written Observations

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

- the Complainant, Dr Martin Franz Pucher, representing himself;
- 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.

² The translation has been adjusted from the text that appears in the translation of the Request for an Advisory Opinion from the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein.

Dr Martin Franz Pucher

16. In considering whether the contested residence requirement is contrary to Article 31 EEA, the Complainant, Dr Martin Franz Pucher, begins by stating that the corresponding provision of the EC Treaty has been construed by the Court of Justice of the European Communities as entailing a general prohibition of discrimination and restrictions on the freedom of establishment.

17. In the view of the Complainant, the residence requirement entails covert discrimination within the meaning of the judgments in *Clean Car Autoservice v Landeshauptmann von Wien*³ and *Rainford-Towning*.⁴ The requirement is a national measure liable to hinder or make less attractive the exercise of the fundamental freedom of establishment guaranteed by the EEA Agreement, but does not fulfil any of the criteria laid down in *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*⁵ in order for such measures to be upheld.

18. The Complainant submits that the contested national provision is not justified on any of the grounds of public interest set out in Article 33 EEA. Contrary to the conclusion arrived at by the Government of Liechtenstein, the Complainant is of the opinion that the residence requirement is not appropriate for the attainment of the objective allegedly pursued, namely that, at all times, at least one responsible board member of a legal entity is to be contactable, and that it should be possible to have recourse against him.

19. The Complainant views the residence requirement as a purely formal requirement that affords no guarantee that the board member will be contactable or that recourse may be had against him, since it does not require him to stay in Liechtenstein at all times.

20. The residence requirement does not make it easier to take enforcement measures in respect of established liability claims against the legal entity. In order to ensure that effective steps can in practice be taken to enforce any such claims, the residence requirement lacks additional criteria, such as measures to ensure the actual presence of the board member, or the existence of any assets that can be seized.

21. The Complainant disagrees with the argument of the Government of Liechtenstein regarding the problems of enforcing judgments abroad due to the non-accession of Liechtenstein to the Lugano Convention.⁶ The Complainant

³ Case C-350/96 *Clean Car Autoservice v Landeshauptmann von Wien* [1998] ECR I-2521.

⁴ Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

⁵ Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

⁶ Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1988 L 319, p. 9).

contends, in essence, that the enforcement of a judgment against a board member who tries to escape such enforcement is equally difficult, regardless of whether that person fulfils the formal requirement of residence in Liechtenstein.

22. The Complainant also disagrees with the argument of the Government of Liechtenstein to the effect that a board member residing in Liechtenstein cannot evade mandatory legal rules as easily as a board member residing abroad, since mandatory legal rules apply with equal force to persons residing abroad.

23. Moreover, the Complainant contests the conclusion arrived at by the Government of Liechtenstein to the effect that the residence requirement is an appropriate measure for maintaining the good reputation of Liechtenstein as a financial centre. The Complainant contends, essentially for the reasons set out above, that such a formal requirement constitutes an unsuitable means of protecting creditors.

24. In the view of the Complainant, the contested national provision prevents him from pursuing his profession as a trustee freely and without restriction. In order to engage in the administration of Liechtenstein companies, the Complainant is required to engage a professional board member residing in Liechtenstein. That constitutes an obstacle to the exercise of his profession.

25. The Complainant states that, under Community law, a person is resident in the place where he maintains permanent premises with the intention of returning there on a regular basis. The Complainant contends that he fulfils those requirements, and that he must, therefore, also be regarded as being permanently resident in Liechtenstein for the purposes of the contested national provision. The Complainant is a qualified and registered Liechtenstein trustee. He has an office in Liechtenstein which fulfils all the requirements of residential premises, and holds an authorisation to exercise his profession in Liechtenstein and stay in that country for a continuous period of at least 5 days a week.

The Government of Liechtenstein

26. The Government of Liechtenstein submits that the compatibility of the residence requirement in Article 180a of the Persons and Companies Act with Article 31 EEA must be assessed taking into consideration the legal and factual context of that provision in Liechtenstein, *inter alia*, the importance of the functioning of the financial services sector for the Liechtenstein economy, and the liberal approach followed by Liechtenstein with regard to regulating the financial services sector in order to create favourable conditions for activities in that sector.

27. The Government of Liechtenstein points out that Liechtenstein follows the incorporation approach, according to which the determining factor for application of the Persons and Companies Act is where the legal entity has been registered,

and not the location of the central administration or principal place of business. The liberal rules of the Persons and Companies Act apply to all legal entities incorporated in Liechtenstein.

28. According to the Government of Liechtenstein, the majority of companies incorporated in Liechtenstein are companies not carrying out business in Liechtenstein (*Sitzgesellschaften*, domiciliary companies). The Persons and Companies Act differentiates between such companies and companies doing business in Liechtenstein (active companies), in that only board members of the former are subject to the residence requirement.

29. The Government of Liechtenstein states that the residence requirement for a board member in companies incorporated in Liechtenstein must be seen in connection with the rule providing that all board members of such a company are entitled to manage it.

30. The Government of Liechtenstein submits that it is necessary to have certain minimum mandatory requirements in the Persons and Companies Act, including the residence requirement, in order to prevent abuse of the liberal rules provided for in that Act. The objective of the contested residence requirement is to maintain the functioning and good reputation of the Liechtenstein financial services sector, *inter alia* by ensuring the administration of justice.

31. The Government of Liechtenstein contends that the Persons and Companies Act entails no restrictions on the access to, or the exercise of, the profession of trustees. It merely sets out the minimum requirements to be met by one of the board members of a domiciliary company. In support of this contention, the Government of Liechtenstein points out that the Liechtenstein authorities have granted a licence allowing the Complainant to act as a trustee in Liechtenstein. The rules governing the access to, and the exercise of, the profession of trustees is set out in the Act on Trustees.

32. The Government of Liechtenstein states that the contested national provision applies equally to Liechtenstein nationals and nationals of other EEA States, and contends that there is no overt discrimination on grounds of nationality leading to a restriction of freedom of establishment contrary to Article 31 EEA. The Government of Liechtenstein adds that the refusal to grant a residence permit to the Complainant is in conformity with EEA Joint Committee Decision 191/1999,⁷ which only requires Liechtenstein to grant a limited number of residence permits each year.

33. The Government of Liechtenstein acknowledges that it follows from the case-law⁸ of the Court of Justice of the European Communities and the EFTA

⁷ 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)

⁸ Case C-279/93 *Schumacker* [1995] ECR I-225; Case C-221/89 *Factortame and Others* [1991] ECR I-3905; Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

Court that national provisions 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. However, referring again to the case-law⁹ of the Court of Justice of the European Communities, the Government of Liechtenstein states that the residence requirement is objectively justified.

34. The Government of Liechtenstein points out that the Liechtenstein economy depends largely on the financial services sector. When considering the importance of the financial services sector in Liechtenstein, one must take into account the specific situation of Liechtenstein in general, as recognised by the EEA Council¹⁰ and in the case-law¹¹ of the EFTA Court. Moreover, the financial services sector of Liechtenstein is different from other financial services sectors, in that it is limited to a very narrow set of specialised services.

35. Measures for the protection from abuse of the financial services sector must be seen in the light of the particular importance of the sector in Liechtenstein. Liechtenstein has a reputation as a leading financial centre. The Government of Liechtenstein suggests that, if the financial services sector were to acquire a negative reputation, the image of the country as a whole would thereby be tarnished. Under the liberal rules of the Liechtenstein financial services sector, the observance of the minimum requirements is essential in order to keep the system free from abuses.

36. The main objective of the residence requirement is to guarantee the continuous presence of at least one board member of legal entities in Liechtenstein. The Government of Liechtenstein claims that such a permanent link to Liechtenstein is indispensable for the administration of justice. In order to ensure effective control of the activities in the financial sector, minimise the risk of abuse of domiciliary companies to the detriment of investors, and avoid violations of other laws, including criminal and tax law provisions, the Liechtenstein legislator enacted the residence requirement. The residence requirement was regarded as the least restrictive measure available.

37. The Government of Liechtenstein argues that it follows from the judgment in *Bachmann*¹² that the need to preserve an effective administration of justice may justify restrictions on the freedom of establishment. The objectives pursued by Liechtenstein in adopting the residence requirement were also recognised by

⁹ Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617; Case C-204/90 *Bachmann* [1992] ECR I-249; Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817; Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* [1993] ECR I-4309.

¹⁰ Declaration on free movement of persons (OJ 1995 L 86, p. 80).

¹¹ Case E-4/00 *Brändle*, judgment of 14 June 2001, not yet reported; Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

¹² Case C-204/90 *Bachmann* [1992] ECR I-249.

the Advocate General in his Opinion in *Clean Car Autoservice v Landeshauptmann von Wien*.¹³

38. The Government of Liechtenstein refers to the judgment in *Centros*,¹⁴ where, it contends, the Court of Justice of the European Communities seems to give preference to the incorporation approach followed by Liechtenstein in the Persons and Companies Act, and goes on to maintain that, when one is following such a liberal approach, it is necessary to establish measures in order to control, correct and intervene when necessary.

39. The Government of Liechtenstein refers to the judgment in *Alpine Investments*,¹⁵ in which the Court of Justice of the European Communities held that maintaining the good reputation of the national financial services sector may constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services. Since the contested residence requirement is guided by the same objective considerations, the Government of Liechtenstein claims that it is justified. The Government of Liechtenstein also refers to the judgment in *Pastors and Trans-Cap*.¹⁶

40. The Government of Liechtenstein contends that the residence requirement is a suitable, necessary and proportionate means of protecting the good reputation of the financial services sector.

41. The maintenance of the good reputation of the national financial services sector may be a common objective of all States, but the means which are suitable and necessary to achieve that objective may vary, due to inherent and systemic differences.

42. In Liechtenstein, the majority of the companies are domiciliary companies, the activities of which take place abroad, where Liechtenstein authorities have only limited influence and control. Apart from the required residence in Liechtenstein of one of the board members, the only link between a domiciliary company and Liechtenstein may be the registration.

43. The Government of Liechtenstein argues that there are material differences in fact and in law between the situation in the present case and those in *Rainford-Towning*¹⁷ and *Clean Car Autoservice v Landeshauptmann von Wien*.¹⁸ The residence requirements dealt with in those cases applied to active companies, while the residence requirement in the present case only applies to

¹³ See footnote 3.

¹⁴ Case C-212/97 *Centros* [1999] ECR I-1459.

¹⁵ Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

¹⁶ Case C-29/95 *Pastors and Trans-Cap* [1997] ECR I-285.

¹⁷ See footnote 4.

¹⁸ See footnote 3.

domiciliary companies. Domiciliary companies require more stringent control. On this point, the Government of Liechtenstein refers to the judgment in *Arblade and Others*.¹⁹

44. Under Liechtenstein law, board members are, in principle, liable for any damage suffered as a result of their intentional or negligent acts or failures to act. In order to ensure the proper functioning of the financial services sector, it is not sufficient merely to provide theoretically for the liability of board members. It must also be effectively enforceable. Enforcement requires a sufficient link between the relevant companies and Liechtenstein.

45. The residence requirement is necessary for the protection of investors and consumers. In the area of civil law, enforcement of judgments is difficult, since Liechtenstein is not a party to the Brussels Convention²⁰ or the Lugano Convention.²¹ Recognition of claims for liability against a board member not residing in Liechtenstein is not guaranteed. In the area of criminal law, the only way to execute a judgement is through mutual assistance under the European Convention on Mutual Assistance in Criminal Matters, which involves a complicated and time-consuming procedure. The residence requirement ensures that at least one board member is aware of the risk of personal liability or criminal sanctions, and will increase the qualitative involvement of board members in the management of companies registered in Liechtenstein.

46. The Government of Liechtenstein argues that effective supervision, as acknowledged by the Advocate General in his opinion in *Clean Car Autoservice v Landeshauptmann von Wien*,²² requires that all documents relating to domiciliary companies are accessible for Liechtenstein administrative authorities. The Government of Liechtenstein also refers to the judgment in *Arblade and Others*.²³

47. The Government of Liechtenstein claims that, unlike the situation in *Clean Car Autoservice v Landeshauptmann von Wien*,²⁴ in the present case the possibility of serving a notice of fines at the location of the domiciliary company is not a suitable alternative means. Only the board member who is resident in Liechtenstein is within reach of the Liechtenstein authorities.

48. The Government of Liechtenstein adds that the situation in the present case is also different from that in *Clean Car Autoservice v Landeshauptmann von*

¹⁹ Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453.

²⁰ Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1972 L 299, p. 32).

²¹ See footnote 6.

²² See footnote 3.

²³ See footnote 19.

²⁴ See footnote 3.

*Wien*²⁵ in that a requirement of a security deposit to ensure enforcement of liability claims or fines against board members is very problematic, since the possible claims may greatly exceed the security deposited.

49. The Government of Liechtenstein adds that liability insurance is not a suitable measure to guarantee enforcement of liability claims against board members, since such insurance, as a rule, does not cover gross negligence or intentional acts, and excludes direct claims from third parties.

50. Based on the above considerations, the Government of Liechtenstein concludes that the residence requirement at issue in the main proceedings is objectively justified and, therefore, not contrary to the freedom of establishment provided for in Article 31 EEA.

The Government of Iceland

51. The Government of Iceland submits that the contested national provision is contrary to Article 31 EEA on the freedom of establishment in so far as it requires a board member of a company to give up his former residence, and take up residence in the country in question, solely to be able to establish a company there.

52. Referring to the judgments in *Clean Car Autoservice v Landeshauptmann von Wien*²⁶ and *Rainford-Towning*,²⁷ the Government of Iceland contends that the residence requirement constitutes indirect discrimination, because there are also restrictions on the right to obtain a residence permit. Reference is also made to the judgments in *Merino García v Bundesanstalt für Arbeit*,²⁸ *Schumacker*²⁹ and *Commission v Belgium*.³⁰

53. The Government of Iceland contends that the national provision at issue cannot be justified on grounds of public policy or public security under Article 33 EEA, and refers to the judgments in *Rainford-Towning*,³¹ *Clean Car Autoservice v Landeshauptmann von Wien*³² and *Regina v Bouchereau*.³³ The information available does not indicate that a serious threat affecting one of the

²⁵ See footnote 3.

²⁶ See footnote 3.

²⁷ See footnote 4.

²⁸ Case C-266/95 *Merino García v Bundesanstalt für Arbeit* [1997] ECR I-3279.

²⁹ Case C-279/93 *Schumacker* [1995] ECR I-225.

³⁰ Case C-203/98 *Commission v Belgium* [1999] ECR I-4899.

³¹ See footnote 4.

³² See footnote 3.

³³ Case 30/77 *Regina v Bouchereau* [1977] ECR 1999.

—

fundamental interests of society would arise in the absence of such a residence requirement.

The Government of Norway

54. The Government of Norway is of the view that the permanent residence requirement at issue is incompatible with the freedom of establishment set out in Article 31 EEA. While acknowledging that the requirement applies equally to Liechtenstein nationals and nationals of other EEA States, the Government of Norway contends that it amounts to covert discrimination. To support that contention, the Government of Norway refers to case-law³⁴ of the Court of Justice of the European Communities and the EFTA Court. The Government of Norway states that no objective considerations independent of nationality have been presented in support of the contested national rule.

55. Referring to the judgment in *Bond van Adverteerders v Netherlands State*,³⁵ the Government of Norway states that Article 33 EEA regulates exhaustively the grounds which may justify a discriminatory national measure. That provision must be interpreted narrowly.

56. According to the Government of Norway, there is nothing in the facts which demonstrates that any fundamental public interest will be affected if not at least one board member of a company is a permanent resident of Liechtenstein. No convincing arguments have been presented to substantiate the arguments concerning the need to improve the quality of Liechtenstein companies.

57. The Government of Norway concludes that the contested national provision cannot be justified on grounds of public policy, public security or public health as set out in Article 33 EEA.

The EFTA Surveillance Authority

58. In considering whether the contested national provision is contrary to Article 31 EEA, the EFTA Surveillance Authority begins by noting that the residence requirement does not entail any direct discrimination. The grant of an authorisation is not made conditional upon the applicant being of Liechtenstein nationality. However, the EFTA Surveillance Authority suggests that, in the absence of any indications to the contrary, the residence requirement involves

³⁴ Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153; Case C-3/88 *Commission v Italy* [1989] ECR 4035; Case C-266/95 *Merino García v Bundesanstalt für Arbeit* [1997] ECR I-3279; Case C-350/96 *Clean Car Autoservice v Landeshauptmann von Wien* [1998] ECR I-2521; Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

³⁵ Case 352/85 *Bond van Adverteerders v Netherlands State* [1988] ECR 2085.

indirect discrimination similar to that found in *Rainford-Towning*.³⁶ The EFTA Surveillance Authority points out that the burden of proof that the national provision is based on objective considerations independent of nationality lies with the party invoking it.

59. According to the EFTA Surveillance Authority, the information available does not indicate that the residence requirement is justified on grounds of public policy under Article 33 EEA. The concept of public policy presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society. The only consideration that has been put forward as underlying the residence requirement is the need to improve the quality of Liechtenstein holding companies and head offices. The EFTA Surveillance Authority submits, in essence, that, in the absence of other arguments in support of the contested residence requirement or information showing that there are decisive differences between managing directors and board members, the EFTA Court may reject justification simply by referring to the judgment in *Rainford-Towning*.³⁷ If there are other, legitimate, concerns than those rejected in that case, the EFTA Surveillance Authority indicates the possibility that such possible concerns may be met by a less restrictive requirement of professional presence in Liechtenstein, a requirement that the Complainant already fulfils.

60. In further support of its view, the EFTA Surveillance Authority refers to the judgments by the Court of Justice of the European Communities in *Factortame*³⁸ and *Ramrath v Ministre de la Justice*.³⁹

The Commission of the European Communities

61. The Commission of the European Communities contends that the permanent residence requirement at issue constitutes a restriction on the freedom of establishment set out in Article 31 EEA. The Commission recalls the judgment by the EFTA Court in *Rainford-Towning*,⁴⁰ and contends that the reasoning in that judgment applies similarly to the present case. In addition to the case-law of the Court of Justice of the European Communities referred to by the EFTA Court in that judgment, the Commission mentions the recent judgments in *Commission v Italy*⁴¹ and *Commission v Italy*.⁴²

³⁶ See footnote 4.

³⁷ See footnote 4.

³⁸ Case C-221/89 *Factortame and Others* [1991] ECR I-3905.

³⁹ Case C-106/91 *Ramrath v Ministre de la Justice* [1992] ECR I-3351.

⁴⁰ See footnote 4.

⁴¹ Case C-162/99 *Commission v Italy*, judgment of 18 January 2001 (not yet reported).

⁴² Case C-263/99 *Commission v Italy*, judgment of 29 May 2001 (not yet reported).

62. In the view of the Commission, such a restriction is not justified on grounds of public interest as provided for in Article 33 EEA. On this point, the Commission limits itself to referring to the reasoning in *Rainford-Towning*.⁴³

Per Tresselt
Judge-Rapporteur

⁴³ See footnote 4.