ADVISORY OPINION OF THE COURT

10 December 1998*

(Right of establishment – Residence requirement for managing director of a company)

In Case E-3/98

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 for the Principality of Liechtenstein) for an Advisory Opinion in the appeal against the decision of the Government of the Principality of Liechtenstein by

Herbert Rainford-Towning

on the interpretation of Articles 31 *et seq.* and 112 of the EEA Agreement and Protocol 15 to the EEA Agreement.

THE COURT,

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

Registrar: Gunnar Selvik

---

* Language of the request for an Advisory Opinion: German.

after considering the written observations submitted on behalf of:

– Mr Herbert Rainford-Towning, Complainant, represented by Counsel Mr Alexander Ospelt;

– The Government of the Principality of Liechtenstein, represented by Counsel Christoph Büchel, acting as Agent, and Dr. Frank Montag;

– the Government of Norway, represented by Mr Aasmund Rygnestad, Head of Division, Royal Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Ms Anne-Lise H. Rolland, Officer, Legal & Executive Affairs, acting as Agent;

– the Commission of the European Communities (hereinafter the "EC Commission"), represented by Ms Christina Tufvesson and Ms Maria Patakia, both members of its Legal Service, acting as Agents.

having regard to the Report for the Hearing,

after hearing the oral observations of the Complainant, the Government of Liechtenstein, the Government of Norway, the EFTA Surveillance Authority and the EC Commission at the hearing on 17 November 1998,

gives the following

Advisory Opinion

Facts and procedure

1 By an order dated 12 May 1998, registered at the Court on 18 May 1998, Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, an administrative court in Liechtenstein, made a request for an Advisory Opinion in the appeal by Mr Herbert Rainford-Towning (hereinafter the "Complainant") against a decision of the Government of Liechtenstein.

2 By an application dated 13 August 1997, the company Tradeparts AG, with its registered office in Vaduz, Liechtenstein, filed a request with the Office for National Economy in Vaduz for the grant of business approval for the "carrying out of trade, brokerage and commission business, the organizational completion of project financing, the negotiation of financial business, the acquisition of real property and holdings, as well as the carrying out of all legal transactions which are directly or indirectly connected with the corporate object". Herbert Rainford-Towning, resident in London, UK, was named as managing director.

3 The Office for National Economy and, by recourse to a higher authority, the Government of the Principality of Liechtenstein, in a decision of 16 December 1997 refused the application for the grant of business approval essentially on the grounds that Mr Rainford-Towning did not reside in Liechtenstein. The refusal was based on Article 17, paragraph 1b, and Article 6, paragraph 1a, of the Liechtenstein *Gewerbegesetz* (LGBl 1970/21 – hereinafter the "Liechtenstein Business Act"), which provides that a managing director must have his residence in Liechtenstein in order to be able to carry on the function of managing director of a company.

4 The Government of the Principality of Liechtenstein is of the opinion that the said provisions of the Business Act are compatible with the Agreement on the European Economic Area (hereinafter variously "EEA" and the "EEA Agreement") since both nationals and foreigners fall under the application of the provisions. The rationale behind the provisions is that difficulties would arise if the holder of a business right did not have his residence in Liechtenstein and no managing director was appointed to be responsible for complying with the legal provisions applicable to the undertaking. For instance, it would be difficult to achieve cross-border enforcement of penal measures.

5 On 30 December 1997, the Complainant brought a complaint before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein.

6 The Complainant is of the opinion that the requirement of residence in Liechtenstein for the managing director does not accord with EEA law. According to the Complainant, the requirement constitutes covert discrimination within the meaning of Article 4 EEA, and restricts the right of establishment conferred by Article 31 EEA in an unacceptable manner. The Complainant is further of the opinion that the exception in Article 33 EEA is unsuitable for justifying a restriction on the right of establishment by means of a residence requirement, since general preventive considerations or economic grounds may not be invoked as grounds under that provision.

7 The national court, considering that it was necessary for it to deliver judgment, decided to stay the proceedings and submitted a request to the EFTA Court for an Advisory Opinion on the following questions:

> *1 Is the business law provision in Liechtenstein's national law, to the effect that a managing director of a Liechtenstein legal person must have his residence in the country (the Principality of Liechtenstein), in conformity with the EEA and in particular in conformity with Article 31 et seq. of the Agreement on the European Economic Area dated 2 May 1992 (EEA)?*
>
> *2 If the answer to the first question is that the Liechtenstein business law provision of a requirement of residence for a managing director of a Liechtenstein company is not in conformity with the EEA, whether in view of the specific case of Liechtenstein –*

Protocol 15, safeguard measures in accordance with Article 112 EEA, and the declaration of the EEA Council on the freedom of choice of residence (recte: free movement of persons) – could the requirement of residence nevertheless be justified with the consequence that the provisions of the Business Law (Article 17, cf. Article 6 paragraph 1a) are in conformity with the EEA?

3 Do the grounds of public policy, public security or public health justify the business law provisions concerning the requirement of residence, either instead of or in addition to the special situation in Liechtenstein or on account of the exceptional provision of Article 33 EEA?

8 Reference is made to the Report for the Hearing for a fuller account of the legal framework, 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.

Legal background

1. EEA law

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

10 Article 31 EEA, in Part III, Free Movement of Persons, Services and Capital, Chapter 2, Right of Establishment, 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, subject to the provisions of Chapter 4.
>
> 2. Annexes VIII to XI contain specific provisions on the right of establishment."

11 Article 33 EEA in the same Chapter reads:

> "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."

2. National law

12 Article 6, paragraph 1a, of the Liechtenstein Business Act reads as follows:

> "The holder of a business right must appoint a managing director, if he has no residence in the country. The managing director must fulfil the personal and professional requirements regarding the operation of the business, have his residence in the country, and be in the position to occupy himself in the business accordingly."

13 Article 17 of the Liechtenstein Business Act reads as follows:

> "1) Legal persons may, like natural persons, be granted business approval, if
> …
> b they demonstrate that they have one or more managing directors, who fulfil the general and special requirements for natural persons in this Act, for the commencement of the business concerned, have a right of signature entered in the Register of Companies, and are active on a full-time basis in the company;
>
> c at least one person entrusted with such management is resident in Liechtenstein, who has Liechtenstein nationality or nationality of a signatory State to the Agreement on the European Economic Area; …"

Remarks on the interpretation of the EEA Agreement

14 The questions presented by the national court concern Articles 31 *et seq.* EEA on the freedom of establishment, which correspond to Articles 52 *et seq.* of the Treaty Establishing the European Community (hereinafter "EC"). Before turning to the actual questions presented, the Court finds it appropriate to make some remarks in reply to a submission by the Government of the Principality of Liechtenstein concerning the relevance of the case law of the Court of Justice of the European Communities (hereinafter the "ECJ") for the interpretation of the EEA Agreement.

15 The *Government of Liechtenstein* submits that the case law of the ECJ relating to the scope of the freedom of establishment under Article 52 EC and the possible compatibility of a residence requirement with that provision is not directly relevant to the interpretation of Article 31 EEA, despite the obligation contained in Article 6 EEA. Although the wording of Article 31 EEA is identical to that of Article 52 EC, the scope of application of those two provisions is not the same due to the fundamental differences between the Community legal order and the European Economic Area. Thus, the case law of the ECJ concerning the compatibility of a residence requirement with Article 52 EC is not transferable to Article 31 EEA and is of no relevance to the present case. To support this view,

reference is made, *inter alia*, to the reasoning by the ECJ in Opinion 1/91 [1991] ECR I-6079, and to the Advisory Opinion of the EFTA Court in Case E-2/97 *Mag Instrument Inc.* v *California Trading Company Norway, Ulsteen* [1997] EFTA Court Report 127 (hereinafter "*Maglite*").

16 The *Complainant*, the *Government of Norway*, the *EFTA Surveillance Authority* and the *EC Commission* have all taken the opposite position, submitting that the case law of the ECJ concerning Article 52 EC is relevant for the interpretation of Article 31 EEA. Reference is made to Article 6 EEA and to the homogeneity objective of the EEA Agreement as expressed, *inter alia*, in Article 1 EEA and in the fourth and fifteenth recitals of the Preamble to the EEA Agreement.

17 As the *Court* has previously held in Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15, at paragraphs 32 *et seq.*, it must be borne in mind when interpreting the EEA Agreement that the objective of the Contracting Parties was to create a dynamic and homogeneous European Economic Area. Accordingly, in the fourth recital of the Preamble to the EEA Agreement, the Contracting Parties state the following:

> "CONSIDERING the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties;"

18 The fifteenth recital of the Preamble reads:

> "WHEREAS, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition;"

19 Furthermore, in accordance with Article 6 EEA, without prejudice to future developments of case law, the provisions of the EEA Agreement must, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Community, be interpreted in their implementation and application in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of the EEA Agreement (2 May 1992).

20 In accordance with Article 3(2) of the Agreement between the EFTA States on establishment of a Surveillance Authority and a Court of Justice, the EFTA Court and the EFTA Surveillance Authority, in the interpretation and application of the EEA Agreement, are to pay due account to the principles laid down by the relevant rulings by the ECJ given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such

rules of the EC Treaty, in so far as they are identical in substance to the provisions of the EEA Agreement.

21 Admittedly, there are differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty, and it cannot be ruled out that such differences may, under specific circumstances, lead to differences in the interpretation, as in the *Maglite* case, cited above. But where parallel provisions are to be interpreted without any such specific circumstances being present, homogeneity should prevail.

The first question

22 By its first question, the national court seeks to establish whether a requirement in national law that a managing director of a legal person registered in the country concerned must have his residence in that country is in conformity with the EEA Agreement and in particular Articles 31 *et seq.* EEA.

23 The *Court* notes that it is not clear from the request whether the questions should be assessed from the perspective of the company Tradeparts AG or from the perspective of the Complainant Mr Rainford-Towning. However, since both parties consider that Mr Rainford-Towning is to be regarded as a self-employed person and not as an employee, the relevant provision of the EEA Agreement would in any case be Article 31, and the scope of that provision is not affected by which perspective is chosen.

24 The *Complainant*, the *Government of Norway*, the *EFTA Surveillance Authority* and the *EC Commission* all submit that it follows from the case law of the ECJ that the residence requirement in the Liechtenstein Business Acts constitutes covert discrimination contrary to Article 31 EEA. The Complainant also submits that, when seen in connection with the limitations on the right of foreigners to take up residence in Liechtenstein established pursuant to Article 112 EEA and Protocol 15 to the EEA Agreement (see below), the residence requirement even constitutes overt discrimination.

25 By contrast, the *Government of Liechtenstein* takes the view that the residence requirement does not constitute either overt or covert discrimination contrary to Article 31 EEA.

26 The *Court* notes that, according to the second paragraph of Article 31(1) EEA, freedom of establishment includes, in the case of nationals of a Contracting Party, “the right to take up and pursue activities as self-employed persons... under the conditions laid down for its own nationals by the law of the country where such establishment is effected...”.

27 It is settled case law of the ECJ 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, e.g., the judgments of the ECJ in C-350/96 *Clean Car Autoservice* [1998] ECR I-2521 (hereinafter "*Clean Car Autoservice*"), at paragraph 27, and Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279, at paragraph 33.

28 It is true that provisions such as those in the Liechtenstein Business Act apply without regard to the nationality of the person to be appointed as manager.

29 However, 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 Contracting Parties, as non-residents are in the majority of cases foreigners, see the judgment of the ECJ in Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225, at paragraph 28.

30 A requirement that nationals of other Contracting Parties must reside in the State concerned in order to be appointed managers of undertakings exercising a trade is therefore such as to constitute indirect discrimination based on nationality, contrary to Article 31 EEA.

31 This would be otherwise only if the imposition of such a residence requirement was based on objective considerations independent of the nationality of the manager concerned and proportionate to a legitimate aim pursued by the national law, see the judgments of the ECJ in *Clean Car Autoservice,* cited above, at paragraph 31; and Case C-15/96 *Schöning-Kougebetopoulou* v *Freie und Hansestadt Hamburg* [1998] ECR I-47, at paragraph 21.

32 According to the *Government of Liechtenstein,* the residence requirement at issue in the present case serves several purposes which are capable of providing justification even if the requirement is found to constitute covert discrimination. First, the requirement is necessary in order to ensure observance of the Liechtenstein Business Act and to safeguard the means to bring criminal prosecutions and in particular the enforcement of penal administrative orders or judgments against a managing director. Secondly, the residence requirement ensures that the managing director is in a position to act effectively in the business. Although similar arguments were recently rejected by the ECJ in *Clean Car Autoservice*, cited above, the Government of Liechtenstein submits that there are relevant differences between the situation in Liechtenstein and that in Austria, to which the *Clean Car Autoservice* case pertains.

33 The *Complainant*, the *Government of Norway*, the *EFTA Surveillance Authority* and the *EC Commission* submit, with reference, *inter alia*, to the *Clean Car Autoservice* case, cited above, that the said objectives may not serve to justify the residence requirement as the objectives may be reached by less restrictive means.

34 The *Court* notes that although ensuring compliance with national legislation must be considered a legitimate aim, the Government of Liechtenstein has not been able to demonstrate that this aim necessitates a general residence requirement for the managing director of a Liechtenstein legal person. As pointed out by the

Government of Liechtenstein, a person living close to the place of business is likely to spend more time there than a person living further away. However, in the opinion of the Court, neither the compliance with national legislation by the managing director nor the control of such compliance by the public authorities would seem to be dependent on the physical presence of the managing director, and it would seem to be even less dependent on his place of residence, see also the judgment of the ECJ in Case C-114/97 *Commission* v *Spain*, judgment of 29 October 1998, not yet reported (hereinafter "*Commission* v *Spain*"), at paragraph 47. While the physical presence of the managing director does not guarantee that public authorities get the information they require, it is fully possible for a managing director to provide all necessary information without being physically present. More appropriate and less restrictive means of ensuring compliance with national legislation could, for instance, consist of requirements as to the availability of relevant information at the place of business of the legal person. A requirement of residence in Liechtenstein is neither necessary nor sufficient to ensure compliance with the national legislation, as this may be achieved by other, less restrictive and more appropriate means.

35 With regard to the argument by the Government of Liechtenstein that the residence requirement is necessary to safeguard the possibility of bringing criminal prosecutions and in particular ensuring the enforcement of penal administrative orders or judgments against a managing director, the Court supports the statement of the ECJ at paragraph 36 of the judgment in *Clean Car Autoservice*, cited above, that other less restrictive means, such as serving notice of fines at the registered office of the undertaking employing the manager and ensuring that those fines will be paid by requiring a guarantee to be provided beforehand, would make it possible to ensure that the manager can be served with notice of any such fines imposed upon him and that they can be enforced against him, see also paragraph 47 of the judgment in *Commission* v *Spain*, cited above.

36 Furthermore, a requirement that the managing director shall reside in the Contracting Party in which the undertaking is established and exercises its trade is not in itself necessary to ensure that he will be in a position to act effectively as manager in the business. As pointed out at paragraph 35 of the judgment of the ECJ in *Clean Car Autoservice*, cited above, 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. However, whether or not this is the case will to a great extent depend on the nature of the business concerned and the available means of communication. In a small country like Liechtenstein, it would also be possible for a managing director to live in the neighbouring Contracting Party Austria and still be at a very short distance from the place of business in Liechtenstein.

37 It must be concluded, therefore, that a national provision such as that at issue in the main proceedings, which requires the managing director of a legal person to

reside in the State concerned, constitutes indirect discrimination contrary to Article 31 EEA.

The third question

38 By its third question, which will be dealt with before the second question for reasons of convenience, the national court asks whether the residence requirement may be justified under Article 33 EEA for reasons of public policy, public security or public health.

39 The *Government of Liechtenstein* submits that the residence requirement is justified under Article 33 EEA for reasons of public policy, especially because of the particular situation of Liechtenstein. The *Complainant*, the *Government of Norway*, the *EFTA Surveillance Authority* and the *EC Commission* submit that Article 33 EEA, in accordance with the case law of the ECJ concerning Article 56(1) EC, must be interpreted narrowly and does not justify a residence requirement such as that at issue in the present case.

40 Concerning the special situation of the Principality of Liechtenstein, the *Court* notes that the EEA Council recognized expressly in its Declaration on free movement of persons (OJ 1995 L 86/80) that "Liechtenstein has a very small inhabitable area of rural character with a unusually high percentage of non-national residents and employees. Moreover, it acknowledges the vital interest of Liechtenstein to maintain its own national identity." This has called for special transitory provisions in respect of Liechtenstein and the Contracting Parties shall, in case of difficulties, endeavour to find a solution which allows Liechtenstein to avoid having recourse to safeguard measures. For the Court, however, the situation must be that the obligations of Liechtenstein are decided on the basis of the decisions of the Contracting Parties at any time.

41 The Court observes, with regard to the justifications based on Article 33 EEA, that a general rule of the kind at issue in the main proceedings cannot be justified on any grounds of public security or public health.

42 As regards justification on grounds of public policy, as envisaged in Article 33 EEA, it must be held that, in so far as it may justify special treatment of foreign nationals who are subject to the EEA Agreement, recourse to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society, see the judgments of the ECJ in *Clean Car Autoservice*, cited above, at paragraph 40; and Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999, at paragraphs 33 *et seq*.

43 Here, however, it does not appear from the documents in the case that any such interest is liable to be affected if the owner of an undertaking is free to appoint,

for the purpose of exercising that undertaking's trade, a managing director who does not reside in the State concerned.

44 Consequently, a national provision such as that at issue in the main proceedings, which requires the managing director of a legal person to reside in the State concerned, cannot be justified on grounds of public policy within the meaning of Article 33 EEA.

The second question

45 By its second question the national court asks whether Protocol 15 to the EEA Agreement, Article 112 EEA or the EEA Council Declaration on free movement of persons (OJ 1995 L 86/80) may serve to justify the residence requirement contained in the Liechtenstein Business Act.

46 Among those who have submitted observations to the Court, it is common ground that none of the above instruments may serve to justify the residence requirement at issue in the main proceedings.

47 With regard to Protocol 15, which establishes transitional periods on the free movement of persons and access to professional activities with regard to Liechtenstein, it suffices to note that the last time-limit contained therein expired on 1 January 1998 and that, in any event, the Protocol may not be invoked to justify the residence requirement after that date.

48 With regard to Article 112 EEA, it suffices to note that, according to the information submitted by the Government of Liechtenstein, the residence requirement at issue is indeed not intended as a safeguard measure pursuant to that provision.

49 With regard to the EEA Council Declaration on free movement of persons, which concerns a possible prolongation of the transitional periods laid down in Protocol 15 to the EEA Agreement and safeguard measures pursuant to Article 112 EEA in the light of the special situation of Liechtenstein as a small country, the Court notes that that Declaration does not provide a basis for maintaining provisions such as the one at hand, and that the Government of Liechtenstein has not invoked the Declaration in order to justify the provision at issue in the main proceedings.

50 Consequently, a national provision such as that at issue in the main proceedings, which requires the managing director of a legal person to reside in the State concerned, cannot be justified by Protocol 15 to the EEA Agreement, Article 112 EEA or the EEA Council Declaration on free movement of persons (OJ 1995 L 86/80).

Costs

51 The costs incurred by the Government of the Principality of Liechtenstein, the Government of the Kingdom of Norway, the EFTA Surveillance Authority and the EC Commission, 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 the order of 12 May 1998, hereby gives the following Advisory Opinion:

1. A national provision such as that at issue in the main proceedings, which requires the managing director of a legal person to reside in the State concerned, constitutes indirect discrimination contrary to Article 31 EEA.

2. A national provision such as that at issue in the main proceedings, which requires the managing director of a legal person to reside in the State concerned, cannot be justified by Protocol 15 to the EEA Agreement, Article 112 EEA or the EEA Council Declaration on free movement of persons (OJ 1995 L 86/80).

3. A national provision such as that at issue in the main proceedings, which requires the managing director of a legal person to reside in the State concerned, cannot be justified on grounds of public policy within the meaning of Article 33 EEA.

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Delivered in open court in Luxembourg on 10 December 1998.

Gunnar Selvik
Registrar

Bjørn Haug
President