REPORT FOR THE HEARING
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 4, 31 *et seq.* and 112 of the EEA Agreement ("EEA") and Protocol 15 to the EEA Agreement.

I. Introduction

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 (the "Complainant") against the decision of the Government of Liechtenstein.

II. Facts and procedure

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 *Gewerbegesetz* (LGBl 1970/21 – the "Liechtenstein Business Law") which provides that a managing director must have a 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 Law are compatible with 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 request the EFTA Court for an Advisory Opinion on the interpretation of the relevant parts of the EEA Agreement.

III. Questions

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

> **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 – 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?

IV. Legal background

EEA law

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

10. Article 4 EEA, in Part I, Objectives and Principles, reads:

> *"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."*

11. 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."

12. 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."

Liechtenstein law

13. Article 6, paragraph 1a, of the Liechtenstein Business Law 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."

14. Article 17 of the Liechtenstein Business Law 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 Law, 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;

…"

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:

– 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, represented by Ms Christina Tufvesson and Ms Maria Patakia, both members of its Legal Service, acting as Agents.

Observations concerning the status as party before the national court

16. In the written observations of the Complainant, the following is stated:

> *"It is placed on record at the outset that, formally, the Complainant, in the context of the proceedings before the Administrative Court, is not the company Tradeparts AG with its registered office in Vaduz, but Mr. Herbert Rainford-Towning ... . In contrast, the Advisory Opinion proceedings before the EFTA Court were clearly filed in the name of the company Tradeparts AG. Of course the company Tradeparts has a legal interest in whether the Complainant can take on the post of managing director. The facts of the case and the legal considerations can thus be dealt with both from the point of view of the Complainant Herbert Rainford-Towning and from the point of view of the company Tradeparts AG ... ."*

17. Based on this information and further information obtained from the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, the Court finds it appropriate, for the purposes of the Advisory Opinion procedure, to consider Mr Herbert Rainford-Towning, and not the company Tradeparts AG as was initially done, as Complainant in the proceedings before the national court.

The first question

The Complainant

18. The Complainant submits that the first question should be solved on the basis of Articles 4 and 31 EEA, and that those provisions, according to Article 6 EEA, should be interpreted in the light of the case law of the Court of Justice of the European Communities ("ECJ") concerning Articles 6 and 52 of the EC Treaty ("EC").

19. It follows from the case law of the ECJ that Article 4 EEA must be interpreted as not only prohibiting overt discrimination on the grounds of nationality, but also all covert forms of discrimination which actually lead, by the use of other distinctions than nationality, to the same result.[1] In its judgment in

[1] Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153; Case C-3/88 *Commission* v *Italy* [1989] ECR 4035.

the *Clean Car*[2] case, paragraph 29, the ECJ recently held that where national statutory provisions provide for a distinction based on the criterion of residence, a danger exists that it will result principally in a disadvantage to nationals of other States, since non-residents are mostly foreigners. The requirement of residence was thus recognized in that case as covert discrimination, and the same applies in the present case.

20. The interpretation of the right of establishment provided for by Article 31 EEA, in the sense of a prohibition on restrictions, emerges in particular from the most recent judgments of the ECJ concerning the corresponding EC Treaty provision.[3]

21. Under this prohibition on restrictions, restrictions are to be understood in particular as covert or indirect discrimination within the meaning of Article 4 EEA, as represented above. Such restrictions are only compatible with the EEA Agreement if they deal with urgent grounds of general interest and are proportionate to the aim pursued.

22. In the opinion of the Complainant, it is not clear which general interest is served in the present case by the requirement of residence.

23. The argument by the Government of the Principality of Liechtenstein, *viz.* that the requirement is justified because a managing director must be in a position to be involved in the business as a regular occupation and thus to play an actual rather than merely a formal role there, does not in itself provide a legitimate basis for a requirement of residence. Mr Rainford-Towning intends to play an active role in the operation of the company but, given the nature of the activities involved, namely financial services with all of Europe as its market, it is neither necessary nor appropriate for him to be physically present at the office in Liechtenstein at all times. The aim of ensuring that the management function is carried out not only in a formal manner but also in fact would be better taken care of if an investigation were made in each case to ascertain whether the prospective applicant intended, independently of his residence in the country or abroad, to undertake this task simply formally or in actual fact. The residency requirement is not suitable to ensure the achievement of this purpose, however.

24. With respect to the stated problem of serving any possible writ or penalty, reference is made to the judgment of the ECJ in *Clean Car*,[4] paragraph 36, which states that any such difficulties can be solved by less restrictive means. In the case of Liechtenstein, it should also be noted that the said purpose is already

---

2 Case C-350/96 *Clean Car Autoservice GmbH* v *Landeshauptmann von Wien*, judgment of 7 May 1998, not yet reported ("*Clean Car*").

3 Case C-340/89 *Vlassopoulou* [1991] ECR I-2357; Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

4 See footnote 2.

protected by the requirement of a board of directors resident in the Principality of Liechtenstein.

25. It should also be noted that all other requirements of the Liechtenstein Business Law can be complied with by the intended managing director, regardless of whether he has his residence in that country or abroad.

26. The Complainant proposes the following answer to the first question:

> *"On the basis of the above explanations, the answer to the first question is that the business approval in the national law of Liechtenstein, whereby a managing director of a Liechtenstein legal person must have his residence in the country, is contrary to Article 31* et seq. *EEA."*

The Government of the Principality of Liechtenstein

27. The Government of the Principality of Liechtenstein is of the view that the Complainant is to be regarded as a self-employed person falling within the scope of application of Article 31 EEA and not as a worker under Article 28 EEA and cites case law from the ECJ to support that proposition.[5] However, regardless of which provision the case will fall under, the analysis will be the same, as both provisions concern discrimination on grounds of nationality.[6]

28. The Government of the Principality of Liechtenstein argues that the residence requirement in Articles 17(1)(b) and 6(1)(a) of the Liechtenstein Business Law does not constitute overt or covert discrimination prohibited by Article 31 EEA.

29. As regards overt discrimination, the Government of the Principality of Liechtenstein argues that the provisions of the Liechtenstein Business Law that require the managing director of a Liechtenstein legal person to have his residence in Liechtenstein apply equally to Liechtenstein nationals and to other EEA citizens. Neither Liechtenstein nationals nor other EEA nationals may be managing directors of Liechtenstein legal persons without having their residence in Liechtenstein.

30. As regards covert discrimination, the Government of the Principality of Liechtenstein notes the case law of the ECJ regarding Article 52 EC, which prohibits not only overt discrimination but also all forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.[7] While it is true that the ECJ has held that national rules under which a distinction is drawn on the basis of residence are likely to operate mainly

---

5 Case 66/85 *Lawrie Blum* [1986] ECR 2121, at para. 17; Opinion of the Advocate General in Case C-107/94 *Asscher* [1996] ECR I-3089, at para. 28 ("*Asscher*").

6 *Asscher*, at para. 29; Case C-106/91 *Ramrath* [1992] ECR I-3351, at para. 17.

7 Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, at para. 11; Case C-3/88 *Commission* v *Italian Republic* [1989] ECR 4035, at para. 8; Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279, at para. 33.

to the detriment of nationals of other Member States,[8] and that a residence requirement can constitute covert discrimination contrary to Article 48 EC,[9] it has also clearly pointed out that a residence requirement may be non-discriminatory if it is in proportion to a legitimate objective and is applicable without distinction based on nationality.[10]

31. Moreover, in the view of the Government of the Principality of Liechtenstein, the case law of the ECJ on Article 52 EC is not directly relevant to the interpretation of Article 31 EEA, Article 6 EEA notwithstanding, as the scope of the two provisions is different due to fundamental differences in the Community legal order and EEA law. These differences have been discussed and elaborated on at length by the ECJ[11] and subsequently reinforced by the EFTA Court.[12] The EEA is a traditional international agreement entailing no transfer of sovereign rights on the part of the Contracting Parties aiming at an improved free trade area but not a customs union with a uniform trade policy. It would thus be erroneous to interpret Article 31 EEA simply by drawing analogies with Article 52 EC. Article 31 EEA is to be interpreted in the light and context of the EEA Agreement alone.

32. The Government of the Principality of Liechtenstein makes reference to Article 31 of the Vienna Convention on the Law of Treaties, which states that treaties are to be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in its context and in the light of its objects and purpose. Consequently, it follows from the lesser ambitions of the EEA, *viz.* strengthening of trade and economic relations, that the furtherance of the freedom of establishment cannot require a total liberalization of the markets or the elimination of all restrictions on that freedom. The EEA is not intended to be an area without internal borders, so differences in economic conditions between EEA States may continue to exist. Moreover, economic relations between EEA States may be strengthened by eliminating only a selection of the restrictions on trade. In fact, Liechtenstein has made substantial amendments to its laws in general since it acceded to the EEA Agreement so as to comply with its obligations. Further amendments to its laws, in particular the Liechtenstein Business Law, would go beyond what is contemplated by the EEA Agreement.

33. Alternatively, the Government of the Principality of Liechtenstein submits that, if the residence requirement is found to be contrary to Article 31 EEA, it is justified by objective considerations independent of the nationality of the persons

---

8 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225, at para. 28; Case C-221/89 *The Queen* v *Secretary of State for Transport, ex parte Factortame* [1991] ECR I-3905, at para. 32.

9 See *Clean Car*, footnote 2, at para. 30.

10 *Clean Car*, footnote 2, at para. 31; Case C-15/96 *Schöning/Kougebetopoulou* v *Freie und Hansestadt Hamburg* [1998] ECR I-47, at para. 21.

11 Opinion 1/91 [1991] ECR I-6079; Opinion 1/92 [1992] ECR I-2821.

12 Case E-2/97 *Maglite Instrument Inc.* v *California Trading Company Norway, Ulsteen* [1997] EFTA Court Report 127.

concerned, which the ECJ has recognized as being in conformity with EC law.[13] The purpose of the residence requirement is to ensure a means of bringing criminal prosecutions, in particular the enforcement of penal administrative orders or judgments against a managing director. It serves the public interest of Liechtenstein. Advocate Fennelly in the *Clean Car*[14] case endorsed such mandatory requirements and, even though he was not followed by the ECJ on this point, the reasoning of the ECJ is not applicable to the present case.

34. There are a number of important reasons for maintaining the residence requirement. First of all, there is no treaty between the Principality of Liechtenstein and the United Kingdom governing the recognition and enforcement of judgments, as there was in the *Clean Car*[15] case. Secondly, under Liechtenstein law, there are different regimes of legal liability for managing directors and administrative councils, or *Verwaltugsrat*, of legal persons. The former may be held liable only for the damage incurred by the company or third persons due to a breach of his duties, whilst the latter may be held liable for the unsound administration of the company as well as its mismanagement. Consequently, enforcement against one does not ensure enforcement of the other, whence the necessity of also requiring the managing director to have his residence in Liechtenstein. Thirdly, the residence requirement ensures that the managing director will involve himself in the business to the extent appropriate to his position in the company. Lastly, the residence requirement seeks to ensure that the business activities of the company are actually carried out in the Principality of Liechtenstein.

35. The Government of the Principality of Liechtenstein submits that the first question should be answered as follows:

> *"Article 31 of the EEA Agreement does not preclude a Member State from providing that a managing director of a legal person carrying on a business on the territory of that State must have his residence there."*

The Government of Norway

36. The Government of Norway makes reference to Articles 4 and 31 EEA

37. According to the Government of Norway, the relevant case law of the ECJ makes it clear that Article 6 EC, which corresponds to Article 4 EEA, not only prohibits discrimination on the basis of nationality, but also any form of covert discriminatory treatment brought about by the formal use of criteria other than nationality, where the actual result is the same.

38. Reference is further made to Annex VIII, item 2, to the EEA Agreement, by virtue of which the General Programme of the Council of the European

---

13 *Clean Car*, footnote 2, at para. 31.

14 See footnote 2.

15 See footnote 2.

Communities for the abolition of restrictions on freedom of establishment (dated 18 December 1961) has been made part of the EEA Agreement. Part III B of the Programme makes it clear that the principles of non-discrimination also affect provisions which do not formally discriminate against foreign nationals, but which in practice exclusively or primarily restrict the freedom of foreign nationals to pursue professional activities.

39. According to the Government of Norway, it follows from the judgment of the ECJ in *Factortame*[16] that it is contrary to Community law, and particularly Article 52 EC (which corresponds to Article 31 EEA), to have in place requirements regarding citizenship and residence in a State, but that Community law does not preclude the requirement that decisions concerning a fishing vessel's operation and use are to be taken within the territory of the State.

40. It is also assumed that there are, in practice, few forms of residence requirement that are not designed to discriminate or that do not function in this way.

41. The Government of Norway also mentions that the Norwegian Companies Act of 4 June 1976 requires the managing director and at least half the members of the board to be resident in Norway and to have lived in Norway for the previous two years. It was considered necessary to amend that provision in connection with the entry into force of the EEA Agreement, due to Articles 4 and 31 EEA, and the provision now contains a general exemption for nationals of EEA States who are resident in an EEA State. The residence requirement is based on considerations of jurisdiction and enforcement and is not aimed at favouring Norwegian nationals. Nevertheless, and with reference to *inter alia* the Lugano Convention, it was considered that this was not in itself sufficient to maintain the residence requirement for nationals of other EEA States.

42. Based on the above, it is, in the view of the Government of Norway, difficult to see that the requirement in Liechtenstein's national legislation that the managing director must reside in Liechtenstein is in accordance with Articles 4 and 31 EEA.

43. The Government of Norway proposes the following answer to the first question:

> *"The requirement in Liechtenstein's national legislation that a managing director of a Liechtenstein legal person must have his residence in the Principality of Liechtenstein is not in accordance with Articles 4 and 31 of the EEA Agreement."*

---

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

The EFTA Surveillance Authority

44. According to the EFTA Surveillance Authority, the ECJ has consistently held that the rules of equal treatment prohibit not only overt discrimination based on nationality, but also all covert forms of discrimination which, through the application of other distinguishing criteria, achieve in practice the same result.[17] The ECJ has furthermore held that national rules under which a distinction is drawn on the basis of residence are likely to operate mainly to the detriment of nationals of other Member States, as non-residents in the majority of cases are foreigners.[18] The EFTA Surveillance Authority also notes that the ECJ has mentioned that the General Programme for the Abolition of restrictions on freedom of establishment designates as its beneficiaries the "nationals of Member States" without any distinction as regards nationality or residence.[19]

45. According to the EFTA Surveillance Authority, attention should also be drawn to the judgment of the ECJ in *Factortame*.[20]

46. Consequently, a residence requirement for the managing director of an undertaking would hinder the right of establishment because it constitutes indirect discrimination on the basis of nationality and is therefore incompatible with Article 31 EEA.

47. The EFTA Surveillance Authority furthermore notes that a residence requirement in Austrian legislation, similar to that at issue in the present case, has recently been assessed by the ECJ in the *Clean Car* case.[21] In that case the ECJ found that Article 48 EC precludes a Member State from providing that the owner of an undertaking exercising a trade on the territory of that State may not appoint as manager a person not resident there, as this constitutes indirect discrimination based on nationality, unless the imposition of such a residence requirement is based on objective considerations independent of the nationality of the employees concerned and is proportionate to a legitimate aim pursued by the national law. Since Article 28 EEA is identical in substance to Article 48 EC, Article 28 EEA should be interpreted in the same manner.

48. The question then remains whether there are, in the present case, any considerations of the above-mentioned kind that would justify the residence requirement. In the case law of the ECJ,[22] the question of possible justification is relevant for the purpose of both Article 28 and Article 32 EEA.

---

17 Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraphs 8 and 9; Case 22/80 *Boussac* v *Gerstenmeier* [1980] ECR 3427, paragraph 9.

18 Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 28.

19 Case 115/78 *Knoors* v *Secrétaire d'État aux affaires économiques* [1979] ECJ 399, paragraph 16.

20 See footnote 16.

21 See footnote 2.

22 Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351, paragraph 17; Case C-107/94 *Asscher* v *Staatssecretaris van Financiën* [1996] ECR I-3089, paragraph 29.

49. In the account of national law given in the request, only one possible ground for justification is mentioned, *i.e.* the need to have a person in the territory responsible for complying with the relevant rules, given the difficulties involved in cross-border enforcement of penal measures. That consideration was dealt with by the ECJ in the *Clean Car* case[23] and found not to be justified in that case. Since the Liechtenstein Government appears to consider the situation in Liechtenstein comparable to that in Austria, there is nothing in the facts available to suggest that that conclusion is not also valid in the present case.

50. The EFTA Surveillance Authority notes that it appears that before the national court the question has also been raised whether the purpose of ensuring an effective management of a business may serve to justify the residence requirement. With reference to the judgment of the ECJ in the *Clean Car* case,[24] paragraph 35, the EFTA Surveillance Authority submits that any requirement of residence for the purpose of ensuring an effective management of a business would have to be based on objective grounds, taking into account *inter alia* the nature of the business, the need for presence at the place of business and the transport infra-structure. There are no indications that any such considerations lie behind the Liechtenstein residence requirement and, taking into account the proximity to *e.g.* Austria, it is not likely that such considerations could possibly provide a justification.

51. While the first question should be answered in the negative, given the circumstances of this case, the EFTA Surveillance Authority nevertheless notes that effective enforcement of national business rules and effective management of businesses are no doubt legitimate interests and that pursuance of such aims may justify national restrictions of the kind involved in present case, provided that they are necessary and proportionate.

52. The EFTA Surveillance Authority proposes the following answer to the first question:

> *"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) is incompatible with Article 31 and Article 28 of the EEA Agreement."*

The Commission of the European Communities

53. According to the Commission of the European Communities, the residence requirement for a managing director of a company constitutes indirect discrimination on grounds of nationality incompatible with the right of

---

[23] See footnote 2.

[24] See footnote 2.

establishment provided for by Article 31 EEA. Reference is made to the judgment of the ECJ in *Factortame*.[25]

54. As the ECJ held in the *Clean Car* case,[26] the residence condition for a managing director of a company also constitutes a restriction on the right of free movement of workers provided for by Article 28 EEA.

55. Although a provision such as that in the Business Law of the Principality of Liechtenstein applies without regard to the nationality of the person to be appointed as manager, 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 Member States, see the judgment of the ECJ in *Schumacker*,[27] paragraph 28.

56. Consequently, such a requirement as laid down in the Business Law of the Principality of Liechtenstein constitutes indirect discrimination based on nationality and the argument that the same restriction also applies to nationals of Liechtenstein cannot be upheld.

57. The remaining question is then whether there are any proportionate objective considerations that could nevertheless serve to justify the residence requirement.

58. First, it is noted that, according to the Government of the Principality of Liechtenstein, it would be difficult to achieve cross-border enforcement of penal measures if there was no residence requirement. As held by the ECJ in the *Clean Car* case,[28] there are other less restrictive measures available to ensure that the manager can be sued with notice of any such fines imposed upon him and that they can be enforced upon him. The ECJ concluded that the residence requirement in question constituted indirect discrimination.

59. Secondly, it is noted that the Government of the Principality of Liechtenstein has explained that the requirements of the Business Law, including the residence requirement, are intended to ensure that the managing director effectively fulfils his tasks. As the ECJ stated in the *Clean Car* case,[29] safeguards of this nature cannot be linked to residence requirements. A managing director residing at a long distance from the company's place of business can raise doubts as to the professional and personal guarantees provided by the director in question and could enhance the risks of letter box companies in Liechtenstein. Nevertheless, a person living at a short distance from the place of business, even on the other side of the border of Liechtenstein, or being able to commute

---

25 See footnote 16.

26 See footnote 2.

27 See footnote 18.

28 See footnote 2.

29 See footnote 2.

between that place and his residence on a daily or weekly basis, would certainly fulfil his tasks in an effective manner. Furthermore, account must be taken of modern means of communication and the varying needs of the physical presence of a managing director depending on the size and activity of the company in question.

60. Consequently, the current residence requirement is disproportionate to the pursued objective given that the company's address can suffice to notify fines and there are no indications that the proposed manager (residing in London) will not be able to fulfil his tasks in an effective manner.

61. The Commission proposes the following answer to the first question:

> *"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), is not in conformity with the EEA and in particular Article 31* et seq. *of the Agreement on the European Economic Area dated 2 May 1992 (EEA)."*

The second question

The Complainant

62. Pursuant to Article 112 EEA and Protocol 15 EEA, Liechtenstein has imposed quantitative restrictions on the right of foreigners to take up residence in the country. According to the Complainant, the fundamental principles of the right of establishment remain unaffected by these provisions.

63. In fact, the combined effect of the restrictions on taking up residence in Liechtenstein and the residence requirement of the Liechtenstein Business Law would, for the managerial activity of a legal person, not only lead to covert discrimination, but also constitute overt discrimination, because it would effectively prevent foreign nationals, who until now have no residence in Liechtenstein, on the grounds of the invocation of the safeguard clause in Article 112 EEA, from transferring their residence to Liechtenstein, and thus fulfil the personal prerequisites for managerial activity.

64. This would in the end lead to the fact that the invocation of the safeguard clause in Article 112 EEA not only meant a quantitative restriction in the context of the taking-up of residence, but that in any case where the requirement of residence is demanded for taking up or carrying on an occupation, the consequence would be a discriminatory qualitative restriction of the right of establishment under the EEA.

65. The Complainant proposes the following answer to the second question:

> *"Question 2 can be answered accordingly that, under special consideration of the present situation in Liechtenstein, Article 31* et seq. *EEA precludes a*

national regulation which would require taking up residence in Liechtenstein in order to take or carry on an occupation."

The Government of the Principality of Liechtenstein

66. The Government of the Principality of Liechtenstein does not see any connection between the question of the compatibility of the residence requirement and Protocol 15 to the EEA Agreement and Article 112 EEA. The two provisions have two very different areas of application: the former contemplates measures for a transitional period while the latter deals with exceptional safeguard measures which may be taken unilaterally by the Contracting Party.

67. The Government of the Principality of Liechtenstein proposes answering the second question as follows:

"The provisions of Protocol 15 to the EEA Agreement and Article 112 et seq. *of the EEA Agreement on unilateral protective measures have a different sphere of application and therefore do not have any connection with a residence requirement such as the one provided for in Articles 17(1)(b), 6(1a) of the Liechtenstein Trade Code."*

The Government of Norway

68. According to the Government of Norway, the issue addressed in the second question is somewhat vague but seems to concern whether the special considerations that lie behind the safeguard measure implemented by Liechtenstein pursuant to Article 112 EEA can nevertheless give grounds for the residence requirement of the Liechtenstein Business Law. Since the Government of Liechtenstein has not invoked the special considerations that form the basis of the safeguard measures as premises for the relevant provisions of the Business Law, the Norwegian Government does not, at the present stage, wish to go into the details of this question.

The EFTA Surveillance Authority

69. The EFTA Surveillance Authority notes that the second question appears to have been raised by the national court on its own motion and that there are no indications that the Liechtenstein Government has relied on Protocol 15 EEA, the safeguard provisions of Article 112 EEA or the declaration by the EEA Council as justification for the disputed residence requirement.

70. Protocol 15 EEA provides for certain transitional arrangements for the free movement of persons. It follows already from the fact that the last time limit for applying transitional arrangements in the case of Liechtenstein expired on 1 January 1998, that Protocol 15 can no longer justify the maintenance of any restrictions otherwise allowed under the Protocol.

71. Moreover, given the nature of the provisions of Protocol 15 as exceptions from the basic principles of the EEA Agreement, the provisions must be construed strictly and cannot be interpreted as allowing for such a far-reaching restriction on the right of establishment as that in issue in the present case.

72. Otherwise, it suffices to note that there is nothing to indicate that the disputed residence requirement has been notified as a safeguard measure under Article 112 EEA and that the EEA Council declaration provides no basis for any restrictions imposed unilaterally by Liechtenstein.

73. The EFTA Surveillance Authority proposes the following answer to the second question:

> *"Protocol 15, safeguard measures in accordance with Article 112 EEA, and the declaration of the EEA Council on the free movement of persons, do not serve to justify the provision."*

The Commission of the European Communities

74. The Commission of the European Communities submits that the residence requirement cannot be justified by Protocol 15 EEA, as that Protocol allows Liechtenstein authorities to impose quantitative restrictions on persons seeking to take up residence in Liechtenstein, whereas the present case is about a person seeking to avoid taking up residence there. Also, Protocol 15 must be interpreted in a restrictive manner and cannot be used to circumvent the freedoms laid down in *inter alia* Articles 28 and 31 EEA, and there is no indication that Article 112 EEA is applicable.

75. The Commission of the European Communities proposes the following answer to the second question:

> *"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 – the requirement of residence can, nevertheless, not 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."*

The third question

The Complainant

76. The Complainant submits that Article 33 EEA must be understood as a so-called public policy proviso which, according to the case law of the ECJ, should only be used in exceptional instances.[30]

---

30 Case 67/74 *Bonsignore* v *Stadt Köln* [1975] ECR 297.

77. The scope of Article 33 EEA is clarified by Council Directive 64/221/EEC, which was subsequently expanded by Council Directive 75/35/EEC and transposed to the EEA Agreement. It follows from the directive that the grounds of public security or health may not be asserted in the context of an economic purpose. Noteworthy here are economic grounds such as crisis situations relating to employment policy, that is to say unemployment or general preventive considerations.

78. Furthermore, the concepts of public policy, security and health are defined in the Directive. Thus, in the context of public security, for example, the personal behaviour of the individual under consideration must prevail.

79. Furthermore, it follows from the case law of the ECJ that individual circumstances are to be taken into consideration in the use of the public policy proviso, and not general considerations.[31] It also follows from the case law of the ECJ that a sufficiently serious danger must exist in the individual case if the public policy proviso is to be used.[32]

80. Consequently, the exceptional provision of Article 33 EEA is only applicable in the context of concrete facts if a sufficiently severe danger threatens. In no case may Article 33 EEA be "misused" for such abstract general preventive motives as put forward by the Government of the Principality of Liechtenstein. It follows from this that the exceptional provision of Article 33 EEA, cited by the Government of the Principality of Liechtenstein, is completely unsuitable for justifying a restriction of the right of establishment by means of a requirement of residence.

81. The Complainant proposes the following answer to the third question:

> *"Consequently, in the view of the Complainant, Question 3 from the Administrative Court in the proceedings for an Advisory Opinion is to be answered to the effect that the Business Law provisions concerning the requirement of residence may not be justified on the grounds of public policy, security or health, either instead of or in addition to the special circumstances in the case of Liechtenstein, or under the exceptional provision of Article 33 EEA and, consequently, violate the EEA Agreement."*

The Government of the Principality of Liechtenstein

82. The Government of the Principality of Liechtenstein argues that the residence requirement may be upheld under Article 33 EEA on grounds of public order. This would be so even if the requirement were found to constitute overt discrimination as Article 33 EEA also covers overt discrimination.

83. In determining the criteria for the application of Article 33 EEA, one must bear in mind the different objectives of the EC Treaty on the one hand and the

---

31 Case 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219.

32 Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* v *Belgium* [1982] ECR 1665.

EEA Agreement on the other. The latter leaves the Member States more room to manoeuvre in their national legislation. It must also be remembered that Liechtenstein is in a very particular situation: it is a very small country with a high proportion of foreign nationals resident within its borders. Since the 1960s it has had a restrictive immigration policy in place. Moreover, the EEA Council, in its Decision 1/95, explicitly recognized the special situation of Liechtenstein, including its right to protect its national identity. The residence requirement for managing directors is a suitable, necessary and above all proportionate means of achieving the Government's policy goals. Its primary effect is to prevent a total de-linking of the management of a company and the location of that company in Liechtenstein. It serves a further object of ensuring some degree of government control over the Liechtenstein economy.

84. The Government of the Principality of Liechtenstein proposes the following answer to the third question:

> *"Article 33 of the EEA Agreement authorizes a Member State to restrict the freedom of establishment under Article 31 of the EEA Agreement by establishing a residence requirement for managing directors in order to protect its national identity."*

The Government of Norway

85. According to the Government of Norway, it follows from the case law of the ECJ that the conditions for justification in Article 33 EEA are exhaustive.[33]

86. The scope of the conditions in Article 33 EEA is clarified both by Council Directive 64/221/EEC and the case law of the ECJ.[34] It follows that there are strict criteria for viewing a measure as "justified" pursuant to Article 33 EEA. Such measures must be based exclusively on the personal conduct of the individual concerned (Article 3 of the directive) and there must be a "real and sufficiently serious threat to fundamental social considerations".[35]

87. In the light of this, the Government of Norway argues that the considerations underlying the Liechtenstein requirement can hardly be viewed as being of such a nature that the measures can be justified out of considerations for public policy and public security.

88. The Government of Norway proposes the following answer to the third question:

> *"The grounds of public policy, public security or public health do not justify the business law provisions concerning the requirement of residence, neither*

---

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

34 Case 41/74 V*an Duyn* v *Home Office* [1974] ECR 1337; Case 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219; Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* v *Belgium* [1982] ECR 1665.

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

instead of or in addition to the special situation of Liechtenstein or on account of the exceptional provision on Article 33 EEA."

The EFTA Surveillance Authority

89. With reference to the judgment of the ECJ in the *Clean Car* case,[36] paragraph 39, the EFTA Surveillance Authority submits that a general rule of residence requirement for managing directors of undertakings cannot be justified on any grounds of public security or public health as provided for by Article 33 EEA.

90. As for the question of possible justification on grounds of public policy, reference is also made to the *Clean Car* judgment, paragraph 40, where the ECJ stated that, in so far as it may justify certain restrictions on the free movement of persons subject to Community law, 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. According to the EFTA Surveillance Authority, there is nothing in the facts submitted by the national court to indicate that that condition is satisfied in the present case.

91. The EFTA Surveillance Authority proposes the following answer to the third question:

"The grounds of public policy, public security or public health can not be invoked to justify the provision."

The Commission of the European Communities

92. The Commission of the European Communities points out that, according to the case law of the ECJ, the term "public policy" in Article 33 EEA (the only valid ground for justification in the present case) must be interpreted in a strict manner. It presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society, see *Clean Car*,[37] paragraph 40, and can only be upheld in specific cases, but not in a general manner, see *Commission* v *France*, paragraph 58.[38] It does not appear from the documents of 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 manager who does not reside in the state concerned.

93. Consequently, the residence requirement cannot be justified by Article 33 EEA.

---

36 See footnote 2.

37 See footnote 2.

38 Case C-265/95 *Commission* v *France* [1997] ECR I-6959.

94. The Commission proposes the following answer to the third question:

"Public policy, public security or public health considerations do not 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."

Bjørn Haug
Judge-Rapporteur