JUDGMENT OF THE COURT

15 July 2021*

(*Free movement of workers – Freedom of establishment – Regulation (EU) No 492/2011 – Combined residence and nationality requirement for corporate officers – General manager – Members of the board – Consistency*)

In Case E-9/20,

EFTA Surveillance Authority, represented by James Stewart Watson, Claire Simpson, Erlend Møinichen Leonhardsen and Carsten Zatschler, acting as Agents,

applicant,

v

The Kingdom of Norway, represented by Ida Thue, Elisabeth Sawkins Eikeland and Tone Hostvedt Aarthun, acting as Agents,

defendant,

APPLICATION seeking a declaration that, by maintaining in force various nationality and/or residence requirements laid down in Norwegian company law in respect of persons who occupy certain management roles in companies registered and incorporated in Norway, the Kingdom of Norway has failed to fulfil its obligations under Articles 31 and 28 of the Agreement on the European Economic Area, as well as Article 1(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

* Translations of national provisions are unofficial and based on those contained in the documents of the case.

THE COURT,

composed of: Páll Hreinsson, President, Per Christiansen and Bernd Hammermann (Judge-Rapporteur), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having regard to the written pleadings of the applicant and the defendant, and the written observations submitted on behalf of:

- the Icelandic Government, represented by Jóhanna Bryndís Bjarnadóttir and Sigurbjörg Stella Guðmundsdóttir, acting as Agents, and Professor Eyvindur G. Gunnarsson, acting as Adviser,

- the European Commission ("the Commission"), represented by Lorna Armati, Bernd-Roland Killmann and Luigi Malferrari, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by James Stewart Watson, Claire Simpson, Erlend Møinichen Leonhardsen and Carsten Zatschler; the defendant, represented by Ida Thue, Elisabeth Sawkins Eikeland and Tone Hostvedt Aarthun; the Icelandic Government, represented by Jóhanna Bryndís Bjarnadóttir and Sigurbjörg Stella Guðmundsdóttir; and the Commission, represented by Lorna Armati, Bernd-Roland Killmann and Luigi Malferrari, at the remote hearing on 18 March 2021,

gives the following

Judgment

I Introduction

1 By an application lodged at the Court's Registry on 10 July 2020, the EFTA Surveillance Authority ("ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), seeking, following amendment, a declaration that by maintaining in force provisions such as various nationality and/or residence requirements laid down in Norwegian company law in respect of persons who occupy certain management roles in companies registered and incorporated in Norway, the Kingdom of Norway has failed to fulfil its obligations under Articles 31 and 28 of the Agreement on the European Economic Area ("EEA" or "the EEA Agreement"), as well as Article 1(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

2 Norway contests the action.

II Legal background

EEA law

3 Article 28 EEA reads:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*
>
> *3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
>
> *(a) to accept offers of employment actually made;*
>
> *(b) to move freely within the territory of EC Member States and EFTA States for this purpose;*
>
> *(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
>
> *(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.*
>
> *4. The provisions of this Article shall not apply to employment in the public service.*
>
> *5. Annex V contains specific provisions on the free movement of workers.*

4 Article 31(1) EEA reads:

> *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.

5 Article 33 EEA 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.

6 Article 34 EEA reads:

Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

7 Protocol 17 to the EEA Agreement entitled "Concerning Article 34" reads:

1. *Article 34 of the Agreement shall not prejudge the adoption of legislation or the application of any measures by the Contracting Parties concerning third-country access to their markets.*

   Any legislation in a field which is governed by the Agreement shall be dealt with according to the procedures laid down in the Agreement and the Contracting Parties shall endeavour to elaborate corresponding EEA rules.

   In all other cases the Contracting Parties shall inform the EEA Joint Committee of the measures and, whenever necessary, endeavour to adopt provisions to ensure that the measures are not circumvented through the territory of the other Contracting Parties.

   If no agreement can be reached on such rules or provisions, the Contracting Party concerned may take measures necessary to prevent circumvention.

2. *For the definition of the beneficiaries of the rights derived from Article 34, Title I of the General Programme for the abolition of restrictions on freedom of establishment (OJ 2, 15.1.1962, p. 36/62) shall apply with the same legal effect as within the Community.*

8 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1, and EEA Supplement 2016 No 47, p. 693) ("the Regulation") was incorporated into the

EEA Agreement by Decision of the EEA Joint Committee No 52/2012 of 30 March 2012 (OJ 2012 L 207, p. 32), replacing the text of point 2 of Annex V (Free movement of workers) to the EEA Agreement. Constitutional requirements were indicated and fulfilled by Norway on 14 December 2012, and the decision entered into force on 1 February 2013.

9 Article 1(1) of the Regulation reads:

> *Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.*

National law

10 Section 6-11(1) of the Private Limited Companies Act of 13 June 1997 no. 44 (*Lov om aksjeselskaper / Aksjeloven*) ("the Private Limited Companies Act") reads:

> *The General Manager and at least half of the members of the Board shall reside here in the realm, unless the King makes an individual exemption. The first sentence does not apply to nationals of States party to the EEA Agreement when resident in such a State.*

11 Section 6-11(1) of the Public Limited Companies Act of 13 June 1997 no. 45 (*Lov om almennaksjeselskaper / Allmennaksjeloven*) ("the Public Limited Companies Act") is worded identically to Section 6-11(1) of the Private Limited Companies Act.

12 Section 6-36(2) of the Public Limited Companies Act reads:

> *Members of and observers to the Board and the General Manager cannot be members of or observers to the corporate assembly. Unless the King makes an individual exception, at least half of the members of the corporate assembly must reside in the realm. This does not however apply to nationals of States party to the EEA Agreement when they reside in such a State. The provisions of the Act regarding the members of the corporate assembly apply, as far as appropriate, to observers and deputy board members.*

13 Section 7-5 of the Financial Undertakings Act of 10 April 2015 no. 17 (*Lov om finansforetak og finanskonsern / Finansforetaksloven*) ("the Financial Undertakings Act") reads:

> *(1) A financial entity may be formed by one or several founders. The founders shall draw up, date and sign a memorandum containing the entity's articles of association which meets the requirements of Sections 7-6 to 7-8.*
>
> *(2) When a financial institution is formed which is not organized as a private limited company or a public limited company, at least half of the founders shall*

be resident in Norway and have lived here for the past two years, unless the Ministry makes an exception in the individual case. The state and Norwegian municipalities, as well as limited liability companies, associations and foundations that have their registered seat (business office) here in the realm, are considered equal to persons who are resident in Norway.

(3) The second paragraph first sentence of this provision does not apply to nationals of States that are party to the EEA Agreement if they are resident in such a State, nor to legal persons as referred to in Article 34, second paragraph of the EEA Agreement, provided that these are created in accordance with the law of another EEA State and have their registered seat, main administration or main office in such a State.

14 Section 8-4(5) of the Financial Undertakings Act reads:

The Public Limited Companies Act's Sections 6-6 to 6-11a apply similarly to undertakings that are not organized as private limited companies or public limited companies.

15 The reference in Section 8-4(5) of the Financial Undertakings Act to Section 6-11 of the Public Limited Companies Act, which contains residence and nationality requirements for the general manager and at least half of the board members of the company, renders these requirements applicable in the context of the Financial Undertakings Act.

16 Section 6-11(1) of the Private Limited Companies Act, Sections 6-11(1) and 6-36(2) of the Public Limited Companies Act and Section 8-4(5) of the Financial Undertakings Act are collectively referred to as "the corporate officer scheme". The term "corporate officers" comprises collectively the general manager, members of the board and members of the corporate assembly as referred to in the aforementioned legislation. Section 7-5 of the Financial Undertakings Act is referred to as "the founder scheme".

III Facts and pre-litigation procedure

17 On 14 May 2014, ESA opened an own-initiative case into the present matter. In a letter sent on the same date, ESA invited the Norwegian Government to provide information on nationality and/or residence requirements for corporate officers, as laid down in Sections 6-11 and 6-36 of the Public Limited Companies Act, Section 6-11 of the Private Limited Companies Act, Sections 4-1 and 14-2 of the Insurance Activity Act, Section 3-8 of the Financial Institutions Act, and Section 7 of the Savings Banks Act.

18 On 11 December 2014, the Norwegian Government replied that, when it assessed its obligations in 1992 under the EEA Agreement, including its obligations pursuant to Article 31 EEA, it had been concluded that a revision was necessary to the residence requirements for corporate officers in the existing domestic legislation to exclude any discrimination between Norwegian citizens and companies, and citizens and companies from other EEA States. Consequently, the exemptions set out in Section 6-11(1) of the

Private Limited Companies Act and in Section 6-11(1) and 6-36(2) of the Public Limited Liability Companies Act were introduced to ensure EEA nationals resident in EEA States were placed on an equal footing with Norwegian nationals.

19 On 4 November 2015, ESA issued a letter of formal notice to Norway. After analysing the residence requirements, ESA came to the conclusion that the provisions of national law, apart from Section 14-2 of the Insurance Activity Act, were incompatible with Articles 28 and 31 EEA, Article 2 of Council Directive 89/666 of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State ("the Eleventh Directive"), and Article 1(1) of the Regulation. ESA also concluded that Sections 7-5 and 8-4(5) of the Financial Undertakings Act, which were due to come into force on 1 January 2016, were incompatible with the same provisions of EEA law.

20 On 18 February 2016, the Norwegian Government acknowledged ESA's letter of formal notice. It confirmed that the Financial Undertakings Act had repealed the relevant provisions in the Financial Institutions Act and the Savings Banks Act. Section 4-1 of the Insurance Activity Act had been repealed and replaced with Section 7-5(2) of the Financial Undertakings Act.

21 On 12 October 2016, ESA delivered its reasoned opinion. Although it maintained the conclusions in its letter of formal notice, ESA observed that these conclusions now only applied to Sections 6-11 and 6-36 of the Public Limited Companies Act, Section 6-11 of the Private Limited Companies Act, and Sections 7-5 and 8-4(5) of the Financial Undertakings Act following the replacement of the other three pieces of legislation, which formed part of the subject matter in the letter of formal notice.

22 On 13 February 2017, the Norwegian Government stated that it would consider alternatives to the residence requirements concerned and would also propose alternative legislation.

23 On 21 November 2019, the Norwegian Government submitted its proposals on the amendments to the legislation at issue for public consultation. Whilst the Norwegian Government observed that the proposals would still restrict the establishment and free movement of workers to a certain degree, it considered the restrictions to be justified and proportionate.

24 On 11 December 2019, ESA decided to refer the matter to the Court.

25 On 16 January 2020, the Norwegian Government's deadline for public consultation on the proposals expired, but no further information on their status was received by ESA.

IV Procedure and forms of order sought

26 On 10 July 2020, ESA lodged an application pursuant to the second paragraph of Article 31 SCA seeking a declaration that Norway had failed to fulfil its obligations under

Articles 28 and 31 EEA, as well as Article 1(1) of the Regulation and Article 2(2) of the Eleventh Directive.

27 ESA initially requested the Court to:

> *(i) Declare that, by maintaining in force provisions such as Sections 6-11(1) and 6-36(2) of the Public Limited Companies Act, Section 6-11(1) of the Private Limited Companies Act and Sections 7-5 and 8-4(5) of the Financial Undertakings Act, the Kingdom of Norway has failed to fulfil its obligations under Articles 31 and 28 of the EEA Agreement, Article 1(1) of the Act referred to at point 2 of Annex V to the EEA Agreement (Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union) and Article 2 of the Act referred at point 8 of Annex XXII to the EEA Agreement (Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State).*
>
> *(ii) Order the Kingdom of Norway to bear the costs of the proceedings.*

28 On 15 July 2020, Norway requested a four-week extension of the deadline to lodge a statement of defence ("the Defence") from 10 September 2020 to 8 October 2020.

29 On 16 July 2020, the President, pursuant to Article 35(2) of the Rules of Procedure ("RoP"), granted Norway's request for an extension and set the deadline for the Defence to 8 October 2020.

30 On 8 October 2020, Norway submitted its Defence, pursuant to Article 35 RoP. Norway requests the Court to:

> *(i) Dismiss the Application of the EFTA Surveillance Authority as unfounded.*
>
> *(ii) Order the EFTA Surveillance Authority to pay the costs of the proceedings.*

31 On 13 October 2020, ESA requested an extension of the deadline to lodge the Reply to 9 December 2020.

32 On 14 October 2020, the President, pursuant to Article 78 RoP, granted ESA's request for an extension, and set the deadline for the Reply to 26 November 2020.

33 On 26 November 2020, ESA submitted its Reply, in which it withdrew its plea as regards the Eleventh Directive without prejudice to the possibility of bringing proceedings on this matter in the future. ESA amended its application accordingly, rewording the form of order sought, now requesting the Court under paragraph (i) to:

(i) Declare that, by maintaining in force provisions such as Sections 6-11(1) and 6-36(2) of the Public Limited Companies Act, Section 6-11(1) of the Private Limited Companies Act and Sections 7-5 and 8-4(5) of the Financial Undertakings Act, the Kingdom of Norway has failed to fulfil its obligations under Articles 31 and 28 of the EEA Agreement, Article 1(1) of the Act referred to at point 2 of Annex V to the EEA Agreement (Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union).

34 On 27 November 2020, the President set 8 January 2021 as the deadline for the submission of Norway's rejoinder ("the Rejoinder"). On the same date, Norway requested an extension of the deadline to lodge the Rejoinder to 22 January 2021. Also on the same date, the President, pursuant to Article 35(2) RoP, granted Norway's request for an extension, and set the deadline for the Rejoinder to 22 January 2021.

35 On 9 December 2020, the Icelandic Government and the Commission submitted written observations.

36 On 22 January 2021, Norway submitted its Rejoinder.

37 The remote hearing was held on 18 March 2021.

38 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 insofar as is necessary for the reasoning of the Court.

V Pleas and arguments submitted to the Court

The applicant

39 ESA submits that the legislation at issue amounts to an unjustified restriction on the freedom of establishment in Norway and, consequently, infringes Article 31 EEA. As regards the individuals targeted by these provisions and their employers, the legislation at issue also infringes Article 28 EEA and the Regulation.

Freedom of establishment

40 ESA asserts that companies which intend to set up a secondary establishment in Norway through subsidiaries, agencies or branches may have to redeploy or recruit personnel to comply with the requirements for corporate officers. Any replacement of personnel would cause disruption within a company, as well as lead to possible administrative and financial consequences. This need to adapt may in itself have a dissuasive effect on the exercise of the freedom of establishment guaranteed by Article 31 EEA.

41 ESA also submits that according to Section 7-5 of the Financial Undertakings Act, nationals of an EEA State who reside in a third country will not be able to found a financial undertaking in Norway when it is not organised as a public or private limited company and there are no other founders complying with the nationality and residence requirement.

42 According to ESA, the Court of Justice of the European Union ("ECJ") already established in *Commission* v *Netherlands*, C-299/02, EU:C:2004:620, that any requirement of nationality or residence of persons occupying key positions in a company constitutes a restriction of the freedom of establishment.

43 ESA maintains that the possibility of obtaining exceptions from the requirements in individual cases does not diminish the restrictive character of the contested measures. The administrative requirement of applying for such an exception may in itself deter or even prevent economic operators from pursuing their activities in the host State through a fixed place of business.

44 In ESA's submission, the justifications asserted by Norway have already been addressed in the case law with regard to the enforcement of administrative, civil, and criminal law.

45 As regards the objective of establishing jurisdiction in respect of civil liability, ESA claims that the cumulative condition of residence and nationality is not suitable, as in civil and commercial matters covered by the Lugano Convention of 21 December 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ 2007 L 339, p. 3) ("the Lugano Convention") only residence in a State party to this convention would be sufficient to ensure that judgments delivered by Norwegian courts could be enforced there.

46 With regard to jurisdiction in criminal matters, ESA claims that this objective must be regarded as an ex-post justification as, at the time of the enactment of the contested provisions in 1992, there could not have been any question of seeking alignment with the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (OJ 2006 L 292, p. 2) ("the ASP"), as it was concluded in 2006 and entered into force on 1 November 2019. Even if this objective were recognised retrospectively, the cumulative residence and nationality requirement would not be suitable for establishing jurisdiction since the ASP system is not based on either the nationality or the residence of the person concerned.

47 ESA further argues that Norway's practice of granting exemptions in individual cases illustrates that other less restrictive measures are both available, and acceptable in practice. ESA contends that the condition, which is applied under its exemption procedure, that an EEA company must have a contact person resident and registered in Norway, with the appropriate powers of representation, is reminiscent of an alternative measure indicated in *Commission* v *Netherlands*, cited above.

48 ESA submits that a codification of this condition would eliminate the need for companies to take the administrative steps of the exemption procedure, which itself amounts to a restriction under Article 31 EEA. In ESA's view, the practice of granting individual exemptions from the combined condition of residence and nationality also undermines a consistent and systematic pursuit of the objective when a contact person exists.

49 ESA concludes that the restrictions on the freedom of establishment arising from the contested measures therefore cannot be justified by overriding reasons in the general interest.

Free movement of workers

50 ESA asserts that the residence requirements in the contested measures also infringe Article 28 EEA and Article 1(1) of the Regulation, the latter specifying that the right of EEA nationals to take up employment in another EEA State applies irrespective of their place of residence.

51 ESA submits that the contested legislation constitutes a restriction on the free movement of workers, particularly in the case where a company is prevented from engaging a general manager with the nationality of an EEA State who is resident outside the EEA. ESA contends that, depending on the circumstances of the individual case, the provisions on the free movement of workers apply to nationals of EEA States in management positions, when these managers are under the direction of others.

52 ESA argues that the residence requirements in Norway's company legislation restrict the exercise of the right to free movement of workers both from the perspective of the manager in an employment relationship, and from the perspective of the company wishing to engage a person for a management position. ESA asserts that residency could be a factor determining whether a potential manager should enter into the employment relationship and thus discourage that person from exercising the rights conferred by Article 28 EEA, which could constitute indirect discrimination.

53 ESA contends that the residence requirements may only be compatible with the provisions on the free movement of workers if they can be justified on grounds referred to in either Article 28(3) EEA or by overriding reasons in the general interest. In that regard, ESA asserts that its submissions on Article 31 EEA apply equally in this context. Consequently, any restriction on the exercise of free movement for workers arising from the application of the residence requirements cannot be justified. Thus, the contested measures are incompatible with Norway's obligations under Article 28 EEA and Article 1(1) of the Regulation.

The defendant

Freedom of establishment

54 In the Defence, Norway did not contest that the corporate officer and founder schemes constituted restrictions within the meaning of Article 31 EEA. However, at the hearing Norway stated that, having regard to the written observations of the Icelandic Government, it had some doubts as to whether ESA had in fact proved the existence of a restriction in the present case.

55 Norway asserts that the reasoning in *Commission* v *Netherlands*, cited above, as to the restrictive effect of a requirement of EEA residence and nationality does not apply to the present case, because companies from other EEA States are free to establish a branch without having to fulfil the residence and nationality requirements under Norwegian company law to do business in Norway. Furthermore, Norway contends that the possibility and the practice of making exemptions mitigates the restrictive effect of the residence requirement. Between 2016 and 2020, no applications from EEA companies were rejected, although some exemptions were subject to conditions that the company had to have a contact person reside in Norway.

56 Norway claims that the legislation at issue is suitable to achieve legitimate objectives and does not go beyond what is necessary.

57 Norway asserts that the primary objective of the contested requirements is to ensure that persons in key positions may be held liable under civil and criminal law for actions performed in their capacity. In its assessment, the most important function of the provisions on civil and criminal liability is the deterrent effect of those rules. This aims to ensure that corporate officers respect Norwegian law, both legislation on limited liability companies and financial undertakings, and other provisions, including EEA legislation, such as Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, which states that Member States must have rules governing the civil liability of, inter alia, members of managing bodies. The purpose is to protect the companies, shareholders, creditors, consumers, public authorities and others by ensuring that judgments in civil and criminal cases can be effectively enforced.

58 According to its submissions at the hearing, Norway does not invoke the ancillary objective of ensuring practical accessibility of the company's management as justification for the legislation at issue.

59 Norway holds the view that the two requirements of residence and nationality must be assessed each on their own merits. For Norway, the residence requirement is more important for securing the enforcement of civil and criminal claims outside Norway. As to the requirement for EEA nationality, Norway argues that this ensures that corporate officers have a firm and stable connection to the EEA with a view to ensuring accessibility and securing assets. Third country nationals are less likely to have the same level of attachment to the EEA, and the prospects of enforcement are more uncertain.

Norway considers it easier for third country nationals to move to their home countries and escape liability for their actions.

60 As to civil liability, Norway contends that the only appropriate measure suitable for ensuring effective enforcement of civil judgments is to require those persons to reside within the EEA, to ensure that they remain within the scope of the Lugano Convention. In relation to criminal liability, the ASP permits the prosecution or execution of a sentence against persons resident within the EEA. Norway rejects ESA's allegation that jurisdiction in criminal matters constitutes an ex-post justification. Norway argues that the focus of its 1992 preparatory works on the Lugano Convention results from the fact that an international framework for criminal law was already in place, in the form of the European Convention on Extradition. Moreover, Norway contends that an assessment of the ASP is relevant as any international instrument currently in force must be considered relevant for the objective invoked. In this regard, Norway acknowledges that some states outside the EEA have acceded to the European Convention on Extradition and that bilateral extradition agreements exist between Norway and both Australia and the United States of America. However, Norway contends that prosecution and enforcement of criminal law judgments outside the EEA is difficult, if not impossible.

61 Norway holds the view that no alternative measures ensuring the same level of protection exist. The burden of proof on the necessity of the measure may shift depending on the circumstances of the case. Norway asserts that ESA has failed to provide any details of measures which would be equally as effective as the EEA residence and nationality requirements.

62 In response to ESA's claim that the practice for granting exemptions demonstrates that less restrictive measures are available, Norway contends that exemptions are not granted only on the condition of providing a contact person. Rather, the essence of the EEA residency requirement is maintained in the exemption practice, since this is the only way of ensuring that some corporate officers remain within the reach of Norwegian law and enforcement authority. Moreover, the exemption scheme is not necessarily an easier option, as it might be difficult to persuade a corporate officer who is within reach of the Norwegian authorities to take on the role.

63 With regard to ESA's argument that the granting of individual exemptions undermines the condition of consistency and a systematic pursuit of the relevant objective, Norway asserts that ESA has misunderstood the process of granting exemptions. Norway emphasises that applications are rejected where the managing director and the board members reside outside Norway or the EEA and that the presence of a contact person is not in itself sufficient to warrant an exemption.

64 Therefore, Norway maintains its position that there are no less restrictive measures that could attain the objectives in an equally efficient manner.

Free movement of workers

65 Norway argues that the contested provisions are compatible with Article 28 EEA and Article 1(1) of the Regulation. Norway agrees that whether a certain position falls within the scope of the definition of worker pursuant to Article 28 EEA must be answered on a case-by-case basis. Under Norwegian law, the general manager of limited liability companies and financial undertakings has an independent role in relation to the shareholders and the board, with extensive personal responsibilities. Therefore, the general manager does not work under the direction of others.

66 If the Court however finds that a managing director is to be considered a worker for the purposes of Article 28 EEA, Norway contends that the contested legislation is justified and compatible with Article 28 EEA and Article 1(1) of the Regulation based on the same arguments as it advances in connection with the freedom of establishment.

Icelandic Government

67 The Icelandic Government supports Norway's request to dismiss the application as unfounded and to order ESA to pay the costs of the proceedings. In the Icelandic Government's view, the contested legislation is compatible with the EEA Agreement and long-established practice.

68 In the Icelandic Government's assessment, the contested provisions only impose requirements on corporate officials of companies established under Norwegian law. The provisions interfere directly neither with the structure of the board of directors nor the management of companies established under the law of other EEA States, in contrast to the situation in *Commission* v *Netherlands*, cited above. A subsidiary is a separate and distinct legal entity from its parent company for the purposes of taxation, regulation and liability whereas a branch is not. On the basis of Article 31 EEA, an EEA parent company cannot demand that the same rules as in the home State apply to the structure of the board and directors of a subsidiary it intends to establish in another EEA State. The Icelandic Government considers that, in the absence of harmonisation, EEA States may impose requirements on the composition of the corporate board and directors of a company as long as they do not discriminate against nationals of other EEA States.

69 Furthermore, the Icelandic Government argues that, in accordance with Protocol 17 EEA, EEA States may take measures to prevent third country nationals accessing the internal market. Therefore, the legislation at issue is compatible with the EEA Agreement.

The Commission

70 The Commission supports ESA's application. According to the Commission, the contested legislation fails the test of pursuing in a consistent and systematic matter the stated objective of ensuring the effective enforcement of judgments as not all EEA States are parties to the Lugano Convention or the ASP. Moreover, there are State parties to the Lugano Convention, which are not EEA States.

71 The Commission asserts that the burden of proof rests with the EEA State, and there is no question of ESA having to demonstrate that less restrictive measures which would attain the same level of protection exist.

72 In the Commission's assessment, it is not sufficient for Norway to simply state that persons can avoid accountability by residing in a State outside the EEA. The assessment of whether a particular less restrictive measure is appropriate for securing the attainment of the objective requires a detailed analysis of all relevant factual and legal circumstances, not using a case-by-case approach, but by a global assessment of the rule. In its view, Norway has not submitted appropriate evidence or an analysis of the appropriateness and proportionality of the restrictive measure such as to allow a proper comparison with other possible measures. Rather, Norway's submissions suggest that there are other ways to ensure that proper enforcement can take place.

73 The Commission rejects Norway's general assertion that a managing director does not fulfil the criteria of the concept of worker within Article 28 EEA. That question must be answered on a case-by-case basis considering all the factors and circumstances of the working relationship. The same logic must apply to other corporate officers such as board members, and it is not possible to make a general statement.

74 The Commission contends that the notion of worker is sufficiently broad to cover managing directors as well as board members, depending on the circumstances of each case. In such cases, the Commission considers that the contested measures restrict the right to free movement of workers for EEA nationals residing outside the EEA, as they are unable to take up a position as managing director or board member.

VI Findings of the Court

Freedom of establishment

75 Article 31(1) EEA provides for nationals of EEA States the freedom of establishment in other EEA States, which includes the setting up of agencies, branches or subsidiaries and the right to set up and manage undertakings, in particular companies or firms, under the conditions laid down for its own nationals by the law of the country where such establishment is effected. This also comprises the freedom to choose the appropriate legal form in which to pursue the economic activity in another EEA State (see Joined Cases E-3/13 and E-20/13 *Fred. Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraphs 93 to 95, and compare the judgment in *CLT-UFA SA*, C-253/03, EU:C:2006:129, paragraphs 13 to 15 and case law cited).

76 Article 34 EEA obliges EEA States to treat companies or firms formed in accordance with the law of an EEA State and having their registered office, central administration or principal place of business within the EEA in the same way as nationals of EEA States. For the definition of the beneficiaries of the rights derived from Article 34 EEA, paragraph 2 of Protocol 17 to the EEA Agreement provides that Title I of the General Programme for the abolition of restrictions on freedom of establishment shall apply with the same legal effect as within the Community.

Restriction

77 Article 31 EEA prohibits all restrictions on the freedom of establishment within the EEA. Measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, albeit applicable without discrimination on grounds of nationality, are an encroachment upon these freedoms requiring justification, even if the restriction is of limited scope or minor importance. No form of *de minimis* rule exists in that regard (see Case E-14/15 *Holship Norge AS* [2016] EFTA Ct. Rep. 240, paragraphs 115 and 116 and case law cited).

78 In the Defence, Norway does not contest that the corporate officer and founder schemes constitute restrictions within the meaning of Article 31 EEA.

79 The corporate officer scheme requires both nationality of and residence in an EEA State for the general manager and at least half of the board members of private limited companies, public limited companies and financial undertakings, and members of the corporate assembly in the case of public limited companies.

80 The corporate officer scheme has the effect of restricting the freedom of establishment guaranteed under Article 31 EEA for the beneficiaries of that freedom. EEA nationals wishing to operate in the form of a legal entity covered by the corporate officer scheme with a general manager and at least half of the board members and members of the corporate assembly who are nationals or residents of a non-EEA State are prevented from doing so (compare the judgment in *Commission* v *Netherlands*, paragraph 32).

81 As for the founder scheme, it requires nationality of and residence in an EEA State for the founders of a financial undertaking.

82 It follows from Article 31 EEA that only EEA nationals and legal entities treated in the same way in accordance with Article 34 EEA enjoy the freedom of establishment. Accordingly, for the exercise of the freedom of establishment a requirement of nationality of an EEA State cannot constitute a restriction on that freedom. However, under the founder scheme an EEA national resident in a non-EEA State is prevented from relying on Article 31 EEA to establish a financial undertaking in Norway. Article 31 EEA does not attach a condition of residence to the exercise of the freedom of establishment by an EEA national in the territory of an EEA State and such a residence requirement is liable to hinder or make less attractive that freedom. Accordingly, the EEA residence requirement in the founder scheme must be considered a restriction on the freedom of establishment.

83 Norway has argued that the practice of making discretionary exemptions mitigates the restrictive effect of the corporate officer scheme. The Court recalls that the uncertainty of whether the exemption is granted and the administrative burden it involves has the same effect as a prior authorisation scheme, if the addressee of the legislation at issue has to rely on being granted an exemption in order to pursue the activity in question. It is settled case law that a prior authorisation scheme renders the freedom of establishment less attractive (see Case E-19/15 *ESA* v *Liechtenstein*, cited above,

paragraph 85; and compare the judgment in *Hartlauer Handelsgesellschaft mbH*, C-169/07, EU:C:2009:141, paragraphs 34, 35 and 38). Hence the possibility to grant exemptions cannot remove the restrictive character of the legislation at issue.

84 As pointed out by ESA, the corporate officer scheme requires a combination of residence in and nationality of an EEA State. In relation to the requirement of nationality, it has been established by the ECJ, that in the absence of a harmonised rule valid for the entire EEA, a condition of nationality of an EEA State, like a condition of nationality of a specific Member State, may constitute an obstacle to freedom of establishment (compare the judgment in *Commission* v *Netherlands*, cited above, paragraph 20).

85 Norway's assertion that this reasoning does not apply to the present case, because companies from other EEA States were free to establish a branch without having to fulfil the nationality and residence requirements under the corporate officer scheme, cannot be upheld.

86 The freedom of establishment guaranteed under Article 31 EEA encompasses also the freedom to choose the appropriate legal form in which to pursue the activity in another EEA State and thereby allowing the establishment of a subsidiary as a separate legal entity. However, the corporate officer scheme restricts the choice of the appropriate legal form in which to pursue economic activity.

87 In the light of the foregoing, the corporate officer and founder schemes must be considered restrictions on the freedom of establishment guaranteed under Article 31 EEA.

Justification

88 A restriction on the freedom of establishment laid down in Article 31 EEA may be justified on the grounds set out in Article 33 EEA or by overriding reasons in the public interest, provided that it is appropriate to secure the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see Case E-8/17 *Kristoffersen* [2018] EFTA Ct. Rep. 383, paragraph 114 and case law cited).

89 Norway has submitted that the corporate officer scheme aims to ensure the effective enforcement of the civil and criminal liability of corporate officers.

90 It is common ground among the parties that the safeguarding of the administration of justice as such constitutes a legitimate objective to justify restrictive measures.

91 It must thus be examined whether the measure restricting the freedom of establishment is suitable to secure the attainment of the legitimate objective which it pursues and that it does not go beyond what is necessary to attain it. It is for the EEA State imposing a restriction to demonstrate that the measure it has adopted is suitable for attaining the stated objectives. Moreover, the measure must genuinely reflect a concern to attain that aim in a consistent and systematic manner. The necessity test implies that the chosen

measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law (see *Kristoffersen*, cited above, paragraphs 114, 118, 121 and 122, and case law cited).

92 As regards the justification of the corporate officer scheme, Norway claims that the requirement of nationality and residence in an EEA State is suitable and necessary to ensure the enforcement of the civil and criminal liability of corporate officers. Norway submits that the nationality of an EEA State is a safeguard, making sure that corporate officers have a firm and stable connection to the EEA with a view to ensuring accessibility and securing assets. Third country nationals could more easily move to their respective home countries and escape civil and criminal liability for their actions. In addition, the residence requirement, when put alongside the nationality requirement, ensures that the civil and criminal liability of corporate officers can effectively be enforced. Norway has also referred to the Lugano Convention with regard to civil liability and to the ASP and the European Convention on Extradition with regard to criminal liability.

93 The Court notes that the requirement of nationality and residence in an EEA State only applies to at least half of the board members. Since both civil and criminal liability is individual, the requirement is inconsistent. Imposing such a requirement only on half of the board members will not hinder the other board members from residing or moving to a third country to escape civil and criminal liability for their actions. Thus, a nationality and residence requirement will not ensure that the civil and criminal liability of corporate officers can be enforced effectively in a consistent and systematic manner.

94 The practice of making exemptions to the residence requirement – where some exemptions were subject to a condition that the company had a contact person residing in Norway – underlines that the requirement is not suitable to enforce civil and criminal liability in a consistent and systematic manner. A contact person will not be able to ensure such enforcement as regards the board members of the company. Hence, such requirement is neither suitable nor necessary to attain the aim of ensuring jurisdiction for civil or criminal liability.

95 Further, as pointed out by ESA, nationality of an EEA State is only required when the corporate officer does not reside in Norway but elsewhere within the EEA. Thus, a firm and stable connection to the EEA is not regarded as necessary under the corporate officer scheme when a corporate officer resides in Norway, although there is nothing to suggest that mere residence in Norway renders it less likely that third country nationals could move to their respective home countries and escape liability for their actions, as claimed by Norway.

96 Accordingly, as mere residence in Norway is regarded as sufficient to attain the aim of the corporate officer scheme, the combined requirement of nationality and residence cannot be regarded as suitable nor necessary to attain the objective stated by Norway.

97 As for the justification of the founder scheme, Norway has not put forward any specific justification for that restriction. In its Defence, it has merely stated that the Norwegian

Government has recently concluded that Section 7-5 of the Financial Undertakings Act no longer has any practical relevance under Norwegian law and that it will be proposed to the Norwegian Parliament that the provision be repealed.

98 As no arguments have been put forward by Norway substantiating why it is necessary to ensure the civil and criminal liability of the founders of a financial undertaking by requiring them to be resident in the EEA, it must be concluded that the founder scheme constitutes an unjustified restriction on Article 31 EEA.

Free movement of workers, Article 28 EEA and Article 1(1) of the Regulation

99 In its application, ESA argues that the EEA residence requirement laid down in the contested legislation infringes Article 28 EEA. It is further argued that Article 1(1) of the Regulation specifies that the right of EEA nationals to take up employment in another EEA State applies, irrespective of their place of residence, including whilst residing in third countries. The core of ESA's argument is that the EEA residence requirement will discourage EEA nationals from residing in third countries whilst working in an EEA State.

100 Article 28(1) EEA provides that freedom of movement for workers shall be secured among EC Member States and EFTA States. Article 28(2) EEA states that such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment. It is settled case law that rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result (see Case E-5/10 *Joachim Kottke* [2009-2010] EFTA Ct. Rep. 320, paragraph 29).

101 All provisions of the EEA Agreement relating to the freedom of movement for workers are intended to facilitate the pursuit by nationals of EEA States of occupational activities of all kinds throughout the EEA and preclude measures which might place nationals of EEA States at a disadvantage when they wish to pursue an economic activity in the territory of another EEA State. Furthermore, national provisions which preclude or deter a national of an EEA State from leaving his country of origin in order to exercise his right of freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (compare the judgment in *Commission* v *Germany*, C-318/05, EU:C:2007:495, paragraphs 114 and 115).

102 As stated in Article 28 EEA, the objective of that article is to secure freedom of movement of workers among EEA States and throughout the EEA. It follows that its purpose is not to secure freedom of movement of workers between EEA States and third countries. Accordingly, Article 28 EEA cannot be relied on in order to remove obstacles to freedom of movement of workers between EEA States and third countries.

103 The contested legislation applies without regard to the nationality of workers. In its application, ESA refers to the judgment of the ECJ in *Clean Car Autoservice*, C-350/96, EU:C:1998:205, which concerned national legislation requiring residence in Austria, the EEA State in question. In that judgment, the ECJ held that such a national residence requirement was liable to operate mainly to the detriment of nationals of other EEA States and thus constituted indirect discrimination (compare the judgment in *Clean Car Autoservice*, cited above, paragraphs 29 and 30). However, that conclusion is not transposable to a residence requirement in an EEA State. Furthermore, ESA has not otherwise explained how such residence requirement, which allows EEA nationals to reside in their respective States of origin or anywhere else in the EEA, operates mainly to the detriment of nationals of other EEA States. ESA has not argued that the contested legislation otherwise constitutes a covert form of discrimination which, by the application of other criteria of differentiation, leads to the same result.

104 As regards the Regulation, it must be noted that, as its title indicates, that regulation only covers freedom of movement within the EEA (compare the judgment in *Akrich*, C-109/01, EU:C:2003:491, paragraph 49) and not between EEA States and third countries. In this context, the wording in Article 1(1) of the Regulation must be understood as referring to an EEA national's place of residence within the EEA.

105 As pointed out by the Commission, the geographical scope of the EEA Agreement does not preclude EEA law from having effects outside the territory of the EEA, for example where a situation is sufficiently closely linked to the EEA (see Case E-8/19 *Scanteam*, judgment of 16 July 2020, paragraphs 66 to 68). However, ESA has neither argued that there is a sufficiently close link nor has it otherwise sufficiently explained why Article 28 EEA and the Regulation should apply to an EEA national resident in a third country.

106 In proceedings pursuant to Article 31 SCA for failure to fulfil obligations, it is incumbent upon ESA to prove the allegation that the obligation has not been fulfilled. It is ESA's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in doing so ESA may not rely on any presumption (see Case E-12/13 *ESA* v *Iceland* [2014] EFTA Ct. Rep. 58, paragraph 82).

107 It follows from the above that ESA's plea alleging that the contested legislation infringes Article 28 EEA and Article 1(1) of the Regulation must be dismissed.

Conclusion

108 Accordingly, it must be held that the corporate officer and the founder schemes infringe the freedom of establishment guaranteed under Article 31 EEA.

109 Therefore, the Court finds that, by maintaining in force Sections 6-11(1) and 6- 36(2) of the Public Limited Companies Act, Section 6-11(1) of the Private Limited Companies Act and Sections 7-5 and 8-4(5) of the Financial Undertakings Act, Norway has failed to fulfil its obligations under Article 31 EEA.

110 The remainder of the application is dismissed.

VII Costs

111 Under Article 66(3) RoP, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. Since both ESA and Norway have been partially successful, each party shall bear its own costs. The costs incurred by the Icelandic Government and the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Declares that, by maintaining in force Sections 6-11(1) and 6-36(2) of the Public Limited Companies Act, Section 6-11(1) of the Private Limited Companies Act and Sections 7-5 and 8-4(5) of the Financial Undertakings Act, the Kingdom of Norway has failed to fulfil its obligations under Article 31 of the EEA Agreement.**

2. **Dismisses the application as to the remainder.**

3. **Orders each party to bear its own costs.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 15 July 2021.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President