REPORT FOR THE HEARING

in Case E-9/20

APPLICATION to the Court pursuant to 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 in the case between

EFTA Surveillance Authority

and

The Kingdom of Norway,

seeking, following amendment, 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.

I Introduction

1. The EFTA Surveillance Authority ("ESA") asserts that, by maintaining nationality and/or residence requirements as specified in Norwegian company law regarding persons who are board members or hold management roles in companies registered and incorporated in Norway, Norway has failed to fulfil its obligations under Articles 28 and 31 of the Agreement on the European Economic Area ("EEA Agreement" or "EEA") and Article 1(1) of Regulation (EU) No 492/2011.

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 EEA 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 Agreement and making certain specific adaptations to Article 36(1) and (2) of the Regulation. 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.*

Lugano Convention

10. The Lugano Convention of 21 December 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ 2017 L 339, p. 3).

Agreement on the Surrender Procedure

11. 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) ("ASP").

National law[1]

12. 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") provides:

> *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.*

13. 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.

14. Section 6-36 (2) of the Public Limited Companies Act provides:

> *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.*

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

15. 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.*

16. 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.*

17. 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 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.

18. Collectively, the national legislation specified in paragraphs 12 to 17 is referred to as the "legislation at issue" or "contested measures".

III Pre-litigation procedure

19. On 14 May 2014, ESA opened an own-initiative case. 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.

20. On 11 December 2014, the Norwegian Government replied that, when assessing in 1992 its obligations 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 in order to ensure EEA nationals resident in EEA States were placed on an equal footing with Norwegian nationals.

21. Additionally, the Norwegian Government noted that the residence requirements were intended to ensure accessibility to company management and the exercise of jurisdiction over those companies. It intended to prevent situations in which companies could avoid accountability to consumers and creditors by having their management and board members reside in States where Norwegian judgments are not recognised and cannot be enforced.

22. The Norwegian Government stated that it had also considered the applicability of the judgment of the Court of Justice of the European Union ("ECJ") in *Commission* v *Netherlands*, C-299/02, EU:C:2004:620 to the present case. It stated that the Norwegian legislation could be differentiated from the Netherlands legislation at issue in *Commission* v *Netherlands* in three ways: it does not concern the ownership or stock capital structure of the company; it allows for exemptions, which were regularly granted to citizens from countries which are parties to the Lugano Convention of 21 December 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Lugano Convention"), and therefore did not cause serious disruption to companies affected; and the Netherlands measures went beyond what was necessary to achieve the aim of effectively exercising jurisdiction.

23. The Norwegian Government further noted that, to its knowledge, similar restrictions on residence requirements are applied in Swedish, Finnish and Icelandic company law legislation. It concluded that the measures in the Norwegian legislation were appropriate, suitable and necessary and any restrictions pursue a legitimate aim which could be exercised in compliance with the freedom of establishment rule in Article 31 EEA.

24. 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 listed in paragraph 19, 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.

25. 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.

26. On 12 October 2016, ESA issued a 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.

27. On 13 February 2017, the Norwegian Government, in its response to ESA's reasoned opinion, stated that it would consider replacements to the residence requirements concerned and would also propose alternative legislation.

28. 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.

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

30. On 16 January 2020, the 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 by the parties

31. On 10 July 2020, ESA lodged an application pursuant to 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 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.

32. ESA requests 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.

33. 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. Norway noted that, owing to the unprecedented health crisis, the Court had extended the time limit by one month in preliminary reference proceedings as well as annulment proceedings, and submitted that this rationale should apply similarly to other proceedings, such as infringement proceedings brought by ESA. Additionally, it indicated that there would be very low staffing levels from 1 July to 15 August due to an aligned holiday practice with the Norwegian courts' summer vacation period which is regulated by statute. With regard to future proceedings, Norway kindly invited the Court to consider whether it may be appropriate, while this unprecedented health crisis is ongoing, to extend the time limit by one month as a matter of course in all proceedings save for exceptions of urgency.

34. 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.

35. 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.

36. On 9 October 2020, ESA was served with the Defence. The President set 9 November 2020 as the deadline for the submission of ESA's reply (the "Reply").

37. On 13 October 2020, ESA requested an extension of the deadline to lodge the Reply to 9 December 2020. ESA submitted that it would need additional time to coordinate and consult on account of the pandemic both internally and with the European Commission (the "Commission") in accordance with Article 109(2) EEA. ESA noted that there had also been changes in personnel and that it had a high litigation burden.

38. 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.

39. 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.

40. 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. Norway submitted that the Reply was almost as lengthy and comprehensive as the Application, which would necessitate an extension in order to adequately respond the Reply. Norway also noted its main agent was handling an important case in which an application for interim relief was submitted in December. This unexpected event had delayed the planned drafting of the Rejoinder. 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.

41. On 9 December 2020, the Commission and the Government of Iceland submitted written observations pursuant to Article 20 of the Statute.

42. On 22 January 2021, Norway submitted its Rejoinder.

V Written submissions

43. Pleadings have been received from:

- the applicant, ESA, represented by Stewart Watson, Claire Simpson, Erlend Leonhardsen and Carsten Zatschler, acting as Agents; and

- the defendant, Norway, represented by Ida Thue, Elisabeth Sawkins Eikeland and Tone Hostvedt Aarthun, acting as Agents.

44. Pursuant to Article 20 of the Statute, written observations have been received from:

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

- the Commission, represented by Lorna Armati, Bernd-Roland Killmann and Luigi Malferrari, acting as Agents.

The applicant

Introduction

45. ESA explains that its application concerns 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. Stated generally, the legislative provisions concerned require a proportion of the founders of

companies, managers, board members and members of the corporate assembly ("corporate officers") to be resident in Norway. At the same time these provisions determine that the said residence requirements do not apply to nationals of EEA States, but only to the extent that they are resident in such a State. Thus, in ESA's submission, they restrict the ability of companies lawfully established in another EEA State to set up and conduct business in Norway to the extent that they have corporate officers who are either not EEA nationals or EEA nationals not resident in the EEA. They also limit the ability of EEA nationals not resident in the EEA to act as corporate officers of Norwegian companies. While the provisions also provide for the possibility of the competent Ministry to make an exception to the residence requirement in individual cases, this is not in practice sufficient to wholly remove the restrictive character of the main provisions in issue.

46. ESA submits that the provisions referred to amount, primarily, to an unjustified restriction on the freedom of establishment in Norway of companies which have been formed in accordance with the law of an EEA State and which have their seat in the EEA and, consequently, infringe Article 31 EEA.[2] Finally, from the perspective of the individuals targeted by these provisions, they also infringe Article 28 EEA and the Regulation.

47. In ESA's submission, Norway effectively acknowledges that the residence requirements at issue are at odds with the obligations arising from Article 31 EEA, in particular, and, consequently, drew up proposals aimed at relaxing these requirements. The public consultation phase of the legislative process was concluded on 16 January 2020. However, these proposals had not been adopted at the time the present application was lodged. At any rate, for the purposes of assessing the merits of the present application, ESA observes that it is the situation which prevailed at the end of the two-month time limit following the receipt of the reasoned opinion of 12 October 2016 which is relevant.

Freedom of establishment

48. ESA submits that freedom of establishment is guaranteed by Article 31 EEA and Article 34 EEA, *ratione personae*, throughout the EEA to natural persons and to companies established under the law of an EEA State. "Companies or firms" are defined in the second paragraph of Article 34 EEA. Further, in *Fred Olsen*, the Court clarified that "any person or entity ... that pursues economic activities that are real and genuine must be regarded as taking advantage of its right of establishment under Articles 31 and 34 EEA."[3]

49. Pursuant to established case law of both the Court and the ECJ, the restrictions covered by Article 31 EEA include not only the prohibition of overt discrimination

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[2] In light of ESA's withdrawal of its plea concerning the Eleventh Directive in its Reply, arguments relating to the Eleventh Directive are not included in this Report.

[3] Reference is made to Joined Cases E-3/13 and E-20/13 *Fred Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraph 96.

based on nationality, but also all covert forms of discrimination.[4] This concept extends to "all measures which prohibit, impede or render less attractive the exercise of the freedoms guaranteed by [Article 31 EEA],"[5] as well as to "measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade".[6]

50. ESA submits that any measure which discourages the establishment of companies or affects market access for companies from other EEA States qualifies as a restriction within the meaning of Article 31 EEA, unless it can be justified on the grounds listed in Article 33 EEA; or where the measure serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective which it pursues, and does not go beyond what is necessary in order to attain it.[7]

Existence of a restriction

51. ESA notes that the residence requirements at issue in the present case apply with respect to:

- the general manager and at least half the board members of public limited companies, private limited companies, and financial undertakings whether or not these are organised as a public or private limited company;[8]
- at least half of the members of the corporate assembly of public limited companies;[9]
- at least half of the founders of financial undertakings where these are not organised as a public or private limited company.[10]

52. ESA submits that the contested measures contain a generic exemption from this requirement for nationals of EEA States, provided that they are also resident in an EEA State.[11] In the Financial Undertakings Act, this exemption also applies to founders of financial undertakings who are legal persons as referred to in the second paragraph of Article 34 EEA.[12] These exemptions were introduced in 1992 in order to ensure that the

[4] Reference is made to Case E-3/98 *Herbert Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 27; Case E-2/01 *Dr Franz Martin Pucher* [2002] EFTA Ct. Rep. 44, paragraph 18; and the judgment in *Clean Car Autoservice*, C-350/96, EU:C:1998:205, paragraph 27.

[5] Reference is made to Case E-14/15 *Holship* [2016] EFTA Ct. Rep. 240, paragraph 115; and the judgments in *Commission* v *Italy*, C-518/06, EU:C:2009:270, paragraph 62; *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraph 45; *Commission* v *Italy*, C-465/05, EU:C:2007:781, paragraph 17; and *Commission* v *France*, C-389/05, EU:C:2008:411, paragraph 52.

[6] Reference is made to *Commission* v *Italy*, C-518/06, cited above, paragraph 64.

[7] Reference is made to Case E-15/16 *Yara International* [2017] EFTA Ct. Rep. 434, paragraph 37; Case E-8/16 *Netfonds Holding* [2017] EFTA Ct. Rep. 163, paragraph 112; and the judgments in *Commission* v *Italy*, C-518/06, cited above, paragraph 72; *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758, paragraph 61; *United Pan-Europe Communications Belgium and Others*, C-250/06, EU:C:2007:783, paragraph 39; and *Government of the French Community and Walloon Government*, C-212/06, EU:C:2008:178, paragraph 55.

[8] Reference is made to Section 6-11 (1) of the Public Limited Companies Act, Section 6-11 (1) of the Private Limited Companies Act and Section 8-4 (5) of the Financial Undertakings Act.

[9] Reference is made to Section 6-36 (2) of the Public Limited Companies Act.

[10] Reference is made to Section 7-5 (2) of the Financial Undertakings Act.

[11] Reference is made to Section 6-11 (1) of the Public Limited Companies Act, Section 6-11 (1) of the Private Limited Companies Act and Section 7-5 (3) of the Financial Undertakings Act.

[12] Reference is made to Section 7-5 (3) of the Financial Undertakings Act.

rules concerned applied to all EEA nationals and companies in the same way.[13] Exceptions to the residency requirements can also be granted in individual cases at the discretion of the King. In ESA's analysis, these features have mitigated the restrictive effect of the contested measures on the freedom of establishment, but have not neutralised all consequences of the residence requirements on the freedom of establishment of companies from other EEA States in Norway. ESA emphasises that, while the residence requirements as such apply to natural persons, it is primarily the freedom of establishment of the companies within which they operate that is affected by them.

53. ESA asserts that companies that do not qualify for the exemptions may be impeded in their ability to exercise their rights under Article 31 EEA in Norway. Moreover, companies which intend to set up a secondary establishment in Norway may have to redeploy or recruit personnel in order to comply with the requirements. ESA argues that this need to adapt may in itself have a dissuasive effect on the exercise of the freedom of establishment guaranteed by Article 31 EEA.

54. ESA contends that such a situation arises in cases where the persons who fulfil any of the corporate functions indicated in the provisions at issue do not reside on the territory of an EEA State or, on the other hand, do reside in such a State, but are not nationals of an EEA State. In view of the fact that persons who fulfil functions within a company act on behalf of the company, which in the main will have legal personality, their nationality or place of residence should have no impact on the exercise of rights by that company. Similarly, the residence requirements restrict the possibilities for such companies established in other EEA States to pursue activities in Norway through subsidiaries, agencies or branches (secondary establishment).

55. ESA also submits that, in view of the requirements laid down in Section 7-5 of the Financial Undertakings Act, in respect of the founders of such a financial undertaking, where it is not organised as a public or private limited company, nationals of an EEA State who reside in a third country will not be eligible to set up such a financial undertaking in Norway if they do not adapt to these requirements.

56. ESA cites three key cases in which the Court already examined the compatibility of Article 31 EEA with residence requirements imposed on managers and board members of companies: *Rainford-Towning*, *Pucher* and *ESA* v *Liechtenstein*.[14] In all three cases, the Court found that the residence requirements constituted covert discrimination, as they placed nationals of other EEA States at a disadvantage to Liechtenstein nationals, amounting to a restriction within the meaning of Article 31 EEA. ESA observes that, in *Rainford-Towning*, the Court also addressed the appropriateness of the measure and observed that the physical presence of the managing director was not necessary in order to ensure compliance with the objectives of the Liechtenstein legislation. The Court thus implied that the residence of the managing

[13] Reference is made to the Reply of the Norwegian Government to the request for information, p. 2 (document number 733928) (Annex 2).

[14] Reference is made to *Rainford-Towning* and *Pucher*, cited above; and Case E-8/04 *ESA* v *Liechtenstein* [2005] EFTA Ct. Rep. 46.

director outside of Liechtenstein, whether in another EEA State or a third country, would not necessarily be prejudicial to the attainment of the objectives of that legislation.

57. In *Commission* v *Netherlands*, the legislation in question required a proportion of the shareholders of a European Community company which owned a ship in the Netherlands, the directors of the shipping company, and the natural persons responsible for the day-to-day management of the shipping company to be of Community or EEA nationality and resident in a Community or EEA State. The ECJ considered that those requirements had "the effect of restricting the freedom of establishment of ship-owners. When ship-owner companies wishing to register their ships in the Netherlands do not satisfy the conditions in issue, their only course of action is to alter the structure of their share capital or of their boards of directors; and such changes may entail serious disruption within a company and also require the completion of numerous formalities which have financial consequences. Likewise, ship-owners must adjust their recruitment policies in order to ensure that their local representatives are not nationals of a State which is not a Member State of the Community or of the EEA."[15] ESA asserts that the same principles apply to the present case.[16] Any replacements of personnel would cause disruption within a company, as well as lead to possible administrative and financial consequences. ESA contends that such effects could dissuade a company from establishing itself in Norway.

58. ESA also points out that in this judgment the ECJ considered that "[i]n the absence of a harmonised rule valid for the entire Community, a condition of Community or EEA nationality, like a condition of nationality of a specific Member State, may constitute an obstacle to freedom of establishment". According to ESA, *Commission* v *Netherlands* establishes that the nationality or residence of persons occupying key positions in a company are irrelevant for the purposes of freedom of establishment within the EEA. Consequently, any specification of residency or nationality constitutes a restriction and is therefore prohibited.

59. ESA also addresses the possibility of obtaining exceptions from the regulations in individual cases. In ESA's view, this does not diminish the restrictive character of the contested measures. Even though Norway reiterates that such exceptions are frequently granted to citizens from States party to the Lugano Convention, ESA considers that 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.[17]

Possible justification

60. ESA submits that any residency or nationality requirements must be regarded as constituting restrictions on the freedom of establishment contrary to Article 31 EEA, unless any restrictive effect can be justified under Article 33 EEA or by overriding

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[15] Reference is made to the judgment in *Commission* v *Netherlands*, cited above, paragraph 19.

[16] Reference is made to the judgment in *Commission* v *Netherlands*, cited above, paragraphs 20 and 32.

[17] Reference is made to Case E-19/15 *ESA* v *Liechtenstein* [2016] EFTA Ct. Rep. 437, paragraph 86; and the judgment in *Hartlauer Handelsgesellschaft mbH*, C-169/07, EU:C:2009:141, paragraphs 34, 35 and 38.

reasons in the general interest, and the restriction is proportionate to that aim.[18] In its view, Norway's asserted justification that these restrictions are intended to guarantee the exercise of jurisdiction and accessibility to company management are insufficient to justify the restrictions they impose. Specifically, Norway contended that the purpose of these provisions is "to enable consumers, creditors and others who deal with a company to effectively enforce claims they may have against that company, when their claim has been decided by a court of law".[19] In ESA's submission, the measures go beyond what is necessary to ensure the effectiveness of their policy aims.

61. ESA submits that *Rainford-Towning* and *Commission* v *Spain* indicate that physical presence of the managing director of a company is not necessary to monitor compliance with national legislation as it may be achieved by less restrictive means.[20]

62. In ESA's submission, the justifications asserted by Norway in the present case, namely, that residence requirements are necessary with a view to exercising jurisdiction, to prevent companies from avoiding accountability in law for their actions and to enable consumers and clients of the companies concerned to enforce court orders and judgments have already been addressed in the case law with regard to the exercise of criminal jurisdiction,[21] and the enforcement of administrative, civil, and criminal law. Thus, in *Pucher*, the Court stated that the residence requirement at issue in that case was "neither suitable nor necessary to assist the administration of justice, ensure the execution of civil judgments or enforce administrative and criminal sanctions".[22]

63. Moreover, the ECJ has also emphasised that the ability of a state to exercise its jurisdiction over a person depends primarily on the practical accessibility of that person and not on his nationality or residence.[23] ESA asserts that Norway has not explained how the current requirements in the contested measures contribute to the realisation of their objectives more effectively than alternative measures, or whether such alternatives have been considered.[24]

64. ESA concludes that the restrictions on the freedom of establishment arising from the contested measures cannot be regarded as necessary to realise the objectives of Norway and therefore cannot be justified by overriding reasons in the general interest.

Free movement of workers

65. ESA asserts that the residence requirements in the contested measures also infringe Article 28 EEA. In addition to the prohibition in Article 28(2) EEA of any

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[18] Reference is made to Case E-9/00 *ESA* v *Norway* [2002] EFTA Ct. Rep. 72, paragraph 54, and Case E-9/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 88.

[19] Reference is made to the Reply to request for information (Doc No 733928): see Annex 2.

[20] Reference is made to *Rainford-Towning*, cited above, paragraph 34, and the judgment in *Commission* v *Spain*, C-114/97, EU:C:1998:519.

[21] Reference is made to *Rainford-Towning*, cited above, paragraphs 34 and 35; and the judgments in *Clean Car Autoservice*, cited above, paragraph 36, and *Commission* v *Spain*, cited above, paragraph 47.

[22] Reference is made to *Pucher*, cited above, paragraphs 37, 38, and 40.

[23] Reference is made to the judgment in *Commission* v *Netherlands*, cited above, paragraphs 26, 36 and 37.

[24] Reference is made to Case E-8/04 *ESA* v *Liechtenstein*, cited above, paragraph 29.

discrimination on grounds of nationality, 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.

66. ESA contends that, depending on the circumstances of the individual case,[25] 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. According to settled case law, a relationship of subordination is an essential characteristic of an employment relationship, bringing it within the ambit of Article 28 EEA.[26] By contrast, where the manager is the owner or sole shareholder of the company, the provisions on the freedom of establishment under Article 31 EEA will apply instead.[27]

67. ESA argues that the residence requirements in Norway's companies 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.[28] ESA asserts that residency could be a factor determining whether or not 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.[29]

68. The residence requirements may only be considered to 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 on overriding reasons in the general interest. In that regard, ESA asserts that its submissions on Article 31 EEA apply equally in this context. Consequently, it must be concluded that any restriction on the exercise of free movement for workers arising from the application of the residence requirements in the context of an employment relationship, whether existing or prospective, cannot be justified. Thus, the contested measures are incompatible with Norway's obligations under Article 28 EEA and Article 1(1) of the Regulation.

Eleventh Directive

69. ESA's submissions on alleged incompatibility with the Eleventh Directive were withdrawn in its Reply.

Proposed new legislation

70. ESA refers to the Norwegian Government's proposed legislative changes to the contested measures. As ESA understands the proposals, rather than requiring corporate officers to be nationals of an EEA or EFTA State *and* be resident in such a State, the

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[25] Reference is made to the judgment in *The Queen* v *Ministry of Agriculture, Fisheries and Foods, ex parte Agegate Ltd.*, C-3/87, EU:C:1989:650, paragraph 36.

[26] Reference is made to the judgments in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 17; *Jany and Others*, C-268/99, EU:C:2001:616, paragraph 34; and *Nadin*, C–151/04 and C–152/04, EU:C:2005:775, paragraph 31.

[27] Reference is made to the judgment in *Asscher*, C-107/94, EU:C:1996:251, paragraphs 25 and 26.

[28] Reference is made to the judgment in *Clean Car Autoservice*, cited above, paragraph 20.

[29] Reference is made to the judgment in *Clean Car Autoservice*, cited above, paragraph 30.

exemption will apply to EEA nationals *or* to those resident in an EEA or EFTA State. If these proposals are adopted, the exemptions will, therefore, include EEA nationals independent of their State of residence and third country nationals resident in an EEA or EFTA State. In that event, the restriction on the freedom of establishment of companies who have persons within these two categories as corporate officers will be removed to that extent.

71. Although it is beyond the scope of the present proceedings, ESA takes the view, nevertheless, that if the proposals are adopted it appears that where a company established in accordance with the law of an EEA State has corporate officers who are not nationals of an EEA or EFTA State or do not reside in such a State, that company will not qualify for the exemption from the residence requirements and will continue to face impediments to exercising its right to establish itself in Norway.

Reply

72. ESA notes that Norway, in its Defence, acknowledges that the measures at issue constitute restrictions on the freedom of establishment within the meaning of Article 31 EEA. ESA does not disagree – as regards its primary plea relating to the incompatibility of the contested measures with Article 31 EEA – that the scope of the dispute is limited to the proportionality of these measures.

73. ESA makes three points as regards the terminology used in the Reply. First, following the course adopted in the Application, the term "*corporate officers*" is used for ease of reference as a catch-all term for the various company functions specified in the contested measures, i.e. managing directors, members of the board, members of the corporate assembly and founders of financial undertakings. Second, ESA refers to the terms "*exception*" and "*exemption*". In the Application the term "exemption" was used to denote the generic exclusion from the residence requirement in Norway for EEA nationals resident in an EEA State, whereas the term "exception" was used for the possibility to grant this exclusion in individual cases. In its Defence, Norway uses the terms inversely, i.e. "exception" for the generic situation and "exemption" for individual cases. ESA states that, for the sake of clarity, it uses these terms in the same way as Norway has in its Defence. Third, the terms "*contested measures*" and "*contested provisions*" are used throughout to denote the national provisions at issue in the present case.

Norway's Defence seen against the background of the pre-litigation procedure

74. ESA observes that Norway's position in its Defence is in contrast with its stance in the pre-litigation phase, where, in its responses to the letter of formal notice and the reasoned opinion,[30] and in a further communication of 22 August 2019,[31] it accepted that the contested measures were in breach of Article 31 EEA and put forward proposals to amend the legislation. ESA notes, however, that a proposal has not yet been submitted to the Norwegian Parliament. It also observes that the details provided by Norway in its

[30] Reference is made to Document Nos. 793636 and 841508, see Annexes A.4 and A.6 to the Application.
[31] Reference is made to Document No. 1084567, in the Annex to the Reply.

Defence are far more detailed than those previously provided, with new references to ASP, its description of the practice of granting exemptions in individual cases, and finally its observations on the Eleventh Directive.[32]

75. ESA emphasises that the pre-litigation procedure is aimed at securing compliance with the obligations flowing from the EEA Agreement through close co-operation and open dialogue with the EEA State concerned. In line with the duty of loyal co-operation laid down in Article 3 EEA, this presupposes the fullest possible exchange of information at that stage. The proper conduct of that procedure constitutes an essential guarantee required by the EEA Agreement not only to protect the rights of the EEA State concerned, but also to ensure that any contentious procedure before the Court will have a clearly defined dispute as its subject matter.[33] ESA asserts that, although it does not intend at this stage to raise a separate plea to this effect, the fact that the detailed information mentioned in paragraph 72 was not provided during the exchanges throughout the administrative procedure implies that this obligation was not fully complied with. Accordingly, it would be open to the Court to consider this point of its own motion, if it is so minded.

<u>The nature of the restriction under Article 31 EEA</u>

76. ESA asserts that beyond the two situations where corporate officers either reside in Norway or fulfil the dual condition of having the nationality of an EEA State and being resident in such a State corporate officers will not meet the requirements of the contested measures. In order to illustrate this, ESA submits a table:

Table: Are the requirements imposed by the contested measures met?

		NATIONALITY		
		NOR	EEA	TCN
RESIDENCE	NOR	1 YES	2 YES	3 YES
	EEA	4 YES	5 YES	6 NO
	TC	7 NO	8 NO	9 NO

“**TC(N)**”: Third country (national)

[32] Reference is made to 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, OJ 1989 L 395, p. 36.

[33] Reference is made to the judgment in *Commission* v *Ireland*, C-552/15, EU:C:2017:698, paragraph 29 and case law cited.

77. ESA submits that the contested measures inhibit the freedom of establishment in Norway for companies which have corporate officers who either do not reside on the territory of an EEA State (boxes 7, 8, 9), or, on the other hand, do reside in such a State, but are not nationals of an EEA State (box 6).[34] Moreover, the contested measures require, in the case of members of the board and of the corporate assembly, that *half* of such members must *both* be *nationals* of an EEA State and *resident* in an EEA State. ESA submits that this also amounts to a restriction on the freedom of establishment of companies formed in accordance with the law of an EEA State. This remains the case even where the composition of the board or corporate assembly partially complies with the requirements, in other words, where less than half of the board members reside in the EEA, and may be eligible for an individual exemption. ESA argues that the need to apply for such an exemption and the procedural requirements connected with that application also constitute a restriction.

78. ESA observes, for the sake of completeness, that if Norway's legislative proposals render the residency and nationality requirements *alternative rather than cumulative*, only the situation contemplated by box 9 will remain outside the scope of the exception.

Justification

79. ESA addresses Norway's arguments in turn: (i) the law in certain EEA States prescribes similar requirements for corporate officers; (ii) the case law relied on by ESA is irrelevant; and (iii) the contested measures are suitable and necessary to achieve those objectives.

80. ESA refers to the statement in Norway's Defence in which it contends that the contested provisions have "clear parallels" with provisions of company law in Sweden, Iceland and Finland, all of which impose residence requirements with the possibility of making exemptions in individual cases. ESA submits that the legislative situation in other EEA States cannot serve to justify a breach of Norway's obligations under the EEA Agreement, and notes that the provisions in force in the other EEA States referred to all contain requirements that are less strict than the contested measures. ESA further notes that it has issued a reasoned opinion to Iceland in respect of the requirements imposed on corporate officers by Icelandic law, in which it concludes that these, too, are incompatible with Article 31 EEA.[35] ESA therefore rejects Norway's suggestion that similar legislation in other EEA States reflects a widespread practice capable of justifying such measures.

Relevance of the case law relied upon

81. ESA notes that Norway contends that the case law relied on by ESA in its Application is not relevant, as it concerns requirements that are not comparable to those laid down in the contested provisions. Norway further maintains that *Commission* v *Netherlands* is authority for the proposition that the reasoning in the case law relating to

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[34] Reference is made to the judgment in *Commission* v *Ireland*, cited above, paragraph 39.
[35] Reference is made to Decision No 089/19/COL in Case 74942.

a residence requirement in a specific EEA State cannot be extended to a provision requiring residence in any EEA State.

82. ESA considers that the distinction that the Norwegian Government seeks to draw between a requirement to reside in a specific EEA State in contrast to a requirement to reside in any EEA State to be of no importance. It is settled case law that both types of provisions can restrict the freedom of establishment.[36] Hence, Norway's argument that the case law on requirements to reside in a specific EEA State is "immaterial" to the present case is wholly misconceived.

83. ESA further emphasises that Norway recognises that the contested measures restrict the freedom of establishment, meaning that any discussion as to the exact nature of the restriction (namely whether or not it constitutes covert discrimination on grounds of nationality) is pointless, as that characterisation does not affect the grounds and conditions for justifying the contested measures.

84. As to Norway's assertion concerning the lack of reference to the Court's case law in *Commission* v *Netherlands*, ESA does not consider that any significance can be accorded to the alleged omission. Consequently, Norway's arguments should be disregarded.

<u>Suitability</u>

85. ESA submits that to the extent that corporate officers comply with the requirements laid down in the contested measures (boxes 1-5 in the table reproduced in paragraph 74), they will usually fall within the scope of the Lugano Convention, as these are all situations in which the corporate officer is resident within the EEA. The fact that, in these situations, the corporate officer also happens to have the nationality of an EEA State should be regarded as being coincidental and irrelevant from the perspective of the Lugano Convention. The dual condition imposed by the contested measures, therefore, remains unsuitable for obtaining the objectives of establishing jurisdiction in respect of matters covered by the Convention and ensuring that judgments delivered by Norwegian courts against these persons can be enforced throughout the EEA.

86. By contrast, the situation of a corporate officer with the nationality of a third country who is domiciled in a State bound by the Lugano Convention (box 6 in the table above) is different. Despite the fact that persons in such a situation can be sued within the EEA and may be subject to judgments being enforced against them, they are nevertheless excluded from fulfilling the function of a corporate officer in a Norwegian limited liability company, as they do not fulfil the dual requirement laid down in the contested measures. This inhibits the freedom of establishment of the companies within which they operate. In these cases, the contested measures are manifestly unsuitable for attaining the stated objectives of ensuring jurisdiction and enforcement of judgments in civil and commercial matters outside Norway.

[36] Reference is made to the judgment in *Commission* v *Netherlands*, cited above, paragraph 20.

87. On the issue of civil liability, ESA considers that, in the case of limited liability companies, it is the companies themselves which are primarily liable for complying with any obligations entered into by them or arising from their articles of association. The liability of corporate officers will only be engaged (additionally) in specific cases of mismanagement, misrepresentation and acting *ultra vires* in respect of the articles of association. In ESA's submission, the citation of Government statistics does not illustrate the practical necessity for the contested measures or provide evidence of a systemic problem.

88. As regards criminal liability, ESA asserts that during the pre-litigation procedure, Norway did not explicitly refer to the need to ensure that corporate officers could be held accountable under criminal law. To the extent that any justification was offered in the written submissions during that phase, this was limited to the exercise of civil jurisdiction.[37] ESA contends that criminal liability, including the reference to the ASP, was only raised in the Defence.

89. ESA therefore considers that the need to ensure jurisdiction in respect of criminal matters must be regarded as an ex post justification.[38] This objective did not constitute an underlying consideration at the time of the enactment of the contested provisions in 1992. Nor could there have been any question of seeking alignment with the ASP, as it was concluded in 2006 and entered into force on 1 November 2019. Should this objective be recognised retrospectively, the conditions relating to EEA residence and nationality which apply cumulatively cannot be accepted as being suitable for establishing jurisdiction. The requirements laid down in the contested provisions are in no way related to the ASP system, which, as regards its scope of application, concerns "acts punishable by the law of the issuing State", as set out in Article 2(1) of the ASP, and is not based on either the nationality or the residence of the person concerned.

90. Consequently, ESA submits that the contested measures which prescribe a dual condition of nationality of an EEA State and residence within the EEA do not comply with the requirement of suitability.

Necessity

91. ESA argues that Norway's omission of the nationality requirement when discussing necessity renders its rebuttal of ESA's arguments insufficient, as the nationality requirement must also be complied with by corporate officers of EEA companies seeking to set up an establishment in Norway. ESA emphasises that the case law on which it relies in its application is highly relevant. Whilst agreeing with Norway that not all of the various alternative measures identified in case law[39] are equally appropriate for all situations, it maintains that some may be considered for different types and aspects of both civil and criminal liability of corporate officers, even though

[37] Reference is made to the Application, Annex A2 (document number 733928).
[38] Reference is made to the judgment in *Zenatti*, C-67/98, EU:C:1999:514, paragraph 36.
[39] Reference is made to the judgment in *Commission* v *Netherlands*, cited above, paragraph 36.

it is doubtful whether the contested measures are designed to ensure that the latter is secured.

92. ESA asserts that an alternative to the contested measures, not included in Norway's Defence, is contained in the Norwegian Government's Consultation Paper of 4 December 2019 relating to the legislative proposals to amend the contested measures[40] which refers to the Danish system. Rather than imposing requirements relating to residence and/or citizenship, the Danish Companies Act establishes a registration scheme for foreign persons in corporate management in Danish companies, which ensures that those persons' identities are known by registering particulars, including passport numbers and a digital signature. ESA further argues that Norway's practice of granting exemptions in individual cases illustrates that other less restrictive measures are available, and acceptable in practice. By way of illustration, it refers to the fact that, where the residence requirement is not met for half of the board of a company, an exemption may be granted if at least one board member is resident in the EEA.

93. ESA contends that the condition which, according to Norway, is applied under its exemptions procedure, that an EEA company must have a contact person resident and registered in Norway, with the appropriate powers of representation, is reminiscent of that indicated as an alternative in *Commission* v *Netherlands*. ESA questions why this criterion could not be codified in the legislation thus eliminating the need for companies to take the administrative steps to obtain this result, which itself amounts to a restriction under Article 31 EEA.

94. ESA observes that, where a national measure is designed to achieve a particular objective, that measure must be capable of attaining its aim in a consistent and systematic manner. The practice of granting individual exemptions where a single contact person exists bypasses the dual condition laid down in the contested measures and, therefore, appears to undermine this condition of consistency and systematic pursuit of the objective.

95. Highlighting Norway's own legislative proposals to make the requirements alternative rather than cumulative, ESA concludes that the cumulative conditions of nationality and residence are excessive and cannot be justified.

Free movement of workers

96. ESA contends that the contested measures result in 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 argues that the fact that the general manager carries overall responsibility within a company does not in itself preclude the manager from having the status of a "worker" within the meaning of Article 28 EEA, as the manager may still operate within

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[40] Reference is made to *Høring Forslag til endringer i aksjelovgivningen mv* (*tilknytningskrav for styremedlemmer og daglig leder mv.*) ("Consultation Paper") of 21 November 2019, https://www.regjeringen.no/contentassets/872491fcc75a4c4c944178ed8a5cd1c1/horingsnotat-om-endringer-i-aksjelovgivningen-mv.-.pdf, section 2.4 on Foreign Law, p. 13.

a hierarchical relationship to the board or the owners of the company. Precisely this situation was at issue in *Clean Car Autoservice*.[41] ESA observes that in this context the provisions on the free movement of workers apply irrespective of the place of residence of the worker concerned.[42] Even if the worker concerned resides outside the EEA, he/she can rely on the provisions on the free movement of workers to the extent that the employment relationship has its effects within the territory of the EEA States.

97. In assessing whether a managing director qualifies as a "worker", in *Rainford-Towning*, the Court considered whether the case should be approached from the angle of the freedom of establishment or the free movement of workers.[43] It was only because both parties to the dispute agreed that the manager concerned was a self-employed person that the Court considered the questions referred under Article 31 EEA.

98. As any possible justification of this restriction on the free movement of workers would be subject to the same analysis as conducted under Article 31 EEA, ESA concludes that the contested measures constitute a breach of Article 28 EEA and Article 1(1) of the Regulation.

<u>Eleventh Directive</u>

99. ESA considers that, in view of the information provided in Norway's Defence, which was not addressed by the Norwegian Government during the pre-litigation procedure, it does not possess sufficient information to pursue the alleged infringement of the Eleventh Directive further in the context of the current proceedings. ESA consequently withdraws its plea on this point, without prejudice to future proceedings.

The defendant

<u>Freedom of establishment</u>

100. Norway does not dispute that the contested legislation constitutes restrictions within the meaning of Article 31 EEA. In its view, what remains to be assessed is whether the contested measures are suitable to achieve legitimate objectives and whether they go beyond what is necessary.

101. Norway emphasises that the legislation at issue is applied without discrimination on grounds of nationality and that this has been acknowledged by ESA.

102. With regards to the justification of restrictions, Norway asserts that EEA States are free to decide the level of protection granted to policy objectives which constitute "overriding reasons in the general interest", and how that protection may be achieved.[44]

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[41] Reference is made to the judgment in *Clean Car Autoservice*, cited above.
[42] Reference is made to Article 1(1) of the Regulation.
[43] Reference is made to *Rainford-Towning*, cited above, paragraph 23.
[44] Reference is made to the judgment in *Commission* v *Netherlands*, cited above, paragraph 18.

103. Norway contends that the contested provisions have clear parallels in the company laws of Sweden, Iceland and Finland. In Norway's view, the fact that one EEA State imposes less strict rules than another EEA State does not mean that the latter's rules are disproportionate and hence incompatible with EEA law.[45]

Relevant case law

104. Norway considers that the cases cited by ESA are not comparable to the present case, as they concerned requirements to reside in specific EEA States and not the requirements to reside in the EEA and have EEA nationality, as in the present case. Additionally, Norway claims that since the judgment in *Commission* v *Netherlands* did not refer to any of the cases cited by ESA, the ECJ must not have considered those cases relevant to the issue of EEA residence or nationality.

Legitimate objectives

105. Norway explains 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. 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.

106. The possibility of holding key persons in the management liable is important, as the main rule under Norwegian law is that the owners of limited liability companies and financial undertakings are not responsible for the actions of the company/undertaking. According to Norway, Norwegian case law[46] related to the liability of persons in key positions as well as a statistics review[47] showing that board members were found personally liable in approximately 51% of the civil cases between 2000 and 2014 dealing with such matters illustrates the practical necessity of holding persons in key positions both civilly and criminally liable.

107. Norway argues that the contested measures are both suitable and necessary for securing the objective of holding persons in key management positions in limited liability companies and financial undertakings responsible for their actions.

108. Norway argues further that it was necessary to retain the residence requirement, so as to ensure effective enforcement of legitimate claims against persons occupying key positions in the management of a limited liability company or a financial undertaking. A requirement to reside within the geographical scope of the Lugano Convention is the only measure capable of ensuring that claims based on personal civil liability can be effectively enforced. As to the issue of criminal liability the ASP permits

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[45] Reference is made to the judgment in *Alpine Investments*, C-384/93, EU:C:1995:126, paragraph 51.

[46] Reference is made to R-2017-2375 (Supreme Court judgment of 14 December 2017); HR-2016-590-A (Supreme Court judgment of 16 March 2016); and Rt. 2011 s. 257 (Supreme Court judgment of 17 February 2011).

[47] Reference is made to the review published in *Dagens Næringsliv* on 26 June 2015, conducted by Ingvald Falch. Judgments from the district courts are usually not published in the database *Lovdata*, so the statistics primarily consist of appeal court and supreme court judgments.

the prosecution or execution of a sentence against persons resident within the EEA. Moreover, although Norway has agreements with a few other States on extradition, prosecution and enforcement outside the EEA is difficult, if not impossible.

Suitability

109. As to the suitability of the contested legislation, Norway argues that it is not possible to enforce judgments outside the EEA and that the only appropriate measure suitable for ensuring effective enforcement is to require those persons to reside within the EEA, in order to ensure that they remain within the scope of the Lugano Convention.

110. On criminal liability, Norway acknowledges that the ASP permits the prosecution or execution of a sentence against persons resident outside Norway within the EEA; that some states outside the EEA have acceded to the European Convention on Extradition (1957); and finally that bilateral extradition agreements exist between Norway and both Australia and the United States. However, Norway contends that it is difficult to prosecute based on Norwegian legislation or execute a sentence of imprisonment issued by a Norwegian court in the rest of the world.

111. Therefore, Norway argues that the requirement to reside in the EEA is suitable for achieving the goal of ensuring the enforceability of judgments in civil and criminal cases involving the liability of persons in key management positions.

Necessity

112. Norway argues that the necessity test related to the legislation in question depends on whether there are alternative measures that would be less restrictive but equally effective.[48] Norway takes the view that, in the present case, no alternative measures ensuring the same level of protection exist.

113. Moreover, Norway asserts that the burden of proof on the necessity of the measure may shift depending on the circumstances of the case. In the present case, it criticises the fact that ESA has only referred to case law, which, in Norway's view, does not demonstrate that less restrictive measures which would attain the same level of protection exist.

114. With respect to ESA's argument that the execution of civil and criminal law may be secured by requiring a guarantee to be paid beforehand, Norway asserts that such a line of reasoning must be rejected for several reasons.

115. First, Norway argues that the case law cited by ESA is not relevant, as it concerns requirements to reside in a *specific* EEA State, whereas the current case concerns a general requirement to reside within the EEA. Referring to paragraph 39 of *Pucher*, Norway contends that, in that case, the Court referred to the fact that Liechtenstein was not party to the Lugano Convention, and observed that if this created complications, one

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48 Reference is made to the judgment in *Commission* v *France*, C-89/09, EU:C:2010:772, paragraph 80; and Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraph 56.

possible remedy would be accession to this instrument. The Court also pointed out that "the encouragement of cross-border activity is a fundamental objective of the EEA Agreement; and, whenever such activity gives rise to litigation, the enforcement of judgments must often be sought within the jurisdiction of another EEA State". The Norwegian Government has ratified the Lugano Convention and the resident requirement was amended in accordance with the geographical scope of the Lugano Convention.

116. Second, Norway claims that *Clean Car Autoservice* and the cases based on it (*Rainford-Towning* and *Pucher*) concerned administrative sanctions and did not relate to personal liability, which is the subject matter in the present case. It contends that administrative sanctions involve moderate sums, and can therefore be differentiated from personal liability cases, which may involve large sums of money, or even imprisonment. Therefore, Norway claims that a system of guarantees would not be suitable to ensure the enforcement of civil and criminal judgments in cases of personal liability.

117. Norway further claims that it would not be fair to require a company to provide a guarantee in such cases; that intentional and criminal actions are not normally covered by insurance; and that a system of guarantees may be even more restrictive of the freedom of establishment because it is so expensive. A system of guarantees may, for obvious reasons, not be considered suitable in the most serious criminal cases as a judgment cannot be executed in the absence of the physical presence of the person in question.

118. Norway dismisses ESA's reference in paragraph 60 of the Application to *Pucher*[49] as Norway considers paragraph 40 of that judgment to be more of an additional comment than a legal argument.

119. Norway also argues that *Commission* v *Netherlands* can be differentiated from the present case as it did not concern liability for natural persons but jurisdiction over ships and that the possibility of jurisdiction over particular persons was to establish a link to the owner and not to establish personal liability. Moreover, the aspect of jurisdiction addressed in *Commission* v *Netherlands* related to obligations of control in administrative, technical and social matters under the United Nations Convention on the Law of the Sea and enforcement *within* the national territory rather than *outside* it, as is the situation in the present case. Consequently, Norway contends that the reasoning of the ECJ in *Commission* v *Netherlands* is by extension not applicable to the present case.

120. Finally, Norway asserts that the practice of making exemptions mitigated the restrictive effect of the residence requirement. It contends that, in the period 2016-2020, no applications from EEA companies were rejected, although some exemptions were subject to conditions that the company would have to have a contact person resident in Norway.

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[49] Reference is made to *Pucher*, cited above, paragraph 40.

121. Therefore, Norway contends that as no less restrictive alternatives exist, the contested measures do not go beyond what is necessary to achieve the relevant objectives.

Free movement of workers

122. Norway does not agree that a managing director is a "worker" within the meaning of Article 28 EEA or the Regulation. It argues that, according to the definition of "worker" in settled case law,[50] managing directors do not perform services under the direction of another person as they are responsible for the day-to-day management of the business.[51] A managing director's wide-reaching personal duties and independent role, including the fact that he can be held personally liable for damage caused,[52] means that the role does not fall within the scope of a "worker".

123. Moreover, Norway observes that, in *Rainford-Towning*, the Court held that the position of managing director under Liechtenstein law fell within the scope of Article 31 EEA.[53]

124. Finally, citing *Clean Car Autoservice*, Norway submits that an employer's corollary right to employ workers in accordance with the rules on freedom of movement for workers cannot go beyond the rights of the workers themselves.[54] If, contrary to these arguments, the Court finds, however, 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 on the basis of the same arguments as it advances in connection with the freedom of establishment.

Eleventh Directive

125. Norway takes the view that the Eleventh Directive is irrelevant to the present case. This is because the contested measures relate to companies and financial undertakings established under Norwegian law, and not branches of EEA companies.[55]

Rejoinder

126. In the introductory remarks of the Rejoinder, Norway contests two aspects of ESA's submissions. First, Norway denies stating that the legislation in question is incompatible with the EEA Agreement. Second, Norway refutes the allegation that it did not comply with its obligations of loyal cooperation in the pre-litigation procedure,

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[50] Reference is made to the judgment in *Lawrie-Blum*, cited above, paragraph 17.

[51] Reference is made to Section 6-14 (1) of the Private Limited Liability Companies Act and the Public Limited Liability Companies Act and Section 8-11 (1) of the Financial Undertakings Act.

[52] Reference is made to Section 17-1 (1) of the Private Limited Liability Companies Act and the Public Limited Liability Companies Act.

[53] Reference is made to *Rainford-Towning*, cited above, paragraph 23; and Case E-1/09 *ESA* v *Liechtenstein*, cited above, paragraph 34.

[54] Reference is made to the judgment in *Clean Car Autoservice*, cited above, paragraph 20.

[55] Reference is made to the Norwegian Act of 21 June 1985 no. 78 (*Foretaksregisterloven*).

emphasising that the legal requirements referred to concern ESA's obligations in infringement proceedings.

EEA residence and EEA nationality requirements

127. Norway contends that both requirements are compatible with EEA law, and that the Court must assess the two requirements each on their own merits. Norway acknowledges that its Defence focused primarily on the requirement of EEA residence because this is the more important of the two requirements for securing the enforcement of civil and criminal claims outside Norway.

128. 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.

129. Norway insists that, contrary to ESA's submission on the point, the existence of similar legislation in other EEA States is highly relevant. It acknowledges that the Norwegian provisions are the most restrictive, but maintains that this reflects the different level of protection chosen.

Freedom of establishment

130. Norway stresses that it has never disputed that the contested measures constitute restrictions. However, in its view, there is a fundamental difference between a requirement to reside in a particular state and a requirement to reside within the free trade area.[56]

131. Norway asserts that its submissions on the absence of case law concerning national residence requirements in *Commission* v *Netherlands* may have been misunderstood. It argues that the Court's case law on national residence requirements is based on ECJ case law on national residence requirements and had the ECJ considered its own case law on this point to be relevant for the assessment of EEA residence requirements in *Commission* v *Netherlands*, references to case law on national requirements, such as *Clean Car Autoservice* or *Commission* v *Spain*, would have been expected. Consequently, Norway reiterates its view that the ECJ did not consider those cases to be relevant.

132. Norway therefore maintains that there is no comparable case law of the Court or the ECJ and that the contested measures must be assessed on their own merit.

Legitimate objectives - ensuring jurisdiction and enforcement in the field of criminal law

133. According to Norway, ESA does not dispute the fact that the measures pursue legitimate objectives as regards ensuring jurisdiction and enforcement in the field of

[56] Reference is made to *Pucher*, cited above.

civil law.[57] However, Norway rejects ESA's argument that jurisdiction in criminal matters constitutes an ex post justification.

134. First, Norway asserts that, according to settled case law, whilst the intention of the legislature gathered from political debates or statements of the grounds on which the law is adopted may be indications of the aim of a given measure, they are not conclusive. It is for the national court to check whether, viewed objectively, the rules in question promote the relevant objective.[58]

135. The question of whether a national measure pursues a particular objective consequently depends on a functional analysis of that measure. It is therefore sufficient that the contested provisions, viewed objectively, in fact promote prosecution or execution of sentences of imprisonment outside Norwegian territory.

136. Second, Norway argues that the contested measures, viewed objectively, promote prosecution or the execution of sentences of imprisonment outside Norwegian territory. Moreover, the general objective of keeping key persons within the reach of Norwegian law also indicates that the objective encompasses criminal law.

137. In support of this argument, Norway relies on a statement of the Norwegian Department of Legislation from 1983,[59] which includes references to both civil and criminal liability.[60]

138. In this statement, the residence requirement for holding board members and managing directors liable in Norway is also assessed.[61] Norway argues that the 1992 preparatory works' focus 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.[62]

139. Norway contends that an assessment of the ASP is relevant. Any international instrument currently in force in the field of criminal law must be considered relevant for the objective invoked by the Norwegian Government.

<u>Legitimate objectives - the need for national provisions on civil and criminal liability for corporate officers</u>

140. In Norway's assessment, ESA appears to agree that there is a certain need for provisions on liability for corporate officers ("cases of e.g. mismanagement,

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[57] Reference is made to the Application, paragraph 56; and the Defence, paragraph 91.

[58] Reference is made to the judgment in *Finalarte*, C-49/98, C-50/98, C-52/98 to C-64/98 and C 68/98 to C-71/98, EU:C:2001:564, paragraphs 40 and 41.

[59] Reference is made to Wilheim Matheson and Geir Woxholth (Eds), *Lovavdelingen. Uttalelser 1976-1988*, pp. 201-205.

[60] Reference is made to the statement of the Department of Legislation from 1983 in Wilheim Matheson and Geir Woxholth (Eds), *Lovavdelingen. Uttalelser 1976-1988*, cited above, paragraph 3 of the statement.

[61] Reference is made to the statement of the Department of Legislation from 1983 in Wilheim Matheson and Geir Woxholth (Eds), *Lovavdelingen. Uttalelser 1976-1988*, cited above, paragraph 4 of the statement.

[62] Reference is made to a full list of signatures and ratifications, see <u>https://www.coe.intien/web/conventions/full-list/-/conventions/treaty/024/signatures?p auth=l1d8UBcE.</u>

misrepresentation and acting ultra vires”), but questions the material and practical scope of liability.

141. Norway contends that the fundamental objective of the Norwegian provisions on civil and criminal liability is 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 Articles 106 and 152 of Directive (EU) 2017/1132 relating to certain aspects of company law, which state that Member States must have rules governing the civil liability of, inter alia, members of managing bodies. Such regulations are without effect if the Member States cannot enforce the rules.

142. Additionally, Norway claims that there is an international tendency towards tightening the obligations of corporate officers, illustrated by the Sustainable Corporate Governance Initiative of the European Commission.

143. In support of its argument, Norway outlines the concept of joint and several liability, emphasising that legal entities cannot act by themselves. It illustrates this with an example based on share subscription. If corporate officers knowingly give wrongful information in the subscription documents, the subscriber most often cannot invoke invalidity or claim compensation for damage from the company as it is not formally formed. Therefore, it is imperative that the subscriber can reach the corporate officers to pursue his or her claim.

144. As a further example, Norway explains that corporate officers may also become liable towards regional or national authorities in winding-up or bankruptcy claims as the company no longer exists.

145. Norway emphasises that, in its assessment, the most important function of the provisions on civil and criminal liability for persons in key positions in the management of companies is the deterrent effect of those rules. Further, its reliance on statistics concerning cases before Norwegian courts is intended to illustrate that the Norwegian provisions on liability for corporate officers are applied on a regular basis by the Norwegian courts.

146. In conclusion, Norway asserts that, if claims of liability are unenforceable because the company management resides outside the EEA, or because non-EEA nationality makes it easy to transfer to a third country, this will weaken the deterrent effect of national rules on civil and criminal liability for corporate officers. Norway argues that this can harm the reputation and competitiveness of limited liability companies and financial undertakings established under Norwegian law.

Suitability

147. Norway maintains that the contested measures are suitable for attaining the objective of ensuring jurisdiction and enforcement in civil and criminal cases involving the liability of corporate officers residing outside Norway.

148. Norway asserts that the EEA residence requirement plays the most important part in securing the objective for persons who reside outside Norway. It regards the EEA nationality requirement as a complementary tool which contributes in a different way, by ensuring that the persons at the top of company management have a firm connection to the EEA. Norway considers it easier for third country nationals to move to their home countries and escape liability for their actions.

149. Norway denies that it has misinterpreted the purpose of the ASP, which it regards as an expedited extradition procedure, largely based on the European Arrest Warrant model.

150. In response 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.

Necessity

151. In response to ESA's claim in the Reply that "different solutions may be considered for different types and aspects of both civil and criminal liability for corporate officers", Norway asserts that ESA has failed to provide any details about which measures would be equally effective as the EEA residence and nationality requirements. Therefore, Norway maintains its position that there are no less restrictive measures that could attain the objectives in an equally efficient manner.

152. In response to ESA's suggestion in the Reply that the Danish registration scheme for foreign persons in corporate management is a possible alternative, Norway maintains that a registration scheme is not suitable for attaining the objective. First, the identity of corporate officers is already known by the companies themselves and public authorities via the Business Register (*Foretaksregisteret*). Second, such a scheme does not make it possible to pursue claims against persons outside Norway, nor does it ensure a firm and stable connection to the EEA.

153. In response to ESA's claim in the Reply that the practice for granting exemptions demonstrates that less restrictive measures are available, Norway contends that ESA's understanding of the practice is flawed as it is not correct to state that exemptions are granted only on the condition of providing a contact person. Rather, according to Norway, 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 in reach of the Norwegian authorities to take on the role.

Free movement of workers

154. Norway maintains that the contested provisions are compatible with Article 28 EEA and Article 1(1) of the Regulation.

155. According to Norway, the question whether a certain position falls within the scope of the definition of "worker" pursuant to Article 28 EEA must be answered based on an assessment of all relevant circumstances in each individual case. In this connection, Norway contends that ESA still has not conducted any assessment of the position of a managing director based on the circumstances of the present case. Norway reiterates that, under Norwegian law, the managing director of limited liability companies and financial undertakings has an independent role in relation to the shareholders and the board, with extensive personal responsibilities.

156. Norway observes that ESA relies heavily on the judgment in *Clean Car Autoservice*. That case concerned requirements for owners of legal persons, commercial-law partnerships, and registered civil partnerships to appoint a manager in order to exercise trade, as regulated in the Austrian Trade Code.[63] However, in Norway's assessment, ESA fails to explain how the position of the manager under Austrian law in that judgment is comparable to the position of managing director under the Limited Liability Companies Acts and the Financial Undertakings Act.

157. Norway argues that, in *Clean Car Autoservice*, it was not contested that the position of appointed manager constituted a "worker", and hence there is no assessment on the part of the ECJ as to whether or why the position of a manager under Austrian law constituted a "worker". Therefore, that case does not provide guidance for the assessment in the present case.

158. Finally, if in the circumstances of the present case, and contrary to Norway's arguments, the Court finds that the position of the managing director is to be considered a "worker", Norway still maintains that the contested measures are justified and compatible with Article 28 EEA and Article 1(1) of the Regulation.

Iceland

159. The Government of Iceland supports the request of the Government of Norway for the Court to dismiss the Application as unfounded and to order ESA to pay the costs of the proceedings. In the view of Iceland, the contested legislation is compatible with the EEA Agreement and long-established practice. Further, Iceland maintains that Norway does not dispute *per se* that the contested measures constitute restrictions within the meaning of Article 31 EEA. However, Norway maintains that the provisions at issue pursue legitimate objectives which may be invoked to justify restrictions on the freedom of establishment.

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[63] Reference is made to the judgment in *Clean Car Autoservice*, cited above, paragraphs 3 to 8.

160. Iceland notes that a case with the same underlying issues is also ongoing between ESA and itself, with ESA delivering its reasoned opinion on 11 December 2019.

Article 34 and Protocol 17 EEA

161. Iceland observes that Article 34 EEA ensures that "companies and firms" are treated in the same way as natural persons with regard to the right of establishment. Protocol 17 EEA addresses the special problems that can arise in the case of companies and firms.

162. Iceland fully supports Norway's claim that, in the absence of international agreement, it is impossible to enforce judgments in civil and criminal cases against managers, directors and owners who are not resident within the EEA. Hence, in Iceland's assessment, the Norwegian law in question must be considered fully justified, socially compelling, as well as proportionate. It observes that Protocol 17 EEA provides, inter alia, that Article 34 EEA shall not prejudge the adoption of legislation or the application of any measures by the Contracting Parties concerning third-country access to their markets. Consequently, were ESA's interpretation to prevail, it would render any measure taken on the basis of Protocol 17 EEA fruitless as it would in effect wipe out the outer boundaries of the EEA.

163. Therefore, Iceland argues that, in accordance with Protocol 17 EEA, EEA States may take measures to prevent third country nationals accessing the internal market, and the EEA Agreement does not prevent them from doing so. It asserts that it is difficult to extrapolate principles applying to individuals, and to apply them to companies. Case law suggests that companies and individuals need to be approached differently.[64]

Secondary establishment

164. As regards secondary establishment, Iceland disagrees with ESA's view that a *parent* company, established under the law of one EEA State, is entitled to establish a *subsidiary* company under the laws of another, under the same legal regime as in the EEA State where the parent company is established. Iceland argues that a parent company in one EEA State cannot demand, on the basis of Article 31 EEA, that the same rules apply to the structure of the board and directors of a subsidiary it intends to establish in another EEA State.

165. In Iceland's assessment, the contested provisions only impose requirements on managers and directors of companies established under Norwegian law. The provisions neither interfere directly with the structure of the board of directors nor management of companies established under the law of other EEA States, in contrast to the situation in *Commission* v *Netherlands.*[65]

166. Iceland emphasises that a subsidiary is a separate and distinct legal entity from its parent company for the purposes of taxation, regulation and liability whereas a branch

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[64] Reference is made to the judgment in *Daily Mail*, C-81/87, EU:C:1988:456, paragraph 19.

[65] Reference is made to the judgment in *Commission* v *Netherlands*, cited above.

is not. Iceland considers that ESA's argument on the infringement of Article 31 EEA as regards secondary establishment should be dismissed.

Money laundering and national security

167. Iceland observes that, pursuant to Directive 2015/849,[66] EEA States are bound to ensure that entities incorporated within their territory obtain and hold adequate, accurate and current information on their beneficial ownership and basic information. In its view, it is much more difficult to acquire this information if managers and directors cannot be reached. Furthermore, Iceland raises the point that criminal sanctions in line with Article 58 of that Directive cannot be enforced against individuals from non-EEA States residing outside the EEA. In addition, where persons owning and controlling shell companies are resident outside the EEA, this increases the risk of such companies being exploited for money laundering and terrorist financing purposes, contrary to the purposes of Directive 2015/849. Abolition of the said nationality/residence requirements, including the *de minimis* screening mechanism embedded in the exemption regime, would, in Iceland's view, undermine Norway's and Iceland's anti-money laundering controls and safeguards.

168. Pointing also to Regulation 2019/452,[67] which establishes a framework for the screening of foreign direct investments into the EU (not currently incorporated into the EEA Agreement), Iceland argues that there is an increasing weight given to national security interests in national and EU/EEA law. Therefore, in its submission, ESA's interpretation appears to be at odds with the geopolitical changes of the last few years as reflected in this European legislation.

Possibility of exemptions

169. Iceland considers that the situations in *Commission* v *Netherlands* and *Hartlauer Handelsgesellschaft mbH*[68] are not comparable to the present case, and therefore cannot be of guidance.

Legislation in EU Member States

170. Iceland argues that, although Swedish and Finnish legislation contain restrictions on the freedom of establishment, those Member States have not been forced to abolish their residency requirements through the application of Article 49 TFEU. Iceland considers the restrictions contained in that legislation fully justified on the basis of

[66] Reference is made to the Decision of the EEA Joint Committee No 249/2018 of 5 December 2018, and Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ 2015 L 141, p. 73.

[67] Reference is made to Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ 2019 L 79I, p. 1.

[68] Reference is made to the judgment in *Hartlauer Handelsgesellschaft mbH*, cited above.

arguments made elsewhere in its observations. In its view, a certain threshold has to be set in order not to encroach too deeply into national autonomy. Therefore, Iceland submits that the Court should go no further in its interpretation of Article 31 EEA than the ECJ has done in the case of Article 49 TFEU, as this would create an unfortunate inconsistency between EU law and EEA law.

Case law does not support ESA's claim

171. Iceland contends that ESA's reading of case law in connection with Article 31 EEA is unconvincing. Comparing the material requirements of the provisions at issue in *Rainford-Towning*, *Pucher*, *ESA* v *Liechtenstein* and *Commission* v *Netherlands*, Iceland concludes that there are major differences, and agrees with Norway's assertion that those judgments are not applicable to the present case.

172. Iceland observes that *Rainford-Towning*, *Pucher* and *ESA* v *Liechtenstein* concerned requirements *to reside in Liechtenstein* and not in the EEA. However, in its view, *Pucher* is relevant to the extent that it confirms Norway's understanding that there is a need to be able to enforce judgments, citing inter alia the Lugano Convention, both in civil and criminal cases.

173. As regards *Commission* v *Netherlands*, Iceland agrees with Norway's submission that, even if the laws of some EEA States lay down less stringent conditions for the formation of limited liability companies, that does not warrant the conclusion that the nationality/residence requirement at issue entails a violation of Article 31 EEA. Iceland submits that the facts and circumstances of *Commission* v *Netherlands* were fundamentally different from those in the present case and refers to the *ratio decidendi*.[69] The consequences set out in that *ratio* do not result, however, from the contested nationality/residence requirements in the case at hand, which relate to directors, inter alia, of limited liability companies, since persons who do not satisfy the requirements may apply for *exemptions* from them. According to Norway's pleadings, applications for such exemptions are rarely rejected. Iceland further contends that the *impact* of the seemingly absolute requirements at issue in *Commission* v *Netherlands* is by no means comparable to that of the exemptible requirements at issue in the present case.

174. Iceland observes that company law is only partially harmonised by EEA law.[70] In the absence of harmonisation, EEA States are permitted, inter alia, by Article 31 EEA, to impose requirements on the composition of the corporate board and directors of a company. This is subject to a requirement not to discriminate against nationals of other EEA States, which Iceland contends is not an issue in this case as the contested measures apply equally to all nationals of EEA States and residents of EEA States. Consequently, Iceland argues that case law referring to a requirement to reside in *one particular EEA State* is of no relevance.

175. Iceland contends that the ECJ's finding in *Commission* v *Netherlands* that the contested EEA nationality and residency requirements in the Netherlands legislation

[69] Reference is made to the judgment in *Commission* v *Netherlands*, cited above, paragraph 19.
[70] Reference is made to the judgment in *Daily Mail*, cited above, paragraph 19.

infringed the freedom of establishment cannot be interpreted to the effect that any EEA nationality or residency requirement with regard to corporate directors is *per se* a violation of the freedom of establishment.[71]

176. Finally, Iceland observes that because the Netherlands legislation also required that the management of a ship had to be carried out from *a place of business in the Netherlands* the "practical accessibility" test was already satisfied.[72] Iceland reiterates its view that the ECJ's reasoning and conclusion in *Commission* v *Netherlands* cannot be extended to the circumstances of the present case.

Article 28 EEA, the Eleventh Directive and the Regulation

177. Iceland supports the argument made by Norway that nothing in the contested measures constitutes a breach of Article 28 EEA, the Eleventh Directive or the Regulation. Iceland contends that ESA's argument on these points is limited and case law does not support its argument.

The Commission

178. The Commission states that its submissions will not repeat ESA's arguments in support of the application, with which it agrees. Rather, it seeks to highlight certain aspects of the analysis that have not been fully developed in the submissions thus far or that merit further discussion. In the Commission's view, it is important not to lose sight of the fact that while much of the discussion focuses on the residence requirement, the Norwegian rules impose a dual condition: both nationality and residence must be demonstrated. It considers that the explanations provided by Norway do not appear to apply to the nationality condition, which in itself should prove fatal to the justification of the measures under examination.

Freedom of establishment – existence of a restriction

179. The Commission asserts that, as a matter of well-settled case law, national measures amount to a restriction within the meaning of the Treaty provisions on free movement when they are "liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty".[73] Specifically in relation to the freedom of establishment, the Grand Chamber of the ECJ has recently emphasised that "any measure which prohibits, impedes or renders less attractive the exercise of the freedom of establishment must be regarded as a restriction on that freedom."[74]

180. In the Commission's assessment, the contested measures limit the possibility for a company to choose freely the persons it wishes to appoint as a "corporate officer". A company will always have to bear in mind the consequences of appointing someone who

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[71] Reference is made to the judgment in *Commission* v *Netherlands*, cited above, paragraph 10.
[72] Reference is made to the judgment in *Commission* v *Netherlands*, cited above, paragraphs 26 and 36.
[73] Reference is made to the judgment in *Gebhard*, C-55/94, EU:C:1995:411, paragraph 37.
[74] Reference is made to the judgment in *Commission* v *Hungary*, C-66/18, EU:C:2020:792, paragraphs 167 and 169.

does not fulfil the dual requirements of nationality and residence, and once the cap of one half is reached, a company will quite simply be unable to appoint such a person. Consequently, the contested measures constitute a restriction on the freedom of establishment in the sense that they are liable to "prohibit, impede or render less attractive" the activity in Norway of undertakings caught by it.

Justification

181. The case law has consistently held that a restriction on the freedom of establishment is permissible only if, *in the first place*, it is justified by an overriding objective in the public interest.[75] The Commission contends that it is for the Court to determine whether a restriction is justified by a legitimate aim in the public interest. In that connection, the Commission considers it instructive that, in *Clean Car Autoservice*, the ECJ appears to have avoided taking a position on whether the public interest invoked in that case was legitimate, and simply found it to be in any event inappropriate and/or unnecessary.[76] The same approach was taken in *Commission* v *Netherlands*.[77]

182. The Commission observes that the Court has acknowledged that "ensuring compliance with national legislation must be considered a legitimate aim".[78] In the context of a policy objective to protect the functioning and good reputation of the financial services sector, the Court has also made reference to the proper administration of justice, facilitating the execution of civil judgments and enforcing administrative and criminal sanctions.[79] The Commission notes that recital 40 of Directive 2006/123/EC mentions "safeguarding the proper administration of justice" as belonging to the notion of an "overriding reason relating to the public interest" as interpreted by the ECJ.[80]

183. Consequently, although the Commission is not aware of any specific positive finding in this respect, there is no reason to suppose that the objective of ensuring the execution and enforcement of judgments, as part of the notion of the proper administration of justice, would not be found to constitute a legitimate interest which, in principle, is capable of justifying a restriction on the obligations imposed by Article 31 EEA. The remainder of the Commission's submissions assume that this objective has been confirmed by the Court as constituting an overriding reason in the public interest.

Proportionality

184. According to the Commission, the case law has consistently held that a restriction on the freedom of establishment is permissible only if, *in the second place*, it observes the principle of proportionality, which means that it is suitable for securing, in a

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[75] Reference is made to the judgment in *Commission* v *Hungary*, cited above, paragraph 178.
[76] Reference is made to the judgment in *Clean Car Autoservice,* cited above, paragraphs 33 and 34.
[77] Reference is made to the judgment in *Commission* v *Netherlands*, cited above, paragraph 33.
[78] Reference is made to *Rainford-Towning*, cited above, paragraph 34.
[79] Reference is made to *Pucher*, cited above, paragraph 32.
[80] Reference is made to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 376, p. 36.

consistent and systematic manner, the attainment of the objective pursued and does not go beyond what is necessary in order to attain it.[81]

185. The Commission asserts that, if an EEA State wishes to rely on an objective that is capable of justifying an obstacle to free movement, it is under a duty to supply the Court with all the evidence capable of enabling it to be satisfied that that measure does indeed fulfil the requirements arising from the principle of proportionality.[82] This includes demonstrating that its rules are appropriate and necessary to attain the legitimate objective pursued.

Suitability of the measures to attain the stated objectives

186. The Commission asserts that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.[83] The Commission understands Norway's concern as being linked to the enforceability of judgments, contending that within the EEA the effective enforcement of judgments is ensured as result of the Lugano Convention. Therefore, Norway concludes that "*the only possible measure*" suitable for attaining the stated objective is to ensure that the person in question resides within the EEA.

187. However, the Commission submits that it is its understanding that Liechtenstein has not ratified the Lugano Convention. Norway itself appears to have the same understanding. The Commission is also not aware of any bilateral agreement on mutual recognition and enforcement of judgments between Norway and Liechtenstein. And yet, an EEA national residing in Liechtenstein would fulfil the requirements set out in the contested measures and would not count towards the "half" of the board members in relation to which effective enforcement of civil law judgments is, in the opinion of the Norwegian authorities, excessively difficult. The Commission therefore considers the contested measures to fail the test of pursuing in a consistent and systematic matter the stated objective.

188. The Commission notes that the situation appears to be similar in relation to criminal liability. Norway refers to the ASP. The Commission contends that Liechtenstein is not a party to that or any similar agreement.[84]

189. The Commission concludes that the contested measures do not pursue in a consistent and systematic manner the stated objective of ensuring the effective enforcement of judgments, so that their suitability is called into question. The Commission considers this sufficient to find that Norway has failed to fulfil its obligations pursuant to Article 31 EEA.

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[81] Reference is made to the judgment in *Commission* v *Hungary*, cited above, paragraph 178.
[82] Reference is made to the judgment in *SEGRO and Horvath*, C-52/16, EU:C:2018:157, paragraph 85, and case law cited.
[83] Reference is made to the judgment in *Hartlauer Handelsgesellschaft mbH*, cited above, paragraph 55, and case law cited.
[84] Reference is made to the Defence, section 2.2.

190. In the Commission's assessment, the Norwegian rules appear also to serve an ancillary objective in terms of ensuring the proximity of the corporate officers in question. However, the ECJ has held that a residence requirement is no guarantee of the accessibility of a company's management: "[c]hecks may be carried out and penalties may be imposed on any undertaking established in a Member State, whatever the place of residence of its directors" (emphasis added by the Commission).[85] The Court reiterated this position in *Rainford-Towning*[86] and *Pucher.*[87]

191. The Commission contends that these considerations must apply a fortiori in relation to the rule requiring prior residence of two years in Section 7-5 of the Financial Undertakings Act. In its view, no detailed and convincing information is given by Norway in relation to the types of situation in which the corporate officers may be held responsible for wrongdoing in the exercise of their corporate functions. Consequently, Norway has failed to substantiate its claims that the contested measures are suitable to attain the stated objectives.

Measures do not go beyond what is necessary to achieve the stated objectives and there are no less restrictive means of achieving the same objective

192. The Commission contends that the burden of proof cannot extend to requiring the EEA State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions.[88] In other words, 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".[89] 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 area".[90]

193. The Commission argues that the transfer of a physical person's residence outside the territory of an EEA State does not, in itself, imply avoidance of legal obligations.[91] The Commission also observes, in this respect, that the need to enforce a judgment against a corporate officer already assumes that the individual in question has acted in such a way as to "lift the corporate veil" and trigger personal liability. In general, it should not be assumed that there will be wrongdoing.[92]

194. The Commission submits that 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

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[85] Reference is made to the judgment in *Commission* v *Spain*, cited above, paragraph 47.
[86] Reference is made to *Rainford-Towning*, cited above, paragraph 34.
[87] Reference is made to *Pucher*, cited above, paragraph 33.
[88] Reference is made to the judgment in *Commission* v *Austria*, C-209/18, EU:C:2019:632, paragraph 82, and case law cited.
[89] Reference is made to the Defence, paragraph 109. See, to that effect, the judgment in *Commission* v *Austria*, cited above, paragraph 101.
[90] Reference is made to the Defence, paragraph 116.
[91] Reference is made to this effect, to the judgment in *de Lasteyrie du Saillant*, C-9/02, EU:C:2004:138, paragraph 51.
[92] Reference is made to the judgment in *Commission* v *Belgium*, C-577/10, EU:C:2012:814, paragraph 53.

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.

195. In relation to objectives such as the administration of justice, the execution of civil judgments or the enforcement of administrative and criminal sanctions, the Commission asserts that the Court has already ruled that a residence requirement goes beyond what is necessary.[93]

196. The Commission concludes that, if Norway is to convince the Court that a different conclusion should be reached in the present case, it must do more than simply distinguish previous judgments, and demonstrate the proportionality of its own rules.

Free movement of workers

197. Pursuant to Article 28 EEA and the Regulation, all EEA nationals, irrespective of their 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 EEA State. According to the Commission, the ECJ has held that the free movement of workers also covers workers residing outside the EU.[94]

198. According to the Commission, the concept of "worker" is defined by objectively assessing the working relationship, including the person's rights and duties, and the time for which they have performed services for and under the direction of another person in return for remuneration.[95] Consequently, the Commission rejects Norway's general assertion that the term "managing director" does not fulfil those criteria. Rather, the question must be answered on a case-by-case basis, taking into account all the factors and circumstances of the working relationship, such as whether the commercial risks of the business are shared and whether the person has the freedom to choose their own working hours and to engage their own assistants.[96] The Commission observes that the ECJ in *Clean Car Autoservice* considered a "managing director of a company" in Austria as a worker who had to be able to enjoy his right to free movement to be able to take up his position irrespective of his residence. However, when a managing director is also a shareholder exercising influence, he will not come within the concept of a "worker". [97]

199. The Commission argues that the same logic must apply to other "corporate officers" such as board members, and it is not possible to make a general statement because each situation must be assessed separately on the facts.

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93 Reference is made to *Pucher*, cited above, paragraph 37.
94 Reference is made to the judgment in *Boukhalfa*, C-214/94, EU:C:1996:174, paragraph 22.
95 Reference is made to the judgment in *Lawrie-Blum*, cited above, paragraph 17.
96 Reference is made to the judgment in *ex parte Agegate*, cited above, paragraph 36.
97 Reference is made to the judgment in *Asscher*, cited above.

200. In that respect, the Commission observes that the ECJ has held that: "Board members who, in return for remuneration, provide services to the company which has appointed them and of which they are an integral part, who carry out their activities under the direction or control of another body of that company and who can, at any time, be removed from their duties, satisfy the criteria for being treated as workers within the meaning of the case-law of the Court".[98] Thus, the notion of "worker" is sufficiently broad to cover managing directors as well as board members, depending on the circumstances of each individual 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.

201. The Commission asserts that restrictions on Article 28 EEA must be justified by an overriding reason in the public interest, be suitable to achieve the objective pursued and not go beyond what is necessary to that end, in the same way as for Article 31 EEA. Consequently, the Commission concludes that the contested measures are an unlawful restriction on the free movement of workers.

202. In conclusion, the Commission submits that ESA's application should be granted and that Norway be ordered to bear the costs.

Bernd Hammermann
Judge-Rapporteur

[98] Reference is made to the judgment in *Iraklis Harlamblidis*, C-270/13, EU:C:2014:2185, paragraphs 34 and 41.