

Case No: 74942
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Decision No: 089/19/COL

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Iceland's breach of its obligations arising from Articles 28 and 31 of the EEA Agreement, Article 2 of the Eleventh Directive 89/666/EEC and Article 1(1) of Regulation (EU) No 492/2011, by maintaining in force residency requirements for persons having certain powers in a company

1 Introduction

1. By a letter dated 22 January 2014 (Doc No 696547), the EFTA Surveillance Authority (“the Authority”) informed the Icelandic Government that it had opened an own initiative case regarding EEA nationality and/or residency requirements in Iceland.
2. The main purpose of the case was to examine the compatibility with the EEA Agreement of the nationality and/or residency requirements for founders of undertakings, managing directors, members of the board of directors and branch managers (hereinafter: “persons having certain powers in a company”) imposed by:
 - 1) Act No 2/1995 on Public Limited Companies (*lög um hlutafélög*, “the Act on Public Limited Companies”),
 - 2) Act No 138/1994 on Private Limited Companies (*lög um einkahlutafélög*, “the Act on Private Limited Companies”),
 - 3) Act No 33/1999 on Foundations Engaging in Business Operation (*lög um sjálfseignarstofnanir sem stunda atvinnurekstur*, “the Act on Foundations Engaging in Business Operation”),
 - 4) Act No 34/1991 on Investment by Non-Residents in Business Enterprises (*lög um fjárfestingu erlendra aðila í atvinnurekstri*, “the Act on Investment by Non-Residents in Business Enterprises”),
 - 5) Act No 56/2010 on Insurance Activities (*lög um váttryggingastarfsemi*, “the Act on Insurance Activities”) ¹.
3. On 4 November 2015 (Doc No 763145), the Authority issued a letter of formal notice to Iceland in which it concluded that the nationality and/or residency requirements contained in the above-listed legislative acts breached the EEA Agreement.
4. In May 2017, Iceland amended the first, second and third legislative acts referred to in point 2 above. On 4 December 2019, amendments to the fourth legislative act referred to in point 2 above were adopted, whilst the adaptation of the remaining act is still outstanding. However, in the Authority’s view, the amendments at issue have not completely removed the breach.

2 Correspondence

5. By the letter of 22 January 2014 (Doc No 696547), the Authority sent a request for information to Iceland, inviting it to provide certain clarifications as concerns the EEA nationality and/or residency requirements of natural persons contained in the above-mentioned acts.

¹ Act No 56/2010 on Insurance Activities was repealed on 1 October 2016 when a new Act No 100/2016 on Insurance Activities took effect.

6. On 27 June 2014 (ref. ANR14030279/4.3.5, Doc No 712613), Iceland replied to the Authority's request for information. In its reply, Iceland, *inter alia*, argued that when an EEA national resides in a country outside the EEA, that national does not enjoy all the same rights as when the national resides within the EEA. When the national returns and resides within the EEA, the rights under EEA law will again be applicable. Therefore, the requirement of residence within the EEA does not constitute a restriction to the rights enshrined in the EEA Agreement.
7. The case was discussed at the package meeting in Reykjavík on 19 May 2014². At the meeting, the Authority's representatives drew the attention of the representatives of the Icelandic Government to the judgment of the Court of Justice of the European Union ("the Court of Justice") of 14 October 2004, *Commission v Netherlands*³. In this judgment, a Dutch law relating to ship registration, which required that a proportion of the shareholders of a Community company owning a ship must be of EU or EEA nationality and the directors of a company owning a ship must be of EU or EEA nationality, was held to be contrary to the freedom of establishment.
8. By letter of 31 October 2014 (ref. ANR14030279/4.3.5, Doc No 728098), Iceland replied to the Authority's follow-up letter to the package meeting. In its reply, the Icelandic Government expressed the view that the residency and nationality requirements at issue are necessary, suitable and appropriate for ensuring that the aim pursued is achieved.
9. The case was discussed at the package meeting in Reykjavík on 27 May 2015⁴. At the meeting, the representatives of the Icelandic Government reiterated the viewpoint expressed in the Government's letter of 31 October 2014.
10. On 4 November 2015, the Authority issued a letter of formal notice to Iceland (Doc No 763145). In this letter, the Authority concluded that by maintaining in force the EEA nationality and/or residency requirements in the legislative acts listed therein, Iceland has failed to fulfil its obligations arising from Articles 31 and 28 of the EEA Agreement, Article 2 of the Eleventh Directive 89/666/EEC⁵ and Article 1(1) of Regulation (EU) No 492/2011⁶.
11. On 19 February 2016, Iceland replied to the Authority's letter of formal notice (ref. ANR14030279/4.3.5, Doc No 793851).

² See the follow-up letter to the package meeting, Doc No 709860.

³ Judgment of the Court of Justice of the European Union of 14 October 2004, *Commission v Netherlands*, C-299/02, EU:C:2004:620.

⁴ See the follow-up letter to the package meeting, Doc No 760231.

⁵ 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* (OJ L 395, 30.12.1989, p. 36), incorporated at point 8 of Annex XXII of the EEA Agreement. The directive has been replaced by Directive (EU) 2017/1132, which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 200/2019 of 10 July 2019 (not yet in force in the EEA EFTA States).

⁶ 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 L 141, 27.5.2011, p. 1, EEA Supplement No 54, 27.9.2012, p. 299), incorporated at point 2 of Annex V of the EEA Agreement by Decision of the EEA Joint Committee No 52/2012 of 30 March 2012 (OJ L 207, 2.8.2012, p. 32).

12. On 9 May 2017, the Icelandic Parliament passed an act⁷, which to a large extent addressed the issues outlined in the letter of formal notice as concerns the Act on Public Limited Companies, the Act on Private Limited Companies and the Act on Foundations Engaging in Business Operation (the first, second and third legislative acts referred to in point 2 above). As a result of the legislative amendments, the residency requirement no longer applies to founders of undertakings and to EEA nationals having certain powers in a company. However, persons from third countries having such powers have to reside within the EEA, although the Minister may grant an exemption from this requirement.
13. The case was discussed at the package meeting in Reykjavík on 8 June 2017⁸, where the representatives of the Icelandic Government informed the representatives of the Authority about the adoption of the above-mentioned Act of 9 May 2017. The Icelandic Government was invited to keep the Authority informed on the progress of the legislative process concerning the remaining legislation.
14. At the package meeting in Reykjavík on 6 June 2018⁹, the representatives of the Icelandic Government stated that Iceland was still looking into whether and which changes needed to be made in order to address the issues outlined in the letter of formal notice as regards the Act on Investment by Non-Residents in Business Enterprises and the Act on Insurance Activities (the fourth and fifth legislative acts referred to in point 2 above).
15. On 10 April 2019 (Doc No 1063368), the Authority sent a request for information to Iceland inviting it to inform the Authority about the status of the outstanding legislation.
16. In the letters of 10 May 2019 (ref. ANR18010140/04.03.05, Doc No 1069235) and 21 May 2019 (ref. FJR19010598/5.11, Doc No 1070877), the Icelandic Government informed the Authority that a draft legislative bill amending the Act on Investment by Non-Residents in Business Enterprises (the fourth legislative act referred to in point 2 above) had been prepared. However, as regards the Act on Insurance Activities (the fifth legislative act referred to in point 2 above), the Government was of the view that the residency requirement contained therein was not a restriction and, in any case, was justified on the grounds of public interest.
17. At the package meeting in Reykjavík on 4 June 2019¹⁰, the representatives of the Icelandic Government informed the representatives of the Authority that the draft legislative bill amending the Act on Investment by Non-Residents in Business Enterprises was included on the parliamentary agenda for September/October 2019. The amendment in question entails removing the residency requirement set out in Article 10 of the Act, similarly to the way this

⁷ Act amending the Act on Public Limited Companies, the Act on Private Limited Companies and the Act on Foundations Engaging in Business Operations (simplification, residency requirements) No 25/2017, entered into force on 25 May 2017.

⁸ See the follow-up letter to the package meeting, Doc No 861615.

⁹ See the follow-up letter to the package meeting, Doc No 918168.

¹⁰ See the follow-up letter to the package meeting, Doc No 1076000.

was done in the Act of 9 May 2017. By e-mail of 9 September 2019 (Doc No 1087041), the Icelandic Government sent to the Authority the draft legislative bill amending the Act on Investment by Non-Residents in Business Enterprises. On 4 December 2019, the bill was adopted by the Icelandic Parliament¹¹.

18. However, as regards the Act on Insurance Activities, the representatives of the Icelandic Government considered that the Authority should judge the residency requirement in this Act differently, in particular in light of the wide scope of the provision in question and in light of the fact that a similar requirement can be found in Article 52(1) of Act No 161/2002 on Financial Undertakings (*lög um fjármálafyrirtæki*, “the Act on Financial Undertakings”). The representatives of the Icelandic Government referred to their letter dated 21 May 2019, stating that they did not consider the requirement a restriction and, in any case, that the requirement pursued legitimate aims and was necessary, suitable and appropriate to secure the public interest objective.
19. On 5 July 2019, the Authority opened an own-initiative case in order to examine the residency requirements in the Act on Financial Undertakings (Case No 83880).
20. By letter of 8 July 2019 (Doc No 1079578), the Authority sent a request for information to Iceland, inviting it to provide a justification as concerns the above-mentioned requirements in the Act on Financial Undertakings. The Icelandic Government was also invited, if necessary, to supplement the justification provided in its letter of 21 May 2019 with regard to the residency requirements currently established in Article 40(5) of the new Act No 100/2016 on Insurance Activities.
21. Iceland replied by letter of 10 July 2019 (ref. FJR19070039/17.3.2, Doc No 1080441). In this reply, the Icelandic Government indicated that it had been decided to amend the Act on Financial Undertakings, as well as the Act on Insurance Activities and to remove the residency requirements for members of the board of directors and managing directors of financial and insurance undertakings. The Ministry intended to submit proposals to this effect during the Parliament’s next legislative session of 2019-2020. By e-mail of 21 November 2019 (Doc No 1102207 and 1102208), the Icelandic Government shared with the Authority a draft of the legislative amendments that are still pending the Government’s approval.

3 Relevant national law

3.1 The Act on Public Limited Companies

¹¹ Act amending the Act on Investment by Non-Residents in Business Enterprises, *Pingskjal 611 186. Mál.*

3.1.1. **The version of the Act on Public Limited Companies in force before the adoption of the Act of 9 May 2017**¹²

22. Article 3 paragraphs 2 and 3 of the Act on Public Limited Companies contained EEA nationality and/or residency requirements for at least half of the natural persons who are founders of a public limited company. They read as follows:

“The founders of a Public Limited Company shall be no fewer than two. The majority of the founders shall be resident in this Country, but half of them in case the number of founders be even, unless the Minister or he to whom he conveys his power grant an exemption therefrom. The condition concerning residence does not, however, apply to citizens of the States being parties to the Agreement on the European Economic Area, provided that the citizens concerned be resident in an EEA State. Neither does the condition concerning residence apply to citizens of States being parties to the Convention Establishing the European Free Trade Association or to the Faroese who are resident in an EEA State, a State being a party to the Convention Establishing the European Free Trade Association or in the Faroe Islands. In such incidents evidence of citizenship and residence must be submitted.

The founders may be individuals, the Icelandic State and its institutes, Municipalities and their institutes, registered Limited Companies, registered Co-operative Societies, other registered Companies with limited liability, registered partnership Companies, registered syndicates and freehold institutes which are subject to official supervision. The Minister or he to whom he conveys his power may grant an exemption from the conditions of the present paragraph. The aforementioned Companies and establishments resident in an EEA State, a State being a party to the European Free Trade Association or the Faroese Islands may, however, be founders without an exemption. In such incidents evidence of residence must be submitted.”

23. Article 66 paragraph 2 of the Act on Public Limited Companies stated:

“Managers and at least half of the Directors shall be resident in this Country, unless a Minister or he to whom he conveys his power grant an exemption therefrom. Condition of residence does, however, not apply to citizens of the States being parties to the Agreement on the European Economic Area, provided that the citizens concerned be resident in an EEA State. The condition concerning residence does not, however, apply to citizens of the States being parties to the Agreement on the European Economic Area, the Convention Establishing the European Free Trade Association or to Faroese, provided that the parties concerned be resident in an EEA State, a State being a party to the Convention or in the Faroe Islands. In such incidents evidence must be given of citizenship and residence.”

¹² The translation of the Act used here found at <https://www.government.is/lisalib/getfile.aspx?itemid=008e5636-3900-11e8-9427-005056bc4d74>. The translation at issue does not include the most recent amendments to the Act.

24. Article 140 paragraph 1 of the Act on Public Limited Companies states:

“One or more Branch Managers shall head a branch. A Branch Manager shall be of legal age and in control of his financial affairs. In other respects there apply the provisions of the present Act respecting Managers concerning residence et al., as appropriate.”

3.1.2. The version of the Act on Public Limited Companies currently in force¹³

25. Article 3 paragraphs 2 and 3 and Article 66 paragraph 2 of the Act on Public Limited Companies were amended by the Act of 9 May 2017. No changes were made to Article 140 paragraph 1 of the Act.

26. Article 3 paragraphs 2 and 3 of the Act on Public Limited Companies currently provide:

*“The founders of a public limited company shall be no fewer than two. [...]”*¹⁴

The founders may be individuals, the Icelandic State and its institutes, municipalities and their institutes, registered limited companies, registered co-operative societies, other registered companies with limited liability, registered partnership companies, registered syndicates, registered non-governmental organisations, pension funds and freehold institutes which are subject to official supervision. The Minister or he to whom he conveys his power may grant an exemption from the conditions of the present paragraph. The aforementioned companies and establishments resident in an EEA State, a State that is a party to the European Free Trade Association or the Faroe Islands may, however, be founders without an exemption. In such instances evidence of residence must be submitted.”

27. Article 66 paragraph 2 of the Act on Public Limited Companies provides:

*“The managing directors and at least half of the members of the board of directors shall be resident in this country, unless a Minister or he to whom he conveys his power grant an exemption therefrom. The condition of residence does not, however, apply to citizens of the States that are parties to the Agreement on the European Economic Area **and those that reside in the European Economic Area**. The residency requirement applies neither to citizens of States being parties to the Convention Establishing the European Free Trade Association or to Faroese. The residency requirement applies to the board of directors and the deputy board, respectively. in such instances evidence of citizenship and residence must be submitted.”*

3.2 The Act on Private Limited Companies

¹³ Unofficial translation by the Authority.

¹⁴ Here and further highlighted by the Authority, in order to indicate the essential changes made to the national provisions.

3.2.1. The version of the Act on Private Limited Companies in force before the adoption of the Act of 9 May 2017¹⁵

28. Article 3 paragraphs 2 and 3 of the Act on Private Limited Companies contained EEA nationality and/or residency requirements for natural persons who are founders of a private limited company. They read as follows:

“A founder, if he is alone, or at least one founder if there are more of them, shall be resident in this Country, unless the Minister or he to whom he conveys his power grant an exemption therefrom. The condition of residence does not, however, apply to the citizens of the States being parties to the Agreement on the European Economic Area, provided that the citizens concerned be resident in an EEA State. Neither does the condition of residence apply concerning citizens of States being parties to the Convention Establishing the European Free Trade Association or the Faroese resident in an EEA State, a State being a party to the Convention or the Faroe Islands. In such instances evidence of citizenship and residence must be produced.

Founders may be individuals, the Icelandic State and its institutes, Municipalities and their institutes, registered Public Limited Companies, registered Co-operative Societies, other registered Companies with limited liability, registered partnership Companies, registered syndicates and freehold institutes which are subject to official supervision. The Minister or he to whom he conveys his power may grant an exemption from the conditions of the present paragraph. The aforementioned Companies and establishments resident in an EEA State, a State being a party to the Convention Establishing the European Free Trade Association or the Faroe Islands may, however, be founders without an exemption. In such instances evidence of residence must be submitted.”

29. Article 42 paragraph 2 of the Act on Private Limited Companies stated:

“The Managers and at least half of the Directors shall be resident in this Country. In case of one Director the condition of residence applies to him and it also applies to one out of two Directors. The Minister or he to whom he conveys his power may grant an exemption from the condition. Condition of residence does, however, not apply to the citizens of the States being parties to the Agreement on the European Economic Area, provided that the citizens concerned be resident in an EEA State. Neither does the condition of residence apply to citizens of States being parties to the Convention Establishing the European Free Trade Association or the Faroese resident in an EEA State, a State being a party to the Convention or the Faroe Islands. In such instances evidence must be given of citizenship and residence.”

30. Article 114 paragraph 1 of the Act on Private Limited Companies states:

¹⁵ The translation of the Act used here found at <https://www.government.is/publications/legislation/lex/2018/02/06/Act-No.-138-1994-respecting-Private-Limited-Companies-as-amended-up-to-1-May-2011-amendments-as-from-Act-43-2008-indicated/>. The translation at issue does not include the most recent amendments to the Act.

“One or more Branch Managers shall head a branch. A Branch Manager shall be of legal age and in control of his financial affairs. In other respects there apply the provisions of the present Act respecting Managers concerning residence et al., as appropriate.”

3.2.2. The version of the Act on Private Limited Companies currently in force¹⁶

31. Article 3 paragraph 2 of the Act on Private Limited Companies was removed by the Act of 9 May 2017 whereas Article 3 paragraph 3 and Article 42 paragraph 2 of the Act on Private Limited Companies were amended by the same Act. No amendments were made to Article 114 paragraph 1 of the Act.

32. Article 3 paragraph 3 of the Act on Private Limited Companies currently provides:

“The founders may be individuals, the Icelandic State and its institutes, municipalities and their institutes, registered public limited companies, registered co-operative societies, other registered companies with limited liability, registered partnership companies, registered syndicates, registered non-governmental organisations, pension funds and freehold institutes which are subject to official supervision. The Minister or he to whom he conveys his power may grant an exemption from the conditions of the present paragraph. The aforementioned companies and establishments resident in an EEA State, a State that is a party to the Convention Establishing the European Free Trade Association or the Faroe Islands may, however, be founders without an exemption. In such instances evidence of residence must be submitted.”

33. Article 42 paragraph 2 of the Act on Private Limited Companies states:

*“The managing directors and at least half of the members of the board of directors shall be resident in this country. Where there is only one member of the board of directors, the condition of residence applies to him and it also applies to one out of two members of the board of directors. The Minister or he to whom he conveys his power may grant an exemption from the condition. The condition of residence does not, however, apply to citizens of the States that are parties to the Agreement on the European Economic Area **and those that reside** in the European Economic Area. The residency requirement applies neither to citizens of States that are parties to the Convention Establishing the European Free Trade Association or to Faroese. The residency requirement applies to the board of directors and the deputy board, respectively. In such instances evidence of citizenship and residence must be submitted.”*

3.3 The Act on Foundations Engaging in Business Operations

¹⁶ Unofficial translation by the Authority.

3.3.1. The version of the Act on Foundations Engaging in Business Operations in force before the adoption of the Act of 9 May 2017¹⁷

34. Article 15 paragraph 2 of the Act on Foundations Engaging in Business Operations stated:

“Managers and at least half of the members of the Board of Directors shall be resident in this country, unless the Minister permits an alternative arrangement or this result from international obligations. The condition of residence does not apply to the citizens of the Member States of the Agreement on the European Economic Area, provided that the parties concerned be residents of an EEA State. The condition of residence does not apply either to the citizens of the States being Members of the Agreement on the European Economic Area, the Convention Establishing the European Free Trade Association or the Faroese, provided that the parties concerned be residents of an EEA State, a Member State of the Establishing Convention or the Faroe Islands. In such instances evidence of citizenship shall be produced.”

3.3.2. The version of the Act on Foundations Engaging in Business Operations currently in force¹⁸

35. The above-provision was amended by the Act of 9 May 2017. The provision currently in force reads:

*“The managing directors and at least half of the members of the board of directors shall be resident in this country, unless the Minister permits an alternative arrangement or this results from international obligations. The condition of residence does not, however, apply to citizens of the States that are parties to the Agreement on the European Economic Area **and those that reside** in the European Economic Area. The residency requirement applies neither to citizens of States that are parties to the Convention Establishing the European Free Trade Association or to Faroese [...]. In such instances evidence of citizenship and residence shall be produced.”*

3.4 The Act on Investment by Non-Residents in Business Enterprises

3.4.1. The version of the Act on Investment by Non-Residents in Business Enterprises before the adoption of the Act of 4 December 2019¹⁹

36. Article 10 of the Act on Investment by Non-Residents in Business Enterprises stated the following:

¹⁷ The translation of the Act used here found at <https://www.government.is/lisalib/getfile.aspx?itemid=7e2a0894-38ff-11e8-9427-005056bc4d74>.

The translation at issue does not include the most recent amendments to the Act.

¹⁸ Unofficial translation by the Authority.

¹⁹ The translation of the Act used here found at <https://www.stjornarradid.is/media/atvinnuvegaraduneyti-media/media/acrobat/act-no-34-1991-on-investment-by-non-residents-in-business-enterprises.pdf>. The translation at issue does not include the most recent amendments to the Act.

“The managers and a majority of the members of the board of directors in Icelandic enterprises must be domiciled in Iceland regardless of the equity share, voting rights, or other control held by non-residents. However, this shall not apply to citizens of member states of the European Economic Area, provided that such citizens are residents of an EEA member state. The Minister of Commerce may grant citizens of other states exemption from this provision.

If special legislation providing for Icelandic citizenship or residence in Iceland by management, effective at the time this Act takes effect, applies to a specific investment in Iceland, the citizens of member states of the European Economic Area who are resident in an EEA state shall be regarded as conforming to the conditions of citizenship or residence provided for in such special legislation.”

3.4.2. The version of the Act on Investment by Non-Residents in Business Enterprises, as amended by the Act of 4 December 2019²⁰

37. Article 10 of the Act on Investment by Non-Residents in Business Enterprises was amended by the Act of 4 December 2019 and currently states:

*“The managers and a majority of the members of the board of directors in Icelandic enterprises must be domiciled in Iceland regardless of the equity share, voting rights or other control held by non-residents. However, this shall not apply to citizens of member states of the European Economic Area **and those that reside** in an EEA member state. The Minister of Commerce may grant citizens of other states exemption from this provision.*

*If special legislation providing for Icelandic citizenship or residence in Iceland by management, effective at the time this Act takes effect, applies to a specific investment in Iceland, the citizens of member states of the European Economic Area **and those that reside there** shall be regarded as conforming to the conditions of citizenship or residence provided for in such special legislation.”*

3.5 The Act on Insurance Activities

38. Article 14 of the Act on Insurance Activities²¹ stated:

“Save as specified in this Chapter, the provisions of Chapter II of the Act respecting Public Limited Companies, No. 2/1995, as amended, shall apply to the establishment of an insurance undertaking.”

39. According to the preparatory works, Article 14 of the Act on Insurance Activities incorporated the requirements of Article 3 of the Act on Public Limited Companies through the reference to Chapter II of the latter Act²².

²⁰ Unofficial translation by the Authority.

²¹ The translation of the Act used here found at <http://en.fme.is/media/utgefid-efni/56-2010-IS-EN-UNOFFICIAL.pdf>. The translation at issue does not include the last amendments to the Act.

40. Article 54 paragraph 6 of the Act on Insurance Activities, *inter alia*, stated:

“Members of the Board shall be resident in a Member State or in a State which is a member of the Organisation for Economic Co-operation and Development (OECD). The Managing Director shall be a resident of a Member State. The Financial Supervisory Authority may grant exemptions from the residence requirements.”

41. Article 9 paragraph 1 point 1 of the Act on Insurance Activities defined the term “Member State” as “a State which is party to the Agreement on the European Economic Area, party to the Convention establishing the European Free Trade Association, or the Faroe Islands.”

42. Act No 56/2010 on Insurance Activities was repealed on 1 October 2016 when a new Act No 100/2016 on Insurance Activities (“the new Act on Insurance Activities”) took effect. The wording of Article 40 paragraph 5 and Article 6 paragraph 1 point 1 of the new Act on Insurance Activities is identical to the wording of Article 54 paragraph 6 and Article 9 paragraph 1 point 1 of the Act on Insurance Activities cited above.

4 Relevant EEA law

43. Article 31 of the EEA Agreement on the right of establishment provides that:

“1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to [...] 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.[...]

44. Article 34 of the EEA Agreement extends the right of establishment to companies and provides that:

“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. [...]

²² See Parliamentary Report A [Alþingistiðindi A] of 2009-2010, p. 58-59. Available at: <http://www.althingi.is/alttext/pdf/138/s/0254.pdf>.

45. Referring to companies or firms where only their registered office is within the Community (their central administration or principal place of business being situated outside the Community), the General Programme for the abolition of restrictions on freedom of establishment (“the General Programme”)²³ made the freedom to set up a secondary establishment subject to the further condition that their activity must show “*a real and continuous link with the economy of a Member State*”, but it expressly stated that such a link must not be one of nationality, whether of the members of the company or firm, or of the persons holding managerial or supervisory posts therein, or of the holders of the capital²⁴.
46. The Eleventh Directive 89/666/EEC relates to branches of companies with share capital.
47. Article 2(1) of the Eleventh Directive lists the documents and particulars that must be disclosed in the Member State where a branch is established. According to Article 2(1)(e) of the Directive, information about the appointment, termination of office and particulars of the persons who are authorised to represent the company in dealings with third parties and in legal proceedings must be disclosed. These can be either persons who can represent the company as a lawful company organ or member thereof, or alternatively persons who are permanent representatives of the company in respect of the activities of the branch. In the latter case, there should be an indication of the extent of their powers.
48. The Eleventh Directive 89/666/EEC has been replaced by Directive (EU) 2017/1132 (not yet in force in the EEA EFTA States). Article 30 of the new directive substantially corresponds to Article 2 of the Eleventh Directive.
49. Article 28(1) of the EEA Agreement provides that the freedom of movement for workers shall be secured among EU Member States and EEA EFTA States.
50. As regards free movement of workers, more specific rules are set out in Regulation No 492/2011 on freedom of movement for workers within the Union. Article 1(1) of Regulation No 492/2011 states:

“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.”

5 The Authority’s Assessment

5.1. Introduction: the scope of this reasoned opinion

The residency requirements for third country nationals

²³ General Programme for the abolition of restrictions on freedom of establishment, adopted by the Council on 18 December 1961 (English version: OJ English Special Edition (2nd Series) IX, p. 7), incorporated at point 2 of Annex VIII of the EEA Agreement.

²⁴ See the fourth indent in Title I of the General Programme, “Beneficiaries”.

51. As mentioned above, the Act of 9 May 2017 to a large extent addressed the issues outlined in the letter of formal notice as concerns the Act on Public Limited Companies, the Act on Private Limited Companies and the Act on Foundations Engaging in Business Operation (the first, second and third legislative acts referred to in point 2 above). As a result of the legislative amendments, the residency requirement was removed with respect to the founders of the companies, as well as with respect to EEA nationals who are managing directors, members of the board of directors and branch managers, *i. e.* they no longer have to reside in the EEA area. Moreover, third country nationals who are managing directors, members of the board of directors and branch managers no longer have to reside in Iceland. Similar amendments were made to the Act on Investment by Non-Residents in Business Enterprises by the Act of 4 December 2019.

52. However, under Article 66 paragraph 2 and Article 140 paragraph 1 of the amended Act on Public Limited Companies, Article 42 paragraph 2 and Article 114 paragraph 1 of the Act on Private Limited Companies, Article 15 paragraph 2 of the Act on Foundations Engaging in Business Operation and Article 10 of the Act on Investment by Non-Residents in Business Enterprises, third country nationals having certain powers in a company (in particular, the managing directors, at least half of the members of the board of directors and branch managers) have to reside within the EEA, although the Minister may grant an exemption from this requirement. The requirements at issue are hereinafter called as “the residency requirements for third country nationals”.

53. As will be explained in Section 5.3 below, in the Authority’s view, this remains problematic from the point of view of the freedom of establishment, besides not complying with the Eleventh Directive 89/666/EEC.

The residency requirements for persons having certain powers in a company

54. The adaptation of the new Act on Insurance Activities (the fifth legislative act referred to in point 2 above) is still outstanding. This act retains the existing residency requirements for persons having certain powers in a company notwithstanding their nationality.

55. In particular, Article 40 paragraph 5 of the new Act on Insurance Activities imposes a residency requirement for the members of the board of directors and the managing directors of an insurance undertaking: the members of the board of directors are required to reside in an EEA State or a State, which is a member of the OECD, whilst the managing director shall be a resident of an EEA State. For reasons of efficiency, these requirements will be further referred to as “the residency requirements for persons having certain powers in a company”.

56. With regard to these requirements, the Authority maintains its conclusions set out in the letter of formal notice to the effect that the residency requirements for persons having certain powers in a company are contrary to the provisions in the EEA Agreement on the freedom of establishment and the free movement of workers, as well as Article 2 of the Eleventh Directive 89/666/EEC.

57. In its letter of 10 July 2019, Iceland undertook to amend the new Act on Insurance Activities and to remove the residency requirements for managing directors and members of the board of directors of insurance undertakings. According to the draft submitted to the Authority by the Icelandic Government by e-mail of 21 November 2019, the above-mentioned residency requirements would not apply to citizens of EEA Member States. However, this legislation has not yet been adopted. Moreover, even in the case of its adoption, the issue concerning residency requirements for third country nationals having certain powers in an insurance undertaking remains at stake.

58. The above-described residency requirements for third country nationals and the residency requirements for persons having certain powers in a company will be assessed further in Sections 5.3 and 5.2 respectively.

5.2. The residency requirements for persons having certain powers in a company

59. The Authority refers to its assessment in the letter of formal notice of 4 November 2015 (**Section 5 of the letter**) to the effect that requirements such as those laid down in Article 40 paragraph 5 of the new Act on Insurance Activities (the fifth legislative act referred to in point 2 above), breach Articles 28 and 31 of the EEA Agreement, Article 1(1) of Regulation (EU) No 492/2011 and Article 2 of the Eleventh Directive 89/666/EEC.

The freedom of establishment

60. The Authority is of the view that the imposition, by the legislative act referred to above, of residency requirements on persons having certain powers in a company restricts the freedom of establishment for EEA companies where those persons do not fulfil the requirements at issue. This also restricts the freedom of establishment of EEA nationals where the persons concerned reside outside the territory of an EEA (or, as the case might be, OECD) State. The right of establishment of EEA companies/nationals may be restricted in the following ways:

- By preventing a company or firm of an EEA State from establishing a connection with the legal system of Iceland, in particular, by transferring its central administration or by participating in the formation of a new company or firm (*i. e.*, interfering with primary establishment);
- By preventing nationals of EEA States from setting up and acting as managing directors and members of the board of directors of companies in Iceland (*i. e.*, interfering with primary establishment);
- By restricting the possibility for companies of other EEA States to pursue activities from Iceland through subsidiaries (*i. e.*, interfering with secondary establishment).

61. The freedom of establishment granted by EEA law to the companies or firms referred to in Article 34 EEA cannot be limited or affected by the nationality

and/or residence of the persons having certain powers in a company²⁵. The status of an EEA company is based on the location of the corporate seat and the legal order where the company is incorporated, not on the nationality and/or residence of its managing directors, members of the board of directors or branch managers²⁶. The same consideration applies in respect of the freedom to establish a principal place of business.

62. The Icelandic requirements at issue place a restriction on companies of other EEA States to transfer their central administration to Iceland, to the extent that the persons fulfilling the designated functions in these companies do not comply with them. In such a situation, the only course of action open to the company concerned is to alter the structure of its management or of its board of directors. The Court of Justice has held that such changes “*may entail serious disruption within a company and also require the completion of numerous formalities which have financial consequences*”²⁷. The requirements also place a restriction on companies of other EEA States wishing to pursue activities from Iceland through subsidiaries, as they may not choose the management freely, given that the conditions operate to exclude managing directors or members of the board of directors who do not fulfil the residency requirements. It is clear that any such requirement will restrict the right of establishment since it will prevent a company from appointing persons of its preference as managing directors or members of the board of directors.
63. In addition, the effect of the link to the EEA (OECD) residence is that nationals of EEA States who are resident outside those territories, may be discouraged from setting up insurance undertakings in Iceland and from acting as members of the board of directors or as managing directors of insurance undertakings in Iceland.
64. Therefore, the residency requirements such as set out in Article 40 paragraph 5 of the Act on Insurance Activities amount to a restriction to the freedom of establishment as laid down in Article 31 of the EEA Agreement.
65. As to the constraints with regard to territoriality referred to by Article 31 EEA, it is true that the chapter of the EEA Agreement relating to the freedom of establishment does not extend to situations involving a national of a third State established outside the EEA. A company established in a third State cannot therefore rely on its provisions²⁸. However, it does not follow from any provision of EEA law that the origin of the persons who are in charge of

²⁵ Under Title I of the General Programme (“Beneficiaries”) it is observed with respect to secondary establishment that removal of the restrictions on the right of establishment will take place for the benefit of companies “*provided that, where only the seat prescribed by their statutes is situated within the Community or in an overseas country or territory, their activity shows a real and continuous link with the economy of a Member State or of an overseas country or territory; such link shall not be one of nationality, whether of the members of the company or firm, or of the persons holding managerial or supervisory posts therein, or of the holders of the capital*”.

²⁶ See, for example, judgment of 1 April 2014, *Felixstowe Dock and Railway Company and Others*, C-80/12, EU:C:2014:200, paragraphs 39-42.

²⁷ Judgment of 14 October 2004, *Commission v Netherlands*, cited above, paragraph 19.

²⁸ Judgment *Felixstowe Dock and Railway Company and Others*, cited above, paragraph 39; see also, by analogy, judgment of 3 October 2006, *Fidium Finanz*, C-452/04, EU:C:2006:631, paragraph 25.

companies resident in the EEA affects the right of those companies to rely on the freedom of establishment.

66. As regards the argument of the Icelandic Government that the Minister or the Financial Supervisory Authority may grant an exemption from the requirement of residence, it is established case law that rules which contain an obligation to obtain authorisation are liable to deter or even prevent economic operators from other Member States from pursuing their activities in the host Member State through a fixed place of business²⁹. Such authorization requirements are thus, by their very nature, restrictive.
67. With regard to the arguments provided by the Icelandic Government to justify the residency requirements, the Authority has already explained, in the letter of formal notice, why they would not succeed (see in particular Section 5.4 of the letter of formal notice).

The free movement of workers

68. In addition, the residency requirements for managing directors and members of the board of directors of companies fall not only under the scope of Article 31 of the EEA Agreement, but also under that of Article 28 thereof to the extent that their connection to the company qualifies as an employment relationship.
69. In that regard, it may be pointed out that Article 1(1) of Regulation No 492/2011 provides that “[a]ny 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.”³⁰
70. Depending on the actual circumstances³¹, persons in the above-mentioned positions might also be under the direction of other persons (for instance, the owners of the company) and, thus, in a relationship of subordination, which is an essential characteristic of an employment relationship according to the settled case-law of the Court of Justice³², unless the manager or the member of the board of directors is at the same time the owner or the sole shareholder of the respective company³³. This interpretation is further reinforced by the judgment *Clean Car Autoservice*³⁴, where a residency requirement for managers of undertakings was examined by the Court of Justice under Article 39 EC (now Article 45 TFEU) and found to be incompatible with the freedom of movement of workers.
71. The Authority therefore concludes that the residency requirements such as set out in the above-mentioned provision also amount to a restriction of Article 28

²⁹ Judgment of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraphs 34, 35 and 38.

³⁰ Our emphasis.

³¹ See e.g. judgment of 14 December 1989, *Agegate Ltd.*, C-3/87, EU:C:1989:650, paragraph 36.

³² Judgment of 3 July 1986 *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 17; judgment of 20 November 2001, *Jany and Others*, C-268/99, EU:C:2001:616, paragraph 34; judgment of 15 December 2005 *Nadin*, C-151/04 and C-152/04, EU:C:2005:775, paragraph 31.

³³ Judgment of 27 June 1996, *Asscher*, C-107/94, EU:C:1996:251, paragraphs 25 and 26.

³⁴ Judgment of 7 May 1998, *Clean Car Autoservice GesmbH*, C-350/96, EU:C:1998:205.

of the EEA Agreement. Iceland has not provided, nor does the Authority see, any arguments for its justification.

The Eleventh Directive 89/666/EEC

72. The Authority also considers that the obligation, which follows from Article 40 paragraph 5 of the new Act on Insurance Activities, to submit evidence of residence for the managing directors and the members of the board of directors is incompatible with Article 2 of the Eleventh Directive 89/666/EEC.
73. Article 2(1) of the Directive lists the documents and particulars that must be disclosed, and Article 2(2) lists the additional information that may be required by the Member State where registration takes place.
74. According to Article 2(1)(e) of the Eleventh Directive 89/666/EEC, information about the appointment, termination of office and particulars of the persons who are authorised to represent the company in dealings with third parties and in legal proceedings must be disclosed. In the latter case, there should be an indication of the extent of their powers. Information about the residence of the persons representing the company is not specified in the exhaustive list in Article 2 of the Directive³⁵. It follows that such a disclosure obligation is contrary to the Eleventh Directive.

5.3. The residency requirements for third country nationals

75. As was indicated in Section 5.1, the amendments introduced by the Act of 9 May 2017 to Article 3 paragraphs 2 and 3 and Article 66 paragraph 2 of the Act on Public Limited Companies, Article 3 paragraphs 2 and 3 and Article 42 paragraph 2 of the Act on Private Limited Companies and Article 15 paragraph 2 of the Act on Foundations Engaging in Business Operation, as well as the amendments introduced by the Act of 4 December 2019 to Article 10 of the Act on Investment by Non-Residents in Business Enterprises to a large extent addressed the concerns raised by the Authority in its letter of formal notice of 4 November 2015. The residency requirement was removed with respect to founders of the companies, regardless their nationality. Moreover, whereas previously an exception to the general residency requirement laid down in these provisions applied to citizens of the EEA States, *provided* that the citizens concerned were resident in an EEA State, this exception now applies to citizens of the EEA States *and those that reside* in the EEA.
76. As a result, the restriction of a company's freedom of establishment flowing from the previously existing nationality and/or residency requirements for persons having certain powers in a company has now been removed for EEA citizens in general and for third country nationals who reside in an EEA State. The restriction remains, however, in so far as third country nationals residing outside the territory of an EEA State are concerned.

³⁵ The Eleventh Directive 89/666/EEC exhaustively regulates the company law disclosure requirements which EEA States can impose on branches covered by the Directive, as confirmed by the Court of Justice in judgment of 30 September 2003, *Inspire Art*, C-167/01, EU:C:2003:512, paragraphs 69 and 70.

77. In that regard, the arguments set out in Section 5.2 of this reasoned opinion apply equally to the residency requirements to the extent that they are imposed on third country nationals residing outside an EEA State.
78. It has to be noted that the Authority's assessment in the letter of formal notice of 4 November 2015 with regard to the freedom of establishment and the Eleventh Directive 89/666/EC concerned the applicability in general of residency requirements to persons having certain powers in a company, regardless of whether they are EEA nationals or third country nationals.
79. In line with the Court of Justice's judgment of 14 October 2004, *Commission v Netherlands*³⁶, the letter stressed moreover that it does not follow from any provision of EEA law that the origin or the residence of the persons who are in charge of companies which have their seat in the EEA affects the right of those companies to rely on the freedom of establishment.
80. The Icelandic Government has not provided any justification for the residency requirements for third country nationals. Nor could the Authority find such a justification in the explanatory notes to the Act of 9 May 2017 or the Act of 4 December 2019.
81. Accordingly, the residency requirements for third country nationals breach Article 31 of the EEA Agreement and Article 2 of the Eleventh Directive 89/666/EEC.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Iceland the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by

maintaining in force residency requirements, such as the requirements laid down in Article 40 paragraph 5 of Act No 100/2016 on Insurance Activities, Iceland has failed to fulfil its obligations arising from Article 31 and 28 of the EEA Agreement, Article 2 of the Eleventh Directive 89/666/EEC and 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*;

maintaining in force residency requirements for third country nationals, such as the requirements laid down in Article 66 paragraph 2 and Article 140 paragraph 1 of Act No 2/1995 on Public Limited Companies; Article 42 paragraph 2 and Article 114 paragraph 1 of Act No 138/1994 on Private Limited Companies, Article 15 paragraph 2 of Act No 33/1999 on Foundations Engaging in Business Operations

³⁶ Judgment of 14 October 2004, *Commission v Netherlands*, cited above.

and Article 10 of Act No 34/1991 on Investment by Non-Residents in Business Enterprises, Iceland has failed to fulfil its obligations arising from Article 31 of the EEA Agreement and Article 2 of the Eleventh Directive 89/666/EEC.

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, the EFTA Surveillance Authority requires Iceland to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

Done at Brussels, 11 December 2019

For the EFTA Surveillance Authority

Bente Angell-Hansen
President

Frank J. Büchel
Responsible College Member

Högni Kristjánsson
College Member

Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.