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Icelandic Ministry of Finance and Economic Affairs
Arnarhvoli við Lindargötu
101 Reykjavík
Iceland

Dear Sir or Madam,

Subject: Letter of formal notice to Iceland concerning residency requirements for members of the board of directors and managing directors of financial undertakings

1 Introduction

1. By a letter dated 8 July 2019 (Doc No 1079578), the EFTA Surveillance Authority (“the Authority”) informed the Icelandic Government that it had opened an own initiative case in order to examine residency requirements in the Icelandic Act on Financial Undertakings No 161/2002¹.
2. In particular, the legislative Act requires that the members of the board of directors of Icelandic financial undertakings reside in an EEA State or a State, which is a member of the Organisation for Economic Co-operation and Development (OECD), whilst the managing directors shall be residents of an EEA State.
3. The Authority is of the view that the above-mentioned residency requirements are unjustified restrictions of the freedom of establishment and the free movement of workers. They are, moreover, in breach of Article 30 of Directive (EU) 2017/1132².

2 Correspondence

4. By the above-mentioned letter of 8 July 2019, the Authority invited Iceland to provide a justification of the residency requirements in the Act on Financial Undertakings.
5. 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

¹ *Lög um fjármálafyrirtæki nr. 161/2002.*

² Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L 169, 30.6.2017, p. 46), incorporated at point 1 of Annex XXII of the EEA Agreement by Decision of the EEA Joint Committee No 200/2019 of 10 July 2019.

Insurance Activities³ 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. In view of this undertaking, the Icelandic Government did not consider it necessary to provide any justification for the existing requirements.

6. 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. According to the draft amendments, the residency requirements would not apply to citizens of EEA States. However, they will continue to apply to managing directors and members of the board of directors who are third country nationals.

3 Relevant national law

7. Article 52 paragraph 1 of the Act on Financial Undertakings⁴ states:

"Members of the board of directors shall be resident in a Member State or a state party to the Organisation for Economic Co-operation and Development (OECD). The managing director shall be resident in a Member State. The Financial Supervisory Authority may grant exemptions from the residence requirements."

8. Article 1a point 7 of the Act on Financial Undertakings defines the term "Member State" as "a state which is a member of the European Economic Area (EEA), a party to the Convention establishing the European Free Trade Association, or the Faeroe Islands."

4 Relevant EEA law

9. 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.[...]"

³ The Act on Insurance Activities is subject of the Authority's Case 74942, in which a reasoned opinion was issued on 11 December 2019 (Doc No 1076545).

⁴ The translation of the Act used here found at https://www.government.is/media/fjarmalaraduneyti-media/media/skjal/Act_No_161_2002_en.pdf.

10. 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. [...]”

11. Article 29 of Directive (EU) 2017/1132 relates to compulsory disclosure of documents and particulars relating to branches of companies of a type listed in Annex II to that Directive.

12. Under Article 30(1) of Directive (EU) 2017/1132, the compulsory disclosure shall cover only the documents and particulars listed therein. 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. There is no mention in this provision of the disclosure of the place of residence of the person concerned.

13. Article 30(2) of Directive (EU) 2017/1132 lists the additional information that may be required by the Member State where registration takes place.

14. 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.

15. 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 Union⁵. 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

16. Article 52 paragraph 1 of the Act on Financial Undertakings imposes a residency requirement for the members of the board of directors and the managing directors of a financial 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.

⁵ 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).

17. It is the Authority's view that these residency requirements are contrary to the provisions in the EEA Agreement on the freedom of establishment and the free movement of workers, as well as Article 30 of Directive (EU) 2017/1132.
18. In its letter of 10 July 2019, Iceland undertook to amend the new Act on Financial Undertakings and to remove the residency requirements for managing directors and members of the board of directors of financial 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 States. However, this legislation has not yet been adopted. Moreover, even in the case of its adoption, the residency requirements will continue to apply to managing directors and members of the board of directors who are third country nationals.

5.1 The freedom of establishment

19. The Authority is of the view that the imposition, by Article 52 of the Act on Financial Undertakings, of residency requirements on managing directors and members of the board of directors of financial undertakings restricts the freedom of establishment for EEA companies where those companies are managed by persons who do not fulfil the requirements at issue. This also restricts the freedom of establishment of EEA nationals who fulfil one of the indicated positions in a company and who 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 making it more onerous to a company or firm of an EEA State to establish a connection with the legal system of Iceland, in particular, to transfer its central administration or to participate 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 financial undertakings 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).
20. 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 residence of the persons having certain powers in such companies. 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 managers⁶. The same consideration applies in respect of the freedom to establish a principal place of business.
21. 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

⁶ 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.

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 of the European Union (“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*”⁷. 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.

22. 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 financial undertakings in Iceland and from acting as members of the board of directors or as managing directors of such financial undertakings.
23. Therefore, the residency requirements set out in Article 52 paragraph 1 of the Act on Financial Undertakings amount to a restriction to the freedom of establishment as guaranteed by Article 31 of the EEA Agreement.
24. 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 provisions⁸. However, it does not follow from any provision of EEA law that 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.
25. As regards the provision in Article 52 paragraph 1 of the Act on Financial Undertakings according to which 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 business⁹. Such authorization requirements are thus, by their very nature, restrictive.
26. The Icelandic Government has not provided any arguments to justify the residency requirements in Article 52 paragraph 1 of the Act on Financial Undertakings.

5.2 The free movement of workers

⁷ Judgment of 14 October 2004, *Commission v Netherlands*, EU:C:2004:620, paragraph 19.

⁸ 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.

⁹ Judgment of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraphs 34, 35 and 38.

27. 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.
28. 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.”¹⁰
29. Depending on the actual circumstances¹¹, 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 Justice¹², 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 company¹³. This interpretation is further reinforced by the judgment *Clean Car Autoservice*¹⁴, 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.
30. 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 of the EEA Agreement. Iceland has not provided, nor does the Authority see, any arguments for its justification.

5.3 Directive (EU) 2017/1132

31. The Authority also considers that the obligation, which follows from Article 52 paragraph 1 of the Act on Financial Undertakings, to submit evidence of residence for the managing directors and the members of the board of directors is incompatible with Article 30 of Directive (EU) 2017/1132.
32. Article 30(1) of the Directive exhaustively lists the documents and particulars that must be disclosed, and Article 30(2) lists the additional information that may be required by the Member State where registration takes place.
33. According to Article 30(1)(e) of Directive (EU) 2017/1132, 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

¹⁰ Our emphasis.

¹¹ See e.g. judgment of 14 December 1989, *Agegate Ltd.*, C-3/87, EU:C:1989:650, paragraph 36.

¹² 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.

¹³ Judgment of 27 June 1996, *Asscher*, C-107/94, EU:C:1996:251, paragraphs 25 and 26.

¹⁴ Judgment of 7 May 1998, *Clean Car Autoservice GesmbH*, C-350/96, EU:C:1998:205.

Article 2 of the Directive¹⁵. It follows that such a disclosure obligation is contrary to Directive (EU) 2017/1132.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force the residency requirements laid down in Article 52 paragraph 1 of the Act on Financial Undertakings, Iceland has failed to fulfil its obligations arising from Article 31 and 28 of the EEA Agreement, 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* and Article 30 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 *relating to certain aspects of company law*.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Icelandic Government submit its observations on the content of this letter *within two months* of its receipt.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Icelandic Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

Bente Angell-Hansen
President

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

¹⁵ See also, in this respect, the judgment of the Court of Justice of 30 September 2003, *Inspire Art*, C-167/01, EU:C:2003:512, paragraphs 69 and 70, where it was confirmed that the predecessor of Directive (EU) 2017/1132, the Eleventh Council Directive 89/666/EEC, exhaustively regulated the company law disclosure requirements which EEA States could impose on branches covered by the latter Directive.