



JUDGMENT OF THE COURT

14 June 2018

*(Failure by an EFTA State to fulfil its obligations – Failure to implement –
Directive 2011/61/EU)*

In Case E-11/17,

EFTA Surveillance Authority, represented by Carsten Zatschler, Catherine Howdle and Ingibjörg-Ólög Vilhjálmsdóttir, members of its Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Veturliði Þór Stefánsson, Counsellor, Ministry for Foreign Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that Iceland has failed to fulfil its obligations under the Act referred to at points 30, 31bb, 31eb, 31i and 31d of Annex IX to the Agreement on the European Economic Area (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010), as adapted by Protocol 1 to the Agreement, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement that Act within the time prescribed, and/or by failing to notify the EFTA Surveillance Authority of the measures it has adopted to implement that Act,

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

Judgment

I Introduction

- 1 By an application lodged at the Court Registry on 20 December 2017, the EFTA Surveillance Authority (“ESA”) brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”) seeking a declaration from the Court that Iceland has failed to fulfil its obligations under the Act referred to at points 30, 31bb, 31d, 31eb, and 31i of Annex IX to the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”), that is Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ 2011 L 174, p. 1, and Icelandic EEA Supplement 2016 No 57, p. 364) (“the Act” or “the Directive”), as adapted to the Agreement under its Protocol 1, and under Article 7 of the Agreement, by failing to adopt measures necessary to implement the Act within the time prescribed, and/or by failing to notify ESA of the measures it has adopted to implement the Act.

II Law

- 2 Article 3 EEA reads:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

...

3 Article 7 EEA reads:

Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

...

(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.

4 Article 31 SCA reads:

If the EFTA Surveillance Authority considers that an EFTA State has failed to fulfil an obligation under the EEA Agreement or of this Agreement, it shall, unless otherwise provided for in this Agreement, deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the EFTA Surveillance Authority, the latter may bring the matter before the EFTA Court.

- 5 Decision No 202/2016 of the EEA Joint Committee of 30 September 2016 (OJ 2017 L 46, p. 30, and Icelandic EEA Supplement 2017 No 13, p. 36) (“Decision No 202/2016”) amended Annex IX (Financial Services) to the EEA Agreement, inter alia by adding the Directive to points 30, 31bb, 31d, 31eb and 31i of the Annex. No constitutional requirements were indicated. Decision No 202/2016 entered into force on 1 October 2016. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

III Facts and pre-litigation procedure

- 6 On 11 January 2017, after certain correspondence, ESA issued a letter of formal notice in which it concluded that Iceland had failed to fulfil its obligations under the Act and Article 7 EEA, by failing to adopt the measures necessary to implement the Act, and/or by failing to notify ESA of measures taken to ensure the implementation of the Act.
- 7 On 9 March 2017, Iceland responded to the letter of formal notice by informing ESA that the Act had still not been implemented. Iceland further stated that it planned to present a legislative proposal to Parliament in order to implement the Act during spring 2017. However, by informal correspondence received by email on 1 June 2017, Iceland informed ESA that the proposal of the relevant legislation to Parliament had been postponed to autumn 2017.
- 8 On 12 July 2017, ESA delivered a reasoned opinion, maintaining the conclusion set out in its letter of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA required Iceland to take the measures necessary to comply with the

reasoned opinion within two months following its delivery, that is, no later than 12 September 2017. Iceland did not reply to the reasoned opinion.

- 9 Since Iceland did not comply by the deadline set out in the reasoned opinion, ESA decided, on 13 December 2017, to bring the matter before the Court pursuant to the second paragraph of Article 31 SCA.

IV Procedure and forms of order sought

- 10 ESA lodged the present application at the Court Registry on 20 December 2017. ESA requests the Court to:

1. *Declare that Iceland has failed to fulfil its obligations under the Act referred to at points 30, 31bb, 31eb, 31i and 31d of Annex IX to the EEA Agreement (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010), as adapted by Protocol 1 to the EEA Agreement, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement that act within the time prescribed, and/or by failing to notify the EFTA Surveillance Authority of the measures it has adopted to implement that act.*

2. *Order Iceland to bear the costs of these proceedings.*

- 11 Iceland's statement of defence was registered at the Court on 21 February 2018. Iceland submits that it does not dispute the facts of the case as set out in ESA's application. Furthermore, it does not contest the declaration sought by ESA. Nevertheless, in its defence, Iceland states that it plans to present a legislative proposal to Parliament in order to implement the Act during spring 2018.

- 12 By letter of 27 February 2018, ESA waived its right to submit a reply and consented to dispense with the oral procedure should the Court wish to do so. By letter of 10 April 2018, Iceland also consented to dispense with the oral procedure.

- 13 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided, pursuant to Article 41(2) of the Rules of Procedure ("RoP"), to dispense with the oral procedure.

V Findings of the Court

- 14 Article 3 EEA imposes upon the EFTA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement (see, inter alia, Case E-7/17 *ESA v*

Iceland, judgment of 24 April 2018, not yet reported, paragraph 15 and case law cited).

- 15 Under Article 7 EEA, the EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. An obligation to implement the Directive also follows from its Article 66. The Court notes that the lack of direct legal effect of acts referred to in decisions by the EEA Joint Committee makes timely implementation crucial for the proper functioning of the EEA Agreement in Iceland also. The EFTA States find themselves under an obligation of result in that regard (see, inter alia, *ESA v Iceland*, cited above, paragraph 16 and case law cited).
- 16 Decision No 202/2016 entered into force on 1 October 2016. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.
- 17 The question whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation as it stood at the end of the period laid down in the reasoned opinion (see, inter alia, *ESA v Iceland*, cited above, paragraph 18 and case law cited). It is undisputed that Iceland had not adopted the measures necessary to implement the Directive by the expiry of the time limit set in the reasoned opinion.
- 18 Since Iceland did not implement the Directive within the time prescribed, there is no need to examine the alternative form of order sought against Iceland for failing to inform ESA of the measures implementing the Directive.
- 19 It must therefore be held that Iceland has failed to fulfil its obligations under the Act referred to at points 30, 31bb, 31d, 31eb and 31i of Annex IX to the EEA Agreement (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010), as adapted to the Agreement under its Protocol 1, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed.

VI Costs

- 20 Under Article 66(2) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has requested that Iceland be ordered to pay the costs, the latter has been unsuccessful, and none of the exceptions in Article 66(3) RoP apply, Iceland must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that Iceland has failed to fulfil its obligations under the Act referred to at points 30, 31bb, 31d, 31eb and 31i of Annex IX to the Agreement on the European Economic Area (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010), as adapted to the Agreement under its Protocol 1, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed.**
2. **Orders Iceland to bear the costs of the proceedings.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 14 June 2018.

Gunnar Selvik
Registrar

Páll Hreinsson
President