



## JUDGMENT OF THE COURT

6 December 2013

*(Failure by a Contracting Party to fulfil its obligations – Directive 2009/44/EC – Failure to implement)*

In Case E-17/13,

**EFTA Surveillance Authority**, represented by Xavier Lewis, Director, and Clémence Perrin, Officer, Department of Legal & Executive Affairs, acting as Agents,

*applicant,*

v

**Iceland**, represented by Anna Katrín Vilhjálmsdóttir, First Secretary, Ministry for Foreign Affairs, acting as Agent,

*defendant,*

APPLICATION for a declaration that by failing, within the time prescribed, to adopt or to notify the EFTA Surveillance Authority forthwith of all measures necessary to implement Article 2 of the Act referred to at point 16b, first indent, of Annex IX and point 4, first indent, of Annex XII to the Agreement on the European Economic Area, that is Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims, as adapted to the Agreement by way of Protocol 1 thereto, Iceland has failed to fulfil its obligations under the Act and under Article 7 EEA.

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-  
Rapporteur) and Páll Hreinsson, 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 application lodged at the Court Registry on 10 July 2013, 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”), for a declaration that, by failing, within the time limit prescribed, to adopt, or to notify ESA forthwith of all the measures necessary to implement Article 2 of the Act referred to at point 16b, first indent, of Annex IX and point 4, first indent, of Annex XII to the Agreement on the European Economic Area, that is Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims (OJ 2009 L 146, p. 37) (“the Directive”), as adapted to the Agreement by way of Protocol 1 thereto, Iceland has failed to fulfil its obligations under the Act and under Article 7 EEA.

**II Facts and pre-litigation procedure**

- 2 Decision No 50/2010 of 30 April 2010 of the EEA Joint Committee (“Decision 50/2010”) amended Annexes IX and XII to the EEA Agreement by adding the Directive to points 16b and 4 of those Annexes respectively. Iceland, Liechtenstein and Norway all indicated constitutional requirements for the purposes of Article 103 EEA.
- 3 As Norway notified on 7 December 2011 that the constitutional requirements had been fulfilled, the last such notification to be received, Decision 50/2010 entered into force on 1 February 2012. The time limit for EFTA States to adopt the measures necessary to implement the Directive expired on the same date.
- 4 By letter of 15 December 2011, ESA reminded the Icelandic Government of its obligations to implement the Directive into its legal order by 1 February 2012. Having received no further information from Iceland, ESA issued a letter of

formal notice on 16 May 2012. ESA concluded that, by failing to adopt or, in any event, to inform ESA of the national measures it had adopted to implement the Directive, Iceland had failed to fulfil its obligations under the Act and under Article 7 EEA.

- 5 In its observations on the letter of formal notice, Iceland indicated that it was preparing a bill. The bill was to be submitted to the Parliament in the autumn of 2012. However, Iceland did not provide a detailed time frame.
- 6 Not having received any further information, ESA delivered a reasoned opinion to Iceland on 12 September 2012 wherein ESA maintained the conclusion set out in its letter of formal notice. Pursuant to Article 31(2) SCA, ESA required Iceland to take the measures necessary to comply with the reasoned opinion within two months following the notification thereof, that is no later than 12 November 2012.
- 7 By its observations on the reasoned opinion of 25 October 2012, Iceland provided information concerning the implementation of Article 1 of the Directive. However, no information was provided regarding Article 2 of the Directive. As a result, the time limit prescribed in the reasoned opinion expired without any measure having been adopted to implement Article 2 of the Directive.
- 8 On 8 January 2013, Iceland provided ESA with a list notifying partial implementation of the Directive through the adoption of Act No 159/2012 on Security of Transfer Orders in Payment Systems. The Act fully implemented Article 1 of the Directive. By email of 26 February 2013, Iceland informed ESA that the Ministry of the Interior, which has the competence to fully implement Article 2 of the Directive, would not be in a position to present its draft legislation to Parliament until the autumn session of 2013.
- 9 On 12 June 2013, neither having received information on any measures adopted to implement Article 2 of the Act, nor being in possession of any information which could indicate that Article 2 had nevertheless been implemented, ESA decided to bring the matter before the Court pursuant to Article 31(2) SCA.

### **III Procedure and forms of order sought**

- 10 On 10 July 2013, ESA lodged the present application at the Court Registry. Iceland submitted a statement of defence which was registered at the Court on 26 September 2013. The reply from ESA was registered at the Court on 2 October 2013. By email of 8 October 2013, Iceland waived its right to submit a rejoinder.
- 11 The applicant, ESA, requests the Court to:
  1. *Declare that by failing (i) to adopt, or (ii) to notify the EFTA Surveillance Authority forthwith, of all the measures necessary to implement Article 2 of the Act referred to at point 16b, first indent,*

*of Annex IX and point 4, first indent, of Annex XII to the Agreement on the European Economic Area (Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims), as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under the Act and under Article 7 of the Agreement.*

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

- 12 Iceland does not dispute the declaration sought by the applicant. However, in the defendant's view, the delay in implementation results from legislative procedure. The Icelandic Government intends to introduce a draft bill to fully implement Article 2 of the Directive to the Parliament during the legislative session which was scheduled to start on 1 October 2013. Iceland, requests the Court to order each party to bear its own costs of the proceedings, due to the circumstances of the case.
- 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.

#### **IV Findings of the Court**

- 14 Article 3 EEA imposes upon the Contracting Parties 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-11/13 *ESA v Iceland*, judgment of 15 November 2013, not yet reported, paragraph 19, and the case law cited). Under Article 7 EEA, the Contracting Parties 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, and to notify ESA thereof, also follows from Article 3 of the Directive.
- 15 Decision No 50/2010 of the EEA Joint Committee of 30 April 2010 entered into force on 1 February 2012. The time limit for EFTA States to adopt the measures necessary to implement the Directive expired on the same date. Decision No 50/2010 did not set a separate EEA time limit for the implementation of the Directive into national law.
- 16 The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see, *inter alia*, *ESA v Iceland*, cited above, paragraph 21, and the case law cited). It is undisputed that Iceland did not adopt measures necessary to implement correctly Article 2 of the Directive before the expiry of the time limit given in the reasoned opinion.

- 17 Since Iceland did not implement Article 2 of the Directive within the time limit prescribed, there is no need to examine the alternative form of order sought against Iceland for failing to notify ESA of the measures implementing Article 2 of the Directive.
- 18 It must therefore be held that Iceland has failed to fulfil its obligations under the Directive, and under Article 7 EEA, by failing, within the time limit prescribed, to adopt the measures necessary to implement into its national legislation the provisions of Article 2 of the Directive.

## **V Costs**

- 19 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 the EFTA Surveillance Authority has requested that Iceland be ordered to pay the costs, and the latter has been unsuccessful, and none of the exceptions in Article 66(3) apply, Iceland must therefore 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 point 16b, first indent, of Annex IX and point 4, first indent, of Annex XII to the Agreement on the European Economic Area (Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims), as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt all the measures necessary to implement Article 2 of the Act within the time prescribed.**
2. **Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 6 December 2013.

Gunnar Selvik  
Registrar

Carl Baudenbacher  
President