



JUDGMENT OF THE COURT

15 July 2015

(Failure by an EEA/EFTA State to fulfil its obligations – Failure to implement – Regulation (EU) No 185/2010 on screening of passengers by ETD and HHMD equipment)

In Case E-2/15,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Janne Tysnes Kaasin, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, Ministry for Foreign Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that Iceland has failed to fulfil its obligations under Article 7 of the Agreement on the European Economic Area by failing, within the time prescribed, to adopt the measures necessary to make as such part of its internal legal order the Act referred to at point 66he, twelfth indent, of Annex XIII to the Agreement (Commission Implementing Regulation (EU) No 104/2013 of 4 February 2013 amending Regulation (EU) No 185/2010 as regards the screening of passengers and persons other than passengers by Explosive Trace Detection (“ETD”) equipment in combination with Hand Held Metal Detection (“HHMD”) equipment), as adapted to the Agreement by way of Protocol 1 thereto and the sectoral adaptations in Annex XIII.

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 an application lodged at the Court Registry on 21 January 2015, 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 Article 7 of the Agreement on the European Economic Area (“EEA”) by failing, within the time prescribed, to adopt the measures necessary to make as such part of its internal legal order the Act referred to at point 66he, twelfth indent, of Annex XIII to the Agreement, that is Commission Implementing Regulation (EU) No 104/2013 of 4 February 2013 amending Regulation (EU) No 185/2010 as regards the screening of passengers and persons other than passengers by Explosive Trace Detection (ETD) equipment in combination with Hand Held Metal Detection (HHMD) equipment (OJ 2013 L 34, p. 13, and EEA Supplement 2013 No 64, p. 336) (“the Regulation”), as adapted to the Agreement by way of Protocol 1 thereto and the sectoral adaptations in Annex XIII.

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:

(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;

...

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 203/2013 of 8 November 2013 of the EEA Joint Committee (OJ 2014 L 92, p. 29, and EEA Supplement 2014 No 19, p. 32) (“Decision No 203/2013”) added the Regulation to point 66he of Annex XIII to the EEA Agreement. Decision No 203/2013 entered into force on 9 November 2013. The time limit for the EEA/EFTA States to adopt the measures necessary to make the Regulation as such part of their national legal order expired on the same date.

6 The Regulation allows for use of ETD equipment in combination with HHMD equipment for screening those parts of passengers and other persons where a hand search is considered inefficient and/or undesirable such as certain headgear, plaster casts or prosthesis, as the use of ETD and HHMD may facilitate the screening process and be experienced as a less intrusive means of screening than a hand search, thus constituting an improvement in the experience of persons screened and giving due respect to fundamental rights and freedoms.

III Facts and pre-litigation procedure

7 By letter of 26 November 2013, ESA reminded Iceland of its obligation to implement the Regulation. On 2 December 2013, Iceland replied that the implementation was expected to be completed by 31 December 2013.

8 On 26 February 2014, having received no further information from Iceland, ESA issued a letter of formal notice, concluding that Iceland had failed to fulfil its obligations under Article 7 EEA by failing to adopt the necessary measures to make the Regulation part of its national legal order.

9 On 4 March 2014, Iceland informed ESA that the implementation of the Regulation was expected to be completed by the end of April 2014.

- 10 On 11 June 2014, upon an informal inquiry from ESA submitted earlier that day, Iceland notified ESA that the Regulation had not yet been implemented but that implementation might be completed in August 2014.
- 11 On 9 July 2014, 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 the notification, that is 9 September 2014.
- 12 On 11 July 2014, Iceland informed ESA that the implementation was expected to be completed by 1 October 2014.
- 13 On 18 December 2014, having received no further information, ESA decided to bring the matter before the Court pursuant to the second paragraph of Article 31 SCA.

IV Procedure and forms of order sought

- 14 ESA lodged the present application at the Court Registry on 21 January 2015. Iceland's statement of defence was registered at the Court on 30 March 2015. By a letter registered on 27 April 2015, ESA waived its right to submit a reply and consented to dispense with the oral procedure should the Court wish to do so. By an email of 3 June 2015, Iceland also consented to dispense with the oral procedure.
- 15 The applicant, ESA, requests the Court to:
 1. *Declare that by failing to adopt the measures necessary to make as such part of its internal legal order the Act referred to at point 66he of Annex XIII to the Agreement on the European Economic Area (Commission Implementing Regulation (EU) No 104/2013 of 4 February 2013 amending Regulation (EU) No 185/2010 as regards the screening of passengers and persons other than passengers by Explosive Trace Detection (ETD) equipment in combination with Hand Held Metal Detection (HHMD) equipment) as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under Article 7 of the Agreement.*
 2. *Order Iceland to bear the costs of these proceedings.*
- 16 The defendant, Iceland, submits that the facts of the case as set out in the application are correct and undisputed. Iceland does not contest the declaration sought by ESA. In its defence, Iceland nevertheless informs that the Regulation was implemented with effect from 29 January 2015.

- 17 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

- 18 Article 3 EEA imposes upon the EEA/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-20/14 *ESA v Iceland*, judgment of 31 March 2015, not yet reported, paragraph 20 and case law cited).
- 19 Under Article 7 EEA, the EEA/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. The Court observes 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 also in Iceland. The EEA/EFTA States find themselves under an obligation to implement regulations as such (see, *inter alia*, *ESA v Iceland*, cited above, paragraph 21 and case law cited).
- 20 Decision No 203/2013 entered into force on 9 November 2013. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Regulation expired on the same date.
- 21 The question whether an EEA/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 23 and case law cited). It is undisputed that Iceland had not adopted the measures necessary to implement the Regulation by the expiry of the time limit set in the reasoned opinion.
- 22 It must therefore be held that Iceland has failed to fulfil its obligations under Article 7 EEA by failing, within the time prescribed, to adopt the measures necessary to make part of its internal legal order the Act referred to at point 66he, twelfth indent, of Annex XIII to the Agreement (Commission Implementing Regulation (EU) No 104/2013 of 4 February 2013 amending Regulation (EU) No 185/2010 as regards the screening of passengers and persons other than passengers by Explosive Trace Detection (ETD) equipment in combination with Hand Held Metal Detection (HHMD) equipment), as adapted to the Agreement by way of Protocol 1 thereto and the sectoral adaptations in Annex XIII.

VI Costs

- 23 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, and the latter has been

unsuccessful, and none of the exceptions in Article 66(3) RoP 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 Article 7 of the Agreement on the European Economic Area by failing, within the time prescribed, to adopt the measures necessary to make part of its internal legal order the Act referred to at point 66he, twelfth indent, of Annex XIII to the Agreement (Commission Implementing Regulation (EU) No 104/2013 of 4 February 2013 amending Regulation (EU) No 185/2010 as regards the screening of passengers and persons other than passengers by Explosive Trace Detection (ETD) equipment in combination with Hand Held Metal Detection (HHMD) equipment), as adapted to the Agreement by way of Protocol 1 thereto and the sectoral adaptations in Annex XIII.**
- 2. Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 15 July 2015.

Gunnar Selvik
Registrar

Carl Baudenbacher
President