REPORT FOR THE HEARING

in Joined Cases E-2/17 and E-3/17

APPLICATIONS to the Court 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 in the cases between

EFTA Surveillance Authority

and

Iceland

seeking a declaration that Iceland has failed to fulfil its obligations arising from the Act referred to at point 1 in Part 1.1 of Chapter I of Annex I to the Agreement on the European Economic Area, that is Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market, and in particular its Article 5, by maintaining in force:

(i) an authorisation system for the import of fresh meat and meat products;
(ii) an authorisation system for the import of raw eggs and raw egg products;
(iii) an authorisation system for the import of unpasteurised milk and dairy products processed from unpasteurised milk, and additional requirements, and a prohibition of the marketing of imported dairy products from unpasteurised milk; and
(iv) an administrative practice of requiring importers to make a declaration and obtain an approval for the import of treated egg and dairy products.

I Legal background

EEA law

1. Part II of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") is headed "Free movement of goods". Chapter 1 of Part II is headed "Basic principles" and comprises Articles 8 to 16. Article 8 EEA reads:

> *1. Free movement of goods between the Contracting Parties shall be established in conformity with the provisions of this Agreement.*
>
> *2. ...*
>
> *3. Unless otherwise specified, the provisions of this Agreement shall apply only to:*
>
> *(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*
>
> *(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.*

2. Chapter 2 of Part II of the EEA Agreement is headed "Agricultural and fishery products", and comprises Articles 17 to 20. Article 17 EEA reads:

> *Annex I contains specific provisions and arrangements concerning veterinary and phytosanitary matters.*

3. Article 18 EEA reads:

> *Without prejudice to the specific arrangements governing trade in agricultural products, the Contracting Parties shall ensure that the arrangements provided for in Articles 17 and 23(a) and (b), as they apply to products other than those covered by Article 8(3), are not compromised by other technical barriers to trade. Article 13 shall apply.*

4. Article 13 EEA, which is referred to in Article 18 EEA, reads:

> *The provisions of Articles 11 and 12 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties.*

5. Chapter I of Annex I to the EEA Agreement contains provisions on veterinary issues. Paragraphs 2 and 3 of the introductory part read:

> *2. The provisions contained in this Chapter shall apply to Iceland, except for the provisions concerning live animals, other than fish and aquaculture animals, and animal products such as ova, embryo and semen. When an act is not to apply or is to apply partly to Iceland, it shall be stated in relation to the specific act.*
>
> *...*
>
> *3. Safeguard and protective measures*
>
> *(a) If the Community or an EFTA State intends to adopt safeguard measures against the other Contracting Parties, it shall inform the other Parties without delay.*
>
> *The proposed measures shall be notified without delay to each Contracting Party and to both the EC Commission and the EFTA Surveillance Authority.*
>
> *Without prejudice to the possibility of putting the measures into force immediately, consultations among the EC Commission and the Parties concerned, at the request of any of them, shall take place as soon as possible in order to find appropriate solutions.*
>
> *In case of disagreement, any of the Parties concerned may refer the matter to the EEA Joint Committee. If an agreement cannot be reached in this Committee, a Contracting Party may adopt appropriate measures. Such measures shall be restricted to what is strictly necessary to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of the Agreement.*
>
> *(b) ...*
>
> *(c) This paragraph applies also to Iceland for the areas referred to in paragraph 2.*

6. In Chapter I of Annex I to the EEA Agreement, Part 1.1 sets out the basic texts concerning control matters. Point 1 in Part 1.1 refers to Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13) ("the Directive"), and to subsequent amendments to that directive. For the purposes of the EEA Agreement, the Directive must be read with the following adaptation:

Article 9 shall not apply. Any reference to that Article shall constitute a reference to paragraph 3 of the introductory Part.

7. The preamble to the Directive includes the following recitals:

[3] Whereas in the veterinary field frontiers are currently being used for carrying out checks aimed at safeguarding public health and animal health;

[4] Whereas the ultimate aim is to ensure that veterinary checks are carried out at the place of dispatch only; whereas the attainment of this objective implies the harmonization of the basic requirements relating to the safeguarding of public health and animal health;

[5] Whereas with a view to the completion of the internal market, pending the attainment of this objective, the emphasis should be placed on the checks to be carried out at the place of dispatch and in organizing those that could be carried out at the place of destination; whereas such a solution would entail the suspension of veterinary checks at the Community's internal frontiers;

…

[7] Whereas in the State of destination spot veterinary checks could be carried out at the place of destination; whereas, however, in the event of a serious presumption of irregularity, the veterinary check could be carried out while the goods are in transit;

...

8. Article 1 of the Directive reads:

Member States shall ensure that the veterinary checks to be carried out on products of animal origin covered by the acts referred to in Annex A or by Article 14 and which are intended for trade are no longer carried out … at frontiers but are carried out in accordance with this Directive.

9. Point (1) of Article 2 of the Directive sets out the following definition:

'Veterinary check' means any physical check and/or administrative formality which applies to the products referred to in Article 1 and which is intended for the protection, direct or otherwise, of public or animal health;

10. Chapter I of the Directive concerns "Checks at origin" and consists of Articles 3 and 4. The first subparagraph of Article 3(1) reads:

Member States shall ensure that the only products intended for trade are those referred to in Article 1 which have been obtained, checked, marked and labelled in

accordance with Community rules for the destination in question and which are accompanied to the final consignee mentioned therein by a health certificate, animal-health certificate or by any other document provided for by Community veterinary rules.

11. The first sentence of Article 4(1) reads:

Member States of dispatch shall take the necessary measures to ensure that operators comply with veterinary requirements at all stages of the production, storage, marketing and transport of the products referred to in Article 1.

12. Chapter II of the Directive concerns "Checks on arrival at the destination", and consists of Articles 5 to 8. Article 5(1)(a) requires EEA States to implement the following measure:

The competent authority may, at the places of destination of goods, check by means of non-discriminatory veterinary spot-checks that the requirements of Article 3 have been complied with; it may take samples at the same time.

Furthermore, where the competent authority of the Member State of transit or of the Member State of destination has information leading it to suspect an infringement, checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport.

13. Articles 7 and 8 of the Directive lay down the measures to be taken if the competent authority of the EEA State of destination establishes the presence of agents responsible for a disease named in Directive 82/894/EEC, a zoonosis or disease, or any cause likely to constitute a serious hazard to animals or humans. In such a case, protective measures provided for in Article 9 may be applied. For the purposes of the EEA Agreement, the reference to Article 9 constitutes a reference to paragraph 3 in the introductory part of Chapter I of Annex I to the EEA Agreement.

14. In Chapter I of Annex I to the EEA Agreement, Part 6.1 sets out the basic texts concerning public health aspects of the exchange and placing on the market of animal products. Following Joint Committee Decision No 137/2007 of 26 October 2007 (OJ 2008 L 100, p. 53), which entered into force on 1 May 2010, point 17 in Part 6.1 refers to Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin (OJ 2004 L 139, p. 55). For the purposes of the EEA Agreement, Regulation (EC) No 853/2004 must be read together with, inter alia, the following adaptation:

In Article 8, the word "Norway" shall be added after the word "Sweden";

15. Article 8 of Regulation (EC) No 853/2004 reads:

> *1. Food business operators intending to place the following food of animal origin on the market in Sweden or Finland shall comply with the rules set out in paragraph 2 in respect of salmonella:*
>
> *(a) meat from bovine and porcine animals …*
>
> *(b) meat from poultry …*
>
> *(c) eggs.*
>
> *2. ...*
>
> *3. In accordance with the procedure referred to in Article 12(2):*
>
> *…*
>
> *(b) the rules laid down in paragraph 2 in respect of any of the foodstuffs referred to in paragraph 1 may be extended, in whole or in part, to any Member State, or any region of a Member State, that has a control programme recognised as equivalent to that approved for Sweden and Finland in respect of the food of animal origin concerned.*

16. Article 10(8) of Regulation (EC) No 853/2004 reads:

> *A Member State may, of its own initiative and subject to the general provisions of the Treaty, maintain or establish national rules:*
>
> *(a) prohibiting or restricting the placing on the market within its territory of raw milk or raw cream intended for direct human consumption; …*

17. In Chapter I of Annex I to the EEA Agreement, Part 7.1 sets out the basic texts concerning measures relating to many sectors. Following Joint Committee Decision No 134/2007 of 26 October 2007 (OJ 2008 L 100, p. 33), which entered into force on 1 May 2010, point 13 in Part 7.1 refers to Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1).

18. Article 14(7) of Regulation (EC) No 178/2002 reads:

> *Food that complies with specific Community provisions governing food safety shall be deemed to be safe insofar as the aspects covered by the specific Community provisions are concerned.*

National law

19. Article 10 of Act No 25/1993 on Animal Diseases and Preventive Measures against them (*Lög nr. 25/1993 um dýrasjúkdóma og varnir gegn þeim*) ("the Icelandic Act") reads:

> *To prevent animal diseases from reaching the country it is prohibited to import the following types of goods:*
>
> *a. Raw and lightly salted slaughter products, both processed and non-processed, raw eggs …*
>
> *Despite the provisions of paragraph 1 the Food and Veterinary Authority is authorised to allow the import of products mentioned in items a to e, if it is considered proven that they will not transmit infectious agents that can cause animal diseases. The Minister [of Fisheries and Agriculture] can decide by regulation that paragraph 1 shall not apply to certain categories of the products listed therein, if the product is disinfected in production or a special disinfection is performed before importation and the product is accompanied with a satisfactory certificate of origin, processing and disinfection. The Minister is authorised to prohibit by regulation the import of products, irrespective of their origin, which carry the risk of transmitting contamination agents that could cause danger to the health of animals.*
>
> *…*

20. Regulation No 448/2012 of 23 May 2012 on Measures to prevent the Introduction of Animal Diseases and Contaminated Products to Iceland (*Reglugerð nr. 448/2012 um varnir gegn því að dýrasjúkdómar og sýktar afurðir berist til landsins*) ("the Icelandic Regulation") sets out detailed provisions on the implementation of Article 10 of the Icelandic Act.

21. Article 3 of the Icelandic Regulation reads:

> *The importation to Iceland of the following animal products and products that may carry infectious agents which cause diseases in animals and humans is not permitted; cf. however, further details in Chapter III:*
>
> *a. Raw meat, processed or unprocessed, chilled or frozen, as well as offal and*

slaughter wastes, which have not been treated by heating, so that the core temperature has reached 72°C for 15 seconds, or other comparable treatment in the assessment of the Food and Veterinary Authority.

…

e. Untreated raw eggs, raw eggshells and raw egg products, which have not been treated by heating so that the product has been heated to 65°C for 5 minutes, or received other comparable treatment in the assessment of the Food and Veterinary Authority.

f. Unpasteurised milk and dairy products processed from unpasteurised milk. However, up to 1 kg of cheese processed from unpasteurised milk from approved establishments in the European Economic Area may be imported for personal use. The Minister may authorise the import of a larger quantity for the same purpose.

22. Article 4 of the Icelandic Regulation reads:

The Minister of Fisheries and Agriculture is authorized to allow the import of products mentioned in Article 3, cf. Article 10 of [the Icelandic Act] and subsequent amendments, having received recommendations from the Food and Veterinary Authority, if it is considered proven that they will not transmit infectious agents that can cause diseases in animals and humans, and the conditions imposed for the import have been fulfilled, see however Article 7.

When an application is submitted for the first time to import a raw or unsterilised product as referred to in the first paragraph, an importer must provide the Ministry of Fisheries and Agriculture with the necessary information on the product for consideration and approval before the product is dispatched from the country of export.

An importer of raw products shall in all cases apply for a permit to the Minister of Fisheries and Agriculture and submit, for the consideration of the Food and Veterinary Authority, an import declaration, information on the country of origin and production, the type of product and producer, and the required certificates, as provided for in Article 5.

…

23. Article 5 of the Icelandic Regulation reads:

> *Imported foods which are listed under [Combined Nomenclature (CN) Codes] 0202, 0203, 0204, 0207, 0208, 0210, 1601 and 1602*[1] *... which the Minister has authorised for import to Iceland as referred to in Article 4 and which have not received satisfactory heat treatment must be accompanied by the following certificates:*
>
> *...*
>
> *c. a certificate confirming that the products have been stored at a temperature of at least -18°C for a month prior to customs clearance;*
>
> *...*
>
> *e. an official certificate confirming that the products are free of salmonella bacteria;*
>
> *f. animal meat products and by-products, dairy products and eggs shall conform to the appropriate provisions of the current regulation on food contaminants;*
>
> *g. the product shall be labelled in conformity with current rules on labelling, advertising and promotion of foodstuffs.*
>
> *...*
>
> *Imported cheese under CN Codes 0406.2000 and 0406.3000 must have received appropriate treatment so that the cheesecurd has been heat treated at least to 48°C, the product must have been stored for at least 6 months at a temperature of not less than 10°C and a humidity of less than 36%. The product must be accompanied by an official certificate of origin and health, in the case of producers outside of the European Economic Area, and confirmation that the product has received appropriate treatment.*

24. Regulation (EC) No 853/2004 was incorporated in Icelandic law by Regulation No 104/2010 of 25 January 2010 ("Icelandic Regulation No 104/2010"). Following an amendment by Regulation No 850/2012 of 18 October 2012, Article 7a of Icelandic Regulation No 104/2010 reads:

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[1] 0202: Meat of bovine animals, frozen; 0203: Meat of swine, fresh, chilled or frozen; 0204: Meat of sheep or goats, fresh, chilled or frozen; 0207: Meat and edible offal, of the poultry of heading 0105, fresh, chilled or frozen; 0208: Other meat and edible meat offal, fresh, chilled or frozen; 0210: Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal; 1601: Sausages and similar products, of meat, meat offal or blood; food preparations based on these products; 1602: Other prepared or preserved meat, meat offal or blood.

In accordance with the provisions of Regulation (EC) No 853/2004, as amended, the following provisions shall apply with regard to the placing on the market of raw milk and raw cream, intended for distribution on the market, for direct human consumption:

Milk that is distributed to consumers shall be pasteurised and packaged in consumer packaging. Dairy products shall be produced from pasteurised milk.

…

II Facts and pre-litigation procedure

25. By letter of 12 December 2011, ESA informed the Icelandic Government that it had received a complaint against Iceland in which it was alleged that, by maintaining a ban on the importation of meat into Iceland without reference to scientific evidence or a relevant risk assessment, Iceland had failed to comply with its obligations under the EEA Agreement. ESA invited Iceland to provide information on the rules governing the importation of meat in Iceland, as well as to provide detailed information in support of the claim that these arrangements are justified under Article 13 EEA.

26. On 12 March 2012, Iceland replied to ESA's request. Iceland considered that the rules governing the importation of meat in Iceland were justified both under Article 13 EEA and the precautionary principle.

27. On 12 June 2012, ESA requested additional clarifications concerning the justifications presented by Iceland. The Icelandic Government replied on 5 September 2012.

28. On 12 February 2013, ESA sent a letter to Iceland in which it presented its preliminary conclusion that Article 10 of the Icelandic Act and Articles 3, 4 and 5 of the Icelandic Regulation are in breach of Article 5 of the Directive and/or Article 18 EEA. ESA did not consider the measures justified under Article 13 EEA.

29. On 27 May 2013, Iceland replied to ESA's letter. Iceland argued that the Directive applied differently to Iceland in comparison with the Member States of the European Union. Since Iceland was not a party to the Common Agricultural Policy and agriculture was excluded from the scope of the EEA Agreement, there was no basis for requiring Iceland to ensure the free movement of agricultural products in the same way as within the European Union. Furthermore, Iceland referred to the higher risk of infection of its livestock due to Iceland's geographic isolation. Iceland argued that Article 13 EEA must be given a wider interpretation in cases regarding agricultural products than for other products in general.

30. On 30 October 2013, ESA sent a letter of formal notice to Iceland concluding that Iceland had failed to comply with its obligations under Article 5 of the Directive by maintaining in force an authorisation system for, inter alia, fresh meat and meat products such as that laid down in Article 10 of the Icelandic Act and Articles 3, 4 and 5 of the Icelandic Regulation. Alternatively, the authorisation system constituted a technical barrier to trade that compromised the relevant arrangements in Annex I to the EEA Agreement and was thus in breach of Article 18 EEA. ESA considered that Iceland had not demonstrated that the measures were justified in accordance with Article 13 EEA.

31. On 27 February 2014, Iceland replied to the letter of formal notice. Iceland contended in particular that the Directive had not fully harmonised veterinary checks in the EEA. In Iceland's view, the Directive could not be read as excluding systematic controls at the border. The measures applied by Iceland served an objective that lay beyond the Directive's purpose, namely to protect Iceland from pathogens that were common in Europe but unknown in Iceland.

32. On 25 March 2014, Iceland submitted two risk assessments in support of its reply to the letter of formal notice.

33. On 27 June 2014, in response to a follow-up letter to a meeting held in Iceland on 19 May 2014, Iceland sent a letter to ESA providing clarifications on the Icelandic legislation.

34. On 8 October 2014, ESA delivered a reasoned opinion, maintaining its conclusions in the letter of formal notice. 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 ("SCA"), ESA required Iceland to take the necessary measures to comply with the reasoned opinion within two months following the notification, that is no later than 8 December 2014. Upon a request from Iceland, the deadline for complying with the reasoned opinion was extended to 8 February 2015.

35. On 24 February 2015, Reykjavík District Court (*Héraðsdómur Reykjavíkur*) decided to request an advisory opinion from the Court on the compatibility with EEA legislation of the Icelandic import regime for meat products, in a case pending before it between the meat distribution company Ferskar kjötvörur ehf. and the Icelandic State concerning a claim for damages arising from the authorities' refusal to allow the import of a consignment of fresh bovine meat. The request was sent by a letter of 22 May 2015, and registered at the Court as Case E-17/15 on 16 June 2015. In light of these events, ESA decided to postpone the further handling of the case.

36. In the context of the proceedings in the complaint concerning imports of raw meat, ESA noted that similar restrictions applied to egg and dairy products. On 21 October 2015, ESA sent a letter to Iceland with a preliminary conclusion that Iceland had failed to comply with Article 5 of the Directive, or alternatively Article 18 EEA, by maintaining in force an authorisation system for the import of raw eggs and dairy products and additional

requirements, as well as a prohibition of the marketing of imported dairy products processed from unpasteurised milk, and by requiring importers to make a declaration and obtain approval for the import of treated egg and dairy products.

37. On 1 February 2016, the Court rendered its advisory opinion in Case E-17/15 *Ferskar kjötvörur*.[2] This case is substantially similar to the joined cases at hand. The Court held that an EEA State's discretion to set rules on the importation of raw meat products may be limited by provisions incorporated into an Annex to the EEA Agreement. Moreover, the Court held that it is not compatible with the provisions of the Directive for an EEA State to enact rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and requiring the submission of a certificate confirming that the meat has been stored frozen for a certain period prior to customs clearance.

38. On 10 February 2016, ESA invited Iceland to provide information on how it intended to comply with the Court's advisory opinion. On 9 March 2016, Iceland replied that it was in the process of evaluating possible adjustments to the authorisation system.

39. On 20 April 2016, ESA sent a letter of formal notice in the case concerning egg and dairy products, maintaining the view set out in its letter of 21 October 2015.

40. On 13 July 2016, Iceland replied to ESA's letter of formal notice. Iceland referred to the legal arguments presented in the reply to ESA's letter of formal notice in the case concerning meat products. Reference was also made to the Court's advisory opinion in Case E-17/15. Iceland considered that it should wait for the procedure before the national courts to be concluded before taking further steps.

41. On 14 September 2016, ESA delivered a reasoned opinion in the case concerning egg and dairy products, and maintained its main conclusions from the 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 from the notification, that is, no later than 14 November 2016. Upon a request from Iceland, the deadline for complying with the reasoned opinion was extended to 14 December 2016.

42. On 18 November 2016, Reykjavík District Court gave judgment in the main proceedings in Case E-17/15. The District Court found in favour of Ferskar kjötvörur ehf. and ordered the Icelandic State to pay damages. The Icelandic State has appealed against that judgment.

43. On 14 December 2016, Iceland replied to ESA's reasoned opinion in the case concerning egg and dairy products. Iceland maintained its position and provided additional comments.

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[2] Case E-17/15 *Ferskar kjötvörur* [2016] EFTA Ct. Rep. 4.

44. As Iceland continued to maintain the national provisions in question at the deadlines set for response to each of the reasoned opinions, ESA decided on 20 December 2016 to bring both matters before the Court.

III Procedure and forms of order sought by the parties

45. By an application registered at the Court on 1 February 2017 as Case E-2/17, ESA brought an action under the second paragraph of Article 31 SCA, seeking a declaration that:

1. *By maintaining in force (i) an authorisation system for the import of raw eggs and raw egg products such as the one laid down in Article 10 of Act No 25/1993 and Articles 3 (e) and 4 of Regulation (IS) No 448/2012; (ii) an authorisation system for the import of unpasteurised milk and dairy products processed from unpasteurised milk and additional requirements, such as laid down in Article 10 of Act No 25/1993 and Articles 3 (f), 4 and 5 of Regulation (IS) No 448/2012, and a prohibition of the marketing of imported dairy products processed from unpasteurised milk, such as laid down in Article 7a of Regulation (IS) No 104/2010; and (iii) an administrative practice of requiring importers to make a declaration and obtain an approval for the import of treated egg and dairy products, such as the one established in the context of the application of Regulation (IS) No 448/2012, Iceland has failed to fulfil its obligations arising from the Act referred to at Point 1.1.1 of Chapter I of Annex I to the EEA Agreement, Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market as amended and as adapted to the EEA Agreement by Protocol 1 thereto and by the sectoral adaptions in Annex I thereto, and in particular Article 5 of that directive.*

2. *Iceland bears the costs of the proceedings.*

46. By another application registered at the Court on 1 February 2017 as Case E-3/17, ESA brought an action under the second paragraph of Article 31 SCA, seeking a declaration that:

1. *By maintaining in force an authorisation system for fresh meat and meat products, such as laid down in Article 10 of Act No. 25/1993 and Articles 3, 4 and 5 of Regulation (IS) No. 448/2012, Iceland has failed to fulfil its obligations arising from the Act referred to at Point 1.1.1 of Chapter I of Annex I to the EEA Agreement, Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market as amended and as adapted to the EEA Agreement by Protocol 1*

thereto and by the sectoral adaptions in Annex I thereto, and in particular Article 5 of that directive.

2. *Iceland bears the costs of the proceedings.*

47. On 10 April 2017, the defendant lodged its defence in Cases E-2/17 and E-3/17, requesting the Court, in both cases, to dismiss the application and order ESA to pay the costs of the proceedings.

48. On 24 April 2017, the Court informed the parties that it considered joining Cases E-2/17 and E-3/17 for the purpose of the written and oral procedure and the final judgment. By emails of 25 April and 2 May 2017, respectively, the applicant and the defendant informed the Court that they had no objections to this course of action.

49. On 11 May 2017, the Court decided, pursuant to Article 39 of the Rules of Procedure, to join Cases E-2/17 and E-3/17 for the purposes of the remainder of the written procedure, the oral procedure and the final judgment. The parties were informed of this decision by a letter of 12 May 2017.

50. On 15 June 2017, ESA submitted its reply. On 20 July 2017, Iceland submitted its rejoinder.

IV Written procedure before the Court

51. Written arguments have been received from the parties:

- the applicant, represented by Carsten Zatschler, Maria Moustakali and Ingibjörg Ólöf Vilhjálmsdóttir, acting as Agents;

- the defendant, represented by Helga Hauksdóttir, Director General, Ministry of Foreign Affairs, Sigurgeir Þorgeirsson, Senior Adviser, Ministry of Industries and Innovation, acting as Agents, and Jóhannes Karl Sveinsson, advocate, acting as Counsel.

V Summary of the arguments and observations submitted to the Court

The applicant

Introductory observations

52. The applicant contends that the authorisation system and the additional requirements imposed by the Icelandic legislation on imports of fresh meat and meat products, raw eggs and egg products and dairy products are not compatible with Article 5 of the Directive, as

they constitute veterinary checks going beyond the controls permitted at the place of destination.

53. The applicant submits that, under Articles 3 to 5 of the Directive, veterinary checks are to take place at the place of dispatch. The competent authority at the place of destination may only carry out non-discriminatory spot-checks to verify compliance with the requirements of EEA legislation. By these provisions, the Directive has exhaustively harmonised the veterinary checks that can take place in the State of destination. This detailed and harmonised system of health inspections replaces all other inspection systems existing within the State of destination.[3]

54. The applicant submits that since the Directive has exhaustively harmonised veterinary checks that may take place in the State of destination, Article 13 EEA cannot be invoked to justify the measures in the case at hand.[4]

55. The applicant submits that the Directive's provisions on veterinary checks on products of animal origin apply in conjunction with an extensive set of rules, known as the Hygiene Package.[5] These rules harmonise, for instance, the conditions according to which risks are managed. According to Article 14(7) of Regulation (EC) No 178/2002, food that complies with specific EEA law provisions governing food safety shall be deemed to be safe insofar as the aspects covered by the specific EEA law provisions are concerned.

56. In the view of the applicant, a reference to Article 114 of the Treaty on the Functioning of the European Union ("TFEU") is of no avail to the defendant, as the EEA Agreement contains no such provision. Apart from a safeguard clause, no adaptations were made to the Directive when it was incorporated. It therefore fully applies to Iceland. Since the Icelandic measures are not temporary and have not followed the special procedure for safeguard measures set out in the Introductory Part to Chapter I of Annex I to the EEA Agreement, the safeguard clause cannot be invoked.

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3 Reference is made to *Ferskar kjötvörur*, cited above, paragraphs 65 and 66, and the judgments in *Commission* v *Germany*, 186/88, EU:C:1989:601; *Ligur Carni and Others*, C-277/91, C-318/91 and C-319/91, EU:C:1993:927, paragraph 26; *Commission* v *Germany*, C-102/96, EU:C:1998:529; *Danske Slagterier*, C-445/06, EU:C:2009:178; and *Commission* v *Sweden*, C-111/03, EU:C:2005:619, paragraph 51.

4 Reference is made to *Ferskar kjötvörur*, cited above, paragraph 76, and the judgments in *Commission* v *Portugal*, C-52/92, EU:C:1993:216, paragraph 17, and *Denkavit Futtermittel*, 251/78, EU:C:1979:252.

5 Regulation (EC) No 178/2002; Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ 2004 L 139, p. 1), referred to at point 16 in Part 6.1 in Chapter I of Annex I to the EEA Agreement; Regulation (EC) No 853/2004; Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption (OJ 2004 L 139, p. 206), referred to at point 12 in Part 1.1 in Chapter I of Annex I to the EEA Agreement; Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ 2004 L 165, p. 1), referred to at point 11 in Part 1.1 in Chapter I of Annex I to the EEA Agreement; and Commission Regulation (EC) No 2073/2005 of 15 November 2005 on microbiological criteria for foodstuffs (OJ 2005 L 338, p. 1), referred to at point 52 in Part 6.2 in Chapter I of Annex I to the EEA Agreement.

57. The applicant submits that a distinction between veterinary checks and substantive requirements cannot be made.[6] Moreover, the fact that the EU Common Agricultural Policy does not apply in the EEA is irrelevant as the EEA Agreement contains specific arrangements concerning agricultural products.[7]

58. The applicant submits that the application of the precautionary principle must follow the guidelines provided by the Court and the ECJ.[8] Iceland has not provided information that could establish a scientific uncertainty. It follows from consistent case law that preventive measures cannot be based on a purely hypothetical approach to the risk, founded on mere conjecture that has not been scientifically verified.[9] Moreover, precautionary measures must be of a provisional nature, pending the development of scientific knowledge.[10] The applicant submits that the Icelandic measures do not satisfy these requirements and cannot therefore be justified as precautionary measures. The applicant also points out the inconsistency in allowing private individuals to import up to 1 kg of cheese produced from unpasteurised milk, while prohibiting all other imports of such products.

(i) Fresh meat and meat products

59. The applicant observes that Article 10 of the Icelandic Act, read in conjunction with Articles 3 to 5 of the Icelandic Regulation, imposes a system of import authorisation for fresh meat and meat products. A special permit is required for the import of fresh meat and meat products, systematically and for each consignment. The applicant stresses that in *Ferskar kjötvörur* the Court already concluded that this system is incompatible with the Directive, as it constitutes a veterinary check going beyond the controls permitted at the place of destination. This conclusion is also supported by two judgments of the Court of Justice of the European Union ("ECJ").[11] Therefore, the authorisation system for the import of fresh meat and meat products is in breach of the Directive.

60. In addition, the applicant contends that the authorisation system for import of fresh meat and meat products obliges the importer to fulfil certain requirements that go beyond ensuring that the products have been obtained, checked, marked and labelled in accordance

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6 Reference is made to *Ferskar kjötvörur*, cited above, paragraph 70.

7 Reference is made to *Ferskar kjötvörur*, cited above, paragraph 42.

8 Reference is made to Case E-3/00 *ESA* v *Norway* [2000-2001] EFTA Ct. Rep. 73, paragraphs 26, 30 and 32, and the judgments in *Commission* v *France*, C-333/08, EU:C:2010:44, paragraph 92, and *Afton Chemical*, C-343/09, EU:C:2010:419, paragraph 60.

9 Reference is made to the judgments in *Pfizer Animal Health* v *Council*, T-13/99, EU:T:2002:209, paragraph 143, *Commission* v *France*, cited above, paragraph 91, and *Monsanto Agricoltura Italia and Others*, C-236/01, EU:C:2003:431, paragraph 106.

10 Reference is made to the judgments in *Agrarproduktion Staebelow*, C-504/04, EU:C:2006:30, paragraph 40, and *France* v *Commission*, C-601/11, EU:C:2013:465, paragraph 110, and to the Communication from the Commission of 2 February 2000 on the precautionary principle (COM(2000) 1 final12.02.2000), p. 1.

11 Reference is made to the judgments in *Commission* v *Germany* (C-186/88) and *Commission* v *Sweden*, both cited above.

with EEA rules. The obligations on importers to demonstrate that the raw meat products have been frozen for 30 days at -18°C, that they are free from salmonella, that they conform to the current legislation on food contaminants, and that they are labelled in conformity with the rules on labelling, advertising and promotion of foodstuffs, as required under Article 5(c), (e), (f) and (g) of the Icelandic Regulation, do not find their basis in EEA legislation. They constitute veterinary checks going beyond the checks allowed under Article 5 of the Directive.

61. In particular, ESA notes that the freezing requirement was specifically addressed by the Court in *Ferskar kjötvörur* and held to be incompatible with the Directive.[12] As regards the salmonella certificate, ESA points out that, while Iceland has submitted to ESA a National Control Programme for salmonella in poultry and poultry products, it has not applied for a recognition of equivalence to the control programmes approved for Finland and Sweden. Iceland may therefore not apply additional guarantees in respect of salmonella as provided for in Article 8(3)(b) of Regulation (EC) No 853/2004. Moreover, the EEA legislation on food contaminants[13] and on the labelling of foodstuffs[14] does not contain any provisions giving EEA States a legal basis to impose on importers the completion of a systematic procedure to demonstrate that food products conform to the current legislation on food contaminants or labelling.

(ii) Raw eggs and raw egg products

62. The applicant observes that Article 10 of the Icelandic Act, read in conjunction with Articles 3 to 5 of the Icelandic Regulation, imposes a system of import authorisation for raw eggs and egg products. That system is similar to the one for fresh meat and meat products. Therefore, the authorisation system for the import of raw eggs and egg products breaches Article 5 of the Directive as it constitutes a veterinary check going beyond the controls permitted at the place of destination.

(iii) Unpasteurised milk and dairy products processed from unpasteurised milk

63. The applicant observes that Article 10 of the Icelandic Act, read in conjunction with Articles 3 to 5 of the Icelandic Regulation, imposes a system of import authorisation for unpasteurised milk and dairy products processed from unpasteurised milk. A special permit is required for the import of these products, systematically and for each consignment. Article 5 imposes additional requirements concerning certain cheeses. Moreover, Article

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[12] Reference is made to *Ferskar kjötvörur*, cited above, paragraph 72, and point 2 of the operative part.

[13] Council Regulation (EEC) No 315/93 of 8 February 1993 laying down Community procedures for contaminants in food (OJ 1993 L 37, p. 1) and Commission Regulation (EC) No 1881/2006 of 19 December 2006 setting maximum levels for certain contaminants in foodstuffs (OJ 2006 L 364, p. 5), referred to at point 54f and 54zzzz, respectively, of Chapter XII of Annex II to the EEA Agreement.

[14] Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers … (OJ 2011 L 304, p. 18), referred to at point 86 of Chapter XII of Annex II to the EEA Agreement.

7a of Icelandic Regulation No 104/2010 prohibits the marketing for direct consumption of imported dairy products processed from unpasteurised milk.

64. The applicant observes that Article 10(8)(a) of Regulation (EC) No 853/2004 allows EEA States to maintain national rules prohibiting the placing on the market of raw milk or raw cream intended for direct human consumption. However, the Icelandic authorisation system goes beyond what is permitted by this provision, as it covers raw milk irrespective of its use, as well as dairy products processed from raw milk. Referring in particular to recital 23 in the preamble to Regulation (EC) No 853/2004, as well as to the harmonised framework of which that regulation forms part,[15] the applicant rejects the defendant's argument that Article 10(8)(a) of that regulation extends to all dairy products processed from raw milk.

65. As regards the defendant's argument that dairy products made of unpasteurised milk pose the same risks as unpasteurised milk, the applicant submits that the legislative authorities made a deliberate choice not to include dairy products in Article 10(8)(a) of Regulation (EC) No 853/2004. This choice cannot be made subject to a wide interpretation. Moreover, Iceland has not provided factual or scientific elements to substantiate its argument, nor has it provided other justifications in light of the harmonised rules.

66. The applicant therefore contends that the authorisation system and the related prohibition on the marketing of imported dairy products processed from unpasteurised milk cannot be based on Article 10(8)(a) of Regulation (EC) No 853/2004. In view of the *Ferskar kjötvörur* judgment, it is not compatible with Directive.

(iv) Treated egg and dairy products

67. The applicant observes that importers of treated egg and dairy products are not subject to the authorisation system. However, it has been confirmed by the defendant that they still have to make a declaration and obtain the approval of the Food and Veterinary Authority in order to obtain customs clearance. In view of the *Ferskar kjötvörur* judgment and relevant ECJ case law, the applicant contends that this obligation to make a declaration and obtain approval goes beyond the checks allowed under Article 5 of the Directive. The administrative practice is therefore incompatible with the Directive.

The defendant

Introductory observations

68. The defendant submits that, given the centuries of virtual isolation of the Icelandic animal population from the outside world, the import of live animals to Iceland would entail a particularly high risk as regards diseases against which the Icelandic animal

[15] In particular Regulation (EC) No 854/2004 and Regulation (EC) No 2073/2005.

population has not developed immunity. That is why Annex I to the EEA Agreement specifies that the provisions on import of live animals do not apply to Iceland. However, animal health and public health can be put at risk also by raw meat, as shown by two scientific reports submitted during the pre-litigation proceedings. Against that background, Iceland has restricted the import of raw meat and meat products. The same rationale applies to the restrictions concerning raw eggs and egg products, as well as unpasteurised milk and dairy products processed from unpasteurised milk.

69. The defendant submits that the restrictive measures at issue are within the scope of Article 18 EEA by virtue of its reference to Article 13 EEA. The defendant is therefore permitted to enact national rules that prohibit or restrict trade of goods with the aim of protecting the life and health of human and animals.

70. The defendant points out that agricultural products do not fall under the EEA Agreement and do not benefit from the general principle of free movement of goods within the EEA. The EU Common Agricultural Policy does not apply within the EEA. Therefore, the EFTA States do not have access to any common resources available to the EU pillar if there is an outbreak of a disease.

71. The defendant nevertheless observes that Chapter 2 of the EEA Agreement provides for further liberalisation in the trade of agricultural products, allowing for special arrangements to be agreed for those products without extending the EEA Agreement to cover them. In these situations, Article 18 EEA provides that such arrangements may not be compromised by other technical barriers to trade. Moreover, that provision expressly states that Article 13 EEA shall apply.

72. The defendant stresses that, under Article 114 TFEU, EU Member States may under certain conditions adopt different or additional measures to those required under directives adopted. Although the EEA Agreement does not contain safeguard provisions similar to Article 114(4) and (5) TFEU, the EFTA States cannot have fewer rights than EU Member States to maintain pre-existing national provisions on an assessment of risk different from that accepted by the EU legislature. In the context of Article 18 EEA, Article 13 EEA must be applied to allow for at least the same protection as exists in the EU pillar. ESA is therefore obliged to assess, based on Articles 18 and 13 EEA, whether Iceland has provided justifications for the measures at hand. In case of uncertainty as to the precise danger to animal or human health, the precautionary principle must apply.[16]

(i) Fresh meat and meat products

73. The defendant submits that the obligation to provide a so-called freezing certificate does not seek to discourage imports of meat to Iceland, nor does it have such an effect in practice. More importantly, it does not imply a double check of compliance with Article 3

[16] Reference is made to *ESA* v *Norway*, cited above, paragraph 26.

of the Directive, in addition to the checks carried out in the State of dispatch. The certificate seeks to take care of the very special situation in Iceland, which is an objective that lies beyond the EEA rules. The "freezing requirement" is a substantive requirement, not a "physical check and/or administrative formality which applies to the products". The Directive is concerned with checks and not substantive requirements. The two ECJ judgments referred to by the applicant in this regard do not support the argument that substantive requirements fall under the scope of the Directive. Consequently, the defendant is entitled to invoke Article 13 EEA.

74. As regards the salmonella certificate, the defendant submits that figures from the European Food Safety Authority ("EFSA") show that the precautionary measures applied by Iceland are efficient and protect important health interests. The defendant is empowered pursuant to Articles 13 and 18 EEA to require an importer to submit an official certificate confirming that the products are salmonella-free. The measures are effective, necessary and proportionate, and aim to protect important interests against an unacceptable risk. Moreover, the defendant submits that the obligations to demonstrate that the products conform to the legislation on food contaminants and labelling do not constitute veterinary checks within the meaning of the Directive.

(ii) Raw eggs and egg products

75. The defendant stresses the importance of preventing transmission of salmonella bacteria and maintaining the exceptional status Iceland currently enjoys in that regard. Salmonella can be transferred to humans through consumption of raw or undercooked eggs. Some EU Member States where the prevalence of salmonella is very low have been entitled under Regulation (EC) No 853/2004 to apply strict national control programmes, including requiring a certificate that the products are salmonella-free before sending consignments to those Member States.

76. The defendant submits that Regulation (EC) No 853/2004 entails considerable flexibility for national authorities to regulate and monitor untreated eggs and egg products. The vast reforms within the EU in recent years illustrate that the measures applied by Iceland are necessary, effective and proportionate to their objective.

(iii) Unpasteurised milk and dairy products processed from unpasteurised milk

77. The defendant submits that the logical reading of Article 10(8)(a) of Regulation (EC) No 853/2004 is that dairy products made of raw milk may also be prohibited. Scientific evidence shows that dairy products made from raw milk pose the same and even greater risk to health than raw drinking milk.

78. In any case, the defendant submits that, to the extent that its prohibition goes beyond Article 10(8)(a) of Regulation (EC) No 853/2004, it is justified under Article 13 EEA. There are no exhaustive harmonisation obligations as regards the marketing of raw milk or

milk products. All EEA States therefore have considerable discretion to regulate on the basis of their own risk assessment. Neither the prohibition on import and marketing nor the exemptions from the prohibition constitutes a veterinary check within the meaning of the Directive. Instead, they are substantive requirements. Finally, other legislation indicates that there is no exhaustive harmonisation of the hygiene rules for food of animal origin and the controls applicable to foodstuffs, and that checks may in some cases take place outside the scope of the Directive.[17]

(iv) Treated egg and dairy products

79. The defendant notes that an importer of eggs and egg products, as well as milk and dairy products, must submit data to prove that the products have been treated (pasteurised). No licence is required but the importer must confirm that its products comply with national regulations on treatment of such products.

Per Christiansen
Judge-Rapporteur

[17] Reference is made to Article 6(1) and (2) of Council Directive 2002/99/EC of 16 December 2002 laying down the animal health rules governing the production, processing, distribution and introduction of products of animal origin for human consumption (OJ 2003 L 18, p. 11), referred to at point 6a of Part 5.1 in Chapter 1 of Annex I to the EEA Agreement. That directive does not apply to Iceland.