



## JUDGMENT OF THE COURT

1 February 2016

*(Failure by an EEA/EFTA State to fulfil its obligations – Failure to implement – Directive 2011/88/EU amending Directive 97/68/EC as regards the provisions for engines placed on the market under the flexibility scheme)*

In Case E-21/15,

**EFTA Surveillance Authority**, represented by Øyvind Bø, Officer, and Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents,

*applicant,*

v

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

*defendant,*

APPLICATION for a declaration that Iceland has failed to fulfil its obligations under Article 2 of the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Directive 2011/88/EU of the European Parliament and of the Council of 16 November 2011 amending Directive 97/68/EC as regards the provisions for engines placed on the market under the flexibility scheme) 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.

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 12 August 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 2 of the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”), that is Directive 2011/88/EU of the European Parliament and of the Council of 16 November 2011 amending Directive 97/68/EC as regards the provisions for engines placed on the market under the flexibility scheme (OJ 2011 L 305, p. 1, and Icelandic EEA Supplement 2014 No 54, p. 469) (“the Directive” or “the Act”), 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.

**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 EEA Joint Committee Decision No 126/2014 of 27 June 2014 (OJ 2014 L 342, p. 26, and EEA Supplement 2014 No 71, p. 25) (“Decision 126/2014”) amended Annex II (Technical regulations, standards, testing and certification) to the EEA Agreement by adding the Directive to point 1a of Chapter XXIV of the Annex. No constitutional requirements were indicated, so Decision 126/2014 entered into force on 28 June 2014, in accordance with its Article 3. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

### **III Facts and pre-litigation procedure**

- 6 By letter of 3 July 2014, ESA reminded Iceland of its obligation to implement the Directive. Iceland did not reply to this letter.
- 7 On 15 October 2014, ESA issued a letter of formal notice, concluding that Iceland had failed to fulfil its obligations under the Act and Article 7 EEA by failing to adopt, or in any event, to inform ESA of the national measures adopted to implement the Directive. Iceland did not reply to the letter of formal notice.
- 8 On 28 January 2015, 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 necessary measures to comply with the reasoned opinion within two months following the notification, that is no later than 28 March 2015. Iceland did not reply to the reasoned opinion.

- 9 On 15 July 2015, 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**

- 10 ESA lodged the present application at the Court Registry on 12 August 2015. Iceland's statement of defence was registered at the Court on 13 October 2015. By letter of 27 November 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 letter of 22 December 2015, Iceland also consented to dispense with the oral procedure.

- 11 The applicant, ESA, requests the Court to:

1. *Declare that by failing to adopt the measures necessary to implement the Act referred to at 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Directive 2011/88/EU of the European Parliament and of the Council of 16 November 2011 amending Directive 97/68/EC as regards the provisions for engines placed on the market under the flexibility scheme) as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under Article 2 of that Act and under Article 7 of the Agreement.*

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

- 12 The defendant, Iceland, submits that it does not dispute the facts of the case as they are set out by ESA in its application. Furthermore, it does not contest the declaration sought by ESA. Nevertheless, in its defence, Iceland indicates that an administrative regulation implementing the Directive is intended to be adopted by 30 October 2015.

- 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 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-18/15 *ESA v Iceland*, judgment of 16 December 2015, not yet reported, paragraph 17 and case law cited).

- 15 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. An obligation to implement the Directive also follows from its Article 2. 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 also in Iceland. The EEA/EFTA States find themselves under an obligation of result in that regard (see, *inter alia*, *ESA v Iceland*, cited above, paragraph 18 and case law cited).

- 16 Decision 126/2014 entered into force on 28 June 2014. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.
- 17 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 20 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 It must therefore be held that Iceland has failed to fulfil its obligations under Article 2 of the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Directive 2011/88/EU of the European Parliament and of the Council of 16 November 2011 amending Directive 97/68/EC as regards the provisions for engines placed on the market under the flexibility scheme) 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

- 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 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 2 of the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Directive 2011/88/EU of the European Parliament and of the Council of 16 November 2011 amending Directive 97/68/EC as regards the provisions for engines placed on the market under the flexibility scheme) 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.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 1 February 2016.

Gunnar Selvik  
Registrar

Carl Baudenbacher  
President