



## JUDGMENT OF THE COURT

24 September 2014

*(Failure by an EEA State to fulfil its obligations – Directive 2009/12/EC on airport charges)*

In Case E-3/14,

**EFTA Surveillance Authority**, represented by Xavier Lewis, Director, and Markus Schneider, Deputy Director, Department of Legal & Executive Affairs, acting as Agents,

*applicant,*

v

**The Kingdom of Norway**, represented by Didrik Tønseth, Senior Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Pål Wennerås, advokat, Office of the Attorney General (Civil Affairs), acting as Agents,

*defendant,*

APPLICATION for a declaration that by failing, within the time prescribed, to adopt and/or to notify the EFTA Surveillance Authority forthwith, of the measures necessary to implement the Act referred to at point 65a of Annex XIII to the Agreement on the European Economic Area, namely Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges, as adapted to the Agreement by way of Protocol 1 thereto, the Kingdom of Norway has failed to fulfil its obligations under the Act and under Article 7 of the Agreement.

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (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 on 10 January 2014, 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 by failing, within the time prescribed, to adopt and/or to notify ESA forthwith of the measures necessary to implement the Act referred to at point 65a of Annex XIII to the Agreement on the European Economic Area, namely Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (OJ L 70, p. 11) (“the Directive” or “the Act”), as adapted to the EEA Agreement by way of Protocol 1 thereto, Norway has failed to fulfil its obligations under the Directive and under Article 7 EEA.

**II Law**

- 2 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;*

*(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.*

- 3 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.*

- 4 The Directive was incorporated into the EEA Agreement by Decision No 64/2012 of 30 March 2012 of the EEA Joint Committee (OJ L 207, p. 44 and EEA Supplement No 43, p. 54) (“Decision 64/2012”). Decision 64/2012 added point 65a containing the reference to the Directive in Annex XIII to the EEA Agreement. According to Article 1 of Decision 64/2012, the Directive shall not apply to Liechtenstein. Decision 64/2012 entered into force on 1 June 2012. According to Article 13 of the Directive, read in conjunction with Decision 64/2012, the time limit for Iceland and Norway to adopt the measures necessary to implement the Directive, and to notify ESA thereof, expired on the same date.
- 5 The Directive establishes a common framework regulating the essential features of airport charges and the way they are set. It applies to airports located in the territory of an EEA State. The main objectives of the Directive are to prohibit discrimination among airport users and to ensure transparency by providing the users regularly with information on the components serving as a basis for the determination of the charges. The Directive introduces a compulsory procedure for regular consultation between the airport managing body and airport users with respect to the operation of the system of airport charges, the level of airport charges and, as appropriate, the quality of service provided. EEA States shall also establish an independent supervisory authority to oversee the implementation of the principles laid down in the Directive.

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

- 6 By letter dated 14 May 2012, ESA reminded the Norwegian Government of its obligation to take the necessary measures to implement the Directive into the Norwegian legal order within the prescribed time limit.
- 7 The Norwegian Government responded in an email dated 11 September 2012, in which it stated that the measures necessary to implement the Directive had not yet been adopted. The Government clarified that the time frame for implementation of the Directive was uncertain due to a revision, being conducted in parallel by the Norwegian Government, of the structure of the airport charges.
- 8 ESA issued a letter of formal notice to Norway dated 19 September 2012. It concluded that by failing to adopt or, in any event, to notify ESA of the measures necessary to ensure implementation of the Directive, Norway had failed to fulfil its obligations under the Directive and Article 7 EEA.
- 9 By letter dated 21 November 2012, the Norwegian Government stated that the Directive had not been implemented into the internal legal order. The

Government reiterated that the reason for the late implementation of the Directive was the close connection between the Directive and a parallel evolution of the future structure and level of charges on airports operated by Avinor AS (“Avinor”), the main airport operator.

- 10 The Norwegian Government further provided in its letter an updated and indicative time schedule for the implementation procedure. The Ministry of Transport and Communications intended to send one joint draft implementing the regulation to a public consultation. The consultation would include the Directive and the future structure and level of charges on airports operated by Avinor. As a result, the Government submitted that the implementation procedure was likely to be completed by September 2013.
- 11 Having received no further information from the Norwegian Government, or any other information which would enable a conclusion that the measures necessary to implement the Directive had been taken, ESA delivered a reasoned opinion to Norway on 30 January 2013.
- 12 ESA maintained the conclusion of its letter of formal notice. Furthermore, ESA required Norway, pursuant to Article 31(2) SCA, to take the measures necessary to comply with the reasoned opinion within two months following notification thereof, i.e. no later than 30 March 2013.
- 13 In its observations of 21 March 2013 on ESA’s reasoned opinion, the Norwegian Government confirmed that it had not adopted the necessary implementation measures within the time prescribed. It stated that the delay was caused by the interdependence between the redistribution of competences between the Ministry of Transport and Communications, the airport operators and the Civil Aviation Authority necessitated by the Directive on one side and the parallel evolution of the socio-economic principles of Avinor’s future charging system should be based on, and the structure of these charges, on the other. The Government indicated the end of 2013 as a new estimate for the expected completion of the procedure to implement the Directive.
- 14 By a letter dated 10 September 2013, ESA invited the Norwegian Government to provide updated information on the matter. In a reply dated 10 October 2013, the Norwegian Government informed ESA that a proposal for implementation of the Directive had been sent out for public consultation on 16 August 2013 and that the deadline for comments on that proposal was 18 November 2013. The Norwegian Government stated that the formal adoption of a measure implementing the Act was anticipated before 1 January 2014.
- 15 Having received no further information, ESA decided to bring the matter before the Court pursuant to Article 31(2) SCA.

#### **IV Procedure before the Court and forms of order sought**

- 16 ESA lodged the present application at the Court on 10 January 2014. The statement of defence from Norway was received on 27 March 2014. On 23 April 2014, ESA, by way of a fax, waived its right to submit a reply.
- 17 The applicant, the EFTA Surveillance Authority, requests the Court to:
1. *Declare that by failing to adopt, and/or to notify the EFTA Surveillance Authority forthwith of, the measures necessary to implement the Act referred to at point 65a of Annex XIII to the Agreement on the European Economic Area (Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges), as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Norway has failed to fulfil its obligations under the Act and under Article 7 of the Agreement.*
  2. *Order the Kingdom of Norway to bear the costs of these proceedings.*
- 18 The defendant, the Kingdom of Norway, submits that the facts of the case as set out in the application are correct and undisputed. Norway neither disputes the declaration nor the order sought by ESA.
- 19 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure in accordance with Article 41(2) of the Rules of Procedure (“RoP”).

#### **V Findings of the Court**

- 20 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 Agreement (see, *inter alia*, Case E-18/13 *ESA v Iceland* [2013] EFTA Ct. Rep. 962, paragraph 14, 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.
- 21 By Decision 64/2012, the EEA Joint Committee made the Directive part of the EEA Agreement. Decision 64/2012 entered into force on 1 June 2012, and the time limit for Iceland and Norway to adopt the measures necessary to implement the Directive expired on the same date.
- 22 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 16, and the case law cited). It is undisputed that Norway had not adopted the measures necessary to implement the Directive before the expiry of the time limit given in the reasoned opinion.

- 23 Since Norway did not in fact implement the Directive within the prescribed period, there is no need to examine the alternative form of order sought against Norway for failing to notify ESA of the measures implementing the Directive.
- 24 It must therefore be held that, by failing to adopt the measures necessary to implement into its national legislation the Act referred to at point 65a of Annex XIII to the Agreement on the European Economic Area, namely Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges, as adapted to the EEA Agreement by way of Protocol 1 thereto, the Kingdom of Norway has failed to fulfil its obligations under the Directive and under Article 7 EEA.

## **VI Costs**

- 25 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 the Kingdom of Norway be ordered to pay the costs, and the latter has been unsuccessful, and since none of the exceptions in Article 66(3) apply, the Kingdom of Norway must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that by failing, within the time prescribed, to adopt all the measures necessary to implement the Act referred to at point 65a of Annex XIII to the Agreement on the European Economic Area (Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges), as adapted to the Agreement by way of Protocol 1 thereto, the Kingdom of Norway has failed to fulfil its obligations under the Act and under Article 7 of the Agreement.**
2. **Orders the Kingdom of Norway to bear the costs of the proceedings.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 24 September 2014.

Gunnar Selvik  
Registrar

Carl Baudenbacher  
President