



JUDGMENT OF THE COURT

2 August 2016

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Directive 2012/46/EU amending Directive 97/68/EC on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery)

In Case E-34/15,

EFTA Surveillance Authority, represented by Carsten Zatschler, Øyvind Bø and Íris Ísberg, Members of its 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 the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Commission Directive 2012/46/EU of 6 December 2012 amending Directive 97/68/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery) as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed or, in any event, by failing to inform the EFTA Surveillance Authority thereof,

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 17 December 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 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 Commission Directive 2012/46/EU of 6 December 2012 amending Directive 97/68/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road machinery (OJ 2012 L 353, p. 80 and Icelandic EEA Supplement 2014 No 73, p. 199) (“the Act” or “the Directive”) as adapted to the Agreement under its Protocol 1, and under Article 7 of the Agreement, by failing to adopt or in any event to inform ESA of 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 186/2014 of 25 September 2014 (OJ 2015 L 202, p. 37 and EEA Supplement 2015 No 43, p. 37) (“Decision 186/2014”) 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 186/2014 entered into force on 26 September 2014 in accordance with its Article 3. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

III Facts and pre-litigation procedure

- 6 On 14 January 2015, after correspondence with the Icelandic authorities, 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 measures necessary to implement the Directive. Iceland did not respond to the letter of formal notice.
- 7 On 13 May 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 13 July 2015. Iceland did not reply to the reasoned opinion.

- 8 Since Iceland did not comply with the reasoned opinion by the deadline set, 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

- 9 ESA lodged the present application at the Court Registry on 17 December 2015. Iceland's statement of defence was registered at the Court on 7 March 2016. By letter of 31 March 2016, 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 3 May 2016, Iceland also consented to dispense with the oral procedure.

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

1. *Declare that Iceland has failed to fulfil its obligations under the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Commission Directive 2012/46/EU of 6 December 2012 amending Directive 97/68/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery) as adapted to the Agreement by the way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed, or in any event by failing to inform the EFTA Surveillance Authority thereof; and*
2. *Order Iceland to bear the costs of these proceedings.*

- 11 The defendant, Iceland, submits that it does not dispute the facts of the case as they are set out in ESA's application. Furthermore, it does not contest the declaration sought by ESA. Nevertheless, in its defence, Iceland emphasised that it has all intentions to fulfil its obligations, and indicated that the implementation of the Directive would be accomplished shortly after March 2016.

- 12 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

- 13 Article 3 EEA imposes upon the 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-21/15 ESA

v Iceland, judgment of 1 February 2016, not yet reported, paragraph 14 and case law cited).

- 14 Under Article 7 EEA, the 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 in Iceland also. The EFTA States find themselves under an obligation of result in that regard (see, *inter alia*, *ESA v Iceland*, cited above, paragraph 15 and case law cited).
- 15 Decision 186/2014 entered into force on 26 September 2014. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.
- 16 The question whether an 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 17 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.
- 17 Since Iceland did not implement the Directive within the time prescribed, there is no need to examine the alternative form of order sought against Iceland for failing to inform ESA of the measures implementing the Directive.
- 18 It must therefore be held that Iceland has failed to fulfil its obligations under the Act referred to at point 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Commission Directive 2012/46/EU of 6 December 2012 amending Directive 97/68/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery) 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, the latter has been unsuccessful and none of the exceptions in Article 66(3) RoP apply, Iceland must 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 1a of Chapter XXIV of Annex II to the Agreement on the European Economic Area (Commission Directive 2012/46/EU of 6 December 2012 amending Directive 97/68/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery) 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 2 August 2016.

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
Acting President