



## JUDGMENT OF THE COURT

5 May 2004

*(Failure of a Contracting Party to fulfil its obligations – Article 8 of Directive 98/34/EC)*

In Case E-4/03,

**EFTA Surveillance Authority**, represented by Niels Fenger, Director, and Arne Torsten Andersen, Officer, Legal & Executive Affairs, acting as Agents, 74 Rue de Trèves, Brussels, Belgium,

*Applicant,*

v

**The Kingdom of Norway**, represented by Guro Hansson Bull, Adviser, Department for Legal Affairs, Ministry of Foreign Affairs, acting as Agent, 7 juni plass 1, Victoria Terrasse, Oslo, Norway,

*Defendant,*

APPLICATION for a declaration that, by adopting Regulation No 853 of 28 August 1998 regarding type approval of gaming machines (*forskrift av 28. august 1998 nr. 853 om typegodkjenning av gevinstautomater*) without previously notifying the EFTA Surveillance Authority at the drafting stage, the Kingdom of Norway has failed to fulfil its obligation under Article 8 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended and adapted to the EEA Agreement by Protocol 1 thereto.

THE COURT,

composed of: Carl Baudenbacher, President, Per Tresselt and Thorgeir Örlygsson (Judge-Rapporteur), Judges,

Registrar: Lucien Dedichen,

having regard to the written pleadings of the parties and the written observations of the Commission of the European Communities, represented by John Forman, Legal Adviser, and Roberto Amorosi, Member of its Legal Service, acting as Agents,

having decided, after receiving express consent from the parties, to dispense with the oral procedure,

gives the following

## **Judgment**

### **I Facts and procedure**

- 1 By an application lodged at the Court on 22 December 2003, the EFTA Surveillance Authority brought an action under Article 31(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice for a declaration that, by adopting Regulation No 853 of 28 August 1998 regarding type approval of gaming machines (*forskrift av 28. august 1998 nr. 853 om typegodkjenning av gevinstautomater*, hereinafter the “Gaming Machines Regulation”) without previously notifying the EFTA Surveillance Authority at the drafting stage, the Kingdom of Norway has failed to fulfil its obligation under Article 8 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, (hereinafter “Directive 98/34/EC”), which was made part of the EEA Agreement by Decision No 146/1999 of the EEA Joint Committee of 5 November 1999, and is listed in point 1 of Chapter XIX of Annex II to the EEA Agreement.
- 2 By letter of 21 June 2002, the EFTA Surveillance Authority informed the Government of Norway that it had received a complaint alleging failure by Norway to notify the EFTA Surveillance Authority, in accordance with the provisions of Directive 98/34/EC, of several draft technical regulations regarding lotteries, including the Gaming Machines Regulation.
- 3 In a reply of 15 August 2002, the Norwegian Government acknowledged that the EFTA Surveillance Authority should have been notified of the Gaming Machines Regulation, in accordance with Directive 98/34/EC, prior to its adoption.
- 4 In a letter of 17 February 2003, the Norwegian Government confirmed this position and informed that draft proposals for new technical regulations concerning gaming devices, replacing inter alia the Gaming Machines Regulation, would be issued and the EFTA Surveillance Authority notified within the year.

- 5 Having received no further information regarding the planned revision, the EFTA Surveillance Authority sent a letter of formal notice to the Norwegian Government on 4 April 2003, concluding that Norway had failed to fulfil its obligations under Article 8 of Directive 98/34/EC as well as Article 3 of the EEA Agreement by failing to give timely notice of the draft Gaming Machines Regulation to the EFTA Surveillance Authority. The Government of Norway was invited to submit its observations on the matter within two months of receiving the letter of formal notice.
- 6 The Norwegian Government did not respond to the letter of formal notice. On 17 July 2003, the EFTA Surveillance Authority delivered a reasoned opinion to the Norwegian Government concluding that Norway had failed to fulfil its obligation under Article 8 of Directive 98/34/EC as well as Article 3 of the EEA Agreement in respect of the Gaming Machines Regulation, and requesting Norway to take the measures necessary to comply with the reasoned opinion within three months.
- 7 In a response to the reasoned opinion dated 8 October 2003, the Norwegian Government reiterated its acknowledgement that Directive 98/34/EC was applicable to the Gaming Machines Regulation and that it should have notified the EFTA Surveillance Authority in accordance with Directive 98/34/EC. In this letter, the Norwegian Government also stated that the Gaming Machines Regulation would be repealed in two steps, in part from 1 January 2004, and fully from 1 January 2005.
- 8 There was no further correspondence between the parties until the present application was brought before the Court.

## **II Legal background**

### **EEA law**

- 9 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 204, 21.7.1998) is referred to in point 1 of Chapter XIX of Annex II to the EEA Agreement.
- 10 Directive 98/34/EC repealed Directive 83/189/EEC (OJ L 109, 26.4.1983) and amendments thereto. It was subsequently amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ L 217, 5.8.1998, hereinafter, “Directive 98/48/EC”), which was incorporated into the EEA Agreement by Joint Committee Decision 16/2001, which entered into force on 1 March 2001.
- 11 Article 8(1) of Directive 98/34/EC, as amended, states:

1. Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European Standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.

- 12 Prior to the amendments made to Directive 98/34/EC by Directive 98/48/EC the term “draft technical regulation” was defined in Article 1(10) as follows:

the text of a technical specification or other requirement, including administrative provisions formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made.

After the amendments made to Directive 98/34/EC by Directive 98/48/EC the term “draft technical regulation” is defined in Article 1(12) as follows:

the text of a technical specification or other requirement or of a rule on services, including administrative provisions, formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made;

- 13 Before the amendments made to Directive 98/34/EC by Directive 98/48/EC the term “technical regulation” was defined in Article 1(9) as follows:

technical specifications and other requirements, including the relevant administrative provisions, the observance of which is compulsory, *de jure* or *de facto*, in the case of marketing or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product.

After the amendments made to Directive 98/34/EC by Directive 98/48/EC the term “technical regulation” is defined in Article 1(11) as follows:

technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, *de jure* or *de facto*, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

- 14 The term “technical specification” is defined in Article 1(3) (Article 1(2) of Directive 98/34/EC as it read before it was amended by Directive 98/48/EC) as a specification contained in a document which lays down the characteristics required of a product.

### **National law**

- 15 The Gaming Machines Regulation lays down the requirements for type approval of gaming machines used for commercial operations. According to Section 1 of

the Regulation, such machines have to be type approved by the Norwegian Gaming Board (*Lotteritilsynet*). Section 6 of the Regulation lists the main requirements that gaming machines must fulfil to be type approved, such as minimum game time, maximum sound output of the machines and pay out requirements. More detailed requirements are set out in an Annex to the Regulation, concerning inter alia game functionality/performance and sounds.

### **III Arguments of the parties**

- 16 The application is based on one plea in law: by adopting the Gaming Machines Regulation without previously notifying the Applicant at the drafting stage, the Defendant has failed to fulfil its obligations under Article 8 of Directive 98/34/EC.
- 17 The Applicant points out that the purpose of Directive 98/34/EC is to forestall the introduction of new national technical measures relating to goods that have an equivalent effect to quantitative restrictions on the free movement of goods. The notification procedure may influence the very content of the national regulation and constitutes an important safeguard measure, which will not achieve its purpose by an ex-post facto declaration by the relevant State.
- 18 The Applicant submits that the Gaming Machines Regulation constitutes a technical regulation as defined by Directive 98/34/EC and refers in that respect to the requirements laid down in Section 6 of the Gaming Machines Regulation and the Annex to the Regulation. It is the view of the Applicant that these requirements constitute technical specifications within the meaning of Article 1(2) of Directive 98/34/EC. The reference in the Application is to Directive 98/34/EC as it read before it was amended by Directive 98/48/EC. Consequently, as the Gaming Machines Regulation contains *de jure* compulsory specifications, which have to be met before putting the machines into operation, the Regulation must be considered as a technical regulation in accordance with the definition of that term in Article 1(9) of Directive 98/34/EC.
- 19 The Defendant has, from the beginning of the pre-litigation procedure, acknowledged that the Gaming Machines Regulation should have been notified in accordance with Article 8 of Directive 98/34/EC and acknowledged its failure to fulfil its obligations. In the statement of defence, the Defendant has requested that the Court declare the application to be founded.
- 20 The Commission of the European Communities supports, in its written observations, the view of the Applicant and concludes that the application should be granted.

### **IV Findings of the Court**

- 21 In its application, the Applicant refers to Directive 98/34/EC as it read before it was amended by Directive 98/48/EC, based on the reasoning that the

amendments had no bearing on the proceedings. While not rejecting this argument, the Court bases its judgment on Directive 98/34/EC, as amended by Directive 98/48/EC.

- 22 Under the Gaming Machines Regulation, type approval by the Norwegian Gaming Board is a necessary requirement for the use of gaming machines in Norway. In order to have type approval, the requirements laid down in Section 6 of the Gaming Machines Regulation and its Annex must be fulfilled. Consequently, the Gaming Machines Regulation lays down technical specifications within the meaning of Article 1(3) of Directive 98/34/EC, as amended, the observance of which is compulsory, *de jure*, for use of such machines, and thus constitutes a technical regulation within the meaning of Article 1(11) of Directive 98/34/EC, as amended. This has not been disputed by the Defendant, which has from the beginning of the pre-litigation procedure acknowledged its failure to give notice of the draft Gaming Machines Regulation.
- 23 The Court refers to Article 3 of the EEA Agreement which 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, Judgment of the EFTA Court in Case E-10/97 *EFTA Surveillance Authority v The Kingdom of Norway* [1998] EFTA Court Report 134, at paragraph 15 and Judgment of the EFTA Court in Case E-2/99 *EFTA Surveillance Authority v Norway* [2000-2001] EFTA Court Report 1, at paragraph 18).
- 24 In light of the above it must be held that by adopting Regulation No 853 of 28 August 1998 regarding type approval of gaming machines, without previously notifying the Applicant at the drafting stage, the Defendant has failed to fulfil its obligations under Article 8 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, adapted to the EEA Agreement by Protocol 1 thereto, and referred to in point 1 of Chapter XIX of Annex II to the EEA Agreement.

## V Costs

- 25 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Applicant has asked that the Defendant be ordered to pay the costs. Since the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- 1. Declares that, by adopting Regulation No 853 of 28 August 1998 regarding type approval of gaming machines, without previously notifying the EFTA Surveillance Authority at the drafting stage, the Kingdom of Norway has failed to fulfil its obligation under Article 8 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, adapted to the EEA Agreement by Protocol 1 thereto, and referred to in point 1 of Chapter XIX of Annex II to the EEA Agreement.**
- 2. Orders the Kingdom of Norway to pay the costs of the proceedings.**

Carl Baudenbacher

Per Tresselt

Thorgeir Örlygsson

Delivered in open court in Luxembourg on 5 May 2004.

Lucien Dedichen  
Registrar

Carl Baudenbacher  
President