



## JUDGMENT OF THE COURT

13 May 2009

*(Failure by a Contracting Party to fulfil its obligations – Directive 2002/91/EC on the energy performance of buildings)*

In Case E-6/08,

**EFTA Surveillance Authority**, represented by Niels Fenger, Director, and Ólafur Jóhannes Einarsson, Senior Officer, in the Department of Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

*Applicant,*

v

**The Kingdom of Norway**, represented by Kaja Moe Winther, Adviser, Ministry of Foreign Affairs, and Marius Emberland, Advocate, Attorney General (Civil Affairs), acting as Agents, Oslo, Norway,

*Defendant,*

APPLICATION for a declaration that, by failing to adopt or notify the EFTA Surveillance Authority of the measures necessary to implement Articles 6–10 of the Act referred to at point 17 of Annex IV to the Agreement on the European Economic Area, i.e. Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings, as adapted to the EEA Agreement by way of Protocol 1 thereto, within the time prescribed, the Kingdom of Norway has failed to fulfil its obligations under Article 15(1) of that Act and under Article 7 EEA.

THE COURT,

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

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties, and the written observations of the Commission of the European Communities, represented by Bernhard Schima, a member of its Legal Service, acting as agent,

having decided to dispense with the oral procedure,

gives the following

## **Judgment**

### **I The application**

- 1 By application lodged at the Court Registry on 12 November 2008, the EFTA Surveillance Authority (hereinafter “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 (hereinafter the “SCA”), for a declaration that by failing to adopt, or to notify the EFTA Surveillance Authority of, the measures necessary to implement the Act referred to at point 17 of Annex IV to the Agreement on the European Economic Area, i.e. Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings, as adapted to the EEA Agreement by way of Protocol 1 thereto, within the time prescribed, the Kingdom of Norway has failed to fulfil its obligations under Article 15(1) of the Directive and Article 7 EEA.

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

- 2 By decision 37/2004 of 23 April 2004 the EEA Joint Committee amended Annex IV to the EEA Agreement by adding Directive 2002/91/EC (hereinafter “the Directive”) as point 17 of the Annex. Article 15(1) of the Directive requires the EFTA States to adopt the measures necessary to comply with the Directive at the latest on 4 January 2006. Decision 37/2004, which entered into force on 1 February 2005, did not set out any other time limit for implementation. According to Article 15(2) of the Directive, cf. Article 4(a) of Protocol I to the EEA Agreement, the EEA States have the possibility of an additional period of three years to fully apply the provisions of Articles 7, 8 and 9 if there is a lack of qualified and/or accredited experts.
- 3 According to the documents of the case, the Norwegian Government stated in a transposition forecast received by ESA that the Government was making every effort to make the implementation phase as short as possible. In a letter received by ESA on 9 January 2006 the Norwegian Ministry of Petroleum and Energy informed ESA that Norway would need to use the whole period of three years in Article 15(2) of the Directive, due to the necessary building up of expertise in Norway and the fact that a long term market for independent energy experts had

to be prepared. In the letter, the Ministry informed ESA that a formal notification regarding this issue would follow.

- 4 In the absence of any further communications regarding national measures to implement the Directive, ESA decided to initiate proceedings under Article 31 SCA and, on 17 May 2006, a letter of formal notice was sent to the Government of Norway, setting out ESA's conclusion on the matter and inviting the Government to submit its observations within three months of receipt.
- 5 By a letter of 17 August 2006, the Government of Norway replied to the letter of formal notice. The Government admitted that it had not yet adopted the relevant legislation in order to implement the Directive. The Government stated that in respect to energy requirements for new buildings, cf. Articles 3–5 of the Directive, a new proposal was subject to public consultation. In regard to the provisions of the Directive on energy certification of buildings and inspection and assessment of heating and cooling installations, i.e. Articles 7–9 of the Directive, Norway stated that impact assessments had been carried out, the results of which had led the Government of Norway to conclude that it needed “more time to prepare for the final solutions.”
- 6 Not having received any subsequent information from the Government of Norway regarding the implementation of the Directive, ESA delivered, on 7 November 2006, a reasoned opinion concluding that, by failing to adopt, or to notify ESA of the adoption of, the measures necessary to implement the Act, Norway had failed to fulfil its obligations under Article 7 EEA.
- 7 By a letter of 20 February 2007, the Government of Norway provided its observations on the reasoned opinion, and informed ESA that it had adopted a new administrative regulation on energy requirements for new and rehabilitated buildings which entered into force on 1 February 2007. Furthermore, the Government had proposed an amendment of Act of 29 June 1990 No 50 (the Energy Act – *Lov om produksjon, omforming, overføring, omsetning, fordeling og bruk av energi m.m.*) in order to ensure implementation of other parts of the Directive and that administrative regulations were being prepared concerning the accomplishment of the remaining parts.

### **III Procedure before the Court**

- 8 ESA lodged the present application at the Court Registry on 12 November 2008. The statement of defence from the Government of Norway was received on 13 January 2009. On 15 January 2009 ESA waived the right to submit a reply to the defence lodged by Norway.
- 9 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.

#### **IV Arguments of the parties**

- 10 The application is based on one plea in law, namely that by failing to adopt the national measures necessary to make Articles 6–10 of Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings part of its internal legal order, or to notify ESA thereof, within the time prescribed, the Kingdom of Norway has failed to fulfil its obligations under Article 15(1) of the Directive and Article 7 EEA. In its application ESA submits that there seems to be a common understanding between the Authority and the Government of Norway that Articles 1–2 and 6–17 of the Directive have not been implemented into Norwegian law. As ESA considers only Articles 6–10 to be of such a nature as to require implementing measures by the Norwegian Government, ESA has decided to limit the scope of its plea to the implementation of Articles 6–10 of the Directive.
- 11 The Government of Norway does not dispute that the necessary national implementation measures were not adopted within the time prescribed. Moreover, in its statement of defence, the Government does not dispute the order sought by ESA.
- 12 As a factual observation, the Government of Norway has clarified that the delay in implementation relates to legislative and regulatory steps which had to be taken before the Directive could be implemented. The Directive is expected to be implemented by new regulations and proposed amendments to the Energy Act, which are expected to enter into force on 1 January 2010.
- 13 The Commission of the European Communities submits in its observations that ESA’s Application to the Court should be granted. The Commission points out that Article 15(1) of the Directive provides that it should be implemented by the EC Member States no later than 4 January 2006 and that by Decision No 37/2004 of the EEA Joint Committee of 23 April 2004, this obligation was extended to the EFTA states.

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

- 14 Under Article 7 EEA, all acts referred to in the Annexes to the Agreement, as amended by decisions of the EEA Joint Committee, shall be, or be made, part of the internal legal order of the Contracting Parties. In this context, the Court notes that 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 EEA Agreement (see Case E-3/07 *EFTA Surveillance Authority v Iceland* [2007] EFTA Ct. Rep. 356, at paragraph 12).
- 15 As mentioned at paragraph 2 above, Article 15(1) of Directive 2002/91/EC sets the time limit for implementation to 4 January 2006 and this time limit applies to the Contracting Parties of the EEA Agreement.

- 16 In its letter to ESA on 4 January 2006 the Ministry of Petroleum and Energy submitted that the deadline for implementing the Directive by 4 January 2006 would not be met. Moreover, the Government of Norway has in its Statement of Defence, accepted ESA's claim that it has failed to fulfil its obligations under Article 15(1), by not implementing Articles 6-10 of the Directive into national law by 4 January 2006. Therefore, it is not disputed that the time limit for Norway to implement the Directive expired on 4 January 2006 and that Norway was obliged to adopt the national measures necessary to make the Directive part of its internal legal order by that date.
- 17 Article 15(2) of the Directive stipulates that EC Member States have an additional period of three years to fully apply the provisions of Articles 7, 8 and 9 because of the lack of qualified and/or accredited experts. When making use of this option, EC Member States shall notify the Commission, providing the appropriate justification, together with a time schedule with respect to the further implementation of the Directive. According to Article 4(a) of Protocol I to the EEA Agreement this obligation extends to the EEA Contracting Parties, as the EFTA States are required by that Article to submit information to ESA in cases where an EC Member State is to submit information to the Commission. Although Norway contemplated invoking this provision in its letter to the the European Commission and ESA dated 19 October 2005 and its letter to ESA dated 4 January 2006, it ultimately did not avail itself of this option.
- 18 The question of whether an EFTA State has failed to fulfil its obligations under the EEA Agreement 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 Case E-3/07 *EFTA Surveillance Authority v Iceland*, cited above, at paragraph 14). It is undisputed that Norway did not adopt those measures before the expiry of the time-limit given in the reasoned opinion.
- 19 Based on the above, it must be held that, by failing to adopt, within the prescribed time-limit, the national measures necessary to implement Articles 6–10 of Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings, Norway has failed to fulfil its obligations under Article 15(1) of that Act and Article 7 of the Agreement on the European Economic Area.

## **VI Costs**

- 20 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. Since the EFTA Surveillance Authority 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, Norway must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- 1. Declares that, by failing to adopt, within the time-limit prescribed, the measures necessary to implement Articles 6–10 of Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings, the Kingdom of Norway has failed to fulfil its obligations under Article 15(1) of the Directive and Article 7 of the Agreement on the European Economic Area.**
- 2. Orders the Kingdom of Norway to bear the costs of the proceedings.**

Carl Baudenbacher

Thorgeir Örlygsson

Henrik Bull

Delivered in open court in Luxembourg on 13 May 2009.

Skúli Magnússon  
Registrar

Carl Baudenbacher  
President