



## JUDGMENT OF THE COURT

17 November 2022

*(Failure by an EFTA State to fulfil its obligations – Failure to implement – Regulation (EU) No 2016/778)*

In Case E-6/22,

**EFTA Surveillance Authority**, represented by Kyrre Isaksen, Ingibjörg-Ólöf Vilhjálmsdóttir and Melpo-Menie Joséphidès, acting as Agents,

*applicant,*

v

**Iceland**, represented by Inga Þórey Óskarsdóttir, Helga Hrönn Karlsdóttir and Hjörleifur Gíslason, acting as Agents,

*defendant,*

APPLICATION for a declaration that Iceland has failed to fulfil its obligations under Article 7 of the Agreement on the European Economic Area by failing to adopt the measures to make the Act referred to at point 19bi of Annex IX (Financial Services) to that Agreement (Commission Delegated Regulation (EU) 2016/778 of 2 February 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the circumstances and conditions under which the payment of extraordinary ex post contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines), as adapted by Protocol 1 to the EEA Agreement, part of its legal order,

THE COURT,

composed of: Páll Hreinsson, President, Per Christiansen and Bernd Hammermann (Judge-Rapporteur), Judges,

Registrar: Ólafur Jóhannes Einarsson,

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’s Registry on 3 June 2022, 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 7 of the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) by failing to make the Act referred to at point 19bi of Annex IX to the EEA Agreement, namely Commission Delegated Regulation (EU) 2016/778 of 2 February 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the circumstances and conditions under which the payment of extraordinary ex post contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines (OJ 2016 L 131, p. 41, and Icelandic EEA Supplement 2022 No 34, p. 1) (“Regulation 2016/778”), as adapted by Protocol 1 to the EEA Agreement, part of its internal legal order.

**II Legal background**

- 2 Article 3 EEA reads, in extract:

*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, in extract:

*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;*

...

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 Decision No 187/2019 of the EEA Joint Committee of 10 July 2019 (“Decision No 187/2019”) amended Annex IX (Financial Services) to the EEA Agreement, inter alia, by adding Regulation 2016/778 as point 19bi of the Annex. No constitutional requirements were indicated. Decision No 187/2019 entered into force on 1 January 2020. The time limit for the EFTA States to adopt the measures necessary to make the Regulation part of their internal legal orders expired on the same date.

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

6 On 10 November 2020, after correspondence between the parties, ESA issued a letter of formal notice in which it concluded that Iceland had failed to fulfil its obligations under Article 7 EEA, by failing to make Regulation 2016/778 part of its internal legal order.

7 On 8 January 2021, Iceland responded to the letter of formal notice by informing ESA that Regulation 2016/778 had not yet been implemented, but that the Icelandic Government planned to present a legislative proposal to Parliament which would provide a legal basis for the implementation in the third or fourth quarter of 2021.

8 On 7 July 2021, 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 three months following its notification, that is, no later than 7 October 2021.

- 9 On 6 October 2021, Iceland replied to the reasoned opinion by informing ESA that the foreseen timeline for implementation of Regulation 2016/778 was in the first half of 2022 following the anticipated approval of a law, intended to be presented to Parliament in December 2021 soon after the convening of the new Parliament.
- 10 On 2 February 2022, Iceland informed ESA by informal correspondence that the aforementioned bill would be presented to Parliament in March 2022 and subsequently should be approved as law in May or June 2022.
- 11 On 23 March 2022, ESA adopted Decision No 067/22/COL to bring the matter before the Court in accordance with the second paragraph of Article 31 SCA as Iceland did not comply with the deadline set out in the reasoned opinion.

#### **IV Procedure and forms of order sought**

- 12 On 3 June 2022, ESA lodged the present application at the Court’s Registry, which was registered at the Court on the same date. ESA requests the Court to:
  1. *Declare that Iceland has failed to fulfil its obligations under Article 7 of the EEA Agreement by failing to make the Act referred to point 19bi of Annex IX to the Agreement on the European Economic Area (Commission Delegated Regulation (EU) 2016/778 of 2 February 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the circumstances and conditions under which the payment of extraordinary ex post contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines), as adapted by Protocol 1 to the EEA Agreement, part of its internal legal order.*
  2. *Order Iceland to bear the costs of these proceedings.*
- 13 On 29 July 2022, Iceland submitted its defence, which was registered at the Court on the same date. Iceland states that it does not dispute the facts as brought forward in the application and the declaration sought by ESA. Iceland asserts that the implementation of Regulation 2016/778 into the national legal order has been finalised: on 15 June 2022 the Icelandic Parliament approved Act No 48/2022 which provided a legal basis for the implementation of Regulation 2016/778. The new legislation entered into force on 7 July 2022. Subsequently, a regulation implementing Regulation 2016/778 into the Icelandic legal order was published in Section B of the Official Gazette in Iceland on 19 July 2022 and entered into force on the same day.
- 14 By letter of 3 August 2022, registered at the Court on the same date, ESA waived its right to submit a reply, and consented to dispense with the oral procedure should the Court wish to do so. ESA welcomed Iceland’s implementation and notification of the Act, while noting – as Iceland acknowledged in its defence – that the reference point

for the application is based on the legal situation in Iceland at the expiry of the deadline set out in the reasoned opinion. ESA further noted that Iceland has not contested its declaration sought.

- 15 By letter of 19 September 2022, registered at the Court on the same date, Iceland also consented to dispense with the oral procedure.
- 16 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided, pursuant to Article 70 of the Rules of Procedure of the Court (“RoP”), to dispense with the oral procedure.

## **V Findings of the Court**

- 17 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 Case E-3/22 *ESA v Iceland*, judgment of 29 July 2022, paragraph 25 and case law cited).
- 18 In accordance with 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.
- 19 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. The EFTA States find themselves under an obligation to implement regulations as such (see *ESA v Iceland*, cited above, paragraph 26 and case law cited).
- 20 Decision No 187/2019 entered into force on 1 January 2020 and the time limit for the EFTA States to adopt the measures necessary to implement Regulation 2016/778 expired on the same date.
- 21 The question of 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 *ESA v Iceland*, cited above, paragraph 28 and case law cited). It is undisputed that Iceland had not adopted the measures necessary to make Regulation 2016/778 part of its internal legal order by the expiry of the time limit set in the reasoned opinion.
- 22 Therefore, it must be held that Iceland has failed to fulfil its obligations under Article 7 EEA by failing, within the time prescribed, to adopt the measures necessary to make part of its internal legal order the Act referred to at point 19bi of Annex IX (Financial Services) to the EEA Agreement (Commission Delegated Regulation (EU) 2016/778 of 2 February 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the circumstances and conditions under which the payment of extraordinary ex post contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to

critical functions, and for the determination of the business lines and associated services with regard to core business lines), as adapted by Protocol 1 to the EEA Agreement.

## **VI Costs**

- 23 Under Article 121(1) 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 as none of the exceptions in Article 121(2) RoP apply, Iceland must be ordered to pay the costs of the proceedings.

On those grounds,

THE COURT

hereby:

1. **Declares that Iceland has failed to fulfil its obligations under Article 7 EEA by failing, within the time prescribed, to adopt the measures necessary to make part of its internal legal order the Act referred to at point 19bi of Annex IX to the EEA Agreement (Commission Delegated Regulation (EU) 2016/778 of 2 February 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the circumstances and conditions under which the payment of extraordinary ex post contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines), as adapted by Protocol 1 to the EEA Agreement.**
2. **Orders Iceland to bear the costs of the proceedings.**

Páll Hreinsson

Per Christiansen

Bernd Hammermann

Delivered in open court in Luxembourg on 17 November 2022.

Ólafur Jóhannes Einarsson  
Registrar

Páll Hreinsson  
President