



## JUDGMENT OF THE COURT

1 December 2009

*(Failure by a Contracting Party to fulfil its obligations – Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies)*

In Case E-7/09,

**EFTA Surveillance Authority**, represented by Bjørnar Alterskjær, Deputy Director, and Ólafur Jóhannes Einarsson, Senior Officer, Department of Legal and Executive Affairs, acting as Agents, Brussels, Belgium,

*Applicant,*

v

**The Principality of Liechtenstein**, represented by Dr. Andrea Entner-Koch, Director, and Monika Zelger-Jarnig, Legal Officer, EEA Coordination Unit, acting as Agents, Vaduz, Liechtenstein,

*Defendant,*

APPLICATION for a declaration that by failing to adopt the measures necessary to implement the Act referred to at point 10e of Annex XXII to the EEA Agreement, i.e. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, as adapted to the EEA Agreement by Protocol 1 thereto, within the time-limit prescribed, the Principality of Liechtenstein has failed to fulfil its obligations under Article 19 of that Act and Article 7 of the EEA Agreement.

THE COURT,

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

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

## **Judgment**

### **I The application**

- 1 By application lodged at the Court Registry on 22 June 2009, 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 the national measures necessary to implement the Act referred to at point 10e of Annex XXII to the EEA Agreement, within the time-limit prescribed, the Principality of Liechtenstein has failed to fulfil its obligations under Article 19 of that Act and Article 7 EEA. The Act referred to is Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, as adapted by way of Protocol 1 to the EEA Agreement.

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

- 2 Decision 127/2006 of 22 September 2006 of the EEA Joint Committee amended Annex XXII to the EEA Agreement by adding Directive 2005/56/EC as point 10e of that Annex. The decision entered into force on 1 June 2007. According to Article 19 of Directive 2005/56/EC, the Principality of Liechtenstein was obliged to take the measures necessary to ensure compliance with the Act by 15 December 2007.
- 3 The Liechtenstein Government informed ESA in an email dated 2 October 2007 that implementing measures for the Act would enter into force in May 2008. ESA sent an email dated 9 April 2008, asking for an update.
- 4 The Liechtenstein Government responded by email dated 10 April 2008, informing ESA that the original time frame for implementation had been amended. The Government indicated that the first reading of the Bill in the Liechtenstein Parliament (*Landtag*) was scheduled to take place in September 2008 and the second reading in November 2008.
- 5 On 8 May 2008, ESA received a transposition forecast from the Liechtenstein Government which stated that the Act was expected to be implemented into Liechtenstein legislation by the third quarter of 2008.

- 6 After receiving no further information indicating that the national measures to ensure implementation had been adopted, ESA initiated proceedings under Article 31 SCA and, on 16 July 2008, a letter of formal notice was sent to the Principality of Liechtenstein, stating that the Principality of Liechtenstein had failed to take the national measures necessary to comply with the Act. The Government was invited to submit its observations on the matter within three months.
- 7 In a letter dated 17 October 2008, the Liechtenstein Government presented its observations on the letter of formal notice. ESA was informed that the implementation had been delayed. The first reading of the Bill in the *Landtag* was scheduled for November 2008 with a second reading in April 2009 and the implementing measures would enter into force in June 2009. ESA's conclusions as set out in the letter of formal notice were otherwise not questioned.
- 8 In the absence of any other information enabling ESA to conclude that the national measures necessary to ensure implementation of the Act had been adopted, a reasoned opinion was delivered on 26 November 2008. ESA concluded that the Principality of Liechtenstein had failed to fulfil its obligations under Article 19 of the Act and under Article 7 of the EEA Agreement. The Principality of Liechtenstein was requested to take the measures necessary to comply with the reasoned opinion within three months.
- 9 The Liechtenstein Government responded to the reasoned opinion on 6 February 2009, informing ESA that the *Landtag* would deal with the Government Bill in a first reading in April 2009 and that the second reading was scheduled for June 2009, which meant that the implementing measures would enter into force mid 2009. However, in a transposition forecast sent to ESA on 15 April 2009 the Liechtenstein Government indicated that the Act would be implemented by the third quarter of 2009.

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

- 10 ESA lodged the present application at the Court Registry on 22 June 2009. The statement of defence from the Liechtenstein Government was received on 21 August 2009. On 2 September 2009, ESA submitted a reply to the defence.
- 11 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**

- 12 The application is based on one plea in law, namely that, by failing to adopt the national measures necessary to implement the Act referred to at point 10e of Annex XXII to the EEA Agreement, i.e. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, within the time-limit prescribed, the Principality of

Liechtenstein has failed to fulfil its obligations under Article 19 of that Act, as included in the EEA Agreement, and under Article 7 of the EEA Agreement.

- 13 In its statement of defence, the Liechtenstein Government sets out several reasons for the delay in implementation, noting that a consultation procedure necessitated changes in a draft Bill, that an expert entrusted with the implementation had to be replaced during the process and that the drafting of a new act proved time-consuming. The Government does not, however, dispute the order sought by ESA.
- 14 The Liechtenstein Government nevertheless requests the Court to order each party to bear its own costs of the proceedings. No reasons are submitted to substantiate this request.
- 15 As additional factual information, the Liechtenstein Government has submitted, *inter alia*, that Directive 2005/56/EC will be implemented in Liechtenstein by amending the Persons and Companies Act (*Personen- und Gesellschaftsrecht*) and by adopting a separate Act on the Employee Participation in a Cross-Border Merger of Limited Liability Companies (*Gesetz über die Mitbestimmung der Arbeitnehmer bei einer grenzüberschreitenden Fusion von Kapitalgesellschaften*). The first reading of the Bill on these legislative measures took place in the *Landtag* in May 2009.
- 16 In its reply to the statement of defence from the Liechtenstein Government, ESA maintains its request to order the Principality of Liechtenstein to bear the costs of the proceedings. It is submitted that according to the general rule under Article 66(2) of the Rules of Procedure, the Principality of Liechtenstein must be ordered to bear the costs and that none of the exceptions in Article 66(3) apply.

## **V Findings of the Court**

- 17 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-3/08 *EFTA Surveillance Authority v The Republic of Iceland* [2008] EFTA Ct. Rep. 308, at paragraph 15). 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.
- 18 The obligation to implement also follows from Article 19 of Directive 2005/56/EC, according to which implementation by the EC Member States is required not later than 15 December 2007. Decision 127/2006 of the EEA Joint Committee did not set a separate EEA time limit for the implementation of the Directive into national law.
- 19 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 Case E-3/08 *EFTA Surveillance*

*Authority v The Republic of Iceland*, cited above, at paragraph 18). It is undisputed that the Principality of Liechtenstein did not adopt those measures before the expiry of the time-limit given in the reasoned opinion.

- 20 Further, Article 7 EEA does not allow for the Contracting Parties to plead provisions, practices or circumstances existing in their internal legal order in order to justify a failure to comply with the obligations and time-limits laid down in a decision of the EEA Joint Committee to add a directive to the EEA Agreement, or laid down in the directive itself as adapted for the purposes of the EEA Agreement (see Case E-2/08 *EFTA Surveillance Authority v The Republic of Iceland* [2008] EFTA Ct. Rep. 301, at paragraph 15).
- 21 Consequently, none of the reasons for the delay in implementation invoked by the Liechtenstein Government are such as to affect the obligation to implement.
- 22 Therefore, it must be held that, by failing to adopt, within the prescribed time-limit, the national measures necessary to implement the Act referred to at point 10e of Annex XXII to the EEA Agreement, i.e. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, as adapted by way of Protocol 1 to the EEA Agreement, the Principality of Liechtenstein has failed to fulfil its obligations under Article 19 of that Act and Article 7 of the EEA Agreement.

## **VI Costs**

- 23 The Government of Liechtenstein has requested the Court to order each party to bear its own costs. The Court is left to address this claim even though no pleas, whether in law or in fact, have been submitted in support of this claim. In the light of ESA's submissions and considering the facts of the case, however, the Court finds it clear that the claim for sharing of costs is without basis in law.
- 24 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 ESA has requested that the Principality of Liechtenstein be ordered to pay the costs and the latter has been unsuccessful, and since none of the exceptions in Article 66(3) apply, the Principality of Liechtenstein 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 Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, as adapted to the EEA Agreement by Protocol 1 thereto, the Principality of Liechtenstein has failed to fulfil its obligations under Article 19 of the Directive and under Article 7 of the EEA Agreement.**
2. **Orders the Principality of Liechtenstein to bear the costs of the proceedings.**

Carl Baudenbacher

Thorgeir Örlygsson

Henrik Bull

Delivered in open court in Luxembourg on 1 December 2009.

Skúli Magnússon  
Registrar

Thorgeir Örlygsson  
Acting President