



JUDGMENT OF THE COURT

10 November 2014

(Failure by a Contracting Party to fulfil its obligations – Directive 2009/38/EC – Failure to implement)

In Case E-8/14,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Maria Moustakali, Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Anna Katrín Vilhjálmisdóttir, First Secretary, Ministry for Foreign Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that by failing, within the time prescribed to adopt and/or to notify the EFTA Surveillance Authority forthwith of all measures necessary to implement the Act referred to at point 27 of Annex XVIII to the Agreement on the European Economic Area, that is Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), as adapted to the Agreement by way of Protocol 1 thereto and by EEA Joint Committee Decision No. 54/2010 of 30 April 2010, Iceland has failed to fulfil its obligations under the Act and Article 7 EEA.

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 application lodged at the Court Registry on 17 January 2014, 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”), for a declaration that by failing, within the time limit prescribed, to adopt and/or to notify ESA forthwith of all measures necessary to implement the Act referred to at point 27 of Annex XVIII to the Agreement on the European Economic Area, that is Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) (OJ 2009 L 122, p. 28) (“the Directive” or “the Act”), as adapted to the Agreement by way of Protocol 1 thereto and by EEA Joint Committee Decision No 54/2010 of 30 April 2010 (“Decision 54/2010”) (OJ 2010 L 181, p. 22 and EEA Supplement No 37, p. 29), Iceland has failed to fulfil its obligations under the Act and Article 7 EEA.

II Relevant law

- 2 Decision 54/2010 amended Annex XVIII to the EEA Agreement by adding the Directive to point 27 of the Annex.
- 3 The Directive sets out to establish a European Works Council (“EWC”) or a procedure for informing and consulting employees in every Community-scale undertaking and every Community-scale group of undertakings. The purpose of the Directive is to improve the right to information and to consultation of employees in such undertakings and in particular to ensure the effectiveness of employees’ transnational information and consultation rights, to favour the creation of new EWCs and to ensure legal certainty in their setting up and operation. The Directive applies to any undertaking with at least 1 000 employees within the EEA States and at least 150 employees in each of at least two EEA States, and to groups of such undertakings.
- 4 Iceland and Liechtenstein indicated constitutional requirements for the purposes of Article 103 EEA. The six-month period for notification prescribed in Article 103 EEA expired on 30 October 2010. On 18 November 2011, Iceland notified a delay in the fulfilment of the constitutional requirements.

- 5 On 5 September 2012, Iceland notified that the constitutional requirements had been fulfilled. Consequently, Decision 54/2010 entered into force on 1 November 2012. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

III Facts and pre-litigation procedure

- 6 By letter of 21 November 2012, ESA reminded Iceland of its obligations to implement the Directive into its legal order by 1 November 2012.
- 7 On 6 February 2013, having received no further information from Iceland, ESA issued a letter of formal notice. ESA concluded that, by failing to adopt or, in any event, to inform ESA of the national measures it had adopted to implement the Directive, Iceland had failed to fulfil its obligations under the Act and Article 7 EEA.
- 8 Iceland did not formally reply to the letter of formal notice. However, at a meeting on 6 June 2013, it informed ESA that it intended to submit a bill to the Parliament in autumn 2013 in order to complete the transposition of the Directive.
- 9 On 26 June 2013, ESA delivered a reasoned opinion to Iceland, maintaining the conclusion set out in its letter of formal notice. Pursuant to Article 31(2) SCA, ESA required Iceland to take the measures necessary to comply with the reasoned opinion within two months following the notification thereof, that is no later than 26 August 2013.
- 10 On 18 September 2013, ESA received written observations on the reasoned opinion. Iceland stated that it would submit a bill to the Parliament implementing the Directive in October 2013, and enclosed the draft of the bill.
- 11 On 18 December 2013, having received no further information as regards the implementation of the Directive, ESA decided to bring the matter before the Court pursuant to Article 31(2) SCA.

IV Procedure and forms of order sought

- 12 ESA lodged the present application at the Court Registry on 20 January 2014. Iceland submitted a statement of defence which was registered at the Court on 7 April 2014. In a fax dated 15 May 2014, ESA waived its right to submit a reply and consented to dispense with the oral procedure should the Court wish to do so. On 18 June 2014, Iceland also consented to dispense with the oral procedure.
- 13 The applicant, ESA, requests the Court to:

1. *Declare that by failing to adopt, and/or to notify the EFTA Surveillance Authority forthwith of, all the measures necessary to implement the Act referred to at point 27 of Annex XVIII to the Agreement on the European Economic Area (Directive 2009/38/EC*

of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), as adapted to the Agreement by way of Protocol 1 and by way of Joint Committee Decision No. 54/2010 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under the Act and under Article 7 of the EEA Agreement.

2. *Order Iceland to bear the costs of these proceedings.*

- 14 The defendant, Iceland, submits that the facts of the case as set out in the application are correct and undisputed. Iceland neither disputes the declaration nor the order sought by the applicant.
- 15 On 3 October 2014, following the Court’s measures of inquiry of 17 September 2014, the EFTA Secretariat provided the Court with general information on the notifications received from the EFTA States on whether constitutional requirements for the entry into force of certain decisions of the EEA Joint Committee had or had not been met within the time limit referred to in Article 103 EEA. In particular, the EFTA Secretariat provided the Court with information on the content of the notification of 18 November 2011 from Iceland, where it was stated that provisional application pending fulfilment of the constitutional requirements was not possible.
- 16 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

- 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, *inter alia*, Case E-18/13 *ESA v Iceland*, [2013] EFTA Ct. Rep. 962, paragraph 14, and the case law cited). 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. An obligation to implement the Directive, and to notify ESA thereof, also follows from Article 16 of the Directive.
- 18 Decision 54/2010 entered into force on 1 November 2012. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.
- 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, *inter alia*, *ESA v Iceland*,

paragraph 16, and case law cited). It is undisputed that Iceland did not adopt measures necessary to implement the Directive before the expiry of the time limit given in the reasoned opinion.

- 20 Since Iceland did not implement the Directive within the time limit prescribed, there is no need to examine the alternative form of order sought against Iceland for failing to notify ESA of the measures implementing the Directive.
- 21 It must therefore be held that by failing, within the time prescribed, to adopt the measures necessary to implement the Act referred to at point 27 of Annex XVIII to the Agreement on the European Economic Area, that is Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), as adapted to the Agreement by way of Protocol 1 thereto and by EEA Joint Committee Decision No. 54/2010 of 30 April 2010, Iceland has failed to fulfil its obligations under the Directive and Article 7 EEA.

VI Costs

- 22 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 the EFTA Surveillance Authority has requested that Iceland be ordered to pay the costs, and the latter has been unsuccessful, and none of the exceptions in Article 66(3) apply, Iceland must therefore be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that by failing, within the time prescribed, to adopt all the measures necessary to implement the Act referred to at point 27 of Annex XVIII to the Agreement on the European Economic Area, that is Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), as adapted to the EEA Agreement by way of Protocol 1 thereto and by Joint Committee Decision No. 54/2010, Iceland has failed to fulfil its obligations under the Act and under Article 7 of the Agreement.**
2. **Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 10 November 2014.

Gunnar Selvik
Registrar

Carl Baudenbacher
President