



JUDGMENT OF THE COURT

29 July 2022

(Failure by an EFTA State to fulfil its obligations – Failure to comply – Regulation (EC) No 1069/2009 and Commission Regulation (EU) No 142/2011)

In Case E-3/22,

EFTA Surveillance Authority, represented by Catherine Howdle, Ingibjörg Ólöf Vilhjálmsdóttir and Ewa Gromnicka, acting as Agents,

applicant,

v

Iceland, represented by Jóhanna Bryndís Bjarnadóttir, Inga Þórey Óskarsdóttir and Iðunn María Guðjónsdóttir, acting as Agents,

defendant,

APPLICATION seeking a declaration that Iceland has failed to fulfil its obligations under the Acts referred to at points 9b and 9c of Part 7.1 of Chapter I of Annex I to the Agreement on the European Economic Area (Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 and Commission Regulation (EU) No 142/2011 of 25 February 2011 implementing Regulation (EC) No 1069/2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive) by failing to prevent the direct disposal of fallen stock (Category 3 slaughterhouse waste and home slaughter waste in authorised landfills without prior processing) and the burial on-site of fallen stock and home slaughter waste (including Category 1 specified risk material) in the absence of the statutory conditions for such disposal method being met,

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 28 January 2022, the EFTA Surveillance Authority ("ESA") brought an action under 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 the Acts referred to at points 9b and 9c of Part 7.1 of Chapter I of Annex I to the Agreement on the European Economic Area ("the EEA Agreement" or "EEA"), namely Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 (Animal by-products Regulation) (OJ 2009 L 300 p. 1 and Icelandic EEA Supplement 2015 No 63, p. 1152) ("Regulation 1069/2009") and Commission Regulation (EU) No 142/2011 of 25 February 2011 implementing Regulation (EC) No 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive (OJ 2011 L 54, p. 1, and Icelandic EEA Supplement 2015, No 63, p. 203) ("Regulation 142/2011") as amended and adapted to the EEA Agreement by the specific and the sectoral adaptations referred to in Annex I to that Agreement, by failing to prevent the direct disposal of fallen stock (Category 3 slaughterhouse waste and home slaughter waste in authorised landfills without prior processing) and the burial on-site of fallen stock and home slaughter waste (including Category 1 specified risk material) in the absence of the statutory conditions for such disposal method being met.

II Legal background

EEA law

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 197/2015 of the EEA Joint Committee of 25 September 2015 (OJ 2017 L 85, p. 1 and Icelandic EEA Supplement 2017 No 19, p. 1) amended Part 7.1 of Chapter I of Annex I to the EEA Agreement, inter alia, by replacing the text of point 9b which now incorporates Regulation 1069/2009, and by inserting point 9c, which incorporated Regulation 142/2011. Constitutional requirements were indicated by Iceland and fulfilled on 10 June 2016, and the decision entered into force on 1 August 2016.

6 Article 4 of Regulation 1069/2009 reads, in extract:

...

3. *Member States shall monitor and verify that the relevant requirements of this Regulation are fulfilled by operators along the entire chain of animal by-products and derived products [...]. For that purpose, they shall maintain a system of official controls in accordance with relevant Community legislation.*

4. *Member States shall ensure that an adequate system is in place on their territory ensuring that animal by-products are:*

...

(b) treated, used or disposed of in accordance with this Regulation.

6 Point (c) of Article 12 of Regulation 1069/2009 reads:

Category 1 material shall be:

(c) in the case of Category 1 material other than material referred to in Article 8(a)(i) and (ii), disposed of by processing by pressure sterilisation, permanent marking of the resulting material and burial in an authorised landfill;

7 Point (c) of Article 13 of Regulation 1069/2009 reads:

Category 2 material shall be:

(c) disposed of in an authorised landfill, following processing by pressure sterilisation and permanent marking of the resulting material;

8 Point (c) of Article 14 of Regulation 1069/2009 reads:

Category 3 material shall be

(c) disposed of in an authorised landfill, following processing;

9 Point (b) of Article 19(1) of Regulation 1069/2009 reads:

The competent authority may, by way of derogation from Articles 12, 13, 14 and 21, authorise the disposal

(b) by burning or burial on site or by other means under official supervision which prevent the transmission of risks to public and animal health of Category 1 material referred to in Article 8(a)(v) and (b)(ii), Category 2 and Category 3 materials in remote areas;

10 Article 20(1) of Regulation 1069/2009 reads:

The procedure for authorisation of an alternative method of use or disposal of animal by-products or derived products may be initiated either by the Commission or, following an application, by a Member State or by an interested party, which may represent several interested parties.

11 Article 32(1) of Regulation 142/2011 reads:

The competent authority shall take the necessary measures to control the entire chain of collection, transport, use and disposal of animal by-products and derived products, as referred to in Article 4(2) of Regulation (EC) No 1069/2009.

National law

12 Icelandic Regulation No 674/2017 on animal by-products and related products that are not intended for human consumption (“Icelandic Regulation No 674/2017”) implemented Regulation 1069/2009 and Regulation 142/2011 into the Icelandic legal system and entered into force on 20 July 2017. It was amended by Icelandic Regulation No 992/2019 on the fourth amendment to Icelandic Regulation No 674/2017 on animal by-products and related products that are not intended for human consumption, which entered into force on 14 November 2019.

III Facts and pre-litigation procedure

13 From 9 to 13 September 2013, ESA carried out a fact-finding mission in Iceland to evaluate the implementation of EEA requirements concerning health rules as regards animal by-products. ESA found that Iceland did not ensure that adequate arrangements were in place, or that sufficient infrastructure existed, to ensure that animal by-products were disposed of in accordance with Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down the health rules concerning animal by-products not intended for human consumption (OJ 2002 L 273 p. 1), the predecessor of Regulation 1069/2009.

14 On 12 March 2014, after opening an investigation (Case No 74406) and some correspondence between the parties, ESA issued a letter of formal notice in which it concluded that Iceland had failed to fulfil its obligations arising from Regulation (EC) No 1774/2002, referred to at that time at point 9b in Part 7.1 of Chapter I of Annex I to the EEA Agreement. Iceland then amended the relevant national legislation.

15 On 16 December 2015, ESA informed Iceland that, notwithstanding that after the changes the Icelandic legal framework appeared to be in line with the EEA legal requirements, a further investigation (Case No 78358) had been opened. This case concerned the absence

of sufficient information enabling ESA to conclude that the incorrect practices concerning the disposal of animal by-products noted during the 2013 fact-finding mission had been rectified and were no longer being carried out. Case No 74406 was closed by Decision No 008/16/COL.

- 16 Iceland implemented Regulation 1069/2009 and Regulation 142/2011 through Icelandic Regulation No 674/2017. After various meetings between the parties, ESA carried out a fact-finding mission from 11 to 20 June 2018 to verify whether official controls related to animal by-products were being undertaken in accordance with the new animal by-products Regulations. In its report, ESA found that there had been insufficient progress towards resolving the animal by-products' disposal issues highlighted in its 2013 report. According to that report, Iceland and the respective competent authorities continued to disregard official controls and the necessary measures to control, monitor and verify compliance with animal by-products' disposal requirements.
- 17 On 3 October 2018, after a meeting and further correspondence between the parties, ESA issued a letter of formal notice in which it concluded that Iceland has failed to fulfil its obligation under Article 4(3) of Regulation 1069/2009 and Article 32(1) of Regulation 142/2011 to maintain a system of official controls and under Article 4(4)(b) of Regulation 1069/2009 to have an adequate system in place on its territory:
 - to ensure that fallen stock, slaughterhouse waste (other than Category 1 specific risk material) and home slaughter waste is disposed of in landfills only after prior processing (in accordance with the requirements of Articles 12(c), 13(c) and 14(c) of Regulation 1069/2009); and
 - to ensure that fallen stock or home slaughter waste is not buried on site, except where specifically authorised pursuant to Articles 19 or 20 of Regulation 1069/2009, and in accordance with Articles 12, 13 and 14 of that Regulation.
- 18 On 29 April 2020, following further meetings and correspondence, ESA delivered a reasoned opinion, maintaining the conclusion set out in its letter of formal notice dated 3 October 2018. 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 of its receipt.
- 19 On 29 September 2020, following further meetings, correspondence and the grant of an extension of the deadline to respond, Iceland delivered its reply to the reasoned opinion in which it, inter alia:
 - (i) acknowledged that animal by-products continued to be directly disposed of in authorised landfills without prior processing;

- (ii) recognised that there were limited procedures in place to ensure that the conditions of Article 19 or 20 of Regulation No 1069/2009 were met because the Environmental Agency, which the Icelandic Ministry of Industries and Innovation identified as the relevant authority, had limited experience with Regulation 1069/2009;
 - (iii) stated that the Ministry of the Environment and Natural Resources was in the process of drafting a policy on waste management for the following twelve years; and
 - (iv) noted that the Ministry of Industry and Innovation had sent the Ministry of Environment and Natural Resources a formal letter requesting further information as to how it intended to address the findings in ESA's reasoned opinion.
- 20 On 20 October 2021, ESA adopted Decision No 244/21/COL to bring the matter before this Court in accordance with the second paragraph of Article 31 SCA.

IV Procedure and forms of order sought

- 21 On 28 January 2022, ESA lodged the present application at the Court's Registry, registered at the Court on the same date. ESA requests the Court to declare that:

By failing to prevent:

- a) the direct disposal of fallen stock, Category 3 slaughterhouse waste and home slaughter waste in authorised landfills in Iceland without prior processing, contrary to Articles 12(c), 13(c) and 14(c) of Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002, as amended and as adapted to the EEA Agreement by the specific and the sectoral adaptations referred to in Annex I to that Agreement; and*
- b) the burial on-site of fallen stock and home slaughter waste (including Category 1 specified risk material) in the absence of the conditions of Article 19 or 20 of Regulation No 1069/2009 being met, contrary to Articles 12, 13 and 14 of Regulation No 1069/2009*

Iceland has failed to fulfil its obligations:

- a) under Article 4(3) of Regulation (EC) No 1069/2009 to maintain a system of official controls in order to verify that the requirements of Regulation (EC) No 1069/2009 concerning disposal of animal by-products are fulfilled by relevant operators;*

- b) *under Article 4(4)(b) of Regulation (EC) No 1069/2009 to have an adequate system in place on its territory to ensure that animal by-products are disposed of in accordance with Regulation (EC) No 1069/2009; and*
- c) *under Article 32(1) of Commission Regulation (EU) No 142/2011 of 25 February 2011 implementing Regulation (EC) No 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive, as amended and as adapted to the EEA Agreement by the specific and the sectoral adaptations referred to in Annex I to that Agreement, to take the necessary measures to control compliance of relevant operators with their animal by-product disposal obligations.*

- 22 On 31 March 2022, Iceland's statement of defence was registered at the Court. Iceland submits that it does not dispute the facts of the case as set out in ESA's application. Furthermore, it does not contest the declaration sought by ESA. Nevertheless, in its defence, Iceland states that it intends to develop an action plan to establish the resources for the collection, processing and disposal of animal by-products and to determine and clarify the role and cooperation of the competent authorities.
- 23 By letter of 7 April 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. By letter of 11 May 2022, registered at the Court on the following day, Iceland also consented to dispense with the oral procedure.
- 24 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

- 25 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-4/18 *ESA v Iceland*, judgment of 14 May 2019, paragraph 21 and case law cited).
- 26 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. 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 in Iceland also. The EFTA States find themselves under an obligation to implement regulations as such (see Case E-4/18 *ESA v Iceland*, cited above, paragraph 22 and case law cited).

- 27 Joint Committee Decision No 197/2015 entered into force on 1 August 2016 and the time limit for the EFTA States to adopt the measures necessary to implement Regulations 1069/2009 and 142/2011 expired on the same date.
- 28 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 Case E-4/18 *ESA v Iceland*, cited above, paragraph 24 and case law cited).
- 29 The Court notes that, even if the applicable national legislation itself complies with EEA law, a failure to fulfil obligations may arise due to the failure to apply that legislation in accordance with EEA law (see Case E-6/12 *ESA v Norway*, [2013] EFTA Ct. Rep. 618, paragraph 58 and case law cited).
- 30 Article 4(3) of Regulation 1069/2009 imposes a duty to maintain a system of official controls in order to verify that the requirements of that regulation concerning disposal of animal by-products are fulfilled by the relevant operators. Article 4(4)(b) of Regulation 1069/2009 imposes a duty to have an adequate system in place on its territory to ensure that animal by-products are disposed of in accordance with that Regulation. Article 32(1) of Regulation 142/2011 imposes a duty to take the necessary measures to control the relevant operators' compliance with their animal by-product disposal obligations. Such obligations cannot be fulfilled merely by the creation of an appropriate regulatory framework for attaining that objective without also ensuring its application (see Case E-13/16 *ESA v Iceland*, [2017] EFTA Ct. Rep. 17, paragraph 29 and case law cited).
- 31 It is undisputed that, by the expiry of the time limit set in the reasoned opinion, Iceland had failed to prevent the direct disposal of fallen stock, Category 3 slaughterhouse waste and home slaughter waste in authorised landfills without prior processing in accordance with the requirements of Articles 12(c), 13(c) and 14(c) of Regulation 1069/2009, as well as the burial on site of fallen stock and home slaughter waste (including Category 1 specified risk material) in the absence of the conditions of Articles 19 or 20 of that Regulation being met, contrary to Articles 12(c), 13(c) and 14(c). There was no adequate system of official controls in place to prevent these infringements. It is uncontested that there has been a continuing lack of recognition by the competent authorities of their respective statutory responsibilities with regard to the disposal of animal by-products, which is a significant contributing factor to the non-compliance. Iceland has accepted that the current system for disposal of animal by-products was inadequate to permit disposal in accordance with the relevant EEA law or the absence of relevant official controls. Furthermore, Iceland did not provide any information suggesting that the prohibited disposal practices are the subject of targeted official controls or measures taken against relevant operators or that adequate changes (infrastructural or other) were made to the Icelandic animal by-products disposal system to enable disposal in accordance with EEA law requirements.

32 Therefore, it must be held that Iceland has failed to fulfil its obligations under the Acts referred to at points 9b and 9c in Part 7.1 of Chapter I of Annex I to the EEA Agreement by failing within the time prescribed to adopt the measures necessary to: (i) implement and maintain a system of official controls in accordance with Article 4(3) of Regulation 1069/2009; (ii) establish an adequate system on its territory to ensure that animal by-products are treated in accordance with that regulation, as prescribed by Article 4(4)(b) of Regulation 1069/2009; and (iii) control the entire chain of collection, transport, use and disposal of animal by-products as required by Article 32(1) of Regulation 142/2011.

VI Costs

33 Pursuant to Article 120 RoP, a decision as to costs shall be given in the judgment which closes the proceedings. Article 121(1) RoP provides that the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has not requested Iceland to be ordered to pay the costs of the proceedings, even though the latter has been unsuccessful, the parties are ordered to bear their own costs of the proceedings.

On those grounds,

THE COURT

hereby:

- 1. Declares that Iceland has failed to fulfil its obligations under the Acts referred to at points 9b and 9c of Part 7.1 of Chapter I of Annex I to the EEA Agreement, in particular:**
 - a) under Article 4(3) of Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002, as amended and as adapted to the EEA Agreement by the specific and the sectoral adaptations referred to in Annex I to that Agreement, to maintain a system of official controls in order to verify that the requirements of that Regulation concerning the disposal of animal by-products are fulfilled by the relevant operators;**
 - b) under Article 4(4)(b) of Regulation (EC) No 1069/2009 to have an adequate system in place on its territory to ensure that animal by-products are disposed of in accordance with that Regulation; and**
 - c) under Article 32(1) of Commission Regulation (EU) No 142/2011 of 25 February 2011 implementing Regulation (EC) No 1069/2009 of the**

European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive, as amended and as adapted to the EEA Agreement by the specific and the sectoral adaptations referred to in Annex I to that Agreement, to take the necessary measures to control compliance of relevant operators with their animal by-products disposal obligations

by failing to prevent:

- **the direct disposal of fallen stock, Category 3 slaughterhouse waste and home slaughter waste in authorised landfills in Iceland without prior processing; and**
- **the burial on-site of fallen stock and home slaughter waste (including Category 1 specified risk material) in the absence of the conditions of Article 19 or 20 of Regulation (EC) No 1069/2009 being met,**

both contrary to Articles 12, 13 and 14 of Regulation (EC) No 1069/2009.

2. Orders each party to bear its own costs of the proceedings.

Páll Hreinsson

Per Christiansen

Bernd Hammermann

Delivered in open court in Luxembourg on 29 July 2022.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President