



JUDGMENT OF THE COURT

12 July 2023

(Failure by an EFTA State to fulfil its obligations – Failure to comply – Commission Regulation (EC) No 29/2009 – Requirements on data link services for the single European sky)

In Case E-15/22,

EFTA Surveillance Authority, represented by Kyrre Isaksen, Marte Brathovde and Melpo-Menie Joséphidès, acting as Agents,

applicant,

v

The Kingdom of Norway, represented by Troels Bjerre Leming and Lotte Tvedt, acting as Agents,

defendant,

APPLICATION seeking a declaration that Norway, by not providing and operating data link services by 5 February 2018, has failed to fulfil its obligations under Articles 3(1) and 7(1) of Commission Regulation (EC) No 29/2009 of 16 January 2009 laying down requirements on data link services for the single European sky,

THE COURT,

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

Registrar: Ólafur Jóhannes Einarsson,

having regard to the written pleadings of the parties, and the written observations submitted on behalf of:

- the European Commission (“the Commission”), represented by Beata Sasinowska and Günter Wilms, acting as Agents;

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 7 December 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 Norway has failed to fulfil its obligations under the act referred to in point 66wg of Annex XIII to the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”), namely Commission Regulation (EC) No 29/2009 of 16 January 2009 laying down requirements on data link services for the single European sky (OJ 2009 L 13, p. 3, and Norwegian EEA Supplement 2014 No 61, p. 145) (“the Regulation”), as subsequently amended, by failing to ensure that its designated air traffic service provider has the capability to provide and operate the defined data link services to operators for data exchanges in respect of aircraft flying within the airspace under its responsibility by 5 February 2018.

II Legal background

EEA law

- 2 Article 3 EEA reads:

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.

Moreover, they shall facilitate cooperation within the framework 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 Article 33 SCA reads:

The EFTA States concerned shall take the necessary measures to comply with the judgments of the EFTA Court.

6 Decision of the EEA Joint Committee No 85/2009 of 3 July 2009 (OJ 2009 L 277, p. 37, and Norwegian EEA Supplement 2009 No 56, p. 14) (“Decision No 85/2009”) amended Annex XIII (Transport) to the EEA Agreement by adding the Regulation as point 66wg of the Annex. No constitutional requirements were indicated, and the decision entered into force on 4 July 2009. Decision of the EEA Joint Committee No 190/2015 of 10 July 2015 (OJ 2017 L 8, p. 23, and Norwegian EEA Supplement 2017 No 3, p. 21) (“Decision No 190/2015”) amended point 66wg Annex XIII (Transport) to the EEA Agreement by deleting the indent (Commission Implementing Regulation (EU) No 441/2014), and adding as an indent Commission Implementing Regulation (EU) 2015/310 of 26 February 2015 amending Regulation (EC) No 29/2009 laying down requirements on data link services for the single European sky and repealing Implementing Regulation (EU) No 441/2014 (“Implementing Regulation (EU) 2015/310”). No constitutional requirements were indicated, and the decision entered into force on 11 July 2015.

7 Recital 1 of the Regulation reads:

Observed and expected increases in air traffic levels within Europe require parallel increases in air traffic control capacity. This leads to a demand for operational improvements, in particular to improve efficiency of communications between controllers and pilots. Voice communications channels are becoming progressively congested and should be supplemented by air-ground data link communications.

8 Article 3(1) of the Regulation, entitled “Data link services”, reads:

ATS [air traffic service] providers shall ensure that ATS units providing air traffic services within the airspace referred to in Article 1(3) have the capability to provide and operate the data link services defined in Annex II.

- 9 Article 7(1) of the Regulation, entitled “General obligations of Member States for data link communications”, reads:

Member States which have designated ATS providers in the airspace referred to in Article 1(3) shall ensure that air-ground communications services applying the requirements of Part B of Annex IV are available to operators for aircraft flying within that airspace under their responsibility for data exchanges of the air-ground applications defined in the ICAO standards specified in points 2 and 3 of Annex III, with due regard to possible coverage limitations inherent in the communication technology used.

- 10 The second paragraph of Article 15 of the Regulation, as amended by Implementing Regulation (EU) 2015/310, entitled “Entry into force and application”, reads:

This Regulation shall apply from 5 February 2018.

- 11 Annex II to the Regulation reads:

Definition of data link services referred to in Articles 3, 4, 5 and 7 and Annex IV

1. Definition of Data Link Communications Initiation Capability (DLIC)

The DLIC service shall enable the exchange of the necessary information for the establishment of data link communications between ground and aircraft data link systems.

The DLIC service shall be available to support:

- the unambiguous association of flight data from the aircraft with flight plan data used by an ATS unit,*
- the exchange of the supported air-ground application type and version information,*
- and the delivery of the addressing information of the entity hosting the application.*

The exchanges between the airborne and ground data link systems for the execution of DLIC service shall comply with:

- operating methods, time sequence diagrams and messages for the DLIC initiation and DLIC contact functions specified in Section 4.1 of the Eurocae [European Organisation for Civil Aviation Equipment] document identified in point 11 of Annex III,*
- safety requirements specified in Section 4.2.2 of the Eurocae document identified in point 11 of Annex III,*

- performance requirements specified in Section 4.3.2 of the Eurocae document identified in point 11 of Annex III.

2. Definition of ATC Communications Management service (ACM)

The ACM service shall provide automated assistance to flight crews and air traffic controllers for conducting the transfer of ATC communications (voice and data) comprising:

- *the initial establishment of CPDLC [controller — pilot data link communications] with an ATS unit,*
- *the transfer of CPDLC and voice for a flight from one ATS unit to the next ATS unit, or to instruct a change of voice channel within an ATS unit or sector,*
- *the normal termination of CPDLC with an ATS unit.*

The exchanges between airborne and ground data link systems for the execution of ACM service shall comply with:

- *operating methods and time sequence diagrams specified in Sections 5.1.1.1.1 to 5.1.1.1.7 and 5.1.1.2 of the Eurocae document identified in point 11 of Annex III,*
- *safety requirements specified in Section 5.1.2.3 of the Eurocae document identified in point 11 of Annex III excluding requirements relating to downstream clearance,*
- *performance requirements for the en route phase specified in Section 5.1.3.2 of the Eurocae document identified in point 11 of Annex III.*

3. Definition of ATC Clearances and Information service (ACL)

The ACL service shall provide flight crews and controllers with the ability to conduct operation exchanges comprising:

- *requests and reports from flight crews to air traffic controllers,*
- *clearances, instructions and notifications issued by air traffic controllers to flight crews.*

The exchanges between airborne and ground data link systems for the execution of ACL service shall comply with:

- *operating methods and time sequence diagrams specified in Sections 5.2.1.1.1 to 5.2.1.1.4 and 5.2.1.2 of the Eurocae document identified in point 11 of Annex III,*
- *a common subset of the message elements specified in Section 5.2.1.1.5 of the Eurocae document identified in point 11 of Annex III as appropriate to the en route operational environment,*
- *safety requirements specified in Section 5.2.2.3 of the Eurocae document identified in point 11 of Annex III,*
- *performance requirements for the en route phase specified in Section 5.2.3.2 of the Eurocae document identified in point 11 of Annex III.*

4. Definition of ATC Microphone Check service (AMC)

The AMC service shall provide air traffic controllers with the capability to send an instruction to several data link equipped aircraft, at the same time, in order to instruct flight crews to verify that their voice communication equipment is not blocking a given voice channel.

This instruction shall only be issued to those aircraft tuned to the frequency that is blocked.

The exchanges between airborne and ground data link systems for the execution of AMC service shall comply with:

- *operating methods and time sequence diagrams specified in Sections 5.3.1.1.1, 5.3.1.1.2 and 5.3.1.2 of the Eurocae document identified in point 11 of Annex III,*
- *safety requirements specified in Section 5.3.2.3 of the Eurocae document identified in point 11 of Annex III,*
- *performance requirements specified in Section 5.3.3.2 of the Eurocae document identified in point 11 of Annex III.*

12 Annex IV to the Regulation reads, in extract:

Requirements referred to in Articles 5, 6, 7, 8 and 9

...

Part B: Requirements for air-ground communications based on ATN [Aeronautical Telecommunication Network] and VDL [very high frequency digital link] Mode 2

...

2. Air-ground communications shall comply with safety and performance requirements of the data link services defined in Annex II.

...

National law

- 13 The Regulation is implemented through Section 2(5) of Norwegian Regulation No 513 of 14 May 2007 (*forskrift om samvirkingsevnen i Det europeiske nett for lufttrafikkstyring*), as amended by Norwegian Regulation No 1249 of 2 October 2009 (*forskrift om endring i forskrift om samvirkingsevnen i Det europeiske nett for lufttrafikkstyring*). Pursuant to Section 2(5) of Norwegian Regulation No 513 of 14 May 2007, the act referred to in point 66wg of Chapter VI of Annex XIII to the EEA Agreement (i.e. the Regulation) is to apply as a Norwegian Regulation (*forskrift*), as adapted by Annex XIII and otherwise by the EEA Agreement.
- 14 Section 2(5) of Norwegian Regulation No 513 of 14 May 2007 was amended by Norwegian Regulation No 907 of 16 July 2015 (*forskrift om endring i forskrift om samvirkingsevnen i Det europeiske nett for lufttrafikkstyring*), which implemented Implementing Regulation (EU) 2015/310, and entered into force on the same date.

III Facts and pre-litigation procedure

- 15 In a letter dated 31 May 2018, ESA requested information from the Norwegian Government as to the status of the implementation of data link services in Norway.
- 16 In its reply of 2 July 2018, the Norwegian Government stated that its designated air traffic service provider, Avinor Air Navigation Services (“Avinor ANS”), had not implemented the data link services as required under the Regulation but anticipated that the services would be operational in mid-2023.
- 17 On 27 November 2018, ESA wrote to the Norwegian Government expressing its concerns as to the delay in the implementation of the data link services. ESA invited Norway to make substantial improvements to its plans for the deployment of data link services infrastructure and the integration of these services in the existing air traffic management systems as a matter of urgency in order to fully meet the applicable requirements no later than by the end of February 2019.
- 18 In its reply of 26 April 2019, the Norwegian Government indicated that Avinor ANS had decided to implement the data link services alongside a new air traffic management system. The Norwegian Government stated that it considered this to be the best solution

but acknowledged that, as a result, compliance in relation to data link services would be delayed until Q2 2023.

- 19 In a further letter of 19 November 2019, the Norwegian Government provided information on its progress in implementing the Regulation, stating that it could not be partially compliant with the Regulation sooner since there were no plans to update the existing system platforms.
- 20 On 10 June 2020, ESA issued a letter of formal notice in which it concluded that, by not providing and operating all data link services defined in Annex II to the Regulation to all operators of aircraft flying within the airspace that in line with Article 6 of the Regulation are capable of data link communications, Norway had failed to fulfil its obligations under Article 3(1) of the Regulation. Article 7(1) of the Regulation was referred to in the section on the relevant EEA law.
- 21 On 12 October 2020, Norway replied to the letter of formal notice. Norway stated that it agreed with ESA’s assessment that the requirements of Article 3(1) and Article 7(1) of the Regulation had not been met within the set deadline. Norway noted that Avinor ANS had originally intended to data link communications at a much earlier stage. However, due to technical challenges reported across Europe and a negative cost-benefit analysis, it had decided to postpone implementation, and to coordinate it with the planned installation of a new air traffic management system. Norway indicated that its new air traffic management system, with an initial intended operational date of Q2 2023, might be further delayed. Norway noted that interim and remedial solutions had been considered, but these had not been found sufficiently robust, nor financially sound. Norway did not consider it obvious that any interim solution would be in the interest of airspace users. Consequently, Norway accepted that it had failed to fulfil its obligations under the Regulation but trusted that the delay in compliance would not have a significant impact on the European Air Traffic Management Network.
- 22 On 10 November 2021, ESA delivered a reasoned opinion in which it found that, by not providing and operating data link services by 5 February 2018, Norway had failed to fulfil its obligations under Articles 3(1) and 7(1) of the Regulation. Pursuant to the second paragraph of Article 31 SCA, ESA required Norway to take the necessary measures to comply with the reasoned opinion within two months of its receipt.
- 23 On 10 January 2022, the period for compliance with ESA’s reasoned opinion expired.
- 24 On 15 February 2022, the Norwegian Government responded to ESA’s reasoned opinion, citing unreasonable costs, safety concerns, and technical challenges as the reasons behind the delay in implementing the data link services within the two month period set in the reasoned opinion. Norway further submitted that, partly due to the Covid-19 pandemic, the required data link services would not be implemented until 2025 at the earliest. Norway observed that the Norwegian Civil Aviation Authority (“CAA”) had considered imposing coercive fines on Avinor ANS for the lack of compliance with the requirement to implement data link communications. However, having regard to all the elements causing the delay in the implementation of the data

link services, the CAA had not found that fines would be effective nor dissuasive and, therefore, that any use of fines in this case would be a breach of Article 9 of Regulation (EC) No 549/2004 as it would not be effective, proportionate or dissuasive.

25 On 16 November 2022, ESA adopted Decision No 202/22/COL to bring the matter before the Court in accordance with the second paragraph of Article 31 SCA.

IV Procedure and forms of order sought

26 On 7 December 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 Norway, by not providing and operating data link services by 5 February 2018, has failed to fulfil its obligations under Articles 3(1) and 7(1) of Commission Regulation (EC) No 29/2009 of 16 January 2009 laying down requirements on data link services for the single European sky, and*
2. *order Norway to bear the costs of these proceedings.*

27 On 13 February 2023, Norway submitted its defence, which was registered at the Court on the same date. Norway does not dispute the facts as set out in ESA’s application, and agrees with ESA’s presentation of the relevant law. Norway acknowledges that it has failed to fulfil the obligations under Articles 3(1) and 7(1) of the Regulation, and does not contest the declaration sought by ESA. Norway states that Avinor ANS provides its air traffic management services using the Norwegian Air Traffic CONtrol system (“NATCON”), commissioned in 1996, and that NATCON is the oldest air traffic management system still in use in Europe. Norway submits that although legal measures have been formally implemented into national law, Avinor ANS is as yet unable to provide and operate data link services as it has determined that the current air traffic management system in Norway does not support this service. Norway states that the only viable solution is to replace the air traffic management system, an option eventually chosen by Avinor ANS, with a targeted implementation date of 2025. Further, Norway consented to the Court dispensing with the oral procedure.

28 By way of its reply dated 28 February 2023, registered at the Court on the same date, ESA welcomes the fact that Norway requests ESA’s application to be declared well founded. ESA notes Norway’s submission that compliance is to be achieved through the implementation of a new air traffic management system, with a target implementation date in 2025. ESA reiterates that the circumstances referred to by Norway are the responsibility of the EFTA State and cannot justify a failure to fulfil obligations arising under EEA law. ESA observes that, in the case of a judgment from the Court, pursuant to Article 33 SCA, Norway shall take the necessary measures to comply; however, that provision does not specify the period in which such measures must be taken. Hence, it is for the Court to decide whether the measures taken are sufficient to comply with a judgment and whether the outlined date of compliance, 2025 at the earliest, fulfils the requirements under EEA law. ESA contends that this target date does not appear to be in line with the requirement that the process of compliance

be commenced immediately and completed as soon as possible. Further, ESA consents to the Court dispensing with the oral procedure.

- 29 A deadline of 21 March 2023 was set for the rejoinder. By letter of 17 March 2023, registered at the Court on 20 March 2023, Norway declined the opportunity to submit a rejoinder.
- 30 On 31 March 2023, the Commission submitted written observations in support of the form of order sought by ESA. The Commission stated that it had initiated similar proceedings pursuant to the Treaty on the Functioning of the European Union for failure to fulfil obligations under the Regulation with respect to Greece, Malta, and Slovakia (respectively Cases C-599/22 *Commission v Greece* (action brought on 16 September 2022), C-622/22 *Commission v Republic of Malta* (action brought on 29 September 2022) and C-668/22 *Commission v Slovak Republic* (action brought on 21 October 2022 and removed from the register on 16 March 2023 following the Commission’s withdrawal of the action on 15 February 2023, due to compliance by Slovakia).
- 31 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

- 32 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-8/22 *ESA v Iceland*, judgment of 17 November 2022, paragraph 20 and case law cited).
- 33 Article 7(a) EEA provides that an act corresponding to an EU regulation, referred to in the Annexes to the EEA Agreement or a decision of the EEA Joint Committee, shall as such be made part of the internal legal order of an EEA State.
- 34 The Court recalls 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 Case E-8/22 *ESA v Iceland*, cited above, paragraph 22 and case law cited).
- 35 Decision No 85/2009 entered into force on 4 July 2009. Decision No 190/2015 entered into force on 11 July 2015. Pursuant to the second paragraph of Article 15 of the Regulation, as amended by Implementing Regulation (EU) 2015/310, the Regulation shall apply from 5 February 2018.
- 36 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-8/22 *ESA v Iceland*, cited above, paragraph 24 and case law cited). In this case, the relevant date is 10 January 2022. It is undisputed that

Norway had failed to fulfil its obligations arising from Articles 3(1) and 7(1) of the Regulation by the expiry of the time limit set in the reasoned opinion.

- 37 In its defence, Norway has submitted that it aims to implement data link services as soon as materially possible but that its earliest possible compliance with the data link services requirements, continuing on the current trajectory, is 2025. However, Norway acknowledges that, in hindsight, an earlier decision to replace the air traffic management system would have ensured less of a delay in complying with the obligation to provide data link services. Norway asserts that its delay has had only minor operational and practical effects for airlines using the Norwegian airspace, and that to its knowledge, no safety issues arise as a consequence of the non-compliance.
- 38 The Court observes that Norway has alleged circumstances in its defence concerning practices or situations prevailing in its domestic legal order. However, such circumstances are the responsibility of the EFTA State and cannot justify failure to observe obligations arising under EEA law.
- 39 The Court recalls that, although Article 33 SCA does not specify the period within which measures necessary to comply with a judgment must be taken, the interest in the immediate and uniform application of EEA law requires that the process of compliance with a judgment must be commenced immediately and completed as soon as possible (see Case E-19/14 *ESA v Norway* [2015] EFTA Ct. Rep. 300, paragraph 42 and case law cited).
- 40 Therefore, in light of the above, it must be held that, by not providing and operating data link services by 5 February 2018, Norway has failed to fulfil its obligations under Articles 3(1) and 7(1) of Commission Regulation (EC) No 29/2009 of 16 January 2009 laying down requirements on data link services for the single European sky.

VI Costs

- 41 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 Norway be ordered to pay the costs, the latter has been unsuccessful, and none of the exceptions in Article 121(2) RoP apply, Norway must be ordered to pay the costs of the proceedings. The costs incurred by the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Declares that by not providing and operating data link services by 5 February 2018, the Kingdom of Norway has failed to fulfil its obligations arising from Articles 3(1) and 7(1) of Commission Regulation (EC) No 29/2009 of 16 January 2009 laying down requirements on data link services for the single European sky.**
2. **Orders the Kingdom of Norway to bear the costs of the proceedings.**

Páll Hreinsson

Bernd Hammermann

Michael Reiertsen

Delivered in open court in Luxembourg on 12 July 2023.

Ólafur Ísberg Hannesson
Acting Registrar

Páll Hreinsson
President