



JUDGMENT OF THE COURT

22 October 2024

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Directive (EU) 2017/828 – Encouragement of long-term shareholder engagement)

In Case E-4/24,

EFTA Surveillance Authority, represented by Hildur Hjörvar, Catherine Howdle and Melpo-Menie Joséphidès, acting as Agents,

applicant,

v

Iceland, represented by Helga Hrönn Karlsdóttir and Sigurbjörg Stella Guðmundsdóttir, acting as Agents,

defendant,

APPLICATION seeking a declaration that Iceland has failed to fulfil its obligations under the act referred to at point 10g of Annex XXII to the Agreement on the European Economic Area (Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement), as adapted by Protocol 1 to the EEA Agreement, and under Article 7 of the EEA Agreement, by failing to adopt the measures necessary to implement the act within the time prescribed, or in any event, by failing to inform the EFTA Surveillance Authority thereof,

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,

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 27 March 2024, 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 the act referred to at point 10g of Annex XXII to the Agreement on the European Economic Area (Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement) (OJ 2017 L 132, p. 1; and Icelandic EEA Supplement 2021 No 19, p. 46) (“the Directive”), as adapted by Protocol 1 to the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”), and under Article 7 EEA, by failing to adopt the measures necessary to implement the Directive within the time prescribed, or in any event, by failing to inform ESA thereof.

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:

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;

(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.

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 of the EEA Joint Committee No 235/2020 of 11 December 2020 (OJ 2023 L 240, p. 113; and Icelandic EEA Supplement 2023 No 70, p. 100) (“JCD No 235/2020”) amended Annex XXII (Company Law) to the EEA Agreement by adding the Directive to point 10g of the Annex. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway and were fulfilled by 30 August 2021, and JCD No 235/2020 entered into force on 1 October 2021.

6 Article 2 of the Directive, entitled “Transposition”, reads:

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 10 June 2019. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Notwithstanding the first subparagraph, Member States shall, not later than 24 months after the adoption of the implementing acts referred to in Articles 3a(8), 3b(6) and 3c(3) of Directive 2007/36/EC, bring into force the laws, regulations and

administrative provisions necessary to comply with Articles 3a, 3b and 3c of that Directive.

2. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this Directive.

III FACTS AND PRE-LITIGATION PROCEDURE

- 7 On 31 May 2022, after prior correspondence, ESA sent a letter of formal notice to Iceland, concluding that, by failing to take the necessary measures to make the Directive part of its internal legal order and/or by failing to notify ESA, Iceland had failed to fulfil its obligations under Article 7 EEA.
- 8 On 6 October 2022, Iceland replied to the letter of formal notice, stating that it had not yet taken the necessary measures to implement the Directive and indicated that a bill for implementation of the Directive was scheduled to be presented to Parliament in November 2022. By letter of 24 January 2023, Iceland noted further implementation delays and stated that a bill containing the measures necessary to implement the Directive would be presented to Parliament in February 2023.
- 9 Having considered Iceland's response, ESA delivered a reasoned opinion on 19 April 2023 in which it maintained the conclusion set out in its letter of formal notice. Iceland was given two months in which to take the measures necessary to comply with the reasoned opinion, i.e. no later than 19 June 2023.
- 10 In its reply to the reasoned opinion dated 15 October 2023, Iceland stated that the implementation had been delayed further, and that a bill was due to be presented to Parliament in the autumn of 2023. In further replies of 29 December 2023 and 15 March 2024, Iceland stated that the implementation had been further delayed. In the latter reply, Iceland indicated that a bill was due to be presented to Parliament in April 2024.
- 11 By the time that the deadline set in the reasoned opinion expired, ESA had received no notification that Iceland had implemented the Directive, nor was ESA in possession of any other information which indicated that it had been made part of Iceland's internal legal order.
- 12 On 27 March 2024, ESA decided, by way of College Decision 041/24/COL, to bring the matter before the Court pursuant to Article 31 SCA.

IV PROCEDURE AND FORM OF ORDER SOUGHT

- 13 On 27 March 2024, 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 the Act referred to at point 10g of Annex XXII to the EEA Agreement (Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement), as adapted by Protocol 1 to the EEA Agreement, and under Article 7 of the EEA Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed, or in any event, by failing to inform the EFTA Surveillance Authority thereof, and

2. order Iceland to bear the costs of these proceedings.

- 14 On 5 June 2024, Iceland submitted its defence, which was registered at the Court on the same date. Iceland submits that the facts of the case, as brought forward in the application, are correct and undisputed. Furthermore, Iceland states that it does not dispute the declaration sought by ESA.
- 15 A deadline of 11 July 2024 was set for the reply. By way of a letter dated 25 June 2024, registered at the Court on the same date, ESA notes that Iceland has not contested the declaration sought. Consequently, ESA waives its right to reply under Article 108 of the Rules of Procedure (“RoP”) and consents to the Court dispensing with the oral procedure should it wish to do so.
- 16 The deadline for intervention expired, pursuant to Article 113(1) RoP, on 27 June 2024. On 5 July 2024, Iceland wrote to the Court stating that it also consents to the Court dispensing with the oral hearing pursuant to Article 70 RoP.
- 17 The deadline for submitting written observations expired on 12 August 2024. No written observations were received.
- 18 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided, pursuant to Article 70 RoP, to dispense with the oral procedure.

V FINDINGS OF THE COURT

- 19 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 the judgment of 2 July 2024, *ESA v Norway*, E-14/23, paragraph 19 and case law cited).

- 20 Under Article 7 EEA, the EFTA States are obliged to implement all acts corresponding to regulations and directives referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. An obligation to implement the Directive also follows from Article 2 thereof.
- 21 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 of result in that regard (see the judgment in *ESA v Norway*, E-14/23, cited above, paragraph 21 and case law cited).
- 22 JCD No 235/2020 entered into force on 1 October 2021. The time limit for EFTA States to adopt the measures necessary to implement the Directive expired on the same date.
- 23 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 the judgment in *ESA v Norway*, E-14/23, cited above, paragraph 23 and case law cited). In this case, the relevant date is 19 June 2023.
- 24 It is undisputed that Iceland had failed to fulfil its obligations arising from Article 2 of the Directive by the expiry of the time limit set in the reasoned opinion.
- 25 In light of the above, it must be held that Iceland has failed to fulfil its obligations under the Directive, as adapted by Protocol 1 to the EEA Agreement, and under Article 7 EEA by failing to adopt the measures necessary to implement the Directive within the time prescribed.

VI COSTS

- 26 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 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 the Act referred to at point 10g of Annex XXII to the EEA Agreement (Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement), as adapted by Protocol 1 to the EEA Agreement, and under Article 7 of the EEA Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed.**
- 2. Orders Iceland to bear the costs of the proceedings.**

Páll Hreinsson

Bernd Hammermann

Michael Reiertsen

Delivered in open court in Luxembourg on 22 October 2024.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President