



JUDGMENT OF THE COURT

5 December 2024

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Commission Delegated Regulation (EU) 2021/923 of 25 March 2021 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards setting out the criteria to define managerial responsibility, control functions, material business units and a significant impact on a material business unit’s risk profile, and setting out criteria for identifying staff members or categories of staff whose professional activities have an impact on the institution’s risk profile that is comparably as material as that of staff members or categories of staff referred to in Article 92(3) of that Directive)

In Case E-10/24,

EFTA Surveillance Authority, represented by Hildur Hjörvar, Sigrún Ingibjörg Gísladóttir, and Melpo-Menie Joséphidès, acting as Agents,

applicant,

v

Iceland, represented by Inga Þórey Óskarsdóttir, Hendrik Daði Jónsson, and Gunnlaugur Helgason, acting as Agents,

defendant,

APPLICATION seeking a declaration that Iceland has failed to adopt the measures necessary to make the act referred to at point 14i of Annex IX to the EEA Agreement (Commission Delegated Regulation (EU) 2021/923 of 25 March 2021 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards setting out the criteria to define managerial responsibility, control functions, material business units and a significant impact on a material business unit’s risk profile, and setting out criteria for identifying staff members or categories of staff whose professional activities have an impact on the institution’s risk profile that is comparably as material as that of staff members or categories of staff referred to in Article 92(3) of that Directive), as adapted by Protocol 1 to the EEA Agreement, part of its internal legal order,

THE COURT,

composed of: Páll Hreinsson, President, Bernd Hammermann and Michael Reiertsen (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 25 April 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 adopt the measures necessary to make the act referred to at point 14i of Annex IX to the Agreement on the European Economic Area (“EEA Agreement” or “EEA”) (Commission Delegated Regulation (EU) 2021/923 of 25 March 2021 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards setting out the criteria to define managerial responsibility, control functions, material business units and a significant impact on a material business unit’s risk profile, and setting out criteria for identifying staff members or categories of staff whose professional activities have an impact on the institution’s risk profile that is comparably as material as that of staff members or categories of staff referred to in Article 92(3) of that Directive), as adapted by Protocol 1 to the EEA Agreement, part of its internal legal order, as required by Article 7 EEA.

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 Commission Delegated Regulation (EU) 2021/923 of 25 March 2021 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards setting out the criteria to define managerial responsibility, control functions, material business units and a significant impact on a material business unit's risk profile, and setting out criteria for identifying staff members or categories of staff whose professional activities have an impact on the institution's risk profile that is comparably as material as that of staff members or categories of staff referred to in Article 92(3) of that Directive (OJ 2021 L 203, p. 1, and Icelandic EEA Supplement 2024 No 69 p. 151) ("the Regulation") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 142/2022 of 29 April 2022 (OJ 2022 L 246, p. 100, and Icelandic EEA Supplement 2022 No 61, p. 96) ("JCD No 142/2022"). The Regulation is referred to at point 14i of Annex IX (Financial services) to the EEA Agreement. No constitutional requirements were indicated, and the decision entered into force, on the basis of Article 3 thereof, upon the entry into force of Decision of the EEA Joint Committee No 383/2021 on 1 July 2022.

III FACTS AND PRE-LITIGATION PROCEDURE

- 6 On 21 July 2023, after prior correspondence, ESA sent a letter of formal notice to Iceland concluding that, by failing to take the necessary measures to make the Regulation part of its internal legal order, Iceland had failed to fulfil its obligations under Article 7 of the EEA Agreement.
- 7 On 10 August 2023, Iceland replied to the letter of formal notice, stating that it had not yet taken the necessary measures to implement the Regulation and indicated its intention to submit a bill to Parliament in the autumn of 2023, on the basis of which the central bank would subsequently implement the Regulation.
- 8 On 24 January 2024, having considered Iceland’s response, ESA delivered a reasoned opinion in which it maintained the view that the Regulation had not been made part of the Icelandic internal legal order as required by Article 7 EEA. Iceland was given two months in which to take the measures necessary to comply with the reasoned opinion.
- 9 On 21 March 2024, Iceland replied to ESA’s reasoned opinion in which it informed ESA that the planned bill had been submitted for formal approval and was expected to be presented to Parliament before the end of March 2024.
- 10 On 24 April 2024, ESA decided, by way of College Decision 063/24/COL, to bring the matter before the Court pursuant to Article 31 SCA.

IV PROCEDURE AND FORM OF ORDER SOUGHT

- 11 On 25 April 2024, ESA lodged the present application at the Court’s Registry, which was registered at the Court on the same day. ESA requests the Court to:
 1. *declare that Iceland has failed to fulfil its obligations under Article 7 of the EEA Agreement by failing to make the Act referred to at point 14i of Annex IX to the EEA Agreement (Commission Delegated Regulation (EU) 2021/923 of 25 March 2021 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards setting out the criteria to define managerial responsibility, control functions, material business units and a significant impact on a material business unit’s risk profile, and setting out criteria for identifying staff members or categories of staff whose professional activities have an impact on the institution’s risk profile that is comparably as material as that of staff members or categories of staff referred to in Article 92(3) of that Directive), as adapted by Protocol 1 to the EEA Agreement, part of its internal legal order, and*
 2. *order Iceland to bear the costs of these proceedings.*
- 12 On 26 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 materially correct and undisputed, but that the statement in paragraph 6 of the application, which claims that Iceland did not reply to ESA’s reasoned opinion,

was incorrect, as it had responded by a letter dated 21 March 2024. Furthermore, Iceland states that it does not dispute the declaration sought by ESA.

- 13 A deadline of 22 July 2024 was set for the reply. In its reply, registered at the Court on 12 July 2024, ESA acknowledged that Iceland’s reply to its reasoned opinion had indeed been received on 21 March 2024 and maintained the declaration sought in its application.
- 14 Pursuant to Article 113(1) of the Rules of Procedure (“RoP”), the deadline for intervention expired on 18 July 2024. No applications to intervene were received.
- 15 On 19 August 2024, Iceland wrote to the Court stating that it waives its right submit a rejoinder pursuant to Article 108 RoP, and consents to the Court, should it wish to do so, dispensing with the oral hearing pursuant to Article 70 RoP.
- 16 The deadline for submitting written observations expired on 28 August 2024. No written observations were received.
- 17 On 11 September 2024, ESA wrote to the Court stating that it also consents to the Court dispensing with the oral hearing.
- 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 22 October 2024, *ESA v Iceland*, E-6/24, paragraph 19 and case law cited).
- 20 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 EFTA State.
- 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 to implement regulations as such (see the judgment in *ESA v Iceland*, E-6/24, cited above, paragraph 21 and case law cited).
- 22 JCD No 142/2022 entered into force on 1 July 2022. The time limit for EFTA States to adopt the measures necessary to make the Regulation part of their internal legal orders 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 Iceland*, E-6/24, cited above, paragraph

23 and case law cited). It is undisputed that Iceland had failed to make the Regulation part of its internal legal order by the expiry of the time limit set in the reasoned opinion.

- 24 In light of the above, it must be held that Iceland has failed to fulfil its obligations under Article 7 EEA by failing to make the Regulation, as adapted by Protocol 1 to the EEA Agreement, part of its internal legal order.

VI COSTS

- 25 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 Article 7 of the EEA Agreement by failing to make the act referred to at point 14i of Annex IX to the EEA Agreement (Commission Delegated Regulation (EU) 2021/923 of 25 March 2021 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards setting out the criteria to define managerial responsibility, control functions, material business units and a significant impact on a material business unit's risk profile, and setting out criteria for identifying staff members or categories of staff whose professional activities have an impact on the institution's risk profile that is comparably as material as that of staff members or categories of staff referred to in Article 92(3) of that Directive), as adapted by Protocol 1 to the EEA Agreement, part of its internal legal order.**
- 2. Orders Iceland to bear the costs of the proceedings.**

Páll Hreinsson

Bernd Hammermann

Michael Reiertsen

Delivered in open court in Luxembourg on 5 December 2024.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President