



JUDGMENT OF THE COURT

31 March 2017

(Failure by an EFTA State to fulfil its obligations – Failure to comply – Directive 95/50/EC on uniform procedures for checks on the transport of dangerous goods by road)

In Case E-14/16,

EFTA Surveillance Authority, represented by Carsten Zatschler, Auður Ýr Steinarsdóttir and Øyvind Bø, members of its Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, Ministry for Foreign Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that Iceland has failed to fulfil its obligations under the Act referred to at point 17d of Annex XIII to the Agreement on the European Economic Area (Council Directive 95/50/EC of 6 October 1995 on uniform procedures for checks on the transport of dangerous goods by road) as adapted to the Agreement under its Protocol 1, by failing to comply with Article 3(1), Article 4(1) to (5), Article 5, Article 6(1) and Article 9(1) of the Act,

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 an application lodged at the Court Registry on 26 September 2016, 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 17d of Annex XIII to the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”), that is Council Directive 95/50/EC of 6 October 1995 on uniform procedures for checks on the transport of dangerous goods by road (OJ 1995 L 249, p. 35) (“the Act” or “the Directive”), as adapted to the Agreement under its Protocol 1, by failing to comply with Article 3(1), Article 4(1) to (5), Article 5, Article 6(1) and Article 9(1) of the Act.

II Law

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.

...

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:

...

(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 EEA Joint Committee Decision No 19/96 of 26 March 1996 (OJ 1996 L 124, p. 27 and EEA Supplement 1996 No 23, p. 43), which entered into force on 1 April 1996, incorporated the Directive into the EEA Agreement by inserting it as point 17d of Annex XIII (Transport). It follows from Article 10 of the Directive that the compliance date was 1 January 1997.

6 Article 3(1) of the Directive reads:

The Member States shall ensure that a representative proportion of consignments of dangerous goods transported by road is subject to the checks laid down by this Directive, in order to check their compliance with the laws on the transport of dangerous goods by road.

7 Article 4 of the Directive reads:

1. In order to carry out the checks provided for in this Directive, the Member States shall use the checklist in Annex I. A copy of this checklist or a certificate showing the result of the check drawn up by the authority which carried it out shall be given to the driver of the vehicle and presented on request in order to simplify or avoid, where possible, subsequent checks. This paragraph shall not prejudice Member States' right to carry out specific measures for detailed checks.

2. The checks shall be random and shall as far as possible cover an extensive portion of the road network.

3. *The places chosen for these checks must permit infringing vehicles to be brought into compliance or, if the authority carrying out the check deems it appropriate to be immobilized on-the-spot or at a place designated for that purpose by the said authority without causing a safety hazard.*

4. *Where appropriate and provided that this does not constitute a safety hazard, samples of the goods transported may be taken for examination by laboratories recognized by the competent authority.*

5. *Checks shall not exceed a reasonable length of time.*

8 Article 5 of the Directive reads:

Without prejudice to other penalties which may be imposed, vehicles in respect of which one or more infringements of the rules on the transport of dangerous goods, in particular infringements listed in Annex II, are established may be immobilized either on-the-spot or at a place designated for this purpose by the authorities carrying out the check and required to be brought into conformity before continuing their journey or may be subject to other appropriate measures, depending on the circumstances or the requirements of safety including, where appropriate, refusal to allow such vehicles to enter the Community.

9 Article 6(1) of the Directive reads:

Checks may also be carried out at the premises of undertakings, as a preventive measure or where infringements which jeopardize safety in the transport of dangerous goods have been recorded at the roadside.

10 Article 9(1) of the Directive reads:

Each Member State shall send the Commission for each calendar year not later than twelve months after the end of that year a report, drawn up in accordance with the model in Annex III, on the application of this Directive, including the following particulars:

- *if possible, determined or estimated volume of dangerous goods transported by road (in tonnes transported or in tonnes/kilometres),*
- *number of checks carried out,*
- *number of vehicles checked by place of registration (vehicles registered nationally, in other Member States or in third countries),*
- *number and types of infringements recorded,*
- *type and number of penalties imposed.*

National law

- 11 The Directive was implemented into the Icelandic legal order by Regulation No 192/1998 of 27 March 1998 on the transport of dangerous goods (*Reglugerð um flutning á hættulegum farmi*). That regulation has been replaced. The applicable regulation is now Regulation No 1077/2010 of 14 December 2010 on the transport of dangerous goods (*Reglugerð um flutning á hættulegum farmi á landi*) (“the Icelandic Regulation”), adopted on the basis of Traffic Act No 50/1987 (*Umferðarlög*).
- 12 Article 31(3) of the Icelandic Regulation reads:

The Transport Authority shall ensure that vehicles registered in accordance with the regulation on vehicle registration for the transport of dangerous goods, fulfil the requirements of [Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods (OJ 2008 L 260, p. 13) (“Directive 2008/68/EC”)].

- 13 Article 32 of the Icelandic Regulation reads:

Roadside checks

Roadside checks on the transport of dangerous goods shall be carried out at different times and in as many different places as possible to have clear information on compliance with regulations concerning the transport.

It shall be ensured:

- a. that necessary arrangements are made for checkpoints on roads or close to roads, as well as on planned roads, and if necessary that service stations and other safe places at the roadside can serve as checkpoints.*
- b. that checkpoints are selected on a random basis and as evenly as possible across the road network as a whole.*

Road checks shall specifically be aimed at:

- a. whether the transport of the consignment is authorised;*
- b. whether the following documents are on board the vehicle:*
 - 1. transport documents regarding the consignment;*
 - 2. certificate of approval for vehicle;*
 - 3. the driver's ADR certificate;*
- c. whether mixed loading provisions are respected;*
- d. whether there is leakage of goods or damage to packages;*

- e. *tank/vehicle placarding;*
- f. *danger markings of tanks or bulks;*
- g. *vehicle equipment, verifying that each vehicle is equipped with the following:*
 - 1. *at least one pair of wheel chocks;*
 - 2. *two hazard lights;*
 - 3. *fire extinguisher (one or more);*
 - 4. *protections for driver.*

14 Article 33 of the Icelandic Regulation reads:

Checks at the premises of undertakings

Checks shall be carried out at the premises of undertakings in light of former experience with checks of undertakings, carrying out different types of transport and operations. Moreover, if necessary, checks shall be carried out at the premises of undertakings when roadside checks have identified serious infringements of this regulation.

III Facts and pre-litigation procedure

- 15 In July 2009, following a conformity assessment, ESA concluded that the Directive was correctly implemented into the Icelandic legal order. However, ESA subsequently became concerned that the legal situation might have changed with the adoption of the Icelandic Regulation. Therefore, in 2013, ESA initiated a case concerning Iceland's fulfilment of its obligations under the Directive.
- 16 On 19 November 2013, ESA requested Iceland to submit the annual report referred to in Article 9(1) of the Directive. On 18 December 2013, Iceland replied by email that some improvements were needed in respect of roadside checks on the transport of dangerous goods and the submission of the annual report. On 21 January 2014, Iceland informed ESA that the checks referred to in the Directive had not been performed in a structured manner up until that time, but several governmental bodies were working together to fulfil the requirements of the Directive.
- 17 On 13 March 2014, Iceland informed ESA that the legal basis in Icelandic law for the checks referred to in the Directive was uncertain. Furthermore, to the extent such checks were carried out, it was not clear how or by whom. Later that same month, ESA requested information regarding these issues. No further information was submitted by Iceland in 2014.
- 18 On 15 April 2015, ESA issued a letter of formal notice concluding that Iceland had failed to fulfil its obligations under the Directive, by (i) adopting national legislation which is not compliant with Article 3(1), Article 4(1) and (3) to (5), and Article 5 of the Directive; (ii) failing to produce any evidence that it has met its obligations in practice under Article 3(1), Article 4(1) to (5), Article 5 and Article

6(1) of the Directive; and (iii) failing to send ESA a yearly report as required by Article 9(1) of the Directive. Iceland did not respond to the letter of formal notice, but the matter was discussed at a meeting in Reykjavík on 27 May 2015.

- 19 On 16 June 2015, Iceland informed ESA by email that a decision had been taken to move the Traffic Control Department from the Transport Authority to the police with effect from 1 January 2016. Iceland stated that by doing so, it would be in compliance with the Directive. In its email, Iceland further informed ESA that until 1 January 2016, the Transport Authority and the police would continue the ongoing special efforts, as discussed, which had been taking place in the last years with respect to road side inspections of commercial vehicles and transport of dangerous goods.
- 20 By two emails dated 26 June 2015, ESA asked Iceland to elaborate on what was meant by “special efforts” and to provide evidence on what special efforts had been made. ESA also asked for a copy of the decision referred to in the email of 16 June 2015.
- 21 On 2 July 2015, Iceland replied to the emails, stating that the special efforts consist of “measures that the police in Iceland has been taking, i.e. stopping vehicles and performing road side checks on the load that heavy vehicles are carrying”. No data was provided on these efforts, and ESA was not provided with a copy of the decision to relocate the Traffic Control Department to the police.
- 22 On 16 September 2015, ESA delivered a reasoned opinion, maintaining the conclusion set out in its letter of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA required Iceland to take the necessary measures to comply with the reasoned opinion within two months following the notification, that is no later than 16 November 2015.
- 23 Iceland responded to the reasoned opinion by a letter dated 16 November 2015. Iceland again referred to the special efforts made by the police “to inspect vehicles transporting dangerous goods and performing roadside checks [...] on a random basis, during different hours and different places, all according to the requirements made by [the Directive]”. However, no concrete information or evidence to that effect was provided.
- 24 In its response, Iceland further stated that the ambiguity and uncertainty regarding the entity responsible for the surveillance of transport of dangerous good on roads would be clarified by an amendment to the Icelandic Regulation. This amendment was expected to be effective by 1 January 2016, pursuant to which the police would be the responsible national body. Iceland stated that, following this amendment, a sufficient number of checks would be carried out and the requested documentation provided to ESA.
- 25 By emails of 4 and 7 January 2016, ESA asked Iceland to confirm whether the measures set out in Iceland's response to the reasoned opinion had been implemented.

- 26 By an email of 26 January 2016, Iceland informed ESA that the planned amendments to the Icelandic Regulation had not yet been adopted. The Traffic Control Department had nevertheless been transferred to the police on 1 January 2016, but the email did not provide the legal basis for the transfer. The email also referred to the special efforts mentioned earlier, concerning which the following statement from the police was attached: “In roadside checks on transport of dangerous goods in the year 2015, there were 16 cases in which there was one or more violation against [the Icelandic Regulation]”.

IV Procedure and forms of order sought

- 27 ESA lodged its application at the Court Registry on 26 September 2016. ESA requests the Court to:

1. Declare that Iceland has failed to fulfil its obligations under the Act referred to at point 17d of Chapter II of Annex XIII to the EEA Agreement (Council Directive 95/50/EC of 6 October 1995 on uniform procedures for checks on the transport of dangerous goods by road), as adapted to the Agreement under its Protocol I, by

- i. failing to ensure that a representative proportion of consignments of dangerous goods transported by road is subject to checks, as required by Article 3(1);*
- ii. failing to use the checklist in Annex I of the Directive when carrying out those checks, as required by Article 4(1);*
- iii. failing to ensure that the checks under the Directive are random and that they as far as possible cover an extensive portion of the road network, as required by Article 4(2);*
- iv. failing to ensure that the places chosen for the checks permit infringing vehicles to be brought into compliance or, if the authority carrying out the check deems it appropriate to be immobilized on-the-spot or at a place designated for that purpose by the said authority without causing a safety hazard, as required by Article 4(3);*
- v. failing to ensure where appropriate, and where it does not constitute a safety hazard, samples of the goods transported may be taken for examination by laboratories recognized by the competent authority, as required by Article 4(4);*
- vi. failing to ensure that the checks do not exceed a reasonable time, as required by Article 4(5);*
- vii. failing to ensure that vehicles in respect of which one or more infringements of the rules on the transport of dangerous goods*

are established may be immobilized either on-the-spot or at a place designated for this purpose by the authorities carrying out the check and required to be brought into conformity before continuing their journey or may be subject to other appropriate measures, depending on the circumstances or the requirements of safety, as required by Article 5;

viii. *failing to ensure that checks may also be carried out at the premises of undertakings, as required by Article 6(1); and*

ix. *failing to send ESA a yearly report as required by Article 9(1).*

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

28 On 5 December 2016, Iceland’s statement of defence was registered at the Court. Iceland submits that it does not dispute the facts of the case as they are set out in ESA’s application. Furthermore, it does not contest the declaration sought by ESA. Nevertheless, Iceland submits that following an agreement of 24 October 2016 between the Ministry of the Interior and the police on the conduct of road and traffic inspection of the police, which has been undertaken since 1 January 2016, the Directive is fully implemented in Iceland.

29 By letter of 3 January 2017, 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 23 January 2017, Iceland also gave such consent.

30 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

31 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, *inter alia*, Case E-10/16 *ESA v Iceland*, judgment of 1 March 2017, not yet reported, paragraph 13 and case law cited).

32 Under 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. An obligation to implement the Directive also follows from its Article 10. 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 of result in that regard (see, *inter alia*, *ESA v Iceland*, cited above, paragraph 14 and case law cited).

- 33 The question 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, *inter alia*, *ESA v Iceland*, cited above, paragraph 16 and case law cited). In this case, the relevant date is 16 November 2015.
- 34 ESA's application mainly addresses Iceland's failure to observe the obligations arising out of Articles 3 to 6 of the Directive. These provisions lay down obligations on EEA States concerning the frequency of checks of consignments of dangerous goods transported by road, the procedure, location and substantive content of those checks, and the remedies available against infringements. ESA claims that Iceland has failed to comply with these provisions, in law by not having implemented the provisions into the national legal order, and/or in fact by not having carried out the checks with the required intensity and according to the required procedure. Finally, ESA claims that Iceland has failed to submit annual reports under Article 9(1) of the Directive. Iceland has not objected to any of these claims.
- 35 Article 3(1) of the Directive obliges EEA States to ensure that a representative proportion of consignments of dangerous goods transported by road is subject to checks according to the Directive. Article 4 states that (1) the checklist provided for in Annex I to the Directive shall be used for these checks; (2) the checks shall be random and as far as possible cover an extensive portion of the road network; (3) the checks shall be carried out at places that permit infringing vehicles to be brought into compliance or to be immobilised on the spot or at a designated place; (4) samples of the goods transported may be taken for examination in certain circumstances; and (5) checks shall not exceed a reasonable length of time. Article 5 of the Directive requires that vehicles, in respect of which one or more infringements of the rules on the transport of dangerous goods are established, may be immobilised on the spot or at a place designated for this purpose and required to be brought into conformity before continuing their journey or may be subject to other appropriate measures.
- 36 These obligations of result require the EEA States to adopt legislative or administrative acts ensuring that such checks are carried out according to the relevant procedure and identifying the entity responsible to perform the checks.
- 37 Icelandic law reflects some of the obligations arising from Articles 3 to 5 of the Directive. Article 31 of the Icelandic Regulation states that it is the responsibility of the Transport Authority to ensure that vehicles transporting dangerous goods comply with the rules set out in Directive 2008/68/EC. Article 32 of the Icelandic Regulation provides that roadside checks shall be carried out at different times and in as many different places as possible to have clear information on compliance with rules concerning the transport of dangerous goods. The same provision also requires necessary arrangements to be made for checkpoints on roads or close to roads throughout the road network as a whole. Finally, a checklist for roadside checks is also set out.

- 38 However, these measures are inadequate to implement the requirements of Articles 3 to 5 of the Directive. First, Article 31 of the Icelandic Regulation merely refers to the rules set out in Directive 2008/68/EC. It does not refer to the checks required by Article 3(1) of the Directive. Second, the checklist provided for in Article 32 of the Icelandic Regulation does not fully correspond to the checklist in Annex I to the Directive, as required by its Article 4(1). Third, Article 32 of the Icelandic Regulation does not reflect the requirements of Article 4(4) and (5) of the Directive, and only to a limited extent that of Article 4(3) of the Directive. Finally, the Icelandic Regulation contains no provision implementing Article 5 of the Directive.
- 39 These shortcomings in the national legal order have inevitably led to the failure by Iceland to carry out checks in compliance with Articles 3 to 5 of the Directive. Despite ESA’s numerous requests for information during the pre-litigation procedure, Iceland has not provided any information or evidence about the number, frequency, location, procedure, or substantive content of such checks. Instead, Iceland has conceded that the checks required by the Directive have not so far been performed in a structured manner.
- 40 Iceland has submitted that, following the relocation on 1 January 2016 of the Traffic Control Department to the police, it now fulfils the requirements of the Directive. Without taking a view on the adequacy of this relocation as a means of complying with the Directive, the Court notes that the relocation in any event took place after the deadline laid down in the reasoned opinion. Consequently, at the expiry of the time laid down in the reasoned opinion, Iceland was in breach of its obligations arising from Article 3(1), Article 4(1) to (5) and Article 5 of the Directive.
- 41 According to Article 6(1) of the Directive, checks may be carried out at the premises of undertakings as a preventive measure or where infringements which jeopardize safety in the transport of dangerous goods have been recorded at the roadside. Correspondingly, Article 33 of the Icelandic Regulation lays down that checks shall be carried out at the premises of undertakings in light of former experience with checks of undertakings, carrying out different types of transport and operations. In addition, checks shall be carried out at the premises of undertakings when roadside checks have identified serious infringements of the Icelandic Regulation.
- 42 In its reasoned opinion, ESA has acknowledged that Article 33 of the Icelandic Regulation adequately reflects Article 6(1) of the Directive. ESA’s claim that Iceland has nevertheless breached the latter provision is based on the absence of evidence which would enable ESA to evaluate whether this is in fact the case in practice. However, Article 6(1) of the Directive merely provides that checks “may also be carried out at the premises of undertakings, as a preventive measure or where infringements which jeopardize safety in the transport of dangerous goods have been recorded at the roadside” but does lay down an obligation to do so. Hence, as long as Icelandic law allows for checks at the premises of undertakings, Iceland has fulfilled its obligations under Article 6(1).

- 43 Article 9(1) of the Directive, as adapted by Protocol 1 to the EEA Agreement, requires the EFTA States to send a report to ESA yearly on the application of the Directive. The report shall be drawn up in accordance with the model in Annex III to the Directive. It is undisputed that Iceland has not sent such reports yearly to ESA as required by Article 9(1).
- 44 It must therefore be held that Iceland has failed to fulfil its obligations arising under the Act referred to at point 17d of Annex XIII to the EEA Agreement (Council Directive 95/50/EC of 6 October 1995 on uniform procedures for checks on the transport of dangerous goods by road), as adapted to the Agreement under its Protocol 1, by failing, within the time prescribed, to implement Article 3(1), Article 4(1) to (5), Article 5 and Article 9(1) of the Act.
- 45 The application is dismissed as regards failure to comply with Article 6(1) of the Act.

VI Costs

- 46 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. ESA has asked for Iceland to be ordered to pay the costs. However, under the first paragraph of Article 66(3) RoP, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs. Since ESA has been successful in the main in its application, the Court finds it appropriate that Iceland be ordered to bear its own costs and the costs incurred by ESA.

On those grounds,

THE COURT

hereby:

- 1. Declares that Iceland has failed to fulfil its obligations arising under the Act referred to at point 17d of Annex XIII to the EEA Agreement (Council Directive 95/50/EC of 6 October 1995 on uniform procedures for checks on the transport of dangerous goods by road), as adapted to the Agreement under its Protocol 1, by failing, within the time prescribed, to implement Article 3(1), Article 4(1) to (5), Article 5 and Article 9(1) of the Act.**
- 2. Dismisses the application as regards failure to comply with Article 6(1) of the Act.**
- 3. Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 31 March 2017.

Birgir Hrafn Búason
Acting Registrar

Carl Baudenbacher
President