



## JUDGMENT OF THE COURT

29 October 2008

*(Failure by a Contracting Party to fulfil its obligations – Directive 2004/26/EC relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery)*

In Case E-2/08,

**EFTA Surveillance Authority**, represented by Niels Fenger, Director, and Florence Simonetti, Officer, in the Department of Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

*Applicant,*

v

**The Republic of Iceland**, represented by Sesselja Sigurðardóttir, First Secretary and Legal Officer, Ministry for Foreign Affairs, acting as Agent, Reykjavik, Iceland,

*Defendant,*

APPLICATION for a declaration that, by failing to adopt, or to notify the EFTA Surveillance Authority of, the measures necessary to implement the Act referred to at point 1a of Chapter XXIV of Annex II to the EEA Agreement, i.e. Directive 2004/26/EC of the European Parliament and of the Council of 21 April 2004 amending Directive 97/68/EC, as adapted to the EEA Agreement by Protocol 1 thereto, within the time-limit prescribed, the Republic of Iceland has failed to fulfil its obligations under Article 3 of that Act and Article 7 of the EEA Agreement.

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson and Henrik Bull (Judge-Rapporteur), Judges,

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

## **Judgment**

### **I The application**

- 1 By application lodged at the Court Registry on 21 February 2008, the EFTA Surveillance Authority (hereinafter “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 (hereinafter the “SCA”), for a declaration that, by failing to adopt, or to notify ESA of, the national measures necessary to implement the Act referred to at point 1a of Chapter XXIV of Annex II to the EEA Agreement, within the time-limit prescribed, the Republic of Iceland has failed to fulfil its obligations under Article 3 of that Act and Article 7 EEA. The Act referred to is Directive 2004/26/EC of the European Parliament and of the Council of 21 April 2004 amending Directive 97/68/EC on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery, as adapted by way of Protocol 1 to the EEA Agreement.

### **II Facts and pre-litigation procedure**

- 2 Decision 30/2006 of 10 March 2006 of the EEA Joint Committee amended Annex II to the EEA Agreement by adding Directive 2004/26/EC to point 1a of Chapter XXIV of that Annex. Article 3 of this decision requires the EFTA States to adopt the measures necessary to implement the Act by 11 March 2006, and to notify ESA thereof.
- 3 In the absence of any information from the Government of Iceland as to the implementation of the Act, ESA decided to initiate proceedings under Article 31 SCA and, on 14 March 2007, a letter of formal notice was sent to the Government of Iceland, stating that Iceland had failed to take the measures necessary to comply with the Act, and inviting the Government to submit its observations on the matter within two months of receipt.
- 4 Not having received any response from the Government of Iceland regarding the implementation of the Act, ESA delivered, on 4 July 2007, a reasoned opinion concluding that, by failing to adopt, or to notify ESA of, the measures necessary to implement the Act, Iceland had failed to fulfil its obligations under Article 3 of that Act and Article 7 EEA. The Government of Iceland was requested to take

the measures necessary to comply with the reasoned opinion within a time-limit of three months following notification thereof.

- 5 The Government of Iceland did not respond to the reasoned opinion.

### **III Procedure before the Court**

- 6 ESA lodged the present application at the Court Registry on 21 February 2008. The statement of defence from the Government of Iceland was received on 23 April 2008. On 19 May 2008, ESA submitted a reply to the defence lodged by Iceland.

- 7 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure.

### **IV Arguments of the parties**

- 8 The application is based on one plea in law, namely that by failing to adopt, or to notify ESA of, the national measures necessary to implement the Act referred to at point 1a of Chapter XXIV of Annex II to the EEA Agreement, i.e. Directive 2004/26/EC of the European Parliament and of the Council of 21 April 2004 amending Directive 97/68/EC, within the time-limit prescribed, the Republic of Iceland has failed to fulfil its obligations under Article 3 of that Act, as included in the EEA Agreement, and under Article 7 EEA.

- 9 It is undisputed by the Government of Iceland that the necessary national implementation measures were not adopted within the time-limit prescribed. Moreover, in its statement of defence, the Government does not dispute the order sought by ESA. The Government nevertheless requests the Court to order each party to bear its own costs of the proceedings. No reasons are submitted to substantiate this request.

- 10 As a factual observation, the Government of Iceland has clarified that the delay in implementing the Directive relates to a delay in publication in the EEA Supplement. The Directive will be implemented by means of a reference technique which entails that the required publication of the Directive in the Law and Ministerial Gazette of Iceland (*Stjórnartíðindi*) will consist of a reference to the Icelandic version of the Directive as published in the EEA Supplement to the Official Journal of the European Union. In Icelandic law, this technique is provided for by Act No 15/2005 on the Law and Ministerial Gazette and the Official Gazette (*Lög nr. 15/2005 um Stjórnartíðindi og Lögbirtingablað*).

- 11 In its reply to Iceland's statement of defence, ESA contests the request for sharing of costs in this case. It is submitted that according to the general rule under Article 66(2) of the Rules of Procedure Iceland must be ordered to bear the costs and that none of the exceptions in Article 66(3) apply.

## V Findings of the Court

- 12 Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. In this context, the Court notes that Article 3 EEA imposes upon the Contracting Parties 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-3/07 *EFTA Surveillance Authority v Iceland* [2007] EFTA Ct. Rep. 356, at paragraph 12).
- 13 The obligation to implement also follows from Article 3 of Directive 2004/26/EC, according to which implementation by the EC Member States is required not later than 20 May 2005. As Decision 30/2006 of the EEA Joint Committee did not set a separate EEA time limit for the implementation of the Directive into national law, Iceland was obliged to adopt the national measures necessary to implement the Directive by the date on which that Decision entered into force, namely 11 March 2006.
- 14 The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see Case E-3/07 *EFTA Surveillance Authority v Iceland*, cited above, at paragraph 14). It is undisputed that Iceland did not adopt those measures before the expiry of the time-limit given in the reasoned opinion.
- 15 Further, Article 7 EEA does not allow for the Contracting Parties to plead provisions, practices or circumstances existing in their internal legal order in order to justify a failure to comply with the obligations and time-limits laid down in a decision by the EEA Joint Committee to add a directive to the EEA Agreement, or laid down in the directive itself as adapted for the purposes of the EEA Agreement (see Case E-6/06 *EFTA Surveillance Authority v Liechtenstein* [2007] EFTA Ct. Rep. 238, at paragraph 21).
- 16 It must therefore be held that, by failing to adopt, within the prescribed time-limit, the national measures necessary to implement the Act referred to at point 1a of Chapter XXIV of Annex II to the EEA Agreement, i.e. Directive 2004/26/EC of the European Parliament and of the Council of 21 April 2004 amending Directive 97/68/EC, as adapted by way of Protocol 1 to the EEA Agreement, Iceland has failed to fulfil its obligations under Article 3 of that Act and Article 7 EEA.

## VI Costs

- 17 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the EFTA Surveillance Authority has requested that the Republic of Iceland be ordered to pay the costs and the latter has been

unsuccessful, and since none of the exceptions in Article 66(3) apply, Iceland must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- 1. Declares that, by failing to adopt, within the time-limit prescribed, the measures necessary to implement the Act referred to at point 1a of Chapter XXIV of Annex II to the EEA Agreement, i.e. Directive 2004/26/EC of the European Parliament and of the Council of 21 April 2004 amending Directive 97/68/EC on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery, as adapted to the EEA Agreement by Protocol 1 thereto, the Republic of Iceland has failed to fulfil its obligations under Article 3 of that Act and under Article 7 of the EEA Agreement.**
- 2. Orders the Republic of Iceland to bear the costs of the proceedings.**

Carl Baudenbacher

Thorgeir Örlygsson

Henrik Bull

Delivered in open court in Luxembourg on 29 October 2008.

Skúli Magnússon  
Registrar

Carl Baudenbacher  
President