JUDGMENT OF THE COURT
29 July 2016

(Failure by an EFTA State to fulfil its obligations – Failure to implement – Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights)

In Case E-31/15,

EFTA Surveillance Authority, represented by Carsten Zatschler, Øyvind Bø and Íris Ísberg, 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 the indent in point 9f of Annex XVII to the Agreement of the European Economic Area (Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights) as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the 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: 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 17 December 2015, 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 the indent in point 9f of Annex XVII to the Agreement on the European Economic Area ("the EEA Agreement" or "EEA"), that is Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights (OJ 2011 L 265, p. 1 and Icelandic EEA Supplement 2013 No 28, p. 360) ("the Act" or "the Directive") as adapted to the Agreement under its Protocol 1, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed or in any event failing to inform ESA thereof.

II 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 94/2013 of 3 May 2013 (OJ 2013 L 291, p. 60, and EEA Supplement 2013 No 61, p. 68) ("Decision 94/2013") amended Annex XVII (Intellectual Property) to the EEA Agreement by adding the Directive to point 9f of the Annex. Constitutional requirements were indicated by all EFTA States for the purposes of Article 103 EEA. By June 2014, all States had notified that the constitutional requirements had been fulfilled. Consequently, Decision 94/2013 entered into force on 1 August 2014. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

III Facts and pre-litigation procedure

6 On 12 November 2014, after correspondence with the Icelandic authorities, ESA issued a letter of formal notice concluding that Iceland had failed to fulfil its obligations under Article 2 of the Act and Article 7 EEA by failing to adopt or in any event to inform ESA of the measures necessary to implement the Directive.

7 By letter of 18 February 2015, Iceland replied to the letter of formal notice, explaining that it had not yet adopted the measures necessary to implement the Act. It indicated that the bill implementing the Directive was expected to be handled by Parliament by the end of the spring session.

8 On 8 April 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 8 June 2015.

9 By letter of 13 August 2015, Iceland responded to the reasoned opinion, explaining that when the Parliament adjourned in the spring of 2015 the implementing bill had only been through a first reading in Parliament. Thus, the bill would be presented again during Parliament's autumn session.

10 Since Iceland did not comply with the reasoned opinion by the deadline set, ESA decided to bring the matter before the Court pursuant to the second paragraph of Article 31 SCA.

IV Procedure and forms of order sought

11 ESA lodged the present application at the Court Registry on 17 December 2015. Iceland's statement of defence was registered at the Court on 7 March 2016. By letter of 31 March 2016, 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 3 May 2016, Iceland also consented to dispense with the oral procedure.

12 The applicant, ESA, requests the Court to:

> *1. Declare that Iceland has failed to fulfil its obligations under the Act referred to at the indent in point 9f of Annex XVII to the Agreement on the European Economic Area (Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights) as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the 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.*

13 The defendant, 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, in its defence, Iceland states that the Directive has been implemented to the Icelandic legal order as of 5 March 2016.

14 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

15 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-21/15 *ESA* v *Iceland*, judgment of 1 February 2016, not yet reported, paragraph 14 and case law cited).

16 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 2. 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 15 and case law cited).

17 Decision 94/2013 entered into force on 1 August 2014. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

18 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 17 and case law cited). It is undisputed that Iceland had not adopted the measures necessary to implement the Directive by the expiry of the time limit set in the reasoned opinion.

19 Since Iceland did not implement the Directive within the time prescribed, there is no need to examine the alternative form of order sought against Iceland for failing to inform ESA of the measures implementing the Directive.

20 It must therefore be held that Iceland has failed to fulfil its obligations under the Act referred to at the indent in point 9f of Annex XVII to the Agreement on the European Economic Area (Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights) as adapted to the Agreement under its Protocol 1, and under Article 7 of the Agreement, by failing to adopt the measures necessary to implement the Act within the time prescribed.

VI Costs

21 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. Since ESA has requested that Iceland be ordered to pay the costs, the latter has been unsuccessful and none of the exceptions in Article 66(3) RoP apply, Iceland must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that Iceland has failed to fulfil its obligations under the Act referred to at the indent in point 9f of Annex XVII to the Agreement on the European Economic Area (Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights) as adapted to the Agreement under its Protocol 1, and under Article 7 of the 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.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 29 July 2016.

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
Acting President