



JUDGMENT OF THE COURT

1 December 2009

(Failure by a Contracting Party to fulfil its obligations – Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC)

In Case E-3/09,

EFTA Surveillance Authority, represented by Bjørnar Alterskjær, Acting Director, and Ólafur Jóhannes Einarsson, Senior Officer, Department of Legal and Executive Affairs, acting as Agents, Brussels, Belgium,

Applicant,

v

The Principality of Liechtenstein, represented by Dr. Andrea Entner-Koch, Director, and Monika Zelger-Jarnig, Legal Officer, EEA Coordination Unit, acting as Agents, Vaduz, Liechtenstein,

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, inter alia, at point 7b of Annex IX to the EEA Agreement, i.e. Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, as adapted to the EEA Agreement by way of Protocol 1 thereto, within the time-limit prescribed, the Principality of Liechtenstein has failed to fulfil its obligations under Article 64(1) of that Act and under Article 7 of the EEA Agreement.

THE COURT

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson (Judge-Rapporteur) and Henrik Bull, 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 1 April 2009, 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, *inter alia*, at point 7b of Annex IX to the EEA Agreement, within the time-limit prescribed, the Principality of Liechtenstein has failed to fulfil its obligations under Article 64(1) of that Act and Article 7 EEA. The Act referred to is Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEA, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, as adapted by way of Protocol 1 to the EEA Agreement.

II Facts and pre-litigation procedure

- 2 Decision 59/2006 of 2 June 2006 of the EEA Joint Committee amended Annex IX to the EEA Agreement by adding Directive 2005/68/EC, *inter alia*, as point 7b of that Annex. The Decision entered into force on 1 June 2007. According to Article 64(1) of Directive 2005/68/EC, the Principality of Liechtenstein was obliged to take the measures necessary to ensure compliance with the Act by 10 December 2007.
- 3 In a letter from ESA dated 22 October 2007, the Liechtenstein Government was reminded of the date by which the measures necessary to implement the Act had to be taken. The Government was also asked to notify ESA as soon as possible, and before 10 December 2007, of the measures taken to implement the Act.
- 4 The Liechtenstein Government responded by email dated 25 October 2007 informing ESA that the Act was expected to be implemented into the Liechtenstein legal order in August 2008. The Government indicated that the first reading of the Bill in the Liechtenstein Parliament (*Landtag*) was scheduled to take place in April 2008 and the second reading in June 2008.
- 5 On 8 May 2008, ESA received a transposition forecast from the Liechtenstein Government which stated that the Act was expected to be implemented into Liechtenstein legislation by the fourth quarter of 2008.

- 6 After receiving no further information indicating that the national measures to ensure implementation had been adopted, ESA initiated proceedings under Article 31 SCA and, on 16 July 2008, a letter of formal notice was sent to the Liechtenstein Government, stating that the Principality of Liechtenstein had failed to take or, in any event, to inform ESA of the national measures to comply with the Act. The Government was invited to submit its observations on the matter within three months.
- 7 In a letter dated 17 October 2008, the Liechtenstein Government presented its observations on the letter of formal notice. ESA was informed that the implementation of the Act would be carried out by amending the Insurance Supervision Act (*Gesetz vom 6. Dezember 1995 betreffend die Aufsicht über Versicherungsunternehmen, Versicherungsaufsichtsgesetz*) and the Insurance Supervision Ordinance (*Verordnung vom 17. Dezember 1996 zum Gesetz betreffend die Aufsicht über Versicherungsunternehmen*). According to the letter, a first reading of the Bill in the *Landtag* was scheduled for April 2009 and a second reading in June 2009 and the implementing measures were foreseen to enter into force in August 2009.
- 8 In the absence of any further information enabling ESA to conclude that the national measures necessary to ensure implementation of the Act had been adopted, a reasoned opinion was delivered on 26 November 2008. ESA concluded that the Principality of Liechtenstein had failed to fulfil its obligations under Article 64(1) of the Act and under Article 7 of the EEA Agreement. The Principality of Liechtenstein was requested to take the measures necessary to comply with the reasoned opinion within three months.
- 9 The Liechtenstein Government responded to the reasoned opinion on 6 February 2009, informing ESA that the *Landtag* would deal with the Government Bill in a first reading in June 2009 and that the second reading was scheduled for September 2009, which meant that the implementing measures would enter into force in October 2009. The amendments to the Insurance Supervision Ordinance would enter into force at the same time.

III Procedure before the Court

- 10 ESA lodged the present application at the Court Registry on 1 April 2009. The statement of defence from the Liechtenstein Government was received on 29 May 2009. On 3 July 2009, ESA submitted a reply to the defence.
- 11 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

- 12 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, *inter alia*, at point 7b of Annex IX to the EEA Agreement, i.e.

Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, as adapted to the EEA Agreement by Protocol 1 thereto, within the time-limit prescribed, the Principality of Liechtenstein has failed to fulfil its obligations under Article 64(1) of that Act, as included in the EEA Agreement, and under Article 7 of the EEA Agreement.

- 13 In its statement of defence, the Liechtenstein Government sets out several reasons for the delay in implementation, noting that unpredicted incidents with the financial sector in late year 2008 and early 2009, which were time consuming, as well as Parliamentary elections in Liechtenstein, are the cause of the legislation being behind schedule. The Government does not, however, dispute that necessary national implementation measures were not adopted within the time-limit prescribed. Moreover, the Government does not dispute the order sought by ESA.
- 14 The Liechtenstein 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.
- 15 As additional factual information, the Government of Liechtenstein has submitted that Directive 2005/68/EC has been implemented in Liechtenstein by amending the Insurance Supervision Act and the Insurance Supervision Ordinance and that the implementing measures have entered into force with retroactive effect from 1 August 2009.
- 16 In its reply to the statement of defence from the Liechtenstein Government, ESA maintains its request to order the Principality of Liechtenstein to bear the costs of the proceedings. It is submitted that according to the general rule under Article 66(2) of the Rules of Procedure, the Principality of Liechtenstein must be ordered to bear the costs and that none of the exceptions in Article 66(3) apply.

V Findings of the Court

- 17 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-3/08 *EFTA Surveillance Authority v The Republic of Iceland* [2008] EFTA Ct. Rep. 308, at paragraph 15). 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 the decisions of the EEA Joint Committee.
- 18 The obligation to implement also follows from Article 64(1) of Directive 2005/68/EC, according to which implementation by the EC Member States is required not later than 10 December 2007. Decision 59/2006 of the EEA Joint Committee did not set a separate EEA time-limit for the implementation of the Directive into national law.

- 19 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-3/08 *EFTA Surveillance Authority v The Republic of Iceland*, cited above, at paragraph 18). The Principality of Liechtenstein was obliged to adopt national provisions necessary to comply with the Directive no later than 10 December 2007. It is undisputed that on 27 February 2009, the date on which the time-limit given in the reasoned opinion of ESA expired, the Principality of Liechtenstein had still not adopted the national measures necessary to comply with the reasoned opinion.
- 20 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-2/08 *EFTA Surveillance Authority v The Republic of Iceland* [2008] EFTA Ct. Rep. 301, at paragraph 15).
- 21 Consequently, none of the reasons for the delay in implementation invoked by the Liechtenstein Government are such as to affect the obligation to implement.
- 22 Therefore, it must be held that, by failing to adopt, within the prescribed time-limit, the national measures necessary to implement the Act referred to, *inter alia*, at point 7b of Annex IX to the EEA Agreement, i.e. Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, as adapted to the EEA Agreement by Protocol 1 thereto, the Principality of Liechtenstein has failed to fulfil its obligations under Article 64(1) of that Act and Article 7 of the EEA Agreement.

VI Costs

- 23 The Government of Liechtenstein has requested the Court to order each party to bear its own costs. The Court is left to address this claim even though no pleas, whether in law or in fact, have been submitted in support of this claim. In the light of ESA's submissions and considering the facts of the case, however, the Court finds it clear that the claim for sharing of costs is without basis in law.
- 24 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 ESA has requested that the Principality of Liechtenstein be ordered to pay the costs and the latter has been unsuccessful, and since none of the exceptions in Article 66(3) apply, the Principality of Liechtenstein 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 Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC, as well as Directives 98/78/EC and 2002/83/EC, as adapted to the EEA Agreement by Protocol 1 thereto, the Principality of Liechtenstein has failed to fulfil its obligations under Article 64(1) of the Directive and under Article 7 of the EEA Agreement.**
- 2. Orders the Principality of Liechtenstein to bear the costs of the proceedings.**

Carl Baudenbacher

Thorgeir Örlygsson

Henrik Bull

Delivered in open court in Luxembourg on 1 December 2009.

Skúli Magnússon
Registrar

Thorgeir Örlygsson
Acting President