



JUDGMENT OF THE COURT

29 June 2006

(Failure by a Contracting Party to fulfil its obligations – Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services – Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) – Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) – Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) – Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive))

In Joined Cases E-5/05, E-6/05, E-7/05, E-8/05 and E-9/05,

EFTA Surveillance Authority, represented by Tor Arne Solberg-Johansen, Senior Officer, and Elisabethann Wright, Senior Officer, in the Department of Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

Applicant,

v

The Principality of Liechtenstein, represented by Dr. Andrea Entner-Koch, Director of the EEA Coordination Unit, acting as Agent, Vaduz, Liechtenstein,

Defendant,

APPLICATIONS for a declaration that, by failing to adopt, within the time-limit prescribed, or to notify the EFTA Surveillance Authority of the adoption of, the measures necessary to implement the Acts referred to at respectively point 13a of Annex XIV and points 5cj, 5ck, 5cl and 5cm of Annex XI to the EEA Agreement, i.e. Commission Directive 2002/77/EC of 16 September 2002 and Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC of the European Parliament and of the Council of 7 March 2002, as adapted to the EEA Agreement by Protocol 1 thereto and the sectoral adaptations contained in Annex

XIV and XI to that Agreement, the Principality of Liechtenstein has failed to fulfil its obligations under those Acts and under Article 7 of the EEA Agreement.

THE COURT,

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

Registrar: Henning Harborg,

having regard to the written pleadings of the parties and the written observations of the Commission of the European Communities, represented by John Forman, Member of its Legal Service, acting as Agent,

having decided to dispense with the oral procedure,

gives the following

Judgment

The applications

- 1 By application lodged at the Court Registry on 21 December 2005, 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, within the time-limit prescribed, the national provisions necessary to implement the Act referred to at point 13a of Annex XIV to the Agreement on the European Economic Area (hereinafter the “EEA” or the “EEA Agreement”) and also listed for information purposes at point 5cg of Annex XI to the EEA Agreement, or to notify ESA thereof, the Principality of Liechtenstein has failed to fulfil its obligations under that Act and Article 7 EEA. The Act referred to is Commission Directive 2002/77/EC of 16 September 2002 on the competition in the markets for electronic communications networks and services (hereinafter the “Competition in Electronic Communications Markets Directive”) as adapted by way of Protocol 1 to the EEA Agreement and the sectoral adaptations contained in Annex XIV.
- 2 At the same time, ESA also brought four further applications for corresponding declarations that, by failing to adopt, within the time-limit prescribed, the national provisions necessary to implement the Acts referred to at points 5cj, 5ck, 5cl, and 5cm of Annex XI to the EEA Agreement, or to notify ESA thereof, the Principality of Liechtenstein has failed to fulfil its obligations under those Acts

and Article 7 EEA. Those Acts are, respectively, Directives 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive), 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive) and 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) of the European Parliament and of the Council of 7 March 2002, as adapted by way of Protocol 1 to the EEA Agreement and the sectoral adaptations contained in Annex XI to that Agreement.

- 3 In its applications, ESA refers specifically to Article 9 of the Competition in Electronic Communications Markets Directive, Article 18 of the Access Directive, Article 18 of the Authorisation Directive, Article 28 of the Framework Directive and Article 38 of the Universal Service Directive, and submits that the Principality of Liechtenstein has failed to adopt the measures necessary to implement the Directives or to notify the Authority thereof. ESA argues that the failure to do so amounts to a violation of the Directives, as included in the EEA Agreement, and Article 7 EEA.

Facts and pre-litigation procedure

- 4 Annexes XI and XIV to the EEA Agreement were amended by Decision 153/2003 of 7 November 2003 and by Decision 11/2004 of 6 February 2004 of the EEA Joint Committee. Decision 153/2003 added the Competition in Electronic Communications Markets Directive to Annex XIV at point 13a of that Annex and also listed it, for information purposes, at point 5cg of Annex XI. Decision 11/2004 added the Access Directive, the Authorisation Directive, the Framework Directive and the Universal Directive to Annex XI (at points 5cj, 5ck, 5cl and 5cm, respectively). At the request of Norway and Liechtenstein, the entry into force of these Decisions was suspended according to Article 103 EEA due to the need of those countries to fulfil constitutional requirements.
- 5 On 1 September 2004, the EFTA Secretariat informed ESA that Decisions 153/2003 and 11/2004 would enter into force on 1 November 2004.
- 6 By letter of 29 October 2004, the Government of Liechtenstein informed ESA that the adoption of national measures ensuring implementation of the Acts was pending. A new Communications Act (Kommunikationsgesetz) and associated ordinances aimed at ensuring full implementation of the Acts were anticipated to enter into force in November 2005.
- 7 In the absence of any further notifications from the Government of Liechtenstein regarding implementing measures, ESA decided to initiate proceedings under Article 31 SCA and, on 2 December 2004, a letter of formal notice was sent to the Government of Liechtenstein, stating that Liechtenstein had failed to take the

measures necessary to comply with the Directives, and inviting the Government to submit its observations on the matter within two months of receipt.

- 8 By letter of 8 March 2005, the Government of Liechtenstein informed ESA that a full implementation of the Directives was still planned in November 2005, when the new Communications Act and ordinances based on that Act were expected to enter into force.
- 9 In the absence of any subsequent information from the Government of Liechtenstein regarding the implementation of the Directives, ESA delivered, on 22 June 2005, a reasoned opinion in which it concluded that, by failing to adopt or to notify the Authority of the measures necessary to implement the Directives within the time limit prescribed, Liechtenstein had failed to fulfil its obligations under the Directives and Article 7 EEA. The Government of Liechtenstein was requested to take the measures necessary to comply with the reasoned opinion within three months following notification thereof. That time-limit for compliance expired on 22 September 2005.
- 10 By letter of 22 September 2005, the Government of Liechtenstein provided its observations on the reasoned opinion, and informed ESA that entry into force of the new Communications Act and the ordinances based on that act, by which the aforementioned Directives would be implemented, had been postponed until April 2006.

Procedure before the Court

- 11 ESA lodged the present applications at the Court Registry on 21 December 2005. The statement of defence from the Government of Liechtenstein was received on 19 January 2006. Written observations were submitted by the Commission of the European Communities on 24 March 2006.
- 12 After having given the parties the opportunity to express their views, the Court decided, under Article 39 of the Rules of Procedure, to join Cases E-5/05, E-6/05, E-7/05, E-8/05 and E-9/05, including for the purposes of the written procedure.
- 13 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.

Arguments of the parties

- 14 The applications are based on one plea of law, that, by failing to adopt, within the prescribed time-limit, the national measures necessary to implement the Acts referred to at respectively point 13a of Annex XIV (also listed, for information purposes, at point 5cg of Annex XI) and points 5cj, 5ck, 5cl and 5cm of Annex XI to the EEA Agreement, as adapted by way of Protocol 1 to the EEA Agreement and the sectoral adaptations contained in Annexes XI and XIV, or to notify ESA thereof, Liechtenstein has failed to fulfil its obligations under Article

9 of the Competition in Electronic Communications Markets Directive, Article 18 of the Access Directive, Article 18 of the Authorisation Directive, Article 28 of the Framework Directive, Article 38 of the Universal Service Directive, as included in the EEA Agreement, and Article 7 EEA.

- 15 ESA points out that the time-limit for Liechtenstein to take the measures necessary to implement the Directives expired on 1 November 2004. Liechtenstein did not adopt any such measures, neither at that time nor by the time-limit set by ESA in its reasoned opinion.
- 16 Referring to these circumstances, ESA requests the EFTA Court to grant the application and to order the Principality of Liechtenstein to bear the costs of the proceedings.
- 17 In its statement of defence, the Government of Liechtenstein describes the reasons for the delay in adopting the Communications Act and ordinances based on this act, which, according to its submission, would bring about the full implementation of the Directives in Liechtenstein. The Government does not, however, dispute the order sought by ESA. As to costs, the Government of Liechtenstein nevertheless requests the Court to order each party to bear its own costs of the proceedings.

Findings of the Court

- 18 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 Cases E-7/97 *EFTA Surveillance Authority v Norway* [1998] EFTA Court Report 62, at paragraphs 15-17 and E-5/01 *EFTA Surveillance Authority v Liechtenstein* [2000–2001] EFTA Court Report 287, at paragraphs 15-16).
- 19 The obligation to implement also follows from Article 9 of the Competition in Electronic Communications Markets Directive, Article 18 of the Access Directive, Article 18 of the Authorisation Directive, Article 28 of the Framework Directive and Article 38 of the Universal Service Directive. As the time limit for implementation in the Community lapsed on 24 July 2003, and the EEA Joint Committee in Decisions 153/2003 and 11/2004 did not set a separate EEA time limit for the implementation of the directives into national law, Liechtenstein was obliged to adopt the national measures necessary to implement the Directives no later than 1 November 2004, the date of entry into force of the decisions.
- 20 On 22 September 2005, the date on which the time-limit given in the reasoned opinion expired, Liechtenstein, according to its own submissions, had still not adopted those measures. The question 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-3/00 *EFTA Surveillance Authority v the Kingdom of Norway*, [2000-2001] EFTA Court Report 73, at paragraph 39.

- 21 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 for comparison *inter alia* Cases C-423/00 *Commission v Belgium* [2002] ECR I-593, at paragraph 16, and C-286/01 *Commission v France* [2002] ECR 5463, at paragraph 13).
- 22 It must therefore be held that, by failing to adopt, within the prescribed time-limit, the national measures necessary to implement the Acts referred to at respectively point 13a of Annex XIV (also listed, for information purposes, at point 5cg of Annex XI) and points 5cj, 5ck, 5cl and 5cm of Annex XI to the EEA Agreement, as adapted by way of Protocol 1 to the EEA Agreement and the sectoral adaptations contained in Annexes XI and XIV, Liechtenstein has failed to fulfil its obligations under those Acts and Article 7 EEA.

Costs

- 23 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 Principality of Liechtenstein be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs. The costs incurred by the Commission of the European Communities are not recoverable.

On those grounds,

THE COURT

hereby:

- 1. Declares that, by failing to adopt, within the time-limit prescribed, the measures necessary to implement the Acts referred to at respectively point 13a of Annex XIV (also listed, for information purposes, at point 5cg of Annex XI) and points 5cj, 5ck, 5cl and 5cm of Annex XI to the EEA Agreement, i.e. Commission Directive 2002/77/EC of 16 September 2002 and Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC of the European Parliament and of the Council of 7**

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March 2002, as adapted to the EEA Agreement by Protocol 1 thereto and the sectoral adaptations contained in Annex XIV and XI to that Agreement, the Principality of Liechtenstein has failed to fulfil its obligations under those Acts 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 29 June 2006.

Henning Harborg
Registrar

Carl Baudenbacher
President