JUDGMENT OF THE COURT
14 November 2017

(Directive 89/662/EEC – Veterinary checks – Import restrictions – Raw and processed meat, egg and milk)

In Joined Cases E-2/17 and E-3/17,

EFTA Surveillance Authority, represented by Carsten Zatschler, Maria Moustakali and Ingibjörg Ólöf Vilhjálmsdóttir, members of its Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Helga Hauksdóttir, Director General, Ministry of Foreign Affairs, Sigurgeir Þorgeirsson, Senior Adviser, Ministry of Industries and Innovation, acting as Agents, and Jóhannes Karl Sveinsson, advocate, acting as Counsel,

defendant,

APPLICATIONS for a declaration that Iceland has failed to fulfil its obligations arising from the Act referred to at point 1 in Part 1.1 of Chapter I of Annex I to the Agreement on the European Economic Area (Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market) as amended and as adapted to the Agreement under its Protocol 1 and by the sectoral adaptations in Annex I, and in particular Article 5 of the Act, by maintaining in force:

(i) an authorisation system for the import of fresh meat and meat products, such as laid down in Article 10 of Icelandic Act No 25/1993 and Articles 3 to 5 of Icelandic Regulation No 448/2012;

(ii) an authorisation system for the import of raw eggs and raw egg products, such as laid down in Article 10 of Icelandic Act No 25/1993 and Article 3(e) and Article 4 of Icelandic Regulation No 448/2012;

(iii) an authorisation system for the import of unpasteurised milk and dairy products processed from unpasteurised milk and additional requirements, such as laid down in Article 10 of Icelandic Act No 25/1993 and Article 3(f) and Articles 4 and 5 of Icelandic Regulation No 448/2012, and a prohibition of the marketing of imported dairy products processed from unpasteurised milk, such as laid down in Article 7a of Icelandic Regulation No 104/2010; and

(iv) an administrative practice of requiring importers to make a declaration and obtain an approval for the import of treated egg and dairy products, such as the one established in the context of the application of Icelandic Regulation No 448/2012,

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 regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by Carsten Zatschler and Ingibjörg Ólöf Vilhjálmsdóttir, and the defendant, represented by Helga Hauksdóttir, Sigurgeir Þorgeirsson and Jóhannes Karl Sveinsson, at the hearing on 27 September 2017,

gives the following

Judgment

I Introduction

1 The EFTA Surveillance Authority ("ESA") has brought two actions 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 that Iceland has breached its obligations under Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13) ("the Directive"), as amended and as adapted to the Agreement on the European Economic Area ("the EEA Agreement" or "EEA"), in particular Article 5 of the Directive, by maintaining in force an authorisation system for the import

of fresh meat and meat products, raw eggs and raw egg products, unpasteurised milk and dairy products processed from unpasteurised milk, and additional requirements, such as laid down in Article 10 of Icelandic Act No 25/1993 and Articles 3, 4 and 5 of Icelandic Regulation No 448/2012; by prohibiting the marketing of dairy products processed from unpasteurised milk, such as laid down in Article 7a of Icelandic Regulation No 104/2010; and by Iceland's administrative practice of requiring importers to make a declaration and obtain an approval for the import of treated egg and dairy products. Iceland contests these actions.

II Legal background

EEA law

2 Article 8 EEA reads:

> *1. Free movement of goods between the Contracting Parties shall be established in conformity with the provisions of this Agreement.*
>
> *2. ...*
>
> *3. Unless otherwise specified, the provisions of this Agreement shall apply only to:*
>
> *(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*
>
> *(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.*

3 Articles 11 and 12 EEA prohibit quantitative import and export restrictions and all measures having equivalent effect. However, Article 13 EEA provides that:

> *The provisions of Articles 11 and 12 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties.*

4 Article 17 EEA reads:

> *Annex I contains specific provisions and arrangements concerning veterinary and phytosanitary matters.*

5 Article 18 EEA reads:

> *Without prejudice to the specific arrangements governing trade in agricultural products, the Contracting Parties shall ensure that the arrangements provided for in Articles 17 and 23(a) and (b), as they apply to products other than those covered by Article 8(3), are not compromised by other technical barriers to trade. Article 13 shall apply.*

6 Chapter I of Annex I to the EEA Agreement contains provisions on veterinary issues. Following Joint Committee Decision No 69/1998 of 17 July 1998 (OJ 1999 L 158, p. 1, and EEA Supplement 1999 No 27, p. 1), paragraph 2 of the introductory part of Chapter I of Annex I to the EEA Agreement provided that the acts referred to in that chapter were to apply to Iceland where it was so stated in relation to a specific act. That text was amended by Joint Committee Decision No 133/2007 of 26 October 2007 (OJ 2008 L 100, p. 27, and EEA Supplement 2008 No 19, p. 34), which entered into force on 1 May 2010. Recitals 2 to 6 of that decision read:

> *(2) Chapter I of Annex I currently applies to Iceland only with regard to aquaculture animals and products and fisheries products.*
>
> *(3) Paragraph 2 of the introductory part of Chapter I of Annex I states that the acts referred to in Chapter I of Annex I shall apply to Iceland, where this is so stated in relation to the specific act.*
>
> *(4) Paragraph 2 of the introductory part of Chapter I of Annex I envisages a review of Chapter I of Annex I for Iceland.*
>
> *(5) The Contracting Parties have reviewed the situation for Iceland and decided that Iceland will take over the acts referred to in Chapter I of Annex I, except for the provisions that concern live animals, other than fish and aquaculture animals, and animal products such as ova, embryo and semen.*
>
> *(6) The acts referred to in Chapter I of Annex I shall apply to Iceland unless it is stated in relation to the specific act that it shall not apply to Iceland. Therefore, paragraph 2 of the introductory part to Chapter I of Annex I must be amended.*

7 Following this decision, paragraph 2 of the introductory part of Chapter I of Annex I to the EEA Agreement reads:

> *The provisions contained in this Chapter shall apply to Iceland, except for the provisions concerning live animals, other than fish and aquaculture animals, and animal products such as ova, embryo and semen. When an act is not to apply or is to apply partly to Iceland, it shall be stated in relation to the specific act.*

Iceland shall implement the provisions contained in this Chapter, in the areas which did not apply to Iceland prior to the review of this Chapter by Decision of the EEA Joint Committee No 133/2007, no later than 18 months after the entry into force of this Decision.

The other Contracting Parties may maintain their third-country regimes in trade with Iceland for areas not applicable to Iceland.

8 Point 1 in Part 1.1 of Chapter I of Annex I to the EEA Agreement refers to Directive 89/662/EEC and to subsequent amendments to it. The preamble to the Directive includes the following recitals:

[3] Whereas in the veterinary field frontiers are currently being used for carrying out checks aimed at safeguarding public health and animal health;

[4] Whereas the ultimate aim is to ensure that veterinary checks are carried out at the place of dispatch only; whereas the attainment of this objective implies the harmonization of the basic requirements relating to the safeguarding of public health and animal health;

[5] Whereas with a view to the completion of the internal market, pending the attainment of this objective, the emphasis should be placed on the checks to be carried out at the place of dispatch and in organizing those that could be carried out at the place of destination; whereas such a solution would entail the suspension of veterinary checks at the Community's internal frontiers;

...

[7] Whereas in the State of destination spot veterinary checks could be carried out at the place of destination; whereas, however, in the event of a serious presumption of irregularity, the veterinary check could be carried out while the goods are in transit;

9 Article 1 of the Directive reads:

Member States shall ensure that the veterinary checks to be carried out on products of animal origin covered by the acts referred to in Annex A or by Article 14 and which are intended for trade are no longer carried out ... at frontiers but are carried out in accordance with this Directive.

10 Point 1 of Article 2 of the Directive sets out the following definition:

'Veterinary check' means any physical check and/or administrative formality which applies to the products referred to in Article 1 and which

is intended for the protection, direct or otherwise, of public or animal health;

11 Chapter I of the Directive concerns "Checks at origin" and consists of Articles 3 and 4. The first subparagraph of Article 3(1) reads:

Member States shall ensure that the only products intended for trade are those referred to in Article 1 which have been obtained, checked, marked and labelled in accordance with Community rules for the destination in question and which are accompanied to the final consignee mentioned therein by a health certificate, animal-health certificate or by any other document provided for by Community veterinary rules.

12 The first sentence of Article 4(1) reads:

Member States of dispatch shall take the necessary measures to ensure that operators comply with veterinary requirements at all stages of the production, storage, marketing and transport of the products referred to in Article 1.

13 Chapter II of the Directive concerns "Checks on arrival at the destination", and consists of Articles 5 to 8. Article 5(1)(a) requires EEA States to implement the following measure:

The competent authority may, at the places of destination of goods, check by means of non-discriminatory veterinary spot-checks that the requirements of Article 3 have been complied with; it may take samples at the same time.

Furthermore, where the competent authority of the Member State of transit or of the Member State of destination has information leading it to suspect an infringement, checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport.

14 Articles 7 and 8 of the Directive lay down the measures to be taken if the competent authority of the EEA State of destination establishes the presence of agents responsible for a disease named in Directive 82/894/EEC, a zoonosis or disease, or any cause likely to constitute a serious hazard to animals or humans. In such a case, the protective measures provided for in Article 9 of the Directive may be applied. However, for the purposes of the EEA Agreement, the reference to Article 9 constitutes a reference to the safeguard and protective measures clause in paragraph 3 in the introductory part of Chapter I of Annex I to the EEA Agreement.

15 By Joint Committee Decisions Nos 134/2007, 135/2007, 136/2007, 137/2007 and 138/2007 of 26 October 2007 (OJ 2008 L 100, pp. 33, 44, 49, 53 and 62, and EEA Supplement 2008 No 19, pp. 39, 51, 55, 58 and 66), which entered into force on 1 May 2010, the essential EU legislation concerning food law was incorporated in

Chapter I of Annex I to the EEA Agreement ("the Hygiene Package"). It includes, inter alia:

- Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1, Icelandic EEA Supplement 2011 No 59, p. 123, and Norwegian EEA Supplement 2011 No 71, p. 559), referred to at point 13 in Part 7.1;

- Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ 2004 L 139, p. 1, and Norwegian EEA Supplement 2011 No 71, p. 890), referred to at point 16 in Part 6.1;

- Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin (OJ 2004 L 139, p. 55, and Norwegian EEA Supplement 2011 No 71, p. 909), referred to at point 17 of Part 6.1;

- Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption (OJ 2004 L 139, p. 206, and Norwegian EEA Supplement 2011 No 71, p. 970), referred to at point 12 in Part 1.1;

- Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ 2004 L 165, p. 1, Icelandic EEA Supplement 2011 No 59, p. 209, and Norwegian EEA Supplement 2011 No 71, p. 1015), referred to at point 11 in Part 1.1; and

- Commission Regulation (EC) No 2073/2005 of 15 November 2005 on microbiological criteria for foodstuffs (OJ 2005 L 338, p. 1, Icelandic EEA Supplement 2011 No 59, p. 273, and Norwegian EEA Supplement 2011 No 71, p. 1079), referred to at point 52 in Part 6.2.

16 Article 14(7) of Regulation (EC) No 178/2002 reads:

> *Food that complies with specific Community provisions governing food safety shall be deemed to be safe insofar as the aspects covered by the specific Community provisions are concerned.*

17 Recital 23 in the preamble to Regulation (EC) No 853/2004 reads:

> *This Regulation should establish criteria for raw milk pending the adoption of new requirements for its placing on the market. These criteria should be trigger values, implying that, in the event of any overshooting, food business*

operators are to take corrective action and to notify the competent authority. The criteria should not be maximum figures beyond which raw milk cannot be placed on the market. This implies that, in certain circumstances, raw milk not fully meeting the criteria can safely be used for human consumption, if appropriate measures are taken. As regards raw milk and raw cream intended for direct human consumption, it is appropriate to enable each Member State to maintain or establish appropriate health measures to ensure the achievement of the objectives of this Regulation on its territory.

18 Article 8 of Regulation (EC) No 853/2004 reads:

1. Food business operators intending to place the following food of animal origin on the market in Sweden or Finland shall comply with the rules set out in paragraph 2 in respect of salmonella:

(a) meat from bovine and porcine animals …

(b) meat from poultry …

(c) eggs.

2. …

(e) In the case of meat from bovine and porcine animals and meat from poultry, a trade document or certificate conforming to a model laid down by Community legislation shall accompany the food …

3. In accordance with the procedure referred to in Article 12(2):

(a) …

(b) the rules laid down in paragraph 2 in respect of any of the foodstuffs referred to in paragraph 1 may be extended, in whole or in part, to any Member State, or any region of a Member State, that has a control programme recognised as equivalent to that approved for Sweden and Finland in respect of the food of animal origin concerned.

19 It follows from the adaptation text to Regulation (EC) No 853/2004 that, for the purposes of the EEA Agreement, in Article 8 the word "Norway" shall be added after the word "Sweden".

20 Article 10(8) of Regulation (EC) No 853/2004 reads:

A Member State may, of its own initiative and subject to the general provisions of the Treaty, maintain or establish national rules:

(a) prohibiting or restricting the placing on the market within its territory of raw milk or raw cream intended for direct human consumption; …

National law

21 Article 10 of Act No 25/1993 on Animal Diseases and Preventive Measures against them (*Lög nr. 25/1993 um dýrasjúkdóma og varnir gegn þeim*) ("the Icelandic Act") reads:

> *To prevent animal diseases from reaching the country it is prohibited to import the following types of goods:*
>
> *a. Raw and lightly salted slaughter products, both processed and non-processed, raw eggs …*
>
> *Despite the provisions of paragraph 1 the Food and Veterinary Authority is authorised to allow the import of products mentioned in items a to e, if it is considered proven that they will not transmit infectious agents that can cause animal diseases. The Minister [of Fisheries and Agriculture] can decide by regulation that paragraph 1 shall not apply to certain categories of the products listed therein, if the product is disinfected in production or a special disinfection is performed before importation and the product is accompanied with a satisfactory certificate of origin, processing and disinfection. The Minister is authorised to prohibit by regulation the import of products, irrespective of their origin, which carry the risk of transmitting contamination agents that could cause danger to the health of animals.*
>
> …

22 Regulation No 448/2012 of 23 May 2012 on Measures to prevent the Introduction of Animal Diseases and Contaminated Products to Iceland (*Reglugerð nr. 448/2012 um varnir gegn því að dýrasjúkdómar og sýktar afurðir berist til landsins*) ("the Icelandic Regulation") sets out in detail the goods falling under the importation ban and any deviations from the ban prescribed in Article 10 of the Icelandic Act.

23 Article 3 of the Icelandic Regulation reads:

> *The importation to Iceland of the following animal products and products that may carry infectious agents which cause diseases in animals and humans is not permitted; cf. however, further details in Chapter III:*
>
> *a. Raw meat, processed or unprocessed, chilled or frozen, as well as offal and slaughter wastes, which have not been treated by heating, so that the core temperature has reached 72°C for 15 seconds, or other comparable treatment in the assessment of the Food and Veterinary Authority.*
>
> *...*

e. Untreated raw eggs, raw eggshells and raw egg products, which have not been treated by heating so that the product has been heated to 65°C for 5 minutes, or received other comparable treatment in the assessment of the Food and Veterinary Authority.

f. Unpasteurised milk and dairy products processed from unpasteurised milk. However, up to 1 kg of cheese processed from unpasteurised milk from approved establishments in the European Economic Area may be imported for personal use. The Minister may authorise the import of a larger quantity for the same purpose.

24 Article 4 of the Icelandic Regulation reads:

The Minister of Fisheries and Agriculture is authorized to allow the import of products mentioned in Article 3, cf. Article 10 of [the Icelandic Act] and subsequent amendments, having received recommendations from the Food and Veterinary Authority, if it is considered proven that they will not transmit infectious agents that can cause diseases in animals and humans, and the conditions imposed for the import have been fulfilled, see however Article 7.

When an application is submitted for the first time to import a raw or unsterilised product as referred to in the first paragraph, an importer must provide the Ministry of Fisheries and Agriculture with the necessary information on the product for consideration and approval before the product is dispatched from the country of export.

An importer of raw products shall in all cases apply for a permit to the Minister of Fisheries and Agriculture and submit, for the consideration of the Food and Veterinary Authority, an import declaration, information on the country of origin and production, the type of product and producer, and the required certificates, as provided for in Article 5.

25 Article 5 of the Icelandic Regulation reads:

[1] Imported foods which are listed under [Combined Nomenclature (CN) Codes] 0202, 0203, 0204, 0207, 0208, 0210, 1601 and 1602 … which the Minister has authorised for import to Iceland as referred to in Article 4 and which have not received satisfactory heat treatment must be accompanied by the following certificates:

…

c. a certificate confirming that the products have been stored at a temperature of at least -18°C for a month prior to customs clearance;

…

e. an official certificate confirming that the products are free of salmonella bacteria;

f. animal meat products and by-products, dairy products and eggs shall conform to the appropriate provisions of the current regulation on food contaminants;

g. the product shall be labelled in conformity with current rules on labelling, advertising and promotion of foodstuffs.

…

[3] Imported cheese under CN Codes 0406.2000 and 0406.3000 must have received appropriate treatment so that the cheesecurd has been heat treated at least to 48°C, the product must have been stored for at least 6 months at a temperature of not less than 10°C and a humidity of less than 36%. The product must be accompanied by an official certificate of origin and health, in the case of producers outside of the European Economic Area, and confirmation that the product has received appropriate treatment.

26 Regulation (EC) No 853/2004 was incorporated into Icelandic law by Regulation No 104/2010 of 25 January 2010 ("Icelandic Regulation No 104/2010"). Article 7a of Icelandic Regulation No 104/2010 reads:

In accordance with the provisions of Regulation (EC) No 853/2004, as amended, the following provisions shall apply with regard to the placing on the market of raw milk and raw cream, intended for distribution on the market, for direct human consumption:

Milk that is distributed to consumers shall be pasteurised and packaged in consumer packaging. Dairy products shall be produced from pasteurised milk.

…

III Facts and pre-litigation procedure

27 By letter of 12 December 2011, ESA informed the Icelandic Government that it had received a complaint against Iceland. The complaint alleged that Iceland had failed to comply with its obligations under the EEA Agreement by maintaining a ban on the importation of meat into Iceland without reference to scientific evidence or a relevant risk assessment. ESA invited Iceland to provide information on the rules governing the importation of meat in Iceland, as well as to substantiate the claim that these arrangements were justified under Article 13 EEA.

28 On 12 March 2012, Iceland replied to ESA's request. Iceland considered that the rules governing the importation of meat in Iceland were justified both under Article 13 EEA and the precautionary principle. On 12 June 2012, ESA requested

additional clarifications concerning the justifications presented. The Icelandic Government replied on 5 September 2012.

29 On 12 February 2013, ESA sent a letter to Iceland in which it presented its preliminary conclusion that Article 10 of the Icelandic Act and Articles 3 to 5 of the Icelandic Regulation were in breach of Article 5 of the Directive and/or Article 18 EEA. ESA did not consider the measures justified under Article 13 EEA.

30 On 27 May 2013, Iceland replied to ESA's letter. Iceland argued that the Directive applied differently to Iceland in comparison with the Member States of the European Union. Since Iceland was not a party to the Common Agricultural Policy and agriculture was excluded from the scope of the EEA Agreement, there was no basis for requiring Iceland to ensure the free movement of agricultural products in the same way as within the European Union. Furthermore, Iceland referred to the higher risk of infection of its livestock due to Iceland's geographic isolation. Iceland argued that Article 13 EEA must be given a wider interpretation in cases regarding agricultural products than for other products in general.

31 On 30 October 2013, ESA sent a letter of formal notice to Iceland concluding that Iceland had failed to comply with its obligations under Article 5 of the Directive by maintaining in force an authorisation system for, inter alia, fresh meat and meat products such as that laid down in Article 10 of the Icelandic Act and Articles 3 to 5 of the Icelandic Regulation. Alternatively, the authorisation system constituted a technical barrier to trade that compromised the relevant arrangements in Annex I to the EEA Agreement and was thus in breach of Article 18 EEA. ESA considered that Iceland had not demonstrated that the measures were justified in accordance with Article 13 EEA.

32 On 27 February 2014, Iceland replied to the letter of formal notice. Iceland contended in particular that the Directive had not fully harmonised veterinary checks in the EEA. In Iceland's view, the Directive could not be read as excluding systematic controls at the border. The Icelandic measures served an objective beyond the Directive's purpose, namely to protect Iceland from pathogens that were common in Europe but unknown in Iceland.

33 On 25 March 2014, Iceland submitted two risk assessments in support of its reply to the letter of formal notice. On 27 June 2014, in response to a follow-up letter to a meeting held in Iceland on 19 May 2014, Iceland sent a letter to ESA providing further clarifications on the Icelandic legislation.

34 On 8 October 2014, ESA delivered a reasoned opinion, maintaining its conclusions in the 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 December 2014. Upon a request from Iceland, the deadline for complying with the reasoned opinion was extended to 8 February 2015.

35 On 24 February 2015, Reykjavík District Court (*Héraðsdómur Reykjavíkur*) decided to request an advisory opinion from the Court on the compatibility with EEA legislation of the Icelandic import regime for meat products. The request was made in a case between the meat distribution company Ferskar kjötvörur ehf. and the Icelandic State concerning a claim for damages arising from the authorities' refusal to allow the import of a consignment of fresh bovine meat. The request was sent by a letter of 22 May 2015, and registered at the Court as Case E-17/15 on 16 June 2015. In the light of these events, ESA decided to postpone the handling of its infringement proceedings.

36 On 1 February 2016, the Court rendered judgment in Case E-17/15 *Ferskar kjötvörur* [2016] EFTA Ct. Rep. 4. The Court held that an EEA State's discretion to set rules on the importation of raw meat products may be limited by provisions incorporated into an annex to the EEA Agreement. Moreover, the Court held that it is not compatible with the provisions of the Directive for an EEA State to enact rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and requiring the submission of a certificate confirming that the meat has been stored frozen for a certain period prior to customs clearance.

37 In the context of the complaint proceedings concerning imports of raw meat, ESA had noted that similar restrictions applied to egg and dairy products and established a separate investigation. On 21 October 2015, ESA sent a letter to Iceland with a preliminary conclusion that Iceland had failed to comply with Article 5 of the Directive, or alternatively Article 18 EEA, by maintaining in force an authorisation system for the import of raw egg and dairy products and additional requirements, as well as a prohibition of the marketing of imported dairy products processed from unpasteurised milk, and by requiring importers to make a declaration and obtain approval for the import of treated egg and dairy products.

38 On 10 February 2016, ESA invited Iceland to provide information on how it intended to comply with the Court's advisory opinion in *Ferskar kjötvörur*. On 9 March 2016, Iceland replied that it was in the process of evaluating possible adjustments to the authorisation system.

39 On 20 April 2016, ESA sent a letter of formal notice in the case concerning egg and dairy products, maintaining the view set out in its letter of 21 October 2015. On 13 July 2016, Iceland replied to ESA's letter of formal notice. Iceland made the same legal arguments as those presented in the reply to ESA's letter of formal notice in the case concerning meat products.

40 On 14 September 2016, ESA delivered a reasoned opinion in the case concerning egg and dairy products, and maintained its main conclusions from the letter of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA required Iceland to take the measures necessary to comply with the reasoned opinion within two months from the notification, that is, no later than 14 November 2016. Upon a request from Iceland, the deadline for complying with the reasoned opinion was

extended to 14 December 2016. In its reply Iceland maintained its position and provided additional comments.

41 As Iceland continued to maintain the national provisions in question at the deadlines set for response to each of the reasoned opinions, ESA decided on 20 December 2016 to bring both cases before the Court.

IV Procedure and forms of order sought

42 By an application registered at the Court on 1 February 2017 as Case E-2/17, ESA brought an action under the second paragraph of Article 31 SCA, seeking a declaration that:

> 1. *By maintaining in force (i) an authorisation system for the import of raw eggs and raw egg products such as the one laid down in Article 10 of Act No 25/1993 and Articles 3 (e) and 4 of Regulation (IS) No 448/2012; (ii) an authorisation system for the import of unpasteurised milk and dairy products processed from unpasteurised milk and additional requirements, such as laid down in Article 10 of Act No 25/1993 and Articles 3 (f), 4 and 5 of Regulation (IS) No 448/2012, and a prohibition of the marketing of imported dairy products processed from unpasteurised milk, such as laid down in Article 7a of Regulation (IS) No 104/2010; and (iii) an administrative practice of requiring importers to make a declaration and obtain an approval for the import of treated egg and dairy products, such as the one established in the context of the application of Regulation (IS) No 448/2012, Iceland has failed to fulfil its obligations arising from the Act referred to at Point 1.1.1 of Chapter I of Annex I to the EEA Agreement, Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market as amended and as adapted to the EEA Agreement by Protocol 1 thereto and by the sectoral adaptions in Annex I thereto, and in particular Article 5 of that directive.*
>
> 2. *Iceland bears the costs of the proceedings.*

43 By another application registered at the Court on 1 February 2017 as Case E-3/17, ESA brought an action under the second paragraph of Article 31 SCA, seeking a declaration that:

> 1. *By maintaining in force an authorisation system for fresh meat and meat products, such as laid down in Article 10 of Act No. 25/1993 and Articles 3, 4 and 5 of Regulation (IS) No. 448/2012, Iceland has failed to fulfil its obligations arising from the Act referred to at Point 1.1.1 of Chapter I of Annex I to the EEA Agreement, Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in*

intra-Community trade with a view to the completion of the internal market as amended and as adapted to the EEA Agreement by Protocol 1 thereto and by the sectoral adaptions in Annex I thereto, and in particular Article 5 of that directive.

2. Iceland bears the costs of the proceedings.

44 On 10 April 2017, Iceland lodged its defences in Cases E-2/17 and E-3/17, requesting the Court to dismiss both applications and order ESA to pay the costs of the proceedings.

45 On 24 April 2017, the Court informed the parties that it considered joining the two cases. By emails of 25 April and 2 May 2017, respectively, ESA and Iceland informed the Court that they had no objections to this course of action. Consequently, on 11 May 2017, the Court decided, pursuant to Article 39 of the Rules of Procedure ("RoP"), to join Cases E-2/17 and E-3/17 for the purpose of the remainder of the written procedure, the oral procedure and the final judgment. The parties were informed of this decision by a letter of 12 May 2017.

46 On 15 June 2017, ESA submitted its reply to Iceland's defences. On 20 July 2017, Iceland submitted its rejoinder.

47 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written pleadings submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

V On the alleged infringements

General remarks

Arguments of the parties

48 ESA submits that, under Articles 3 to 5 of the Directive, veterinary checks are to take place at the place of dispatch. The competent authority in the State of destination may only carry out non-discriminatory spot-checks to verify compliance with the requirements of the relevant EEA legislation. By these provisions, the Directive has exhaustively harmonised the veterinary checks that can take place in the State of destination. This detailed and harmonised system of health inspections replaces all other inspection systems existing within the State of destination (reference is made, inter alia, to *Ferskar kjötvörur*, cited above, paragraphs 65 and 66, and the judgment of the Court of Justice of the European Union ("ECJ") in *Commission* v *Sweden*, C-111/03, EU:C:2005:619, paragraph 51).

49 ESA contends that, since the Directive has exhaustively harmonised the veterinary checks that may take place in the State of destination, Article 13 EEA cannot be

invoked to justify the measures in the case at hand (reference is made, inter alia, to *Ferskar kjötvörur*, cited above, paragraph 76, and the judgment in *Commission* v *Portugal*, C-52/92, EU:C:1993:216, paragraph 17).

50 ESA submits further that the Directive's provisions on veterinary checks on products of animal origin apply in conjunction with the extensive set of rules in the Hygiene Package. These rules harmonise, for instance, the conditions according to which risks are managed. According to Article 14(7) of Regulation (EC) No 178/2002, food that complies with specific EEA law provisions governing food safety shall be deemed to be safe insofar as the aspects covered by the specific EEA law provisions are concerned.

51 As regards the arguments submitted by Iceland, ESA submits that a distinction between veterinary checks and substantive requirements cannot be made. Moreover, the fact that the EU Common Agricultural Policy does not apply in the EEA is irrelevant as the EEA Agreement contains specific arrangements concerning agricultural products (reference is made to *Ferskar kjötvörur*, cited above, paragraphs 70 and 42).

52 In ESA's view, a reference to Article 114 of the Treaty on the Functioning of the European Union ("TFEU") is of no avail to Iceland, as the EEA Agreement contains no such provision. Apart from a safeguard clause, no adaptations were made to the Directive when it was incorporated. It therefore fully applies to Iceland. Since the Icelandic measures are not temporary and have not followed the special procedure for safeguard measures set out in the introductory part of Chapter I of Annex I to the EEA Agreement, the safeguard clause cannot be invoked.

53 ESA submits that the application of the precautionary principle must follow the guidelines provided by the Court and the ECJ. Preventive measures must be based on a relevant scientific uncertainty, not on a purely hypothetical approach to the risk. Moreover, precautionary measures must be of a provisional nature, pending the development of scientific knowledge. The Icelandic measures do not satisfy these requirements and cannot therefore be justified as precautionary measures (reference is made, inter alia, to Case E-3/00 *ESA* v *Norway* [2000-2001] EFTA Ct. Rep. 73, paragraphs 26, 30 and 32, and the judgments in *Commission* v *France*, C-333/08, EU:C:2010:44, paragraphs 91 and 92, and *France* v *Commission*, C-601/11 P, EU:C:2013:465, paragraph 110).

54 Iceland submits that, given the centuries of virtual isolation of the Icelandic animal population from the outside world, the import of live animals to Iceland would entail a particularly high risk as regards diseases against which the Icelandic domestic animal population has not developed immunity. That is why Annex I to the EEA Agreement specifies that the provisions on import of live animals do not apply to Iceland. However, animal health and public health may also be put at risk by raw meat, as the two scientific reports submitted during the pre-litigation proceedings demonstrate. Against that background, Iceland has restricted the import of raw meat and meat products. The same rationale applies to the

restrictions concerning raw eggs and egg products, as well as unpasteurised milk and dairy products processed from unpasteurised milk.

55 Iceland notes that agricultural products do not fall under the EEA Agreement and do not benefit from the general principle of free movement of goods within the EEA. The EU Common Agricultural Policy does not apply within the EEA. Therefore, the EFTA States do not have access to any common resources available to the EU pillar if there is an outbreak of a disease.

56 Iceland nevertheless observes that Chapter 2 of the EEA Agreement provides for further liberalisation in the trade of agricultural products, allowing for special arrangements to be agreed for such products. In these situations, Article 18 EEA provides that such arrangements may not be compromised by other technical barriers to trade. Moreover, that provision expressly states that Article 13 EEA shall apply.

57 Iceland contends that the import bans at issue are not veterinary checks, but substantive requirements. They seek to take care of the very special situation in Iceland, which is an objective that lies beyond the EEA rules. The Directive is concerned with checks and not substantive requirements. Consequently, the defendant is entitled to invoke Article 13 EEA.

58 In Iceland's view, EU Member States may under Article 114 TFEU take different or additional measures to those required by EU directives. The EFTA States cannot have fewer rights than EU Member States to maintain pre-existing national provisions on an assessment of risk different from that accepted by the EU legislature. Consequently, Article 13 EEA must be applied to allow for at least the same protection as exists under the EU pillar. ESA is therefore obliged to assess, based on Articles 18 and 13 EEA, whether Iceland has provided justifications for the measures at hand. In the event of uncertainty as to the precise danger to animal or human health, the precautionary principle must apply (reference is made to *ESA* v *Norway*, cited above, paragraph 26).

Findings of the Court

59 The aim of the EEA Agreement is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules. The Agreement is thus intended to create a homogenous European Economic Area so that the internal market is extended to the EFTA States (see Case E-1/16 *Synnøve Finden* [2016] EFTA Ct. Rep. 931, paragraph 55).

60 There are, however, certain differences between the TFEU and the EEA Agreement with regard to agricultural and fishery products, as the EFTA States are not part of the EU's Common Agricultural Policy or Common Fisheries Policy. As for the free movement of goods between the Contracting Parties, it follows from Article 8(3) EEA that the provisions of the Agreement do not apply, unless otherwise specified, to products falling outside Chapters 25 to 97 of the

Harmonized Commodity Description and Coding System or to products not specified in Protocol 3. The reason for excluding certain goods from the scope of the EEA Agreement is that the Contracting Parties wished to maintain freedom to decide on their respective regulations for these products unaffected by the rules contained in the EEA Agreement (see *Synnøve Finden*, cited above, paragraph 56 and case law cited).

61 As meat, egg, unpasteurised milk and products processed from meat, egg and unpasteurised milk do not fall within said chapters of the Harmonized Commodity Description and Coding System, with the exceptions provided for by Article 8(3)(b), they fall outside the scope of the EEA Agreement, unless otherwise specified in the Agreement.

62 Nevertheless, Chapter 2 of Part II of the EEA Agreement lays down certain provisions concerning agricultural and fisheries products and comprises Articles 17 to 20. According to Article 17 EEA, Annex I contains provisions and arrangements concerning veterinary and phytosanitary matters. Chapter I of Annex I (Veterinary issues) originally applied to Iceland only with regard to aquaculture animals and products and fisheries products. However, recital 5 in the preamble to Joint Committee Decision No 133/2007 states that the Contracting Parties have decided that Iceland will take over the acts referred to in Chapter I of Annex I, except for the provisions that concern live animals, other than fish and aquaculture animals, and animal products such as ova, embryo and semen. Article 1 of that decision amended Chapter I of Annex I to the EEA Agreement as specified in the decision's Annex. In part, this introduced a rule in the first subparagraph of paragraph 2 of the introductory part of that chapter that when an act is not to apply or is to apply partly to Iceland, it shall be stated in relation to the specific act.

63 The acts included in Chapter I of Annex I therefore apply to Iceland, unless an adaptation text states otherwise. In relation to the Directive and the relevant acts of the Hygiene Package, which are all included in that chapter, no such adaptation was agreed upon, except for live animals other than fish and aquaculture animals, and animal products such as ova, embryo and semen, as stated in the first subparagraph of paragraph 2 in the introductory part of Chapter I of Annex I. It follows that Iceland has undertaken the obligation to implement the Directive into national law.

64 As expressed in its preamble, the emphasis of the Directive is to ensure that veterinary checks are carried out at the place of dispatch only. This is an emanation of the country of origin principle. To that end, Article 1 provides that veterinary checks for products of animal origin intended for trade may no longer be carried out at the frontiers, without prejudice to Article 6, but shall be carried out in accordance with the Directive. In particular, Article 3 of the Directive requires the EEA States to ensure that products of animal origin have been obtained, checked, marked and labelled in accordance with the relevant EEA rules for the destination in question and that the products are accompanied by the documents required under EEA veterinary rules. According to Article 5, non-discriminatory veterinary spot-checks may be carried out at the place of destination or, in the event of a serious

presumption of irregularity, while the goods are in transit (see *Ferskar kjötvörur*, cited above, paragraph 64).

65 The objective of the Directive is the harmonisation of the basic requirements of veterinary control to safeguard public and animal health. The harmonised system of veterinary checks is based on systematic and full inspection of the goods in the EEA State of dispatch. The system is intended to replace, as a rule, inspection in the EEA State of destination. Considerations related to the need to protect public or animal health cannot justify additional specific constraints imposed by an EEA State when the frontier is crossed (see *Ferskar kjötvörur*, cited above, paragraph 65 and case law cited).

66 The objective of the Directive could not be realised, nor its effectiveness achieved, if the EEA States were free to go beyond its requirements. Maintaining or adopting national measures other than those expressly provided for in the Directive must therefore be regarded as incompatible with the wording and purpose of the Directive (see *Ferskar kjötvörur*, cited above, paragraph 66 and case law cited). Consequently, the Directive must be read as exhaustively harmonising the veterinary checks that may take place in the State of destination.

67 In response to Iceland's arguments concerning Article 13 EEA, the Court notes that the aim to protect human and animal health in EEA trade mentioned in Article 13 EEA cannot be invoked to justify measures banning or restricting imports when a directive provides for the harmonisation of the measures necessary to guarantee the protection of animal and human health (see *Ferskar kjötvörur*, cited above, paragraph 76 and case law cited). For the same reason, Iceland's argument concerning the precautionary principle must also be rejected (see *ESA* v *Norway*, cited above, paragraph 25). Furthermore, the reference in Article 18 EEA to Article 13 EEA does not alter these conclusions since that reference does not make the latter provision applicable to instances where EEA legislation provides for exhaustive harmonisation.

68 Iceland has pointed to the possibility for EU Member States to maintain or introduce national measures on the conditions laid down in Article 114(4) to (6) TFEU. However, since no provision in the EEA Agreement corresponds to Article 114(4) to (6) TFEU, any reference by Iceland to those provisions is without merit. Moreover, these provisions relate to the fact that the Council predominantly may adopt legal acts by qualified majority instead of unanimity. In the EEA, unanimity is necessary pursuant to Article 93(2) EEA when an EU legal act is made part of the EEA Agreement. An EFTA State cannot be bound by an EU legal act unless it consents to it. When incorporating a legal act, the Joint Committee may adapt the act to take account of the situation in a particular EFTA State. Furthermore, subject to strict substantive and procedural conditions, an EFTA State has a certain opportunity to amend its internal legislation according to Article 97 EEA.

69 Iceland has argued that the authorisation systems at issue do not constitute veterinary checks, but rather seek to ensure that the imported goods satisfy substantive requirements, namely that the imported products are not raw. The

premise for this argument appears to be that Iceland may lawfully ban the import of raw products since agricultural products do not enjoy free movement under Article 8(3) EEA.

70 However, following the incorporation of the Directive and the Hygiene Package in the EEA Agreement, Iceland has committed itself to not impose technical barriers to the import of agricultural products when they satisfy the relevant EEA legislation, regardless of whether they are raw or not. The sole exception applies to live animals, other than fish and aquaculture animals, and animal products such as ova, embryo and semen, as stated in the first subparagraph of paragraph 2 in the introductory part of Chapter I of Annex I to the EEA Agreement.

71 It may be added that paragraph 3 in the introductory part of Chapter I (Veterinary issues) of Annex I to the EEA Agreement allows a Contracting Party to put in place safeguard and protective measures subject to a specific procedure. Article 7 of the Directive provides for such a procedure where the competent authorities establish the presence of agents responsible for a disease named in Directive 82/894/EEC, a zoonosis or disease, or any cause likely to constitute a serious hazard to animals or humans. However, Iceland has not invoked this procedure.

72 On the basis of the above, the Court concludes that the Directive exhaustively harmonises the extent to which veterinary checks may be carried out in the EEA State of destination. On these grounds, the Court will examine the four pleas raised by ESA.

(i) Fresh meat and meat products

Arguments of the parties

73 *ESA* observes that Article 10 of the Icelandic Act, read in conjunction with Articles 3 to 5 of the Icelandic Regulation, imposes a system of import authorisation for fresh meat and meat products. A special permit is required systematically and for each consignment. ESA stresses that in *Ferskar kjötvörur* the Court has already concluded that this system is incompatible with the Directive, as it constitutes a veterinary check going beyond the controls permitted at the place of destination. This conclusion is also supported by the ECJ's judgments in *Commission* v *Germany* (C-186/88, EU:C:1989:601) and *Commission* v *Sweden* (cited above). Therefore, the authorisation system for the import of fresh meat and meat products is in breach of the Directive.

74 In addition, ESA contends that the authorisation system for import of fresh meat and meat products obliges the importer to fulfil certain requirements that go beyond ensuring that the products have been obtained, checked, marked and labelled in accordance with EEA rules. The obligations on importers to demonstrate that the raw meat products have been frozen for 30 days at -18°C, that they are free from salmonella, that they conform to the current legislation on food contaminants, and that they are labelled in conformity with the rules on labelling,

advertising and promotion of foodstuffs, as required under Article 5(c), (e), (f) and (g) of the Icelandic Regulation, do not find a basis in EEA legislation. They constitute veterinary checks going beyond the checks allowed under Article 5 of the Directive. In ESA's view, this would also be true if the fulfilment of these requirements were not subject to systematic checks at the border but rather to random spot-checks.

75 In particular, ESA notes that the freezing requirement was specifically addressed by the Court in paragraph 72 and in point 2 of the operative part of *Ferskar kjötvörur* and held to be incompatible with the Directive. As regards the salmonella certificate, ESA points out that while Iceland has submitted to ESA a national control programme for salmonella in poultry and poultry products, it has not applied for a recognition of equivalence to the control programmes approved for Finland and Sweden. Iceland may therefore not apply additional guarantees in respect of salmonella as provided for in Article 8(3)(b) of Regulation (EC) No 853/2004. Moreover, the EEA legislation on food contaminants and on the labelling of foodstuffs does not contain any provisions giving EEA States a legal basis to impose on importers the completion of a systematic procedure to demonstrate that food products conform to the current legislation on food contaminants or labelling.

76 Iceland essentially argues that the freezing requirement in Article 5(c) of the Icelandic Regulation is a substantive requirement and not a veterinary check. It is therefore beyond the scope of the Directive. The two ECJ judgments referred to by ESA do not support the argument that substantive requirements fall under the scope of the Directive. Consequently, Iceland is entitled to invoke Article 13 EEA.

77 As regards the salmonella certificate in Article 5(e) of the Icelandic Regulation, Iceland submits that figures from the European Food Safety Authority show that the precautionary measures applied by Iceland are efficient and protect important health interests. Iceland is empowered pursuant to Articles 13 and 18 EEA to require an importer to submit an official certificate confirming that the products are salmonella-free. The measures are effective, necessary and proportionate, and aim to protect important interests against an unacceptable risk. Moreover, Iceland submits that the obligations in Article 5(f) and (g) of the Icelandic Regulation, to demonstrate that the products conform to the legislation on food contaminants and labelling, do not constitute veterinary checks within the meaning of the Directive.

Findings of the Court

78 Article 10(1)(a) of the Icelandic Act prohibits the import of raw and lightly salted slaughter products, both processed and non-processed. This provision is supplemented by Article 3(a) of the Icelandic Regulation, which prohibits the import of raw meat, processed or unprocessed, chilled or frozen, as well as offal and slaughter wastes, which have not been treated by heating, so that the core temperature has reached 72°C for 15 seconds, or other comparable treatment in the opinion of the Food and Veterinary Authority.

79 However, the Minister of Fisheries and Agriculture may permit the import of such products upon recommendations from the Food and Veterinary Authority "if it is considered proven that they will not transmit infectious agents that can cause diseases in animals and humans, and the conditions imposed for the import have been fulfilled", cf. Article 4 of the Icelandic Regulation. An importer of raw products must thus apply for an authorisation from the Minister, and must submit an import declaration, information on the country of origin and production, the type of product and producer, and the required certificates as provided for in Article 5 of the Icelandic Regulation.

80 Article 2(1) of the Directive defines a veterinary check as any physical check and/or administrative formality which applies to the products referred to in Article 1 and which is intended for the protection, direct or otherwise, of public or animal health.

81 It is apparent from the description of the authorisation system for the import of fresh meat and meat products that it is intended for the protection of animal and human health. Moreover, the requirements to apply for an import permit and to submit certain certificates are administrative formalities. They are therefore veterinary checks within the meaning of the Directive.

82 Pursuant to Article 5(1)(a) of the Directive, veterinary checks in the EEA State of destination may be carried out only as non-discriminatory spot-checks at the place of destination, or during transit, when that EEA State has information leading it to suspect an infringement. It is undisputed that the Icelandic authorisation system for the import of fresh meat and meat products, and the requirement to submit certain certificates, apply systematically to every consignment of such products. Consequently, under the current Icelandic legal regime, the import of fresh meat and meat products is subject to systematic veterinary checks. This is not compatible with Article 5 of the Directive (see *Ferskar kjötvörur*, cited above, paragraph 67).

83 Furthermore, the veterinary spot-checks permitted under Article 5 of the Directive must have as their objective to verify that the requirements of Article 3 of the Directive have been complied with; that is, that the only products intended for trade are those which have been obtained, checked, marked, and labelled in accordance with EEA rules for the destination in question and which are accompanied by the documents required by EEA veterinary rules.

84 Article 5(c) of the Icelandic Regulation requires the importer to submit a certificate confirming that the products have been stored at a temperature of at least -18°C for a month prior to customs clearance. However, EEA law makes no provision for the freezing of meat as a legitimate requirement for veterinary purposes between EEA States and does not therefore allow for any such requirement to be made under national law. As a consequence, national law may not require a certificate to verify the freezing of meat (see *Ferskar kjötvörur*, cited above, paragraph 72).

85 Article 5(e) of the Icelandic Regulation requires the importer to submit an official certificate confirming that the products are free of salmonella bacteria. It should be noted that Article 8(1) of Regulation (EC) No 853/2004, as adapted to the EEA Agreement, requires food business operators intending to place on the market bovine or porcine meat or certain species of poultry in Sweden, Norway or Finland to comply with a set of rules in respect of salmonella, including the production of a trade document or certificate as prescribed in Article 8(2)(e). Article 8(3)(b) of Regulation (EC) No 853/2004 foresees the possibility of extending the rules laid down in that article to any EEA State that has a control programme recognised by the European Commission or ESA as equivalent to that approved for Sweden, Norway and Finland. However, this procedure has not been invoked by Iceland. Therefore, Iceland may not require importers of the relevant food categories to comply with the rules laid down in Article 8(2) of Regulation (EC) No 853/2004.

86 It must therefore be held that Iceland has failed to fulfil its obligations arising from Article 5 of the Directive by maintaining in force the authorisation system for the import of fresh meat and meat products laid down in Article 10 of the Icelandic Act and Article 3(a) and Articles 4 and 5 of the Icelandic Regulation.

(ii) Raw eggs and raw egg products

Arguments of the parties

87 ESA observes that Article 10 of the Icelandic Act, read in conjunction with Articles 3 to 5 of the Icelandic Regulation, imposes a system of import authorisation for raw eggs and raw egg products. That system is similar to the one for fresh meat and meat products. Therefore, the authorisation system for the import of raw eggs and raw egg products breaches Article 5 of the Directive as it constitutes a veterinary check going beyond the controls permitted at the place of destination.

88 Iceland stresses the importance of preventing transmission of salmonella bacteria and maintaining the exceptional status Iceland currently enjoys in that regard. In Iceland's view, Regulation (EC) No 853/2004 entails considerable flexibility for national authorities to regulate and monitor untreated eggs and egg products. The vast reforms within the EU in recent years illustrate that the measures applied by Iceland are necessary, effective and proportionate to their objective.

Findings of the Court

89 Article 10(1)(a) of the Icelandic Act prohibits the import of raw eggs. This provision is supplemented by Article 3(e) of the Icelandic Regulation, which prohibits the import of untreated raw eggs, raw eggshells and raw egg products, which have not been treated so that the product has been heated to 65°C for five minutes, or received other comparable treatment in the opinion of the Food and Veterinary Authority. However, pursuant to Article 4 of the Icelandic Regulation, the import of raw eggs and raw egg products may be allowed under the same

procedure as for the import of fresh meat and meat products, that is, by ministerial consent.

90 It is apparent from the description of this authorisation system that it is intended for the protection of animal and human health. Moreover, the requirement to apply for a permit for the import of raw eggs and raw egg products is an administrative formality. It is therefore a veterinary check within the meaning of the Directive. Furthermore, it is undisputed that this authorisation system applies systematically to every consignment of raw eggs or raw egg products. Consequently, under the current Icelandic legal regime, the import of raw eggs and raw egg products is subject to systematic veterinary checks. This is incompatible with Article 5 of the Directive (see *Ferskar kjötvörur*, cited above, paragraph 67).

91 It must therefore be held that Iceland has failed to fulfil its obligations arising from Article 5 of the Directive by maintaining in force the authorisation system for the import of raw eggs and raw egg products laid down in Article 10 of the Icelandic Act and Article 3(e) and Article 4 of the Icelandic Regulation.

(iii) Unpasteurised milk and dairy products processed from unpasteurised milk

Arguments of the parties

92 ESA observes that Article 10 of the Icelandic Act, read in conjunction with Articles 3 to 5 of the Icelandic Regulation, imposes a system of import authorisation for unpasteurised milk and dairy products processed from unpasteurised milk. A special permit is systematically required for the import of each consignment of these products. Article 5 imposes additional requirements concerning certain cheeses. Moreover, Article 7a of Icelandic Regulation No 104/2010 prohibits the marketing for direct consumption of imported dairy products processed from unpasteurised milk.

93 ESA observes that Article 10(8)(a) of Regulation (EC) No 853/2004 allows EEA States to maintain national rules prohibiting or restricting the placing on the market of raw milk or raw cream intended for direct human consumption. However, the Icelandic authorisation system goes beyond what is permitted by this provision, as it covers raw milk irrespective of its use, as well as dairy products processed from raw milk. Referring in particular to recital 23 in the preamble to Regulation (EC) No 853/2004, as well as to the harmonised framework of which that regulation forms part, in particular Regulations (EC) Nos 854/2004 and 2073/2005, ESA rejects Iceland's argument that Article 10(8)(a) of Regulation (EC) No 853/2004 extends to all dairy products processed from raw milk.

94 As regards Iceland's argument that dairy products made of unpasteurised milk pose the same risks as unpasteurised milk, ESA submits that the legislative authorities made a deliberate choice not to include dairy products in Article 10(8)(a) of Regulation (EC) No 853/2004. This choice cannot be made subject to a wide interpretation. Moreover, Iceland has not provided factual or scientific

elements to substantiate its argument, nor has it provided other justifications in light of the harmonised rules.

95 ESA therefore contends that the authorisation system and the related prohibition on the marketing of imported dairy products processed from unpasteurised milk cannot be based on Article 10(8)(a) of Regulation (EC) No 853/2004. This system is not compatible with the Directive (reference is made to *Ferskar kjötvörur*, cited above).

96 Iceland submits that the logical reading of Article 10(8)(a) of Regulation (EC) No 853/2004 is that, in addition to raw drinking milk, dairy products made of raw milk may also be prohibited. Scientific evidence shows that dairy products made from raw milk pose the same and even greater risk to health than raw drinking milk.

97 In any case, Iceland submits that, to the extent that its prohibition goes beyond Article 10(8)(a) of Regulation (EC) No 853/2004, it is justified under Article 13 EEA. There are no exhaustive harmonisation obligations as regards the marketing of raw milk or milk products. All EEA States therefore have considerable discretion to regulate these matters on the basis of their own risk assessment. Neither the prohibition on import and marketing nor the exemptions from the prohibition constitute a veterinary check within the meaning of the Directive. Instead, they are substantive requirements.

Findings of the Court

98 Article 10 of the Icelandic Act does not explicitly prohibit the import of unpasteurised milk and dairy products processed from unpasteurised milk. However, Article 3(f) of the Icelandic Regulation, which supplements the Icelandic Act, prohibits the import of such products, except for a quota of maximum 1 kg of cheese for personal use. Notwithstanding this provision, pursuant to Article 4 of the Icelandic Regulation, the import of unpasteurised milk and dairy products processed from unpasteurised milk may be allowed under the same procedure as for the import of fresh meat and meat products and raw eggs and raw egg products, that is, by ministerial consent.

99 It is apparent from the description of this authorisation system that it is intended for the protection of animal and human health. Moreover, the requirement to apply for a permit for the import of unpasteurised milk and dairy products processed from unpasteurised milk is an administrative formality. It is therefore a veterinary check within the meaning of the Directive. Furthermore, it is undisputed that this authorisation system applies systematically to every consignment of such products. Consequently, under the current Icelandic legal regime, the import of unpasteurised milk and dairy products processed from unpasteurised milk is subject to systematic veterinary checks. This is incompatible with Article 5 of the Directive (see *Ferskar kjötvörur*, cited above, paragraph 67).

100 Pursuant to the third paragraph of Article 5 of the Icelandic Regulation, additional requirements apply to the import of cheeses under CN codes 0406.2000 and

0406.3000. These products must have received appropriate treatment so that the cheesecurd has been heated to at least 48°C. Moreover, they must have been stored for at least six months at a temperature of not less than 10°C and at a humidity of less than 36%. However, EEA law contains no provisions for such requirements for veterinary purposes between EEA States and therefore does not allow for any such requirement to be made under national law. Furthermore, these requirements apply systematically to the products concerned. They are therefore incompatible with Article 5 of the Directive.

101 Finally, Article 7a of Icelandic Regulation No 104/2010 provides that milk that is distributed to consumers must be pasteurised and that dairy products shall be produced from pasteurised milk. ESA has submitted that the Icelandic authorisation system goes beyond what is permitted under Article 10(8)(a) of Regulation (EC) No 853/2004. However, ESA has not sought a declaration that Iceland has breached that regulation. It follows that this argument falls outside the scope of the present proceedings.

102 In its application, ESA seeks a declaration that by maintaining in force a prohibition of the marketing of imported dairy products processed from unpasteurised milk, such as laid down in Article 7a of Icelandic Regulation No 104/2010, Iceland has failed to fulfil its obligations arising from the Directive, in particular its Article 5. As the Court has already concluded, the Directive exhaustively harmonises the veterinary checks available to the EEA State of destination. However, a marketing prohibition cannot be characterised as a veterinary check since that concept is defined in Article 2(1) of the Directive as any physical check and/or administrative formality intended for the protection of public or animal health. This part of the application must therefore be dismissed.

103 The Court concludes that Iceland has failed to fulfil its obligations arising from Article 5 of the Directive by maintaining in force the authorisation system for the import of unpasteurised milk and dairy products processed from unpasteurised milk laid down in Article 3(f) and Article 4 of the Icelandic Regulation, and the additional requirements concerning certain cheeses laid down in the third paragraph of Article 5 of the Icelandic Regulation.

104 However, the Court dismisses ESA’s application for a declaration that Iceland has failed to fulfil its obligations arising from the Directive by maintaining in force a prohibition of the marketing of imported dairy products processed from unpasteurised milk, such as laid down in Article 7a of Icelandic Regulation No 104/2010.

(iv) Treated egg and dairy products

Arguments of the parties

105 *ESA* observes that importers of treated egg and dairy products are not subject to an authorisation system. However, ESA seeks a declaration that by maintaining in

force an administrative practice of requiring importers to make a declaration and obtain an approval for the import of treated egg and dairy products, such as the one established in the context of the application of the Icelandic Regulation, Iceland has failed to fulfil its obligations arising from the Directive, in particular its Article 5. ESA contends that this obligation to make a declaration and obtain approval goes beyond the checks allowed under Article 5 of the Directive. The administrative practice is therefore incompatible with the Directive (reference is made, inter alia, to *Ferskar kjötvörur*, cited above).

106 *Iceland* submits, as stated above, that both applications are without merit. However, it acknowledges that importers of either eggs and egg products or milk and dairy products, must submit data to prove that the products have been treated (pasteurised). No licence is required but the importer must confirm that its products comply with national regulations on the treatment of such products. Nevertheless, Iceland maintains that this administrative practice does not contravene EEA law.

Findings of the Court

107 ESA contends that, in applying the Icelandic Regulation, there is an administrative practice in Iceland of systematically requiring importers of treated egg and dairy products, that is, products that are no longer raw or unpasteurised, to make a declaration and obtain the approval of the Food and Veterinary Authority in order to obtain customs clearance.

108 Iceland objects to ESA's claim but has not refuted that certain administrative requirements apply to importers of treated egg and dairy products. The extent of this administrative practice is, however, unclear and no factual proof of the practice has been produced before the Court. Iceland's submissions do not confirm conclusively whether there is a requirement in place for importers to make a declaration and obtain an approval that products comply with national regulation. Iceland has nonetheless explicitly confirmed that importers of treated egg and dairy products must submit data to the relevant national authority proving that said products have been treated (pasteurised) in accordance with national legislation. Such practice amounts to a veterinary check going beyond the checks allowed under Article 5 of the Directive.

109 It must therefore be held that Iceland has failed to fulfil its obligations under Article 5 of the Directive by maintaining in force an administrative practice requiring importers of treated (pasteurised) egg and dairy products to submit data to the relevant national authority proving that said products have been treated in accordance with national legislation.

Conclusion

110 Iceland has failed to fulfil its obligations arising from Article 5 of the Directive by maintaining in force (i) the authorisation system for the import of fresh meat and meat products laid down in Article 10 of the Icelandic Act and Article 3(a) and

Articles 4 and 5 of the Icelandic Regulation; (ii) the authorisation system for the import of raw eggs and raw egg products laid down in Article 10 of the Icelandic Act and Article 3(e) and Article 4 of the Icelandic Regulation; (iii) the authorisation system for the import of unpasteurised milk and dairy products processed from unpasteurised milk laid down in Article 3(f) and Article 4 of the Icelandic Regulation, and the additional requirements concerning certain cheeses laid down in the third paragraph of Article 5 of the Icelandic Regulation; and (iv) an administrative practice requiring importers of treated egg and dairy products to submit data to the relevant national authority proving that the products have been treated (pasteurised) in accordance with national legislation.

111 The remainder of the application is dismissed.

112 The Court recalls that in its judgment of 1 February 2016 in *Ferskar kjötvörur*, cited above, paragraph 77, it found that it was not compatible with the provisions of the Directive for an EEA State to enact rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and requiring the submission of a certificate confirming that the meat has been stored frozen for a certain period prior to customs clearance. The Court notes that the underlying case in *Ferskar kjötvörur* is yet to be decided by the Supreme Court of Iceland.

113 In this context it could be recalled that the proper functioning of the EEA Agreement is dependent on individuals and economic operators being able to rely on the rights intended for their benefit (see Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraph 58). It is a general principle of EEA law that an EFTA State is obliged to provide for compensation for damages caused to individuals and economic operators provided that the EEA rule infringed intends to confer rights on them, that the breach is sufficiently serious and that a direct causal link exists between the breach and the damages suffered (see Case E-2/12 *HOB-Vín* [2012] EFTA Ct. Rep. 1092, paragraphs 119 and 121 and case law cited). Moreover, the Court has repeatedly underlined 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 (see, inter alia, Case E-18/16 *ESA* v *Iceland*, judgment of 7 June 2017, not yet reported, paragraph 17).

VI Costs

114 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 largely unsuccessful and 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 Iceland has failed to fulfil its obligations arising from Article 5 of the Act referred to at point 1 in Part 1.1 of Chapter I of Annex I to the Agreement on the European Economic Area (Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market) as amended and as adapted to the Agreement under its Protocol 1 and Annex I, by maintaining in force:**

   (i) the authorisation system for the import of fresh meat and meat products laid down in Article 10 of Icelandic Act No 25/1993 and Article 3(a) and Articles 4 and 5 of Icelandic Regulation No 448/2012;

   (ii) the authorisation system for the import of raw eggs and egg products laid down in Article 10 of Icelandic Act No 25/1993 and Article 3(e) and Article 4 of Icelandic Regulation No 448/2012;

   (iii) the authorisation system for the import of unpasteurised milk and dairy products processed from unpasteurised milk laid down in Article 3(f) and Article 4 of Icelandic Regulation No 448/2012, and the additional requirements concerning certain cheeses laid down in the third paragraph of Article 5 of Icelandic Regulation No 448/2012; and

   (iv) an administrative practice requiring importers of treated egg and dairy products to submit data to the relevant national

authority proving that the products have been treated in accordance with national legislation.

2. **Dismisses the remainder of the application.**

3. **Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 14 November 2017.

Gunnar Selvik
Registrar

Carl Baudenbacher
President