

Case

E-35/15

EFTA Surveillance Authority



The Kingdom of Norway

(Failure by an EFTA State to fulfil its obligations – Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues)

— *Table of Contents* —

721

Judgment of the Court, 2 August 2016

Summary of the Judgment

- 1 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.
- 2 Decision 77/2001 entered into force on 1 February 2002 and the time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on 28 December 2002.
- 3 Article 5(1) of the Directive imposes on EEA States a duty to develop and implement an appropriate waste reception and handling plan for each port covered by the Directive. Therefore, it cannot be satisfied merely by the creation of an appropriate regulatory framework for attaining that objective. Norway acknowledged that it has not developed a waste reception and handling plan for each port on its territory, before the time limit expired.
- 4 Article 5(3) of the Directive imposes on EEA States a duty to evaluate and approve waste reception and handling plans, monitor their implementation and ensure their re-approval at least every three years and after significant changes in the operation of the port.
- 5 Only with the adoption of the Amending Regulation did Norway comply with Article 5(3) of the Directive. The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion. Since the Amending Regulation came into force on 3 October 2013, and the period laid down in the reasoned opinion expired on 10 September 2013, Norway has failed to fulfil its obligations under Article 5(3) of the Directive. In a letter to ESA dated 23 October 2015 Norway acknowledged that a waste reception and handling plan had been approved only for 969 of the 4443 ports in Norway identified.

- 6 Article 4(1) of the Directive obliges EEA States to ensure the availability of adequate port reception facilities; however, Norway acknowledged in its defence that, as of 10 September 2013, not all the ports it had identified on its territory had adequate port reception.
- 7 Norway has failed to fulfil its obligations under the Directive by i) failing to develop and implement an appropriate waste reception and handling plan for each port in Norway, as required by Article 5(1) of the Directive; ii) failing to evaluate and approve the waste reception and handling plans for all ports in Norway, monitor their implementation and ensure their re-approval at least every three years, as required by Article 5(3) of the Directive; and iii) failing to ensure the availability of port reception facilities in all ports in Norway adequate to meet the needs of the ships normally using the port without causing undue delay to ships, as required by Article 4(1) of the Directive.

Judgment of the Court

2 August 2016

(Failure by an EFTA State to fulfil its obligations – Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues)

In Case E-35/15,

EFTA Surveillance Authority, represented by Carsten Zatschler, Markus Schneider and Øyvind Bø, members of its Department of Legal & Executive Affairs, acting as Agents,

– *applicant*,

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The Kingdom of Norway, represented by Ingunn Skille Jansen, Senior Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Ketil Bøe Moen, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents,

– *defendant*,

APPLICATION for a declaration that the Kingdom of Norway has failed to fulfil its obligations under the Act referred at point 56i of Annex XIII to the Agreement on the European Economic Area (Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues) by failing to (i) develop and implement an appropriate waste reception and handling plan for each port as required by Article 5(1) of Directive 2000/59/EC; (ii) evaluate and approve the waste reception and handling plans, monitor their implementation and ensure their re-approval at least every three years as required by Article 5(3) of Directive 2000/59/EC; and

(iii) ensure the availability of port reception facilities in all ports in Norway adequate to meet the needs of the ships normally using the ports without causing undue delay to ships as required by Article 4(1) of Directive 2000/59/EC.

The Court

composed of: Carl Baudenbacher, President (Judge-Rapporteur),
Per Christiansen and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,
having decided to dispense with the oral procedure,
gives the following

Judgment

I INTRODUCTION

1 By an application lodged at the Court Registry on 22 December 2015, the EFTA Surveillance Authority (“ESA”) brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”) seeking a declaration that the Kingdom of Norway has failed to fulfil its obligations under the Act referred at point 56i of Annex XIII to the Agreement on the European Economic Area (“the EEA Agreement or “EEA”), that is Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on

port reception facilities for ship-generated waste and cargo residues (OJ 2000 L 332, p. 81 and EEA Supplement 2002 No 12, p. 224) (“the Directive”) by failing to (i) develop and implement an appropriate waste reception and handling plan for each port as required by Article 5(1) of the Directive; (ii) evaluate and approve the waste reception and handling plans, monitor their implementation and ensure their re-approval at least every three years as required by Article 5(3) of the Directive; and (iii) ensure the availability of port reception facilities in all ports in Norway adequate to meet the needs of the ships normally using the ports without causing undue delay to ships as required by Article 4(1) of the Directive.

II LAW

EEA LAW

2 Article 3 EEA reads:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

...

3 Article 31 SCA reads:

If the EFTA Surveillance Authority considers that an EFTA State has failed to fulfil an obligation under the EEA Agreement or of this Agreement, it shall, unless otherwise provided for in this Agreement, deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the EFTA Surveillance Authority, the latter may bring the matter before the EFTA Court.

- 4 EEA Joint Committee Decision No 77/2001 of 19 June 2001 (OJ 2001 L 238, p. 27 and EEA Supplement 2001 No 44, p. 22) (“Decision 77/2001”) amended Annex XIII (Transport) to the EEA Agreement by adding the Directive to point 56i of the Annex.
- 5 Norway indicated constitutional requirements for the purposes of Article 103 EEA. In December 2001, Norway notified that the constitutional requirements had been fulfilled. Consequently, the Directive entered into force on 1 February 2002. According to Article 16(1) of the Directive, the time limit for EEA States to comply with the Directive expired on 28 December 2002.
- 6 Article 2 of the Directive reads:

For the purpose of this Directive:

...

- (e) *“port reception facilities” shall mean any facility, which is fixed, floating or mobile and capable of receiving ship-generated waste or cargo residues;*

...

- (h) *“port” shall mean a place or a geographical area made up of such improvement works and equipment as to permit, principally, the reception of ships, including fishing vessels and recreational craft.*

...

7 Article 3 of the Directive reads:

This Directive shall apply to:

- (a) all ships, including fishing vessels and recreational craft, irrespective of their flag, calling at, or operating within, a port of a Member State, with the exception of any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service; and*
- (b) all ports of the Member States normally visited by ships falling under the scope of point (a).*

Member States shall take measures to ensure that ships which are excluded from the scope of this Directive under point (a) of the preceding paragraph deliver their ship-generated waste and cargo residues in a manner consistent, in so far as is reasonable and practicable, with this Directive.

8 Article 4 of the Directive reads:

- 1. Member States shall ensure the availability of port reception facilities adequate to meet the needs of the ships normally using the port without causing undue delay to ships.*
- 2. To achieve adequacy, the reception facilities shall be capable of receiving the types and quantities of ship-generated waste and cargo residues from ships normally using that port, taking into account the operational needs of the users of the port, the size and the geographical location of the port, the type of ships calling at that port and the exemptions provided for under Article 9.*
- 3. Member States shall establish procedures, in accordance with those agreed by the International Maritime Organization (IMO), for reporting to the port State alleged inadequacies of port reception facilities.*

9 Article 5 of the Directive reads:

1. *An appropriate waste reception and handling plan shall be developed and implemented for each port following consultations with the relevant parties, in particular with port users or their representatives, having regard to the requirements of Articles 4, 6, 7, 10 and 12. Detailed requirements for the development of such plans are set out in Annex I.*
2. *The waste reception and handling plans referred to in paragraph 1 may, where required for reasons of efficiency, be developed in a regional context with the appropriate involvement of each port, provided that the need for, and availability of, reception facilities are specified for each individual port.*
3. *Member States shall evaluate and approve the waste reception and handling plan, monitor its implementation and ensure its re-approval at least every three years and after significant changes in the operation of the port.*

NATIONAL LAW

- 10 The Directive was implemented into Norwegian law by Regulation No 1243 of 12 October 2003 on reception facilities for ship-generated waste and cargo waste. That regulation was repealed and replaced by Regulation No 931 of 1 June 2004 relating to pollution control (“the Regulation”). Chapter 20 of the Regulation concerns port reception facilities for ship-generated waste and cargo residues. That chapter has later been amended, inter alia by Regulation No 1210 of 3 October 2013 (“the Amending Regulation”).
- 11 Section 20-5 of the Regulation imposes an obligation on the operator or the owner of a port to ensure that there are sufficient port reception facilities to satisfy a normal need to deliver waste and cargo residues in the port without causing undue delay to the ships.

- 12 Section 20-6 of the Regulation provides, in particular, that the operator or owner of a port must develop a waste plan.
- 13 Following the Amending Regulation, Section 20-6, fourth paragraph, of the Regulation provides that the waste plan must be submitted to the County Governor for evaluation and approval, and that it must be approved every three years, and/or after significant changes in the operation of the port.
- 14 Following the Amending Regulation, Section 20-6, last paragraph, of the Regulation provides that municipalities shall draw up an overview of all ports within their respective areas. Such overview shall be submitted to the competent County Governor by 1 January 2014.
- 15 Pursuant to Section 20-12 of the Regulation, County Governors shall monitor whether the operators of the ports comply with their obligations under Chapter 20 of the Regulation.

III FACTS AND PRE-LITIGATION PROCEDURE

- 16 At ESA's request, the European Maritime Safety Agency ("EMSA") carried out an inspection in Norway from 7 to 11 June 2010 to determine to what extent Norway's port reception facilities system complied with the requirements of the Directive. The infrastructure was inspected, as well as legislative and administrative provisions adopted. On 28 September 2010, EMSA issued a report presenting the results of the inspection and setting out its conclusions.
- 17 On 13 March 2013, following extensive correspondence and meetings with Norwegian officials, ESA issued a letter of formal notice, concluding that Norway had failed to fulfil some of its obligations under the Directive, in particular those arising from Article 4(1), Article 5(1) and Article 5(3).

- 18 By letter dated 14 May 2013, Norway replied to the letter of formal notice.
- 19 On 10 July 2013, ESA issued a reasoned opinion, maintaining the conclusions set out in its letter of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA requested Norway to take the necessary measures to comply with the reasoned opinion within two months following the notification, that is no later than 10 September 2013.
- 20 By letter dated 11 September 2013, Norway replied to the reasoned opinion.
- 21 Between 2013 and 2015, several letters concerning the case were exchanged between ESA and Norway, and the case was discussed in three different meetings. Unconvinced by Norway's arguments, and due to the late progress of the case, ESA decided on 17 November 2015 to bring the present action.

IV PROCEDURE AND FORMS OF ORDER SOUGHT

- 22 On 22 December 2015, ESA lodged its application at the Court Registry.
- 23 The applicant, ESA, requested the Court to:
 1. *Declare that the Kingdom of Norway has failed to fulfil its obligation arising under the Act referred to at point 56i of Annex XIII to the Agreement on the European Economic Area (Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues) within the time-limit prescribed by*

- a. *failing to develop and implement an appropriate waste reception and handling plan for each port in Norway as required by Article 5(1) of Directive 2000/59/EC;*
- b. *failing to evaluate and approve the waste reception and handling plans for all ports in Norway, monitor their implementation and ensure their re-approval at least every three years as required by Article 5(3) of Directive 2000/59/EC; and*
- c. *failing to ensure the availability of port reception facilities in all ports in Norway adequate to meet the needs of the ships normally using the port without causing undue delay to ships as required by Article 4(1) of Directive 2000/59/EC.*

2. *Order the defendant to bear the costs of these proceedings.*

24 On 7 March 2016, Norway's statement of defence was registered at the Court.

25 Although Norway pointed out that its reasoning in relation to Article 4(1) of the Directive differed to some extent from ESA's, Norway acknowledged that it had failed to fully comply with its obligations under Article 4(1), Article 5(1) and Article 5(3) of the Directive within the time-limit prescribed in the reasoned opinion. On these grounds, Norway requested the Court to declare the application founded.

26 By letter dated 18 April 2016, ESA waived its right to submit a reply.

27 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided, pursuant to Article 41(2) of the Rules of Procedure ("RoP"), to dispense with the oral procedure.

V PLEAS AND ARGUMENTS SUBMITTED TO THE COURT

28 ESA contends that Norway failed to fully comply with its obligations under Article 4(1), Article 5(1) and Article 5(3) of the Directive within the time-limit prescribed in the reasoned opinion, that is by 10 September 2013.

FIRST PLEA - FAILURE TO COMPLY WITH ARTICLE 5(1) OF THE DIRECTIVE

29 First, ESA submits that only with the adoption of the Amending Regulation did Norway implement Article 5(1) of the Directive. Since that regulation came into force after the period laid down in the reasoned opinion expired, implementation of Article 5(1) of the Directive was late.

30 Second, ESA argues that, even had the Amending Regulation come into force before the period laid down in the reasoned opinion expired, implementation of Article 5(1) of the Directive would nonetheless have been incomplete. The duty on EEA States to draw up waste reception and handling plans is an obligation as to the result to be achieved, and it cannot therefore be satisfied by the mere creation of the appropriate regulatory framework. Actual implementation is required, and in the present case that has not been achieved, since not all Norwegian ports have submitted a waste reception and handling plan.

31 Norway does not dispute ESA's arguments.

SECOND PLEA - FAILURE TO COMPLY WITH ARTICLE 5(3) OF THE DIRECTIVE

32 First, ESA contends that originally, the Regulation merely obliged port operators and owners to submit a waste reception and handling plan. The obligation on County Governors to evaluate and approve such plans was introduced by the Amending Regulation. Since that

regulation came into force after the expiry of the period laid down in the reasoned opinion, implementation of Article 5(3) of the Directive was late.

- 33 Second, ESA argues that the obligation to evaluate and approve waste reception and handling plans is an obligation as to the result to be achieved, which cannot be satisfied merely by the creation of the appropriate regulatory framework. Since a waste reception and handling plan had not been approved for all Norwegian ports within the time limit prescribed in the reasoned opinion, Norway has failed to fulfil its obligations under Article 5(3) of the Directive.
- 34 Norway does not dispute ESA's arguments.

THIRD PLEA - FAILURE TO COMPLY WITH ARTICLE 4(1) OF THE DIRECTIVE

- 35 First, ESA submits that only with the adoption of the Amending Regulation did County Governors have an obligation to ensure the availability of port reception facilities. Since that regulation came into force after the expiry of the period laid down in the reasoned opinion, implementation of Article 4(1) of the Directive was late.
- 36 Second, ESA contends that the obligation to ensure the availability of port reception facilities laid down in Article 4(1) of the Directive is an obligation as to the result to be achieved. In the present case, as of 16 October 2015 not all coastal municipalities have submitted to the competent County Governor an overview of the ports in their area. Without an overview of all ports covered by the Directive, Norway cannot determine whether all the relevant ports have an adequate port reception facility.
- 37 Norway claims that the obligation on port owners or operators to have an adequate reception facility has always been included in the Regulation. The Amending Regulation merely facilitated the monitoring of ports.

38 Norway acknowledges that not all municipalities have submitted an overview of the ports in their area, and it has no exact knowledge of the number of ports to which the Directive applies according to its Article 3(b). However, even without such knowledge, Norway may fulfil its obligations under Article 4(1) of the Directive, since according to recital 10 in the preamble to the Directive EEA, States may comply with Article 4(1) either by providing fixed reception installations or by appointing service providers bringing to the ports mobile units for the reception of waste when needed. Nevertheless, Norway acknowledges that it is difficult to assert that as of 10 September 2013, a port reception facility was available in all Norwegian ports.

VI FINDINGS OF THE COURT

- 39 Article 3 EEA imposes upon the EFTA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement (see, *inter alia*, Case E-21/15 *ESA v Iceland*, judgment of 1 February 2016, not yet reported, paragraph 14 and case law cited).
- 40 Decision 77/2001 entered into force on 1 February 2002. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on 28 December 2002.

FIRST PLEA - FAILURE TO COMPLY WITH ARTICLE 5(1) OF THE DIRECTIVE

- 41 Article 5(1) of the Directive imposes on EEA States a duty to develop and implement an appropriate waste reception and handling plan for each port covered by the Directive. Such duty is an obligation as to the result to be achieved. Therefore, it cannot be satisfied merely by the creation of an appropriate regulatory framework for attaining

that objective (compare the judgment in *Commission v Spain*, C-480/07, EU:C:2008:715, paragraph 22).

- 42 Norway acknowledged in its defence that it has not developed a waste reception and handling plan for each port on its territory, before the time limit set in the reasoned opinion expired. In particular, in a letter dated 23 October 2015, that is, more than two years after the deadline expired, Norway stated that of the 4443 ports it had until then identified on its territory, only 1514 had submitted a waste reception and handling plan.
- 43 Therefore, ESA's first plea is well-founded.

SECOND PLEA - FAILURE TO COMPLY WITH ARTICLE 5(3) OF THE DIRECTIVE

- 44 Article 5(3) of the Directive imposes on EEA States a duty to evaluate and approve waste reception and handling plans, monitor their implementation and ensure their re-approval at least every three years and after significant changes in the operation of the port.
- 45 Prior to the Amending Regulation, the Regulation merely provided in Section 20-6 that waste reception and handling plans had to be sent to the County Governor and comply with the provisions of Chapter 20 of the Regulation. Section 20-6 of the Regulation now provides that the waste reception and handling plan must be submitted to the County Governor for evaluation and approval, and that it must be approved every three years, and/or after significant changes in the operation of the port.
- 46 Therefore, only with the adoption of the Amending Regulation did Norway comply with Article 5(3) of the Directive. It is settled case law that 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-21/15 *ESA v Iceland*, not yet reported, paragraph

17. Since the Amending Regulation came into force on 3 October 2013, and the period laid down in the reasoned opinion expired on 10 September 2013, Norway has failed to fulfil its obligations under Article 5(3) of the Directive.

47 Moreover, the duty to evaluate and approve waste reception and handling plans and monitor their implementation pursuant to Article 5(3) of the Directive is, like the duty to implement and develop such plans provided for by Article 5(1), an obligation as to the result to be achieved. In a letter to ESA dated 23 October 2015, Norway acknowledged that a waste reception and handling plan had been approved only for 969 of the 4443 ports identified.

48 Therefore, ESA's second plea is well-founded.

THIRD PLEA - FAILURE TO COMPLY WITH ARTICLE 4(1) OF THE DIRECTIVE

49 Article 4(1) of the Directive obliges EEA States to ensure the availability of adequate port reception facilities.

50 Prior to the Amending Regulation, the Regulation provided in Section 20-5 that the operator or owner of a port must ensure that there are sufficient port reception facilities to satisfy a normal need to deliver waste and cargo residues. As submitted by Norway, the Amending Regulation merely made it easier for County Governors to implement such obligation by requiring municipalities to submit an overview of all ports within their area to the competent County Governor by 1 January 2014.

51 However, as submitted by ESA, Article 4(1) of the Directive imposes on EEA States an obligation as to the result to be achieved, that is, an obligation to ensure that adequate port reception facilities are actually available in all ports on the national territory. In that regard, the Court notes that it is irrelevant whether the port reception facility within the meaning of Article 4(1) is a fixed

installation or, as mentioned in recital 10 in the preamble to the Directive, a mobile unit. What matters is that an adequate port reception facility, whether fixed or mobile, is available in each port on the national territory. Norway acknowledged in its defence that as of 10 September 2013, not all the ports it had identified on its territory had adequate port reception facilities. Therefore, the Court finds that Norway has failed to fulfil its obligations under Article 4(1) of the Directive.

- 52 It must therefore be held that Norway has failed to fulfil its obligations under the Directive by i) failing to develop and implement an appropriate waste reception and handling plan for each port in Norway, as required by Article 5(1) of the Directive; ii) failing to evaluate and approve the waste reception and handling plans for all ports in Norway, monitor their implementation and ensure their re-approval at least every three years, as required by Article 5(3) of the Directive; and iii) failing to ensure the availability of port reception facilities in all ports in Norway adequate to meet the needs of the ships normally using the port without causing undue delay to ships, as required by Article 4(1) of the Directive.

VII COSTS

- 53 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 Norway be ordered to pay the costs, the latter has been unsuccessful and none of the exceptions in Article 66(3) RoP apply, Norway must be ordered to pay the costs.

On those grounds,

The Court

hereby:

- 1. Declares that the Kingdom of Norway has failed to fulfil its obligation arising under the Act referred to at point 56i of Annex XIII to the Agreement on the European Economic Area (Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues) within the time-limit prescribed by**
 - a. failing to develop and implement an appropriate waste reception and handling plan for each port in Norway as required by Article 5(1) of Directive 2000/59/EC;**
 - b. failing to evaluate and approve the waste reception and handling plans for all ports in Norway, monitor their implementation and ensure their re-approval at least every three years as required by Article 5(3) of Directive 2000/59/EC; and**
 - c. failing to ensure the availability of port reception facilities in all ports in Norway adequate to meet the needs of the ships normally using the port without causing undue delay to ships as required by Article 4(1) of Directive 2000/59/EC.**

2. **Orders the Kingdom of Norway to bear the costs of the proceedings.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

*Delivered in open court in Luxembourg on
2 August 2016.*

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
Acting President