Brussels, 30 January 2017
Case No: 80001
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ORIGINAL

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EFTA SURVEILLANCE AUTHORITY

IN THE EFTA COURT

APPLICATION

submitted pursuant to Article 31 (2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by

THE EFTA SURVEILLANCE AUTHORITY

represented by Carsten Zatschler and Maria Moustakali,
acting as Agents,

AGAINST

ICELAND

Seeking a declaration that by maintaining in force an authorisation system for the import of 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 adaptations in Annex I thereto, and in particular Article 5 of that directive.

Table of Contents

1 INTRODUCTION 3
2 LEGAL FRAMEWORK 4
2.1 EEA Law 4
2.2 National law 6
3 PRE-LITIGATION PROCEDURE 9
4 THE INFRINGEMENTS 13
4.1 Introduction 13
4.2 The Icelandic legal framework regarding imports of fresh meat and meat products is in breach of Directive 89/662/EEC 14
4.2.1 The import authorisation system 14
4.2.2 Specific requirements 16
5 CONCLUSION 21
6 SCHEDULE OF ANNEXES 22

1 INTRODUCTION

1. By the present Application, the EFTA Surveillance Authority ("ESA") seeks a declaration that Iceland has breached its obligations under Directive 89/662/EEC on veterinary checks in intra-Community trade[1] by maintaining in force an authorisation system for the import of, *inter* alia, fresh meat and meat products.
2. The Icelandic legislation imposes restrictions on the importation to Iceland of animal products such as fresh meat and meat products. The importation of such products into Iceland is not permitted for the reason that they might carry infectious agents. According to the Icelandic authorities, the objective of the restriction on imports is the prevention of the introduction of diseases for humans and animals. An exception to that rule is granted only by the Food and Veterinary Authority ("MAST"),[2] if it is considered proven that they do not transmit infectious agents that can cause diseases in humans and animals, in conjunction with the fulfilment of further conditions.
3. As will be explained in further detail below, ESA submits that the rules concerning the intra-EEA trade of products of animal origin and veterinary checks are harmonised at EEA level. Council Directive 89/662/EEC regulates veterinary checks in intra-EEA trade of products of animal origin. Its main objective is to eliminate veterinary checks at the EEA's internal borders while reinforcing the checks carried out at the point of origin. Moreover, products of animal origin will only be placed on the market if they comply with the requirements laid down in the EEA law acts comprising the so-called "Hygiene Package" as well as the relevant animal health and welfare rules applicable in the EEA. The competent authorities of the EEA State of destination may only check, by means of non-discriminatory spot-checks, compliance with the relevant EEA legislation.
4. By maintaining in force the authorisation system for the importation of fresh meat and meat products, Iceland imposes additional requirements, which are not

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[1] Act referred to at Point 1.1.1 of Chapter I of Annex I to the EEA Agreement, incorporated into 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*).

[2] Authorisation was formerly granted by the Minister of Fisheries and Agriculture but, upon the amendment of Article 10 paragraph 2 of Act No 25/1993 by Act No 71/2015, the approval is now granted by MAST.

allowed by the harmonised at EEA level framework of veterinary checks. The non-compliance with EEA law of such imposition of additional requirements has already been recognised by the EFTA Court in its judgment in Case E-17/15 - *Ferskar kjötvörur ehf. v the Icelandic State* ("the *Ferskar kjötvörur ehf.* judgment" or "the judgment in Case E-17/15 *Ferskar kjötvörur ehf.*").[3]

5. It is for those reasons that ESA challenges in the present proceedings the Icelandic legislation and administrative practice concerning the importation of raw meat and meat products.

2 LEGAL FRAMEWORK

2.1 EEA Law

6. *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*[4], as adapted to the EEA Agreement aims to regulate veterinary checks in intra-EEA trade of products of animal origin. Its main objective is to eliminate veterinary checks at the EEA State's internal borders while reinforcing those carried out at the point of origin. It defines and harmonises the type of controls that can be performed within the EEA on products of animal origin.
7. Under Article 1 of Directive 89/662/EEC, veterinary checks to be carried out on products of animal origin covered by that directive, which are intended for trade between EEA States, are (subject to the provisions of Article 6 on products from third countries) no longer to be carried out at frontiers within the EEA, but are to take place in accordance with the provisions of Directive 89/662/EEC.
8. Article 2 of Directive 89/662/EEC specifies that the term "veterinary check" within the meaning of the directive "*means any physical check and/or administrative formality which applies to the products covered by the directive and which is intended for the safeguarding, direct or otherwise, of public or animal health*".
9. Chapter I of that directive, entitled "Checks at origin", consists of Articles 3 and 4 which regulate veterinary checks in the EEA State of dispatch.

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[3] Not yet reported.
[4] Act referred to at Point 1.1.1 of Chapter I of Annex I to the EEA Agreement.

10. Under the first of those two provisions, the EEA State of dispatch is to ensure that the only products intended for intra-EEA 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 to the final consignee by the certificates required by the EEA veterinary rules.
11. In practice, this means that products of animal origin can only be placed on the market if they comply with the requirements laid down in the applicable EEA legislation, i.e. in particular the so-called "hygiene package" as well as the relevant animal health and welfare rules applicable in the EEA. Products of animal origin, including fresh meat and meat products, are subject in particular to the harmonised requirements of *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*[5] ("Regulation (EC) No 853/2004"), of *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*[6] and *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*[7].
12. Then, Article 4(1) of Directive 89/662 provides that:

    "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 Directive 89/662/EEC, entitled "Checks on arrival at the destination", consists of Articles 5 to 8.
14. Article 5 defines - restrictively - the types of checks that can be carried out by the competent authority at the place of destination and states in particular in its paragraph 1 (a) that:

    "Member States of destination shall implement the following measures:
    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,

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[5] Act referred to at Point 6.1.17 of Chapter I of Annex I to the EEA Agreement.
[6] Act referred to at Point 1.1.12 of Chapter I of Annex I to the EEA Agreement.
[7] Act referred to at Point 1.1.11 of Chapter I of Annex I to the EEA Agreement.

checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport."

15. It follows from these provisions that competent authorities of the EEA State of destination may only check, by means of non-discriminatory veterinary spot-checks, compliance with the relevant EEA legislation.

16. Articles 7 and 8 of Directive 89/662/EEC lay down the measures to be taken and the procedure to be followed if, during a check carried out at the place of destination of a consignment, the competent authority establishes the existence of an epizootic disease, any new serious and contagious disease or other cause likely to constitute a serious hazard to animals or to human health.

17. Article 9 of Directive 89/662/EEC provides that, in cases of an outbreak in its territory of any zoonoses, disease or other cause likely to constitute a serious hazard to human or animal health, Member States may adopt safeguard measures[8].

2.2 National law

18. Article 10 of Act No 25/1993 on animal diseases and preventive measures against them, as amended, provides that:

> *"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, non-disinfected raw skins and hides, feed for food producing animals* (in Icelandic: alidýraáburður) *and* (rotmassi) *mixed with feed for food producing animals,*
> *b. meat meal, bone flour, blood meal, and fat that is distilled from the production of these materials,*
> *c. hay and straw,*
> *d. any type of used packaging, saddlery, machinery, device, instruments, and other objects that have been in contact with animals, animal products or animal waste,*
> *e. any type of equipment used for angling.*
>
> *Despite the provision of paragraph 1, the Food and Veterinary Authority is authorised to allow the import of the products mentioned in items a-e, if it is considered proven that they will not transmit infectious agents that can cause animal diseases. The Minister 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, in the case of producers outside of the European Economic Area. The*

[8] Directive 89/662/EEC was incorporated into the EEA Agreement with an adaptation to Article 9, according to which this provision does not apply and any reference to it must be read as a reference to paragraph 3 of the Introductory Part of Annex I, Chapter I thereto, which concerns safeguard and protective measures.

Minister is authorised to prohibit by regulation the import of products, irrespective of their origin, which carry the risk of transmitting contaminating agents that could cause danger to the health of animals.[...]"[9]

19. The above text reflects the Icelandic provision as it currently stands. The first sentence of paragraph 2 above reflects an amendment introduced by Act No 71/2015, which entered into force on 20 July 2015.

20. Upon the amendment of Article 10 paragraph 2 of Act No 25/1993 by Act No 71/2015, the approval is now granted by MAST and not by the Minister, as the case was previously.

21. Icelandic Regulation (IS) No 448/2012 of 23 May 2012 *on measures to prevent the introduction of animal diseases and contaminated products* to Iceland, which is issued by virtue of an authorisation in Act No. 25/1993 and repealed Regulation 509/2004, provides detailed provisions on the implementation of Article 10 of Act No 25/1993.

22. Article 3 of Regulation (IS) No 448/2012 provides that:

"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. (...)"

23. Article 4 of Regulation (IS) No 448/2012 provides that:

"The Minister of Fisheries and Agriculture is authorised to allow the import of products mentioned in Article 3, cf. Article 10 of [Act No 25/1993] 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 unsterilized 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 MAST, 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."

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[9] Paragraph 2 of Article 10 of Act No 25/1993 on animal diseases and preventive measures against them was amended by Act No 71/2015, which entered into force on 20 July 2015 (unofficial translation by the Authority).

24. In practice, when the initial application has been processed, the importer has to apply for permission for the import of each individual consignment. This is satisfied by submitting all the necessary documentation to the office of import and export at MAST, where an evaluation of conformity takes place. If conformity is established, the documents are sent to MAST for final approval, as upon the amendment of Article 10 paragraph 2 of Act No 25/1993 by Act No 71/2015, the approval is now granted by MAST, as mentioned above. Upon such final approval, the importer may submit the documents to the customs authorities and have the consignments released.

25. Moreover, Article 5 of Regulation (IS) No 448/2012 provides that:

> *"Imported foods which are listed under classifications (CN Codes) 0202, 0203, 0204, 0207, 0208, 0210, 1601 and 1602[10], cf. Appendix I to the Customs Act, No 88/2005, 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:*
>
> *a. an official certificate of origin and health, in the case of products from producers outside the European Economic Area;*
>
> *b. an official certificate confirming that the animals from which the products derive were not given growth-promoting substances during rearing, in the case of products from producers outside the European Economic Area;*
>
> *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;*
>
> *d. an official certificate confirming that the animals from which the products derive were slaughtered in slaughterhouses and the products processed in processing plants authorised in the European Economic Area, in the case of products from producers outside the European Economic Area;*
>
> *e. an official certificate confirming that the products are free of salmonella bacteria;*
>
> *f. animal meat products and by-products, dairy products and raw 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."*

26. ESA considers that Article 10 of Act No 25/1993 and Articles 3, 4 and 5 of Regulation (IS) No 448/2012 read together, do not constitute a total ban on the importation of fresh meat but rather a system of import declaration and further

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[10] Description of the CN Codes: 0202: Meat of bovine animals, frozen, 0203: Meat of swine, fresh, chilled or frozen ; 0204: Meat of sheep or goats, fresh, chilled or frozen ; 0207: Meat and edible offal, of the poultry of heading 0105, fresh, chilled or frozen ; 0208: Other meat and edible meat offal, fresh, chilled or frozen ; 0210: Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal ; 1601: Sausages and similar products, of meat, meat offal or blood; food preparations based on these products ; 1602: Other prepared or preserved meat, meat offal or blood.

authorisation for these products based on the production of certain certificates by the relevant food business operator.

27. In addition, based on the CN Codes referred to in Regulation (IS) No. 448/2012, ESA understands that the products concerned are principally "fresh meat", "meat preparations" as well as "meat products". All these products, except animal by-products, are defined and covered by Regulation (EC) No. 853/2004 laying down specific hygiene rules for food an animal origin.[11]

3 PRE-LITIGATION PROCEDURE

28. By letter of 12 December 2011,[12] ESA informed the Icelandic government that it had received a complaint against Iceland concerning the restrictions on the importation of raw meat into Iceland. In the complaint, it was alleged that Iceland, by keeping a ban on the importation of meat into Iceland without reference to available scientific evidence or relevant risk assessment, had failed to comply with its obligations under the EEA Agreement. The complaint identified Act No. 25/1993 and Regulation No 509/2004 (now Regulation (IS) No. 448/2012 of 23 May 2012) as the main rules governing imports of meat in Iceland.
29. In the same letter of 12 December 2011, ESA invited Iceland to describe in detail the Icelandic rules governing the importation of meat in Iceland originating both from third countries and from EEA States and to provide detailed information in support of the claim that these arrangements are justified under Article 13 EEA.
30. Iceland replied to this request on 12 March 2012.[13] In its letter, Iceland set out the reasons why it considered that the rules governing imports of meat in Iceland were justified both under Article 13 EEA and the precautionary principle.

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[11] Annex I of Regulation (EC) No. 853/2004 laying down specific hygiene rules for food of animal origin (Point 6.1.17 of Chapter I of Annex I to the EEA Agreement) defines "Fresh meat" as *"meat that has not undergone any preserving process other than chilling, freezing or quick-freezing, including meat that is vacuum-wrapped or wrapped in a controlled atmosphere"* ; "Meat preparations" as *"fresh meat, including meat that has been reduced to fragments, which has had foodstuffs, seasonings or additives added to it or which has undergone processes insufficient to modify the internal muscle fibre structure of the meat and thus to eliminate the characteristics of fresh meat"* and "Meat products" as *"processed products resulting from the processing of meat or from the further processing of such processed products, so that the cut surface shows that the product no longer has the characteristics of fresh meat"*.

[12] Document No. 618214. Annex A.1 to this Application.

[13] Document No. 627908. Annex A.2 to this Application.

31. On 12 June 2012, ESA requested the Icelandic authorities to provide additional clarifications concerning the justifications presented by Iceland.[14] The Icelandic government replied to that letter on 5 September 2012[15].
32. On 20 February 2013, ESA's Internal Market Affairs Directorate sent a pre-Article 31 letter to Iceland,[16] in which it presented its preliminary conclusion that
    - Article 10 of Act No. 25/1993 and Articles 3, 4 and 5 of Icelandic Regulation No. 448/2012 are in breach of Article 5 of Directive 89/662/EEC and/or Article 18 of the EEA Agreement;
    - based on the information submitted by Iceland, ESA cannot consider the measures justified on the basis of Article 13 EEA.
33. On 27 May 2013, Iceland replied to this letter.[17] With regard to the application of secondary EEA legislation, Iceland argued that the legal implications of the incorporation of Directive 89/662/EEC concerning veterinary checks differed depending on whether it applied in Iceland or in countries of the European Union. This stems from the fact that Iceland is not a party to the European Common Agricultural Policy and that agriculture is excluded from the scope of the EEA Agreement. Consequently, Iceland had "*never abandoned its right to apply more stringent requirements for the protection of public health and livestock populations in Iceland*". There is no basis, Iceland argued, for requiring Iceland to ensure the free movement of agricultural products in the same way as within the European Union.
34. Moreover, Iceland insisted on the higher risk of infection of its livestock due to Iceland's geographic isolation over the centuries. It alleged that the EEA legislation only provides protection against known pathogens and not against pathogens to which livestock in other countries have built up immunity which the Icelandic livestock has not. Concerning the application of Article 13 EEA, Iceland argued that it must be given a different, wider, interpretation in the case of agricultural products than other products in general.
35. On 30 October 2013, ESA sent a letter of formal notice to Iceland,[18] in which it concluded that:

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[14] Document No. 637437. Annex A.3 to this Application.
[15] Document No. 645901. Annex A.4 to this Application.
[16] Document No. 660557. Annex A.5 to this Application.
[17] Document No. 673445. Annex A.6 to this Application.
[18] Document No. 680889. Annex A.7 to this Application.

- by maintaining in force an authorisation system for, *inter* alia, 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 No. 448/2012, Iceland had failed to comply with its obligations under Directive 89/662/EEC and were thus not in line with Article 5 of that Directive;

  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 has not demonstrated that the measures are justified under Article 13 EEA.

36. On 27 February 2014, the Icelandic Government sent a reply to ESA's letter of formal notice of 30 October 2013.[19] In its reply, Iceland stated in particular that, in its view, Directive 89/662/EEC had not fully harmonised veterinary checks in the EEA, that it could not be read, in the EEA context, as excluding systematic controls at the border, and that the Icelandic measures served an objective that lied beyond the Directive's purpose, namely to protect Iceland from pathogens that were common in Europe but unknown in Iceland.
37. On 25 March 2014, Iceland submitted two risk assessments in support of its reply to the letter of formal notice.[20]
38. On 27 June 2014, Iceland sent a letter to ESA in response to the follow-up letter to the package meeting in Iceland held on 19 May 2014.[21] In that letter, as requested by ESA, Iceland clarified the actual text of Article 5, points *(f)* and *(g)* of Regulation (IS) No 448/2012. With regard to point *(f)* concerning conformity with the Regulation on food contaminants, Iceland indicated that no specific documentary checks were being carried out.
39. On the 8 October 2014, ESA delivered a reasoned opinion, maintaining its conclusions in the letter of formal notice.[22] Pursuant to the second paragraph of Article 31 of the Surveillance and Court Agreement ("SCA"), ESA required Iceland to take the measures necessary to comply with the reasoned opinion within two months following the notification, that was, no later than 8 December 2014.

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[19] Document No. 700978. Annex A.8 to this Application.
[20] Document No. 703361. Annex A.9 to this Application.
[21] Document No. 712615. Annex A.10 to this Application.
[22] Document No. 709596. Annex A.11 to this Application.

40. By a letter dated 8 December 2014,[23] the Icelandic government requested an extension of the deadline to reply to ESA's reasoned opinion of 8 October 2014. ESA granted an extension until 8 February 2015 by letter dated 15 December 2014.[24] It is accordingly that date – 8 February 2015 – at which the infringement has to be assessed.
41. At that point, ESA decided to postpone further handling of the case following a request from the Reykjavík District Court to the EFTA Court for an advisory opinion concerning the compatibility with EEA legislation of the Icelandic import regime for meat products.[25] That case concerned the exact same provisions of Icelandic law that constituted the object of ESA's infringement proceedings.
42. On 10 February 2016, ESA sent a letter to Iceland,[26] in which it invited it to inform ESA of how it intended to comply with the EFTA Court's judgment of 1 February 2016 in Case E-17/15 *Ferskar kjötvörur ehf.*, in view of the conclusions concerning the incompatibility with Directive 89/662/EEC of the Icelandic authorisation system for raw meat imports.
43. On 9 March 2016, the Icelandic Government sent a reply to that letter,[27] in which it stated, in particular, that it was in the process of evaluating possible adjustments to the authorisation system.
44. On 18 November 2016, the District Court of Reykjavík handed down its judgment in the case in the main proceedings in Case E-17/15 *Ferskar kjötvörur ehf.* The District Court found for the plaintiff, Ferskar kjötvörur, and the Icelandic State was ordered to pay damages as requested by the plaintiff. The Icelandic Government has informed the Authority that it had decided to seek leave to appeal that judgment.
45. As Iceland has not made any changes to align its legislation to the conclusion of the aforementioned judgment of the EFTA Court and it still maintained the national provisions in question by the deadline set for response to the reasoned opinion, ESA decided to bring the matter before the EFTA Court pursuant to the second paragraph of Article 31 SCA.[28]

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[23] Document No. 732042. Annex A.12 to this Application.
[24] Document No. 732509. Annex A.13 to this Application.
[25] Case E-17/15, *Ferskar kjötvörur ehf* v *the Icelandic State,* not reported yet.
[26] Document No. 792343. Annex A.14 to this Application.
[27] Document No. 796940. Annex A.15 to this Application.
[28] College Decision No. 243/16/COL, adopted on 20 December 2016, Document No. 829097.

4 THE INFRINGEMENTS

4.1 Introduction

46. ESA submits that the EFTA Court has conclusively settled the matter concerning the infringements in the case at hand by its judgment in Case E-17/15 *Ferskar kjötvörur ehf.* The legal issues raised in the case referred by the Reykjavik District Court for an advisory opinion to the EFTA Court were identical to the present infringement action. Therefore, ESA considers it unambiguous that, by maintaining in force an authorisation system for fresh meat and meat products, Iceland has failed to fulfil its obligations arising from Directive 89/662/EEC, in particular its Article 5. Given the fact that Iceland has not to date amended its legislation in order to bring it in line with its EEA law obligations, ESA brings the present application requesting the EFTA Court to reaffirm its conclusions in Case E-17/15 *Ferskar kjötvörur ehf.*

47. For the sake of clarity and completeness, ESA will only reiterate the major points of its argumentation to the effect that the rules concerning the intra-EEA trade of products of animal origin and veterinary checks have been harmonised in the EEA.

48. According to Directive 89/662/EEC, veterinary checks are to take place at the place of dispatch, and the competent authority at the place of destination may carry out checks only by means of non-discriminatory spot-checks. In addition, Article 5 of Directive 89/662/EEC provides that the veterinary checks at the place of destination are limited to verifying the fulfilment of the requirements of EEA legislation. Hence, veterinary checks on imports of fresh meat and meat products can only be aimed at verifying compliance with the requirements of relevant EEA legislation.

49. In its judgment of 1 February 2016 in Case E-17/15 *Ferskar kjötvörur ehf.* the EFTA Court stated that:

> *"65 The harmonised system of veterinary checks [under Directive 89/662/EEC] is based on 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, for comparison, judgment in Commission v Sweden, C-111/03, EU:C:2005:619, paragraph 51).*
>
> *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 Directive's purpose".*

50. Furthermore, the EFTA Court stated in paragraph 76 of that judgment 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 harmonization of the measures necessary to guarantee the protection of animal and human health and when they establish procedures to check that they are observed".*

51. It also follows from the consistent interpretation made on several occasions by the Court of Justice of the European Union ("the CJEU" or "the Court of Justice") that Directive 89/662/EEC has exhaustively harmonised veterinary checks that can take place in the State of destination.[29] The CJEU has stated that a detailed and harmonised system of health inspections, based on harmonised rules at EEA level, replaces all other inspection systems existing within the country of destination, whatever the place where such inspections may be carried out[30].

52. In light of the above and in particular of the *Ferskar kjötvörur ehf.* judgment, ESA maintains the conclusion that the authorisation procedure and the additional requirements imposed by the Icelandic legislation on imports of fresh meat and meat products are not in line with Directive 89/662/EEC, and in particular Article 5 thereof. In what follows, ESA will elaborate on a few legal issues concerning the application. However, it reiterates that the judgment in *Ferskar kjötvörur ehf.* has conclusively settled the issue.

4.2 The Icelandic legal framework regarding imports of fresh meat and meat products is in breach of Directive 89/662/EEC

4.2.1 The import authorisation system

53. First of all, Article 10 of Act No 25/1993 read in conjunction with Articles 3 to 5 of Regulation (IS) No 448/2012 impose a system of import authorisation for fresh meat and meat products based on the production of certain documents and certificates (with a prohibition of imports for products not granted with an authorisation).

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[29] See, in particular, *Commission* v *Germany*, C-186/88, ECLI:EU:C:1989:601; *Commission* v *Germany*, C-102/96, ECLI:EU:C:1998:529; *Danske Slagterier v Bundesrepublik Deutschland*, C-445/06, ECLI:EU:C:2009:178 and *Commission* v *Sweden*, C-111/03, ECLI:EU:C:2005:619.

[30] See, in particular, joined cases *Ligur Carni Srl and Genova Carni Srl v Unità Sanitaria Locale n. XV di Genova and Ponente SpA v Unità Sanitaria Locale n. XIX di La Spezia and CO.GE.SE.MA Coop a r l*, C-277/91, C-318/91 and C-319/91, ECLI:EU:C:1993:927, paragraph 26, and *Commission* v *Sweden*, C-111/03, cited above, paragraph 51.

54. In particular, Article 4 of Regulation (IS) No 448/2012 requires all operators to submit an initial application and then - systematically and for each consignment - an application for the import of fresh meat and meat products. Therefore, the requirement for a special permit for the import of fresh meat and meat products is not compatible with the provisions of Directive 89/662/EEC, and in particular Article 5 thereof, as it constitute obligations that go beyond the controls permitted at the place of destination.

55. The EFTA Court stated in paragraph 71 of its *Ferskar kjötvörur ehf.* judgment that: *"An import permit requirement such as the one at issue is even more restrictive than a mere notification system."* Consequently, it concluded in the operative part of the judgment that: *"It is not compatible with the provisions of Directive 89/662/EEC 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* [...]."

56. It follows from the *Ferskar kjötvörur ehf.* judgment that such administrative formalities constitute veterinary checks and that these *"veterinary checks"* within the meaning of Article 2 of Directive 89/662/EEC are not allowed under Article 5 of Directive 89/662/EEC as they constitute obligations that go beyond the controls permitted at the place of destination.

57. The CJEU has ruled that similar additional veterinary checks placed on imports of products of animal origin are not compatible with harmonized rules on veterinary checks[31].

58. In Case C-186/88 *Commission v. Germany*, the Court stated that: *"in the light of the harmonised system of health inspections set up by Community legislation and based on full inspection of the goods in the exporting State, which replaces inspection in the State of destination, considerations based on the need to protect health cannot justify additional specific constraints placed on carriers when they cross a frontier"*.[32]

59. In Case C-111/03 *Commission* v *Sweden*, a system of compulsory prior notification and health checks for imports of certain food product of animal origin from other Member States in place in Sweden was considered incompatible with Article 5 of Directive 89/662.

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[31] See *Commission v. Germany*, C-186/88, cited above; *Commission v. Germany*, C-102/96 cited above; *Danske Slagterier*, C-445/06, cited above and *Commission v. Kingdom of Sweden*, C-111/03, cited above.

[32] *Commission v. Germany*, C-186/88, cited above, paragraph 16.

60. In that judgment, the Court of Justice first recalled the broad definition of the concept of 'veterinary checks' which covers any physical check and/or administrative formality which applies to the products in question and which is intended for the protection of public or animal health.
61. These two judgments confirm that *'additional specific constraints'*, such as a systematic obligation to make a prior declaration of imports of certain products of animal origin, going beyond the framework of the harmonised system of health and veterinary inspections applicable in EEA trade in the products in question, cannot be imposed on importers of products of animal origin.
62. Thus, a systematic authorisation system, such as the one in place in Iceland based on Article 10 of Act No. 25/1993 and Regulation (IS) no. 448/2012, is in breach of the requirements of Directive 89/662 and in particular its Article 5.

4.2.2 Specific requirements

63. Additionally, ESA considers that the Icelandic prior authorisation scheme imposes the fulfilment of certain requirements by the importers that are not allowed under Article 5 of Directive 89/662/EEC as they go beyond ensuring that the products have been obtained, checked, marked and labelled in accordance with EEA rules. This would also be true if the fulfilment of these requirements were not subjected to systematic checks at the border but rather to random spot checks.
64. In particular, Article 5 of Regulation (IS) No. 448/2012 imposes on producers in the European Economic Area whose products are intended for the Icelandic market an obligation to present the following four certificates: A certificate confirming that the products have been stored at a temperature of at least -18°C for a month prior to customs clearance, an official certificate confirming that the products are free of salmonella bacteria, a certificate confirming that animal meat products and by-products conform to the appropriate provisions of the current Icelandic Regulation on food contaminants and a certificate confirming that the product is labelled in conformity with current rules on labelling, advertising and promotion of foodstuffs.
65. According to Article 5 of Directive 89/662/EEC veterinary checks by Members States at the place of destination (in the form of non-discriminatory spot checks) can only be aimed at verifying that the requirements of Article 3 of Directive

89/662/EEC have been complied with. Article 3 of Directive 89/662/EEC provides that in carrying out checks at origin, "*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*" and that the products are accompanied by a health certificate, animal-health certificate or any other document provided for by EEA veterinary rules. It follows that EEA States cannot impose checks that do not find their basis in EEA law.

66. In practice, following the entry into force of the hygiene package, veterinary checks on fresh meat and meat products can only be aimed at verifying that these products comply with EEA rules on products of animal origin, and in particular the requirements laid down in Regulations (EC) No. 853/2004 laying down specific hygiene rules for food of animal origin and are checked according to Regulation (EC) No. 854/2004 laying down specific rules for the organisation of official controls and Regulation (EC) No. 882/2004 on official controls.

4.2.2.1 Freezing requirement

67. In particular, the obligation on importers to demonstrate that products have been frozen for 30 days at -18°C does not find its basis in the EEA legislation and constitutes checks on products that go beyond what is required under EEA rules. There is indeed no legal basis in the EEA legislation and, in particular in Regulation (EC) No. 853/2004 which has harmonised the rules under which products of animal origin are placed on the market, that would allow an EFTA State to require that all fresh meat and meat products imported be frozen.

68. In this respect, the EFTA Court states in paragraph 72 of the *Ferskar kjötvörur ehf.* judgment: "*[...] the Directive makes no provisions for the freezing of meat as a legitimate trade rule for veterinary purposes between EEA States and does not 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*".

69. And thus, it concludes in the operative part of the same judgment that: "*It is not compatible with the provisions of Directive 89/662/EEC for an EEA State to enact rules* [...] *requiring the submission of a certificate that the meat has been stored frozen for a certain period prior to customs clearance.*"

4.2.2.2 The salmonella certificate

70. Concerning the obligation for the importer to show that the products are free of salmonella (point *e* of Article 5 of Regulation No.448/2012), it should be stressed that according to Article 8 of Regulation (EC) No. 853/2004, EEA States may impose additional guarantees in respect of salmonella only if they meet certain requirements.

71. Indeed, Article 8 establishes additional guarantees on salmonella for Finland and Sweden (consisting in particular in the mandatory presentation of a document certifying the absence of Salmonella), and foresees a possibility for other Member States to apply these guarantees, if they have a control programme which was recognised as equivalent to that approved in Finland and Sweden.

72. Iceland has submitted to ESA a National Control Programme for Salmonella in poultry and poultry products, but it has not applied for a recognition of equivalence to that approved in Finland and Sweden and therefore may not apply the additional guarantees foreseen by Article 8 of Regulation (EC) No. 853/2004.

73. Consequently, the obligation for the importer to show that the products are free of salmonella bacteria (point *e* of Article 5 of Regulation (IS) No. 448/2012) does not find a legal basis in the EEA legislation and it constitutes a veterinary check which goes beyond the checks allowed under Article 5 of Directive 89/662.

4.2.2.3 The obligation concerning food contaminants

74. Concerning the obligation for the importer to show that the products are in conformity with Regulation on food contaminants (point *f* of Article 5 of Regulation No. 448/2012), Iceland has indicated that there were no specific documentary checks but a procedure to confirm that the meat is produced according to EU legislation by referring the given approval number to the list of approved establishments in the country in question. ESA understands that such verification is carried out on the basis of the documents presented by the importers when they apply for permission for the importation of each consignment on the basis of Article 4 of Regulation (IS) No. 448/2012.

The EEA legislation on contaminants in food (Council Regulation (EEC) No. 315/93[33] and Commission Regulation (EC) No. 1881/2006[34]) sets out maximum

[33] Point 54f of Chapter XII of Annex II to the EEA Agreement.
[34] Point 54zzzz of Chapter XII of Annex II to the EEA Agreement.

levels for certain contaminants in food. A product that complies with the levels set out in these Acts is presumed to be safe and compliant. Where maximum levels have not been established under EEA law, relevant legislation applicable in EEA States may continue to apply, provided that they inform the European Commission or ESA as the case may be.

75. ESA notes that the legislation on food contaminants does not contain any provisions that gives 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.

76. Consequently, the obligation imposed by point *f* of Article 5 of Regulation No. 448/2012 does not find a legal basis in the EEA legislation and it constitutes a veterinary check which goes beyond the checks allowed under Article 5 of Directive 89/662.

4.2.2.4 The labelling requirement

77. Concerning the obligation for the importer to demonstrate that the products shall be labelled in conformity with current rules on labelling, advertising and promotion of foodstuff (point *g* of Article 5 of Regulation No.448/2012), Iceland has indicated that conformity is ensured by a "one-off" documentary check at the time of application, which involves sending photographs/pdf documents illustrating the packaging to be examined by the Icelandic Food Safety Authority (MAST).

78. ESA thus understands that there is a systematic obligation for the importer to present certain documents (photographs) at the time of application (albeit only the first time) for inspection by MAST.

79. In this regard, ESA notes that the obligations under EEA legislation on the labelling of foodstuffs are already laid out in particular in Regulation (EU) No 1169/2011 of 25 October 2011 on the provision of information to consumers[35]. This regulation does not contain any provisions that give EEA States a legal basis to impose on importers the completion of a systematic procedure to demonstrate that food products conform to the legislation on labelling.

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[35] Point 86 of Chapter XII of Annex II to the EEA Agreement.

4.2.2.5 Final remarks on the above specific requirements

80. Furthermore, in addition to the conclusion of the EFTA Court in the *Ferskar kjötvörur ehf.* judgment that the freezing requirement is not compatible with the provisions of Directive 89/662/EEC, the Court also observed that in relation to the Directive the certificates concerning salmonella, food contaminant and labelling *"(...) must, in principle, be considered in the same manner as a freezing certificate."*

81. Hence, the submission of the certificates required as part of the authorisation procedure does not find a legal basis in the EEA legislation and its constitutes a veterinary check which goes beyond the checks allowed under Article 5 of Directive 89/662.

82. Finally, it follows from the *Ferskar kjötvörur ehf.* judgment and settled case-law of the CJEU[36] that in harmonised fields of European legislation, recourse to justification under Article 13 EEA is not available. As Directive 89/662 has exhaustively harmonised veterinary checks that may take place in the State of destination of the products covered by the Directive, it follows that Iceland may not rely on Article 13 EEA to justify the measure at issue.

[36] See *Commission* v *Portugal*, C-52/92 EU:C:1993:216, paragraph 17; *Denkavit Futtermittel* v *Minister für Ernährung, Ladwirtschaft und Forsten*, 251/78, EU:C:1979:252, paragraph 14.

5 CONCLUSION

Accordingly, ESA requests the Court to declare 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 adaptations in Annex I thereto, and in particular Article 5 of that directive.**

2. **Iceland bears the costs of the proceedings.**

Carsten Zatschler

Maria Moustakali

Agents of the EFTA Surveillance Authority

6 SCHEDULE OF ANNEXES

No	Description	Date	Document Number	Number of pages	Referred to in this Application at paragraph(s)
A.1	ESA's letter informing Iceland about the receipt of the complaint and request for information	12/12/2011	618214	3	28
A.2	Iceland's reply to the request for information	12/03/2012	627908	48	30
A.3	ESA's request for additional information	12/06/2012	637437	2	31
A.4	Iceland's reply to the request for additional information	05/09/2012	645901	5	31
A.5	ESA's pre-Article 31 letter	20/02/2013	660557	19	32
A.6	Iceland's reply to the pre-Article 31 letter	27/05/2013	673445	13	33
A.7	ESA's letter of formal notice	30/10/2013	680889	23	35
A.8	Iceland's reply to the letter of formal notice	27/02/2014	700978	14	36
A.9	Reports with further information from Iceland	25/03/2014	703361	250	37
A.10	Iceland's reply to follow-up letter to the package meeting of 19 May 2014	27/06/2014	712615	2	38

A.11	ESA's reasoned opinion	08/10/2014	709596	28	39
A.12	Iceland's request for extension of the deadline to reply to the reasoned opinion	08/12/2014	732042	1	40
A.13	ESA's reply to the request for extension	15/12/2014	732509	1	40
A.14	ESA's letter following the EFTA Court judgment in Case E-17/15	10/02/2016	792343	2	42
A.15	Iceland's reply to the follow-up letter	09/03/2016	796940	2	43