Ministry for Foreign Affairs
Rauðarárstíg 25
IS-150 Reykjavík
Iceland

Dear Sir or Madam,

Subject: Letter of formal notice to Iceland concerning Fulfilment of notification obligations under Directive 98/34/EC in Iceland (2013-2014)

1 Introduction

By a letter dated 30 March 2015 (Doc No 706947), the EFTA Surveillance Authority (“the Authority”) informed the Icelandic Government that it had opened an own initiative case for the purposes of scrutinising Iceland’s fulfilment of its obligations under Directive 98/34 (“the Directive”).¹ In this letter, the Authority requested further details on several potentially non-notified technical regulations, within the meaning of the Directive, adopted in Iceland in 2013-2014.

After having examined the Icelandic Government’s submissions of 10 July 2015 (Doc No 764790), the Authority has reached the conclusion that Iceland has failed to fulfil its obligations under the Directive insofar as it has failed to notify several technical regulations, adopted in 2013-2014, within the meaning of the Directive, to the Authority.

2 Correspondence


The Icelandic Government responded to this letter by letter of 10 July 2015.

The case was also discussed during the package meeting in Iceland in in May 2015 and in June 2016.

¹ The Act referred to at point 1 of Chapter XIX of Annex II to the EEA Agreement (Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations), as amended and as adapted to the EEA Agreement.
3 Relevant EEA law

Article 1(1)-(5) and 1(10)-(11) of the Directive, as adapted to the EEA Agreement, reads:

Article 1

For the purposes of this Directive, the following meanings shall apply:

(1) ‘product’, any industrially manufactured and any agricultural product, including fish products;

(2) ‘service’, any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

— ‘at a distance’ means that the service is provided without the parties being simultaneously present,

— ‘by electronic means’ means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

— ‘at the individual request of a recipient of services’ means that the service is provided through the transmission of data on individual request.

(3) ‘technical specification’, a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures.

The term ‘technical specification’ also covers production methods and processes used in respect of products intended for human and animal consumption, and medicinal products as defined in Article 1 of Directive 65/65/EEC, as well as production methods and processes relating to other products, where these have an effect on their characteristics;

(4) ‘other requirements’, a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing;

(5) ‘rule on services’, requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

This Directive shall not apply to rules relating to matters which are covered by Community legislation in the field of telecommunications services, as defined by Directive 90/387/EEC [...].

This Directive shall not apply to rules relating to matters which are covered by Community legislation in the field of financial services, as listed non-exhaustively in Annex VI to this Directive.

With the exception of Article 8(3), this Directive shall not apply to rules enacted by or for regulated markets within the meaning of Directive 93/22/EEC or by or for other markets or bodies carrying out clearing or settlement functions for those markets.

For the purposes of this definition:

— a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner;

— a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner;

[...]

(10) ‘draft technical regulation’, the text of a technical specification or other requirement, including administrative provisions formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made.

(11) ‘technical regulation’, technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

De facto technical regulations include:

— laws, regulations or administrative provisions of a Member State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements or to rules on services, compliance with
which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions,

— voluntary agreements to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements or rules on services, excluding public procurement tender specifications,

— technical specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services; technical specifications or other requirements or rules on services linked to national social security systems are not included.

Article 8(1) of the Directive, as adapted to the EEA Agreement, reads:

“Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.

[...]

Where appropriate, and unless it has already been sent with a prior communication, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

Member States shall communicate the draft again under the above conditions if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.”

4 The Authority’s assessment

The Icelandic Government, in its letter dated 10 July 2015 and during the package meeting in Iceland in May 2015, has provided satisfactory explanations for some of the potentially non-notified technical regulations adopted in 2013-2014, as requested by the Authority in its letter of 30 March 2015. The Authority however remains of the opinion that several technical regulations adopted in 2013-2014 have not been duly notified to the Authority.

3 By Joint Committee Decisions No 146/1999 and No 16/2001.
These measures are:

- Act No 121/2013, Lög um breytingu á lögum um geislavarnir, nr. 44/2002, með síðari breytingum (breytingar á eftirliti, niðurlagning geislavarnarráðs o.fl.).

- Regulation 415/2013, Reglugerð um breytingu á reglugerð 1104/2008 um raf – og rafeindatækjaúrgang

- Regulation 1209/2013, Reglugerð um (7.) breytingu á reglugerð nr. 368/2000, um söfnun, endurvinnslu og skilagjald á einnota umbúðir fyrir drykkjarvörur.

- Regulation 1061/2013, Reglugerð um dragnótaveiðar

- Regulation 877/2013, Reglugerð um úthlutun á opnum tollkvótom á hakkefni úr nautakjöti

- Regulation 850/2014, Reglugerð um endurgreiðslu virðisaukaskatts vegna kaupa á varmadælu til upphitunar íbúðarhúsnæðis

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4 Section 6 of the Act provides for changes in Article 7 of the Act, providing that use of radiological equipment capable of production ionizing radiation is subject to licencing/authorization by the Icelandic Radiation Safety Authority. Such equipment could for example be x-ray tubes, which falls within the product scope of the EEA Agreement pursuant to Article 8(3) of the EEA Agreement, cf. also Article 23 EEA. Therefore, the Act should also have been notified to the Authority in accordance with Article 8(1) first subparagraph of the Directive. See, comparatively, Case C-194/94 CIA Security, judgment of 30 April 1996, ECLI:EU:C:1996:172, paragraph 30.

5 Whereas the Icelandic Government maintains that the act transposes Directives 2002/96/EC and 2003/108/EC, it does not specify how the provision of the Regulation transposes the obligations in these Directives. The regulation essentially prohibits import of specific electrical and electronic equipment, unless the producers are parties to a take-back system, the conditions for which are specified in the Icelandic regulation no 1104/2008. It does not appear that the obligations in the aforementioned Directives are such that they would leave no room for manoeuvre, so that they are applicable in a uniform manner in all EEA States. Insofar as they leave room for manoeuvre in terms of national transposing measures (see, to this effect, for example Case C-443/98 Unilever [2000] ECR I-7535 and Case C-390/99 Canal Satélite Digital [2002] ECR I- I-00607), such regulations are not encompassed by the exception clause in Article 10 of the Directive, and should therefore still be notified to the Authority in accordance with Article 8(1) first subparagraph of the Directive.

6 Section 1-2 of the Regulation contains, inter alia, provisions on fees for packaging units, constituting thus an “other requirement” pursuant to Article 1(4). The fee differentiates according to the type of packaging, thus rendering it possible that the fee will influence the choice of packaging both on the part of the producer and the consumer.

7 Section 5 of the Regulation provides requirements for minimum mesh size for seine fishing equipment etc. The Authority notes that the product scope of the EEA Agreement is not relevant to the Directive, cf. Article 23 EEA; seine fishing equipment/fish nets are in any event within the product scope of the EEA Agreement, cf. Article 8(3) EEA (depending on the specific components, such would for example fall under Chapter 56 of the HS Code).

8 The Regulation provides updated import provisions for specific beef, Section 3 of the Regulation makes such import subject to compliance with Regulation 448/2012, which the Icelandic Government has already acknowledged as constituting a notifiable technical regulation, see letter from the Icelandic Government dated 20 March 2014, Doc No 703388.

9 The regulation contains, inter alia, VAT reimbursement provisions for heat pumps purchased for domestic use. The regulation thus constitutes a de facto technical regulation, e.g. a fiscal/financial measures affecting the consumption of a specific product by encouraging compliance with specific technical specifications, in this case, that the device is indeed a heat pump rather than any other product which can potentially be used for the heating of houses.
The Icelandic Government agrees that the following two regulations and Act, containing various technical requirements to the construction of buildings and/or parts thereof should have been notified to the Authority under Directive 98/34:\(^\text{11}\)

- Act No. 20/2013, Lög um breytingu á lyfjalögum nr. 93/1994, med síðari breytingum (lyfjablandad fóður)\(^\text{12}\)
- Regulation 350/2013, Reglugerð um 2. Breytingu á byggingarreglugerð nr. 112/2012
- Regulation 280/2014, Reglugerð um (3.) breytingu á byggingarreglugerð, nr. 112/2012

All of these measures contain technical regulations within the meaning of the Directive, which should have been notified to the Authority in accordance with Article 8(1) first subparagraph of the Directive, as adapted to the EEA Agreement.

The Icelandic Government agreed, during the package meeting in Iceland in May 2015 and 2016, to notify several of the measures which it agrees constitute technical regulations. The Icelandic Government agrees with the Authority that the first Act mentioned (Act No 20/2013) and the two final regulations mentioned (Regulations 350/2013 and 280/2014), must be notified under Directive 98/34. In this respect, the Authority recalls that the obligation on the EFTA States is to notify the full text of the technical regulation, not merely the provision(s) that contain technical regulations within the meaning of the Directive.\(^\text{13}\)

\(^{10}\) The regulation contains requirements for high voltage installations, which the Icelandic Government claims to be “voluntary standards”. Such requirements, containing references to European or International standards, are notifiable pursuant to Article 8(1) of the Directive, however, “information about the relevant standard […] suffice[s]” in such a case.

\(^{11}\) See letter from the Icelandic Government dated 10 July 2015, Doc No 764790.

\(^{12}\) The Icelandic Government has agreed that this Act is notifiable under Directive 98/34. Whereas a DTR has been notified seemingly repealing Section 1 of this Regulation (DTR 2015/9021/IS) Section 2 of the Regulation provides that a licence is required for the import of medicated feed (prior approval), and the licence is subject to a number of conditions. Therefore, this part of the Act should have also been notified to the Authority in accordance with Article 8(1) first subparagraph of the Directive. See, comparatively, Case C-194/94 CIA Security, cited above, paragraph 30.

\(^{13}\) The Court of Justice of the European Union has repeatedly held that EEA States must notify the full text containing the relevant technical regulations, see for example case C-145/97 Commission v Belgium, judgment of 7 May 1998, ECLI:EU:C:1998:212, at paragraphs 11-12, in which the Court of Justice of the European Union stated: “[…] as regards the precise scope of the obligation to communicate, the last sentence of the first subparagraph of Article 8(1) of the Directive provides that Member States are also to communicate the text of the basic legislative or regulatory provisions principally and directly concerned […]. As the Court made clear in its judgment in Case C-279/94 Commission v Italy [1997] ECR I-4743, paragraph 40, the aim of that provision is to enable the Commission to have as much information as possible on any draft technical regulation with respect to its content, scope and general context in order to enable it to exercise as effectively as possible the powers conferred on it by the Directive. It follows that, since it contains technical regulations, the contested decree should have been communicated […].”
5 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that by failing to notify the Authority of certain technical regulations adopted in 2013-2014, in accordance with its obligations under the Act referred to at point 1 of Chapter XIX of Annex II to the EEA Agreement (Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations) as amended and adapted by the Agreement, Iceland has failed to fulfil its obligations under Article 8 of that Act in respect of the acts and regulations adopted in 2013-2014 referred to above in Section 4.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority invites the Icelandic Government to submit its observations on the content of this letter within two months following receipt thereof.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Icelandic Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

Helga Jónsdóttir
College Member

This document has been electronically signed by Helga Jonsdottir on 13/07/2016