

Case No: 90525
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Decision No: 064/24/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 24 April 2024

closing a complaint case arising from an alleged failure by Iceland to comply with requirements in EEA legislation when issuing an operating licence to a company for whale hunting in 2023

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

1 Introduction

On 17 May 2023, the EFTA Surveillance Authority (“the Authority”) received a complaint against Iceland (Doc No 1373996). The complaint alleged that an operating licence issued to a company for whale hunting in the 2023 season breached the requirements set out in EEA legislation on animal welfare (‘the animal welfare allegation’), as well as EEA regulations on food hygiene (Regulations (EC) No 178/2002, (EC) No 852/2004, (EC) No 853/2004 and (EU) 2017/625) (‘the food hygiene allegation’) and greenhouse gas emissions (Regulation (EU) 2018/842) (‘the greenhouse gas emissions allegation’).

By a supplementary email on 24 May 2023, the complainant also alleged a breach of EEA rules on water for human consumption (Directive 98/83/EC) (‘the potable water allegation’), wastewater (Directive 91/271/EEC) (‘the wastewater allegation’) and ship generated waste (Directive 2000/59/EC) (‘the ship generated waste allegation’).

By emails of 1, 2, 6 and 19 June 2023, the complainant submitted additional information concerning the complaint, including copies of inspection reports from the Icelandic Food and Veterinary Authority and the local competent authorities relating to the company in question (Docs No 1376510, No 1376805, No 1376847 and No 1380248).

By emails of 8 August, 21 September and 5 October 2023, the complainant submitted further information, including information about recent developments as regards the temporary halt of whaling operations in Iceland over the summer, as well as copies of correspondence with the Icelandic competent authorities about matters relating to the case (Docs No 1392003, No 1398922 and No 1402841).

On 20 December 2023, the Authority's Internal Market Affairs Directorate informed the complainant by letter (Doc No 1396209) of its intention to propose to the Authority that the case be closed and invited the complainant to submit its observations. The complainant submitted observations by letter of 14 February 2024 (Doc No 1436683) and emails of 27 February 2024 (Doc No 1438919) and 14 March 2024 (Doc No 1443619), providing additional arguments and information regarding its food hygiene and potable water allegations.

Article 5(1)(a) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") confers on the Authority a mandate to ensure the fulfilment by the EEA EFTA States of their obligations under the EEA Agreement. To this end, Article 5(2) SCA empowers the Authority to adopt a range of measures.

According to settled case-law of the EFTA Court, the Authority enjoys wide discretion in deciding whether and how to pursue proceedings against an EEA EFTA State. The Authority alone is competent to decide whether it is appropriate to bring proceedings under Article 31 SCA for failure to fulfil the obligations under the EEA Agreement.¹

Furthermore, any infringement proceedings brought by the Authority under Article 31 SCA should be concentrated so as to ensure the greatest impact for the functioning of the EEA Agreement, bearing in mind the resources of the Authority and having regard to alternative enforcement mechanisms available at national level.²

2 The Authority's assessment

2.1 The animal welfare allegation

It falls under the competences of the Authority to investigate possible breaches of EEA law on the part of the authorities of the EEA EFTA States. This would imply that in order for a complaint to be admissible, it must relate to an infringement of the EEA Agreement by one of these States.

As concerns the animal welfare allegation, the complainant contended in its complaint *inter alia* that the practice of whale hunting in Iceland "violates requirements and the spirit of Icelandic and European animal welfare legislation and should be stopped immediately". The complainant furthermore argued that "[t]he issued license and the decision not [to] withdraw the license from [the operator] violates the requirements set out by the EEA legislation on animal welfare, which aim is to ensure that animals do not endure avoidable pain or suffering and are free from pain and injury, cf. Chapter I (Veterinary matters) of Annex I to the EEA Agreement. The Annex is applicable to

¹ See, for example, Order of the EFTA Court of 23 October 2013 in Case E-2/13, *Bentzen Transport v EFTA Surveillance Authority*, EFTA Ct. Rep [2013] p. 802, point 40, and further, the Order of the EFTA Court in Case E-13/10 *Aleris Ungplan AS v ESA* [2011] EFTA Ct. Rep. 3, point 26.

² As the European Commission has stated: "Certain categories of cases can often be satisfactorily dealt with by other, more appropriate mechanisms at EU and national level. This applies in particular to individual cases of incorrect application not raising issues of wider principle, where there is insufficient evidence of a general practice, of a problem of compliance of national legislation with EU law or of a systematic failure to comply with EU law. In such cases, if there is effective legal protection available, the Commission will, as a general rule, direct complainants in this context to the national level." See "EU law: Better results through better application" (2017/C 18/02) paragraph 3, sub para 9. The same principles are applicable *mutatis mutandis* to the EEA legal order.

*Iceland*³. The complainant also referred to the preamble to Regulation (EU) 2017/625 on official controls³, and its Article 21.

In their email of 19 June 2023, the complainant referred to Article 5 of Regulation (EU) 2017/625 and the obligation for the EEA States to ensure effectiveness and appropriateness of official controls, and to ensure that the competent authorities have the legal powers to take the action provided for in the Regulation or in the rules referred to in Article 1(2) of the Regulation.

The Authority notes that there is currently no EEA legislation on animal welfare that applies to the killing of wild aquatic mammals such as whales.⁴ Regulation (EU) 2017/625 is not applicable to controls on welfare of aquatic mammals hunted in the wild either, as it applies only to official controls performed for the verification of EEA rules, or national rules established to apply EEA legislation, in the areas covered by the Regulation, see Article 1(2).

The complainant also stated that the Icelandic State would not be “*prohibited to restrict export of goods based on protection of health and life of humans and animals*” and that the inaction by the Icelandic authorities in this regard “*contradicts the authority available under e.g. Article 13 of the EEA Agreement*”.

In this regard, the Authority notes that Article 13 of the EEA Agreement sets out possible justifications for restrictions to the free movement of goods in the EEA. The provision does not entail a positive obligation for the EEA EFTA States to impose such restrictions.

In its email of 19 June 2023, the complainant also stated that the whaling methods are conducted in defiance of the principles of minimising pain and suffering of animals and paying full regard to the welfare requirements of animals under Article 13 of the Treaty on the functioning of the European Union (“TFEU”).

The Authority notes that the EEA EFTA States are not Parties to the TFEU, and that the EEA Agreement does not contain provisions that correspond to Article 13 TFEU. Accordingly, the Authority will not make an assessment of actions taken by Iceland in relation to this provision.

Against this background, the Authority takes the view that there are insufficient grounds to pursue the animal welfare allegation raised in the complaint.

2.2 The food hygiene and potable water allegations

The complainant in their complaint alleged *inter alia* that the practice of processing whale carcasses partly outdoors “*does not conform to legislation on food [safety]*”. *Seagulls have*

³ Act referred to at Point 11b of Chapter I of Annex I to the EEA Agreement, *Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulations (EC) No 999/2001, (EC) No 396/2005, (EC) No 1069/2009, (EC) No 1107/2009, (EU) No 1151/2012, (EU) No 652/2014, (EU) 2016/429 and (EU) 2016/2031 of the European Parliament and of the Council, Council Regulations (EC) No 1/2005 and (EC) No 1099/2009 and Council Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC and 2008/120/EC, and repealing Regulations (EC) No 854/2004 and (EC) No 882/2004 of the European Parliament and of the Council, Council Directives 89/608/EEC, 89/662/EEC, 90/425/EEC, 91/496/EEC, 96/23/EC, 96/93/EC and 97/78/EC and Council Decision 92/438/EEC (Official Controls Regulation).*

⁴ *Regulation (EC) No 1099/2009 on the protection of animals at the time of killing* is part of the EEA Agreement (see Point 2a of Part 9.1 of Chapter I of Annex I to the EEA Agreement). However, this Regulation only applies to the killing of animals bred or kept for the production of food, etc. It does not apply to hunting activities, as specified in its Article 1.

access to the carcasses and [...] it is impossible to secure that bird faeces does not land on the meat, which is sold for human consumption”.

As regards the potable water allegation, the complainant in their complaint pointed to shortcomings in relation to the use of water in the food business in question. Specifically, the complainant stated that a 2022 report by the Icelandic competent authorities found that water is gathered from an unprotected well in the hill above the station, leaving it open for contamination. The complainant also referred to a 2018 report showing contaminated water in the operator’s factory.

The complainant has also provided ESA with copies of other reports from inspections by the competent Icelandic authorities, dating from 2013 until 2022, as well as photographic material, to support these allegations.

Furthermore, the complainant has provided copies of correspondence with the Icelandic competent authority in relation to the applicability of EEA food hygiene legislation to products of whale origin.

After receiving the pre-closure letter from the Authority, the complainant provided additional information.

By letter of 14 February 2024 (Doc No 1436683), the complainant reiterated that the processing of whale carcasses takes place partly outdoors with possible exposure to contamination from bird droppings, etc. The complainant also contended that it is “*not possible to perform a satisfactory surveillance on the hygienic safety of the food products in question*”. In this regard, the complainant sought to highlight provisions of Regulation (EC) No 852/2004 which it considered not to be met during the processing of whale carcasses in Iceland and noted that the Icelandic legislation on production and surveillance of whale products was amended in 2009 to remove the requirement that flensing of whales took place under a roof.

By email of 27 February 2024 (Doc No 1438919) the complainant referred to information provided by the Icelandic Food and Veterinary Authority regarding the sampling and monitoring of contaminants in whale products for human consumption in Iceland. The complainant considers that the sampling and monitoring performed by the Icelandic Food and Veterinary Authority and by the food business operator itself, is insufficient to ensure the safety of whale meat and blubber which is placed on the market in Iceland.

Finally, by email of 14 March 2024 (Doc No 1443619) the complainant provided a copy of a letter from the State prosecutor of Iceland, confirming the decision of the police department of West Iceland to close an investigation into breaches of food law by the operator in question.

The Authority has obtained further clarifications from the Icelandic Government in respect of the applicability of EEA food hygiene legislation to products of whale origin.⁵ The Government confirmed its understanding that whale products for human consumption are foodstuffs within the meaning of EEA law and that the general obligations on food business operators laid down in Article 3 of Regulation (EC) No 852/2004⁶ have been made part of Icelandic legislation. However, the Government also noted that there are no specific rules or requirements in the EEA Agreement for the processing and treatment of whale products, beyond these general obligations.

⁵ Request for information dated 4 October 2023 (Doc No 1401433) and reply from the Icelandic Government dated 20 November 2023 (Doc No 1415231).

⁶ Act referred to at Point 16 of Part 6.1 of Chapter I of Annex I to the EEA Agreement, *Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs*.

The Authority considers the position of the Icelandic Government to be correct, and a logical consequence of the prohibition on the import and trade of whale products into the EU.⁷

The issue raised by the food hygiene allegations in the complaint relates to the organisation of official controls in the food and veterinary area in Iceland and specifically shortcomings of food hygiene in an individual establishment.

The Authority is responsible for monitoring the EEA EFTA States' implementation and application of EEA legislation on food and feed, animal health and welfare. It is among the Authority's core tasks to ensure that the national control systems in the food and veterinary area meet the requirements of the EEA Agreement, and it carries out this task in cooperation with the national competent authorities (in Iceland, the Icelandic Food and Veterinary Authority and/or the local health authorities).

However, it is the national competent authorities which have responsibility for ensuring that individual food business operators comply with the standards set out in EEA legislation, and the Authority does not have legal powers towards such operators in the EEA EFTA States in this respect.

The primary tool for the Authority to identify shortcomings in the official controls in the food and veterinary area by the EEA EFTA States is audits, including on-site verifications. The Authority has a long-term control programme that is subject to annual review, and that covers, *inter alia*, safety of food of animal origin.⁸

The foregoing considerations entail that, as a matter of practice, the Authority will not pursue complaint cases concerning the organisation of official controls in the food and veterinary area, or complaint cases based on allegations of shortcomings of food hygiene in specific individual establishments, in the EEA EFTA States. However, information from complainants giving credible grounds to suggest shortcomings in the control system in any of the EEA EFTA States, will be included in the Authority's risk assessment to identify priority areas in the long-term control programme.

Against this background, the Authority takes the view that there are insufficient grounds to pursue the food hygiene and potable water allegations raised in the complaint.

2.3 The greenhouse gas emissions allegation

The complainant alleged in its complaint that *"the decision to authorize whale hunting breaches against the obligations of Iceland on lessening output of carbon dioxide, which is contradictory to the European Climate Law and goals set out in the European Green deal, which has the intention to have climate-neutral emissions by Europe's economy by 2050."* The complainant further alleged that the authorization of whale hunting is in breach of Regulation (EU) 2018/842, in particular Article 1 thereof.

The Authority notes that *Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law")* has not been incorporated into the EEA Agreement and does therefore not apply to Iceland.

⁷ See *Council Regulation (EEC) No 348/81 of 20 January 1981 on common rules for imports of whales or other cetacean products* (OJ L 39, 12.2.1981, p. 1).

⁸ <https://www.eftasurv.int/internal-market/food-safety/food-safety-missions>.

Furthermore, the “European Green Deal” is a communication of the European Commission. It does not constitute a legal act and does not set out legal obligations that apply to Iceland.

Regulation (EU) 2018/842 is included in Protocol 31 of the EEA Agreement and has been applicable to Iceland since 11 March 2020. Among other things, it requires each State to limit, in 2030, emissions of greenhouse gases by at least the percentage set for that State (Article 4(1) read together with Annex I of Regulation (EU) 2018/842). However, Regulation (EU) 2018/842 does not require the adoption of specific mitigation actions. Iceland has the discretion to decide what policies and measures to adopt in order to attain its emission reductions.

Against this background, the Authority takes the view that there are insufficient grounds to pursue the greenhouse gas emissions allegation raised in the complaint.

2.4 The wastewater allegation

As regards the wastewater allegation, the complainant alleged in its complaint that the whaling operations do not comply with requirements of Directive 91/271/EEC,⁹ and that this is evidenced in inspection reports by Icelandic authorities. However, the complainant did not specify the specific requirement(s) of Directive 91/271/EEC claimed to have been breached.

The Authority notes that Directive 91/271/EEC contains requirements for both urban and industrial wastewater. These requirements include *inter alia* provisions on authorisation and monitoring.

The information provided by the complainant does not set out sufficient evidence to enable the Authority to conclude that there has been a breach of the provisions of Directive 91/271/EC. Moreover, the Authority notes that the alleged breach only relates to one specific operator, rather than indicating a consistent and general administrative practice in contravention of EEA law.

Against this background, the Authority takes the view that there are insufficient grounds to pursue the wastewater allegation raised in the complaint.

2.5 The ship-generated waste allegation

Regarding the ship-generated waste allegation, which the complainant added to its complaint on 24 May 2023, the complainant considers that the waste reception facilities in the port where the whaling vessels dock are insufficient. The complaint invokes Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues.¹⁰

The evidence attached to the complaint on this point is limited to a reference to a report by the local competent authorities in 2022. The Authority has not been able to identify any reference to the reception of ship-generated waste and cargo residues in the reports the complainant has attached to the complaint.

⁹ Act referred to at point 13 of Chapter II of Annex XX to the EEA Agreement, *Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment*.

¹⁰ Act referred to at point 56i of Annex XIII to the EEA Agreement, *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*.

Moreover, the complainant has not identified which provisions of Directive 2000/59/EC the complainant believes Iceland is infringing in this case.

Against this background, the Authority takes the view that there are insufficient grounds to pursue the ship generated waste allegation raised in the complaint.

3 Pre-closure letter of 20 December 2023 and the complainant's observations

By letter of 20 December 2023 (Doc No 1396209), the Authority's Internal Market Affairs Directorate informed the complainant of its intention to propose to the Authority that the case be closed. The complainant was invited to submit any observations on the Internal Market Affairs Directorate's assessment of the complaint or present any new information by 31 January 2024. At the request of the complainant, the deadline was extended to 14 February 2024 (Doc No 1431287).

The complainant responded by letter of 14 February 2024, by email of 27 February 2024 and by email of 14 March 2024, as stated in Section 2.2 above.

However, the Authority does not consider that the additional information provided by the complainant in correspondence of 14 and 27 February and 14 March 2024 alters the conclusions set out in its letter of 20 December 2023.

For the sake of completeness, the Authority notes that the present Decision in no way restricts the Authority's future actions concerning the legal, administrative and/or factual issues arising in or from the case closed.

4 Conclusion

In the context outlined above, the Authority concludes, in the exercise of its discretion pursuant to Article 31 SCA, not to pursue the case further.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Iceland to comply with requirements in EEA legislation when issuing an operating licence to a company for whale hunting in 2023, is hereby closed.

For the EFTA Surveillance Authority,

Arne Røksund
President

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This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.