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EFTA SURVEILLANCE AUTHORITY

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Iceland's failure to comply with its obligations under the Act referred to at point 19a of Annex IX to the EEA Agreement *(Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes)* and/or Article 4 of the EEA Agreement

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1 Introduction

On 26 May 2010, the EFTA Surveillance Authority (hereafter "the Authority") issued a letter of formal notice to Iceland for its failure to ensure that Icesave depositors in the Netherlands and the United Kingdom receive payment of the minimum amount of compensation provided for in Article 7(1) of the Act referred to at point 19a of Annex IX to the EEA Agreement (*Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes*) as amended (hereafter "Directive 94/19/EC" or "the Act") within the time limits laid down in Article 10 of the Act, in breach of the obligations resulting from the Act and/or of Article 4 of the EEA Agreement.

The Government of Iceland answered the letter of formal notice on 2 May 2011. In that reply, the Government maintains the position that it has expressed previously to the Authority that it is not in breach of its obligations under Directive 94/19/EC and under Article 4 of the EEA Agreement. It disagrees with the statements made by the and urges the Authority to conclude this matter without any further action.

The Authority will examine each of the submissions made by the Government of Iceland below.

The Government of Iceland has made a number of allegations in its reply of 2 May 2011 concerning what it claims to be a number of breaches of cross-border banking legislation by the United Kingdom and the Netherlands, alleged incorrect implementation of the Directive by other EEA States and the alleged role of EEA States in the circumstances leading up to deposits becoming unavailable on 6 October 2008 or the recovery rate of the estate of Landsbanki Íslands hf. (hereafter "Landsbanki"). The Authority wishes to make clear that it considers that such allegations of breaches by other EEA States have no legal bearing on the present case. The Authority considers that such allegations, even if well founded, cannot release Iceland from its obligations under Directive 94/19/EC and under Article 4 of the EEA Agreement. Consequently, the Authority will not examine the substance of those allegations further.

The present infringement proceedings only relate to the compliance, by Iceland, with the obligations it has subscribed to under the EEA Agreement, according to which all depositors whose deposits in branches of Icelandic banks became unavailable must be compensated according to the terms of the protection laid down by Directive 94/19/EC and without discrimination.

The Authority emphasises the importance of the principle at stake. A main objective of the Directive is to enhance depositor protection. That objective would be compromised if the Directive were interpreted as only obliging Member States to set up a deposit guarantee scheme without any obligation actually to ensure that the aggrieved depositors are

provided with compensation. Depositors need to be able to place trust in the national deposit guarantee schemes established to protect them effectively as required by the Directive in order for the financial sector in the internal market to function properly and to increase the stability of the banking system within the EEA.

2 Background

In October 2006, the Icelandic bank Landsbanki Íslands hf. (hereafter "Landsbanki") launched, through its UK branch, online savings accounts under the brand "Icesave". In the spring of 2008, Landsbanki introduced the same product in the Netherlands through its Dutch branch.

In early October 2008, the three largest Icelandic banks, Kaupþing, Glitnir and Landsbanki collapsed and were taken over by the Icelandic State. On 7 October 2008, the Icelandic Financial Supervisory Authority (the "*Fjármálaeftirlitið*", hereafter "the FME") decided to assume the powers of the meeting of the shareholders of Landsbanki and immediately suspend the bank's board in its entirety because of the urgent financial and operational difficulties the bank suffered at that time. The FME appointed a winding-up committee which took over with immediate effect all authority of the board of directors.

On 27 October 2008, the FME issued an opinion stating that on 6 October 2008, Landsbanki's Icesave websites in the Netherlands and in the United Kingdom had ceased to work. The FME concluded that on the same day, Landsbanki was unable to make payment of the amount customers demanded, of certain deposits, in accordance with applicable terms. The statement from the FME triggered an obligation for the Icelandic deposit guarantee scheme, the Depositors and Investors Guarantee Fund (hereafter "the Fund" or the "Deposit Guarantee Fund" – *Tryggingarsjóður innstæðueigenda og fjárfesta*), to make payments in accordance with Article 9 of the Act No. 98/1999 on Deposit Guarantees and Investor Compensation Scheme, to Landsbanki's customers who did not receive the amount of their deposits. According to Article 10 of Directive 94/19, implemented into Icelandic law by Article 7(1) of Regulation No 120/2000 on Deposit Guarantees and Investor-Compensation Scheme, the payments from the fund should be made no later than three months from the time that the opinion of the FME is available, *i.e.* within three months from 27 October 2008. On 26 January 2009, 24 April 2009 and 23 July 2009, the Minister of Economic Affairs extended the deadline for payouts from the fund, each time for three months, based on Article 10(2) of the Directive (Article 7(4) of Regulation No 120/2000). Thus, the final deadline for payments expired on 23 October 2009. The Icelandic Government has not informed the Authority that the Fund has made any payments to depositors who had unavailable deposits.

The domestic depositors of Landsbanki were transferred to a new bank "new Landsbanki" (now NBI hf.) established by the Icelandic Government. The transfer was made by an FME decision of 9 October 2008 (later amended several times but with no effect on the deposits). The domestic depositors had thereby access to their funds in full at all times.

In accordance with the division of responsibility laid down under Directive 94/19/EC, deposits at the UK and Dutch branches of Landsbanki were under the responsibility of the Icelandic Fund, which offered a minimum guarantee of EUR 20 887 per depositor, cf. Article 10 of Act No. 98/1999. Iceland did not make use of the option provided for in Article 7(2) of the Directive to exclude certain categories of depositors from the guarantee scheme. From May 2008, Landsbanki opted to take part in the Dutch deposit guarantee

scheme to supplement its home scheme. At that time, the minimum guaranteed amount in the Dutch scheme was EUR 40 000 per depositor. This was later raised to EUR 100 000 per depositor.[1] Similarly, the UK branch had joined the UK deposit guarantee scheme for additional coverage. As a consequence, deposits at the UK branch over EUR 20.887 per depositor were guaranteed by the UK scheme up to GBP 50 000 for retail depositors.

Already on 11 October 2008, a Memorandum of Understanding was concluded between Iceland and the Netherlands, formalising a shared understanding that the Icelandic deposit guarantee fund was under an obligation to compensate each Dutch depositor of Landsbanki Amsterdam branch up to EUR 20 887, that the Netherlands would prefinance the amount required and that the Icelandic State would guarantee the loan[2].

Again, on 15 November 2008, the Icelandic Government confirmed in its Letter of Intent and Technical Memorandum of Understanding to the International Monetary Fund[3] that it was "*committed to recognize the obligations to all insured depositors*". This commitment was done *"under the understanding that prefinancing for these claims (was) available by respective foreign governments and that (Iceland) as well as these governments (were) committed to discussions within the coming days with a view to reaching agreement on the precise terms for this prefinancing*".

Following the unavailability of Icesave deposits, both the UK and Dutch authorities organised for depositors at the Landsbanki branches in the UK and the Netherlands to file claims to the deposit guarantee scheme in each country. The UK Government decided to arrange for the pay-out of all retail depositors in full. About 300 000 depositors received in total more than GBP 4,5 billion of which GBP 2,1 billion fell within the responsibility of the Icelandic deposit guarantee scheme, based on the minimum laid down in Article 10 of Act No. 98/1999.[4] The Dutch Government decided to organise the pay-out of all depositors up to a maximum of EUR 100 000. Between 11 and 31 December 2008, the Dutch Central Bank paid reimbursements totalling EUR 1,53 billion to 118 000 account holders of the Landsbanki branch in the Netherlands. Of this amount, EUR 1,34 billion was within the responsibility of the Icelandic deposit guarantee scheme.[5]

The Icelandic Government then entered into negotiations with the Governments of the United Kingdom and of the Netherlands for the reimbursements of the pay-outs made by those states to the depositors of Landsbanki, for the parts that were within the responsibility of the Icelandic deposit guarantee scheme. The parties reached two agreements in June 2009. After the Icelandic Parliament approved the agreements with conditions, the parties resumed negotiations and new agreements were concluded in December 2009. However, the law voted by the Iceland Parliament and approving the necessary state guarantees under the agreements was turned down in a referendum in March 2010.

As indicated above, on 26 May 2010, the Authority issued a letter of formal notice to Iceland for its failure to ensure that Icesave depositors in the Netherlands and the United

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[1] See Annual Report 2008 from the Dutch Central Bank, page 85-86.

[2] Memorandum of Understanding between the Depositors and Investors Guarantee Fund of Iceland, the Government of Iceland and the Government of the Netherlands dated 11 October 2008, published on Island.is.

[3] Letter of Intent and Technical Memorandum of Understanding from the Government of Iceland to the International Monetary Fund, 15 November 2008, point 9, published on the website of the IMF.

[4] See Annual Report and Accounts 2008/09 from the UK Financial Services Compensation Scheme, page 25.

[5] See Annual Report 2008 from the Dutch Central Bank, page 85-86.

Kingdom receive payment of the minimum amount of compensation provided for in Article 7(1) of Directive 94/19/EC, within the time limits laid down in Article 10 of that Directive, in breach of the obligations resulting from Directive and/or of Article 4 of the EEA Agreement.

Initially, Iceland was requested to submit its observations within two months following receipt of that letter. At the request of the Government of Iceland, the Authority granted extensions of the deadline, first until 8 September 2010, then until 7 December 2010 and finally until 2 May 2011.

The Icelandic, United Kingdom and Dutch Governments renegotiated new agreements, which were concluded in December 2010. The corresponding bill was approved by the Icelandic Parliament in February 2011. But again, the law was turned down in a referendum in April 2011.

3 Relevant EEA law

The Act referred to at point 19a of Annex IX to the EEA Agreement (*Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes*) as amended, provides for minimum harmonized rules as regards deposit guarantee schemes.[6]

Article 1 of Directive 94/19/EC reads:

> *For the purposes of this Directive:*
>
> *1. 'deposit' shall mean any credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution must repay under the legal and contractual conditions applicable, and any debt evidenced by a certificate issued by a credit institution.*
>
> *[...]*
>
> *3. 'unavailable deposit' shall mean a deposit that is due and payable but has not been paid by a credit institution under the legal and contractual conditions applicable thereto, where either:*
>
> *(i) the relevant competent authorities have determined that in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and to have no current prospect of being able to do so.*
>
> *The competent authorities shall make that determination as soon as possible and at the latest 21 days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable;*

[6] (OJ No L 135, 31.5.1994, p. 5), incorporated into the EEA by Decision of the EEA Joint Committee No 18/94 amending Annex IX (Financial Services) to the EEA Agreement of 19 October 1994.

or (ii) a judicial authority has made a ruling for reasons which are directly related to the credit institution's financial circumstances which has the effect of suspending depositors' ability to make claims against it, should that occur before the aforementioned determination has been made;

4. 'credit institution' shall mean an undertaking the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account;

5. 'branch' shall mean a place of business which forms a legally dependent part of a credit institution and which conducts directly all or some of the operations inherent in the business of credit institutions; any number of branches set up in the same Member State by a credit institution which has its head office in another Member State shall be regarded as a single branch.

Article 3 states:

1. Each Member State shall ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognized.
[...]

Article 4 reads:

1. Deposit-guarantee schemes introduced and officially recognized in a Member State in accordance with Article 3 (1) shall cover the depositors at branches set up by credit institutions in other Member States.
[...]

Article 7 reads:

1. Deposit-guarantee schemes shall stipulate that the aggregate deposits of each depositor must be covered up to ECU 20 000 in the event of deposits' being unavailable.
[...]

6. Member States shall ensure that the depositor's rights to compensation may be the subject of an action by the depositor against the deposit-guarantee scheme.

Article 8 reads:

1. The limits referred to in Article 7 (1), (3) and (4) shall apply to the aggregate deposits placed with the same credit institution irrespective of the number of deposits, the currency and the location within the Community.
[...]

Article 10 reads:

1. Deposit-guarantee schemes shall be in a position to pay duly verified claims by depositors in respect of unavailable deposits within three months of the date on which the competent authorities make the determination described in Article 1 (3) (i) or the judicial authority makes the ruling described in Article 1 (3) (ii).

2. In wholly exceptional circumstances and in special cases a guarantee scheme may apply to the competent authorities for an extension of the time limit. No such extension shall exceed three months. The competent authorities may, at the request of the guarantee scheme, grant no more than two further extensions, neither of which shall exceed three months.
[...]

4 Relevant national law

At the material time, Directive 94/19/EC was implemented into Icelandic law by Act No. 98/1999 on Deposit Guarantees and Investor-Compensation Scheme (*lög um innstæðutryggingar og tryggingakerfi fyrir fjárfesta*).[7]

Article 1 of Act No. 98/1999 reads:

Objective
The objective of this Act is to guarantee a minimum level of protection to depositors in commercial banks and savings banks, and to customers of companies engaging in securities trading pursuant to law, in the event of difficulties of a given company in meeting its obligations to its customers according to the provisions of this Act.

Article 2 of Act No. 98/1999 reads:

Institution
Guarantees under this Act are entrusted to a special institute named the Depositors' and Investors' Guarantee Fund, hereinafter referred to as the "Fund". The Fund is a private foundation, operating in two independent departments, the Deposit Department and the Securities Department, with separate finances and accounting, cf. however the provisions of Article 12.

Article 3 of Act No. 98/1999 reads:

Fund Members
Commercial banks, savings banks, companies providing investment services, and other parties engaging in securities trading pursuant to law and established in Iceland, shall be members of the Fund. The same shall apply to any branches of such parties within the European Economic Area within the States parties to the EFTA Convention or in the Faroe Islands. Such parties, hereinafter referred to as Member Companies, shall not be liable for any commitments entered into by the Fund beyond their statutory contributions to the Fund, cf. the provisions of Articles 6 and 7. The Financial Supervisory Authority shall maintain a record of Member Companies.

[7] The translation of the Act used here may be found at Act No. 98/1999 on Deposit Guarantees and Investor-Compensation Scheme.

Article 6 of Act No. 98/1999 reads:

Deposit Department

The total assets of the Deposit Department of the Fund shall amount to a minimum of 1% of the average amount of guaranteed deposits in commercial banks and savings banks during the preceding year.
[...]

Article 9 of Act No. 98/1999 reads:

Payments from the Fund

If, in the opinion of the Financial Supervisory Authority, a Member Company is unable to render payment of the amount of deposits, securities or cash upon a customer's demand for refunding or return thereof in accordance with applicable terms, the Fund shall pay to the customer of the Member Company the amount of his deposit from the Deposit Department and the value of his securities and cash in connection with securities trading from the Securities Department. The obligation of the Fund to render payment also takes effect if the estate of a Member Company is subjected to bankruptcy proceedings in accordance with the Act on Commercial Banks and Savings Banks and the Act on Securities Trading.
The opinion of the Financial Supervisory Authority shall have been made available no later than three weeks after the Authority first obtains confirmation that the relevant Member Company has not rendered payment to its customer or accounted for his securities in accordance with its obligations.
[...]

Further specifications regarding payments from the Fund shall be included in a Government Regulation.

Article 10 of Act No. 98/1999 reads:

Amount payable

In the event that the assets of either department of the Fund are insufficient to pay the total amount of guaranteed deposits, securities and cash in the Member Companies concerned, payments from each Department [i.e. the Fund's deposits department and the Funds's securities department] shall be divided among the claimants as follows: each claim up to ISK 1.7 million shall be paid in full, and any amount in excess of that shall be paid in equal proportions depending on the extent of each Department's assets. This amount shall be linked to the EUR exchange rate of 5 January 1999. No further claims can be made against the Fund at a later stage even if losses suffered by the claimants have not been compensated in full.
Should the total assets of the Fund prove insufficient, the Board of Directors may, if it sees compelling reasons to do so, take out a loan in order to compensate losses suffered by claimants.

In the event that payment is effected from the Fund, the claims made on the relevant Member Company or bankruptcy estate will be taken over by the Fund.

5 The Authority's assessment

The Authority remains of the view set out in its letter of formal notice of 26 May 2010 that Iceland is in breach of its obligations under Directive 94/19/EC and under Article 4 of the EEA Agreement. The Authority considers that Directive 94/19/EC imposes obligations of result on the EFTA States:

1. To ensure that a deposit guarantee scheme, capable of guaranteeing the deposits of depositors up to the amount laid down in Article 7(1) of the Directive[8], is set up, and
2. To ensure that duly verified claims by depositors of unavailable deposits are paid within the deadline laid down in Article 10 of the Directive.

The Authority submits it is clear from the wording of Directive 94/19/EC itself that the Directive imposes an obligation of result on the states.

Article 3 of the Directive requires the EFTA States to introduce and officially recognise one or more deposit guarantee schemes, which under the terms of Article 7 must cover deposits up to EUR 20 000. The wording of Article 7(1) is unconditional[9].

Article 10(1) of Directive 94/19/EC then requires the EFTA States to ensure that if deposits become unavailable, the necessary procedures are completed no later than three months after the date on which the competent authorities determine that the credit institution concerned appears to be unable to repay the deposit. This deadline may be extended in order to take into account exceptional circumstances, but even in that case, the procedures cannot go beyond 12 months after the recognition of the unavailability of the deposits. The wording of Article 10(1) is also unconditional.

The Directive thus imposes upon EFTA States an obligation to ensure compensation of depositors up to at least EUR 20 000 in the event of their deposits being unavailable, irrespective of the reasons for that being the case. The Directive provides for no derogation or exemption from that obligation.

This obligation has also been confirmed explicitly by the Court of Justice of the European Union ("Court of Justice").

In *Paul and others*, the Court of Justice held that Directive 94/19 "[prescribes that] *compensation of depositors is ensured in the event that their deposits are unavailable*"[10]. According to the Court, the Directive gives a right to depositors to a refund of at least EUR 20 000 each, wherever deposits are located in the EU, in the event of the unavailability of deposits.[11] Although the Court did not have to rule specifically on the matter because of the specific facts of the case, it is evident from the judgment that the

[8] That provision remains unchanged in the EEA as Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay (OJ 2009 L 68, p. 3) has not been made part of the EEA Agreement to date.

[9] The only limits the EFTA States may impose on the absolute requirements of the first paragraph of Article 7 are strictly circumscribed in paragraphs 2 and 4 and only relate to the possible exclusion of certain types of deposits from the coverage and the possibility to limit coverage to 90%. Iceland has never availed itself of these options.

[10] Case C-222/02 *Paul and others* [2004] ECR I-9425, paragraph 30.

[11] Case C-222/02 *Paul and others* [2004] ECR I-9425, paragraphs 26 and 27.

Court considers the provisions of Articles 7 and 10 of Directive 94/19/EC require a clear and precise result to be achieved.

Iceland, in its reply of 2 May 2011, claims both in principle and in the circumstances of this case, that the Authority is wrong to submit that Directive 94/19/EC lays down an obligation of result that it must achieve. In particular, Iceland claims :

- Articles 7 and 10 of Directive 94/19/EC do not lay down an obligation of result;
- Iceland has fully and correctly transposed Directive 94/19/EC;
- Directive 94/19/EC requires no state guarantee or additional liability.

The Authority will deal with each of those submissions made by Iceland in turn.

5.1 Obligation of result under Articles 7 and 10 of Directive 94/19/EC

In its reply, Iceland claims that Directive 94/19/EC does not provide for an obligation of result as submitted by the Authority. Iceland submits that Article 7 of Directive 94/19/EC imposes no obligation on the state but only an obligation on the deposit guarantee fund. It points out that the EU legislator felt the need to clarify Article 7 of Directive 94/19/EC through Directive 2009/14/EC[12] and explicitly indicate that "*Member States shall ensure that the coverage for the aggregate deposits of each depositor shall be at least EUR 50 000 in the event of deposits being unavailable*".[13]

The Authority disagrees. Nothing in the recitals of Directive 2009/14/EC or in the preparatory work leading up to its adoption would suggest that the legislator intended to introduce any substantive changes to Article 7 of the Directive.

The fact that the EU legislator appears to have felt the need to underline that the obligations set out in that provision of the Directive were addressed to the states, does not mean that, objectively, those obligations were not stated in a clear and precise fashion prior to the amendment, as determined by the Court of Justice.

Indeed, Article 7 of the EEA Agreement provides that the Acts in the Annexes are binding upon the *Contracting Parties*, who under item b) of the Article are left the choice of form and method of implementation of directives. This provision of the EEA Agreement is modelled upon what is now Article 288(3) TFEU which provides that "*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*" By definition, the obligations set out in directives are addressed to states and not to the bodies that states might be obliged to establish or designate in order to comply with their obligations under those directives. Thus, the change in the wording of Directive 2009/14/EC referred to by the Icelandic authorities makes no substantive change as regards the legal obligations laid down in that provision.

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[12] Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay (hereafter "Directive 2009/14/EC"). As indicated above, Article 7 of the Directive remains unchanged in the EEA as Directive 2009/14/EC has not been made part of the EEA Agreement to date.

[13] Letter from the Icelandic Government to the Authority dated 2 May 2011, page 16-17.

The obligation of result imposed by Directive 94/19/EC is apparent not just from its wording but also from its context and the objectives it pursues, elements which must be taken into account when interpreting a provision of EU/EEA law[14].

According to its preamble, Directive 94/19/EC seeks to ensure a high level of protection of retail deposits paid into bank accounts within the common market. In particular, recitals 8 and 9 to the Directive set out as its objectives that deposit-guarantee schemes must intervene as soon as deposits become unavailable and must, within a very short period, ensure payments. As stated by the Court of Justice in *Germany v Parliament and Council*, the reduction in the level of protection that may result in certain cases "*does not call into question the general result which the Directive seeks to achieve, namely a considerable improvement in the protection of depositors within the Community.*"[15]

In its reply, Iceland argues that in *Germany v Parliament and Council*, the Court of Justice, in the context of a plea regarding the legal basis of Directive 94/19/EC, ruled that the objective of the Directive is to abolish obstacles to the right of establishment and the freedom to provide services and that depositor protection is only an incidental effect[16].

It is correct that, in its judgment, the Court of Justice noted that the Directive's aim was "*to promote the harmonious development of the activities of credit institutions throughout the Community by eliminating any restrictions on freedom of establishment and the freedom to provide services, while increasing the stability of the banking system and the protection of savers*"[17]. And indeed, the Court ruled that the Directive's objective is to remove obstacles to free movement of credit institutions across the internal market.

But the Court did not rule that the protection of depositors was of incidental effect. On the contrary, the Court of Justice made it clear that the protection of depositors is central to the scheme and aim of the Directive.

The Court expressly stated that the Directive provides for the compulsory participation by all credit institutions in guarantee schemes providing cover up to EUR 20 000 for the aggregate deposits of each depositor with a credit institution in the event of deposits being unavailable. It noted also that the deposit-guarantee systems introduced by a Member State in accordance with Article 3(1) of the Directive are to cover depositors in branches set up by credit institutions in other Member States. Consequently, the aim and purpose of the Directive is to oblige Member States to introduce a uniform standard of minimum protection of depositors throughout the internal market, so that Member States would no longer be able to invoke depositor protection in order to impede the activities of credit institutions authorized in other Member States[18].

Clearly, the system laid down in Directive 94/19/EC rests on the protection of depositors by the schemes of the home state of credit institutions, both for deposits made in the home state and for the deposits made in branches of those credit institutions in other Member States. For such a trans-European cross-border network of protection of depositors to function and safeguard financial stability, EEA States and the depositors in all those EEA

[14] Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 50, and Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 34.
[15] Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paragraph 48.
[16] Letter from the Icelandic Government to the Authority dated 2 May 2011, page 13-14.
[17] Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paragraph 13.
[18] Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paragraphs 17 to 19.

States must be able to trust that whichever credit institution they choose, they will be protected, at the same level.

It is doubtful that Member States would have accepted to adopt a harmonising directive and thereby sign off their right to restrict the activities of credit institutions established in other Member States with insufficient depositor protection, simply on the basis of a formal obligation, for all Member States, to establish some kind of deposit guarantee scheme. The aim of a credible trans-European cross-border network of protection of depositors, which is an indispensible condition for a cross-border single market of credit institutions, can only be safeguarded by a clear and unconditional requirement that, within a specified deadline, a certain amount will be paid out in the event of a bank failure. Which is why Articles 7 and 10 impose an obligation of result, which alone can ensure the credibility of the system and thus allow a well functioning single market for credit institutions.

Accordingly, the Authority considers that the Article imposes an obligation of result on the Icelandic Government, which is to ensure that a deposit guarantee scheme, capable of guaranteeing the deposits up to the amount laid down in Article 7(1) of the Directive, is set up, and to ensure that duly verified claims by depositors of unavailable deposits are paid within the deadline laid down in Article 10 of the Directive.

According to the information available to the Authority, following the unavailability of Icesave deposits on 6 October 2008, the FME issued its finding of unavailability of deposits regarding those deposits on 27 October 2008. That was the first step of the procedure laid down in Article 10(1) of Directive 94/19/EC. According to the Directive, the time-frame foreseen for the necessary procedure shall not exceed three months following the finding of unavailability of deposits by the competent authorities, unless the deposit guarantee scheme requests the competent authorities to extend that time limit[19]. The Icelandic authorities extended the deadline for payment until 23 October 2009[20]. Subsequently, however, further steps were not taken and, in particular, the relevant procedures foreseen under national law were not completed. To the Authority's knowledge no payments at all have been made by the Fund.

As stated in the letter of formal notice, the Authority considers that the Fund forms part of the Icelandic State within the meaning of the EEA Agreement. Indeed, it was established by law with the sole purpose of providing a public service, it acts within a tightly defined framework which leaves no genuine margin for independent decisions by its board and it has special powers beyond those which result from the normal rules applicable in relations between individuals[21]. As a consequence, any breach of the Directive by the Fund is directly attributable to the Icelandic State.

Even if the Fund were considered to be an independent entity, the state remains under the obligation to ensure full compliance with the Directive and proper compensation of depositors under its terms.

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[19] Article 10 of Directive 94/19/EC.

[20] http://www.tryggingarsjodur.is/Frett/9747/

[21] Case C-356/05 *Elaine Farrell v. Alan Whitty and Others* [2007] ECR I-3067, paragraph 40 and the cases cited therein. Furthermore, Case C-157/02 *Rieser Internationale Transporte GmbH v. Asfinag* [2004] ECR I-1477, paragraphs 24-28. This case law is concerned with whether the bodies in question are part of the State for the purposes of determining whether provisions of directives having direct effect may be relied on against those bodies. EEA law does not provide for direct effect, Case E-1/07 *Criminal proceedings against A* [2007] EFTA Court Rep. p. 246, paragraph 40. However, the Authority considers that this case law is relevant with regard to determining which bodies fall to be regarded as emanations of the State for the purposes of EEA law.

As the Icelandic State, neither directly nor through the Fund, has ensured payment to those depositors in the Netherlands and the United Kingdom whose deposits became unavailable within the meaning of Directive, Iceland has failed to comply with its obligations under Articles 7 and 10 of the Directive.

5.2 Directive 94/19/EC and the obligation of transposition

In its reply of 2 May 2011, Iceland submits that the Authority's claims in the letter of formal notice of 26 May 2010 are unfounded because Iceland had implemented Directive 94/19/EC correctly. In particular, Iceland makes three submissions in that respect:

- In its letter of 23 March 2010, the Icelandic Government outlined the provisions of Act No. 98/1999 enacted to implement the Directive and concluded "*[t]he Icelandic State has therefore fully complied with its obligations under Directive 94/19/EC. The Government has no further obligation based on the Directive than to set up a Guarantee Scheme in line with the Directive.*"[22]
- This position is reiterated in the Icelandic Government's reply of 2 May 2011, which adds that the transposition of the Directive by Iceland was comparable to that of other EEA States[23].
- The Icelandic Government also argues that its breach should be considered justifiable in view of alleged breaches by the Governments of the United Kingdom and of the Netherlands [24].

At the outset, the Authority makes clear that this infringement case is not about wrongful implementation of Directive 94/19/EC.

Iceland appears to argue in the first place that it has fulfilled all its obligations by transposing the Directive 94/19/EC into its national law and by setting up a deposit guarantee scheme. It seems to claim that once the Directive has been transposed, the state is exonerated from any further obligation under it.

The Authority disagrees. The Court of Justice has ruled consistently that a directive, by its nature, imposes an obligation on the states to achieve the result envisaged by it and all the authorities of the Member States must take all the appropriate measures, whether general or particular, to ensure fulfilment of that obligation.[25] The obligations under the EEA Agreement do not stop at the transposition stage.

In the words of Advocate General Geelhoed:

> *"The implementation process (...) is not concluded with the correct transposition of the provisions of the directive and the establishment of the organisational framework for the application of these provisions, it must also be ensured that these two aspects operate in such a way as to achieve in practice the result sought by the directive"(...)*

[22] Letter from the Icelandic Government to the Authority dated 23 March 2010, page 5.
[23] Letter from the Icelandic Government to the Authority dated 2 May 2011, pages 12-13.
[24] Letter from the Icelandic Government to the Authority dated 2 May 2011, pages 6-10, 21 and 23.
[25] Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26.

> *"Beyond the 'paper wall' erected in the transposition phase, the Member States, [...] are and remain responsible for ensuring that the directive is applied and enforced correctly, in short, that its useful effect is achieved."*[26]

Indeed, the Court of Justice has held consistently that "*the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures*"[27].

In addition, the objective of the Directive to enhance depositor protection would be compromised if the Directive were interpreted as only obliging Member States to set up a deposit guarantee scheme without any obligation to actually ensure that the aggrieved depositors are provided with compensation. Such an interpretation would also compromise the uniformity within the EEA of the minimum protection of depositors.[28]

The Court of Justice has consistently held that, where a provision of EU law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness.[29] As stated above, the Authority considers that the provision in question is not open to differing interpretation. However, on the assumption that it would be, concluding that it entails an obligation of result is the only interpretation that retains its effectiveness, as otherwise the minimum protection envisaged by the Directive would be seriously jeopardised.

As a result, the argument of the Icelandic Government, according to which the simple setting up and recognition of a deposit guarantee scheme, irrespective of whether compensation of depositors is ensured under the conditions prescribed in the Directive, must be rejected.

The Icelandic Government also appears to argue that by adopting the "Emergency Law" and giving priority status to claims for deposits in the case of financial institutions becoming insolvent, Iceland fulfilled its obligations under the Directive[30].

The Authority submits that such an adjustment to domestic bankruptcy law cannot be deemed to amount to compliance with Directive 94/19/EC. The very purpose of Directive 94/19/EC is to avoid depositors having to rely on bankruptcy proceedings and the associated hazards and delays, in order to receive the minimum amount of EUR 20 000. Simply facilitating the claims of depositors in bankruptcy proceedings does not constitute a satisfactory fulfilment of the obligation of result imposed by the Directive.

In any event, the Authority notes as a matter of fact that to its knowledge, even under the pending bankruptcy proceedings, depositors have not yet received any payments of their claims.

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[26] Opinion of Advocate General Geelhoed, Case C-494/01 *Commission v Ireland* [2005] ECR I-3338, paragraph 29.

[27] Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 27; see also Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, paragraphs 116-117.

[28] See by analogy Case E-8/07 *Nguyen* [2008] EFTA Court Report p. 226, paragraph 27.

[29] Joined Cases C-402/07 and C-432/07 *Sturgeon and others* [2009] ECR I-10923, paragraph 47 and the cases cited therein.

[30] Letter from the Icelandic Government to the Authority dated 2 May 2011, pages 20-21.

Secondly, Iceland seems to argue its own transposition was comparable to the manner in which other states have implemented Directive 94/19/EC. The Authority observes that such comparison is, as a matter of law, irrelevant with regard to whether Iceland has complied with its obligations under the Directive.[31]

Moreover, the measures taken by Iceland were, in fact, not comparable to those of other States during the financial crisis that struck in the autumn of 2008. The other Member States took measures to avoid deposits becoming unavailable. Thus, the depositors with the Icesave branches in the Netherlands and the United Kingdom are the only ones who have not received even the minimum compensation from the deposit guarantee scheme responsible under the Directive.

As noted by European Commissioner Michel Barnier in a letter to the Icelandic Minister of Finance Steingrímur J. Sigfússon :

> *"as to the implementation of Directive 94/19/EC in the Member States of the European Union, we have no knowledge of any comparable situation in which depositors have not been compensated"*[32].

Lastly, Iceland claims that while its own transposition of Directive 94/19/EC was correct, the United Kingdom and the Netherlands committed alleged breaches of cross-border banking regulations. In that regard, the Authority recalls that, according to the Court of Justice's settled case-law, a Member State cannot plead failure to respect the principle of reciprocity or rely on a possible infringement of the Treaty by another Member State to justify its own default[33]. Similarly, the Court of Justice has consistently held that a Member State may not, under any circumstances, unilaterally adopt, on its own authority, corrective or defensive measures designed to obviate any such failure, but is bound to act within the context of the procedures and legal remedies laid down to that effect by the Treaty[34]. The same principles, the Authority submits, apply in EEA law.

Accordingly, Iceland's argument on the issue of the transposition of the Directive must be rejected.

5.3 Directive 94/19/EC and state responsibility

In its reply of 2 May 2011, Iceland argues that the Directive does not require a state guarantee for the amount set out in Article 7 of the Directive and was never meant to place a financial obligation on the EEA States. Iceland even goes as far as implying that such a state guarantee would run against the Directive[35]. The Authority notes that, at the same time, the bill for the Budget Act 2011[36] refers to the Icelandic Government's declaration that deposits in Icelandic banks enjoy a state guarantee.

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[31] Case E-1/03 *The Authority v Iceland* [2003] EFTA Court Report p. 143, paragraph 33.

[32] Letter from Commissioner Michel Barnier to Minister of Finance Steingrímur J. Sigfússon dated 17 August 2010, published on the website of the Ministry of Finance.

[33] Case C-131/01 *Commission v Italy* [2003] ECR I-01659, paragraph 46; Case C-38/05 *Commission v Ireland*, unpublished, paragraph 17; Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, paragraph 35.

[34] Case 232/78 *Commission v France* [1979] ECR 2729, paragraph 9 and Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 20.

[35] Letter from the Icelandic Government to the Authority dated 2 May 2011, pages 20-21.

[36] Section of the bill for the Budget Act 2011 concerning state guarantees. Also, the Memorandum of Understanding of 11 October 2008, referred to above, makes clear that the Icelandic State intended to guarantee the loan of the Dutch Government to the Icelandic Guarantee Fund.

The Authority submits that, in any event, such an interpretation of the Directive cannot be upheld.

In the Directive, the issue of state liability is addressed in Recital 24, which states that: *"this Directive may not result in the Member States' being made liable in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognised"* (underlining added).

This recital confirms that a Member State may be liable if it has not ensured that one or more schemes capable of ensuring the compensation or protection of depositors under the conditions prescribed by the directive, has been introduced.

Recital 24 cannot be interpreted as meaning that it limits the obligations of the Member States to simply setting up and recognising a deposit guarantee scheme in their territory, irrespective of whether the scheme is capable of ensuring the compensation or protection of depositors in accordance with the provisions of the Directive.

According to the wording of this recital itself it is not sufficient for Member States to set up and officially recognise a deposit guarantee scheme: merely doing so does not preclude any further liability in respect of depositors. Recital 24 is to be understood in the sense that further liability of the state is only excluded once depositors have been compensated or protected "*under the conditions prescribed in this Directive*". Recital 24 also makes clear that the depositors must be ensured compensation. If the obligation outlined above has not been achieved or cannot be achieved by the schemes established pursuant to the Directive, depositors are not compensated or protected "*under the conditions prescribed*" by it. Consequently, the exoneration of liability does not come into play.

This is confirmed by the statements of the Court of Justice in *Paul and others* in which the Court held:

> *"[...] if the compensation of depositors is ensured in the event that their deposits are unavailable, as prescribed by Directive 94/19, Article 3(2) to (5) thereof does not confer on depositors a right to have the competent authorities take supervisory measures in their interest. That interpretation of Directive 94/19 is supported by the 24th recital in the preamble thereto, which states that the directive may not result in the Member States' or their competent authorities' being made liable in respect of depositors if they have ensured the compensation or protection of depositors under the conditions prescribed in the directive."*[37]

The Court has thus clarified that if the compensation of deposits prescribed by Directive 94/19/EC is ensured, the state cannot be held further liable in damages for faulty banking supervision. It can be inferred from the judgment that if the compensation of depositors prescribed by the Directive is not ensured in the event that deposits become unavailable (which is the case in Iceland), the state should be held liable.

This does not mean that the Directive imposes on states an obligation to have in place a state guarantee absolving credit institutions from all responsibility for funding.

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[37] Case C-222/02 *Paul and others*, cited above, paragraphs 30-31.

But as a consequence of the obligation on the states to achieve the result envisaged by the Directive and to take all the appropriate measures, whether general or particular, to ensure fulfilment of that obligation, it does mean that, should all else fail, the state will ultimately be responsible for the compensation of depositors up to the amount provided for in Article 7, in order to discharge its duties under Directive 94/19/EC.

As a matter of fact, the Icelandic State, either directly or through the Fund, has not ensured that the depositors in the Netherlands and the United Kingdom whose deposits were unavailable received any compensation from the Fund. Iceland is thus in breach of its obligations under the Directive.

5.4 Directive 94/19/EC and exceptional circumstances

In its reply of 2 May 2011, the Icelandic Government claims that the Directive does not apply in a financial crisis of the magnitude experienced in Iceland in the autumn of 2008, since no deposit guarantee scheme envisioned by the Directive could have dealt with such a systemic failure.

As previously indicated, the Authority disagrees. The terms of the Directive itself cannot support such an argument. According to the case law of the Court of Justice, a Member State cannot plead exceptional circumstances to justify non-compliance with a directive in the absence of a specific legislative provision in the directive to that effect.

In a case concerning pre-emptive rights under the Second Company Law Directive, Greece claimed, *inter alia*, that special measures were needed in order to avoid social disturbances. The Court of Justice noted that the Second Company Law Directive contained specific provisions for well-defined derogations and for procedures which may result in such derogations with the aim of safeguarding certain vital interests of the Member States which are liable to be affected in exceptional situations." [38] It continued:

> *"It follows that, in the absence of a derogation provided for by Community law, Article 25(1) of the Second Directive must be interpreted as precluding the Member States from maintaining in force rules incompatible with the principle set forth in that article, even if those rules cover only exceptional situations. To recognize the existence of a general reservation covering exceptional situations, outside the specific conditions laid down in the provisions of the Treaty and the Second Directive, would, moreover, be liable to impair the binding nature and uniform application of Community law (see, to this effect, the judgment in Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 26).*
>
> *"As for the idea that rules comparable to those set out in Law No 1386/1983 might qualify under the derogation provided for in Article 41(1), it should be observed that that provision pursues a precise, well-defined social-policy aim, namely to encourage private individuals to hold shares. Like the exceptions provided for in Article 19(3) and Article 23(2) of the Second Directive, it is intended solely to encourage, in an objective and concrete manner, persons, such as employees, who generally do not have the means necessary to do so under the normal conditions of company law in the Member States, to participate in the capital of undertakings.*

[38] Joined Cases C-19/90 and C-20/90 *Karella and Karellas,* [1991] ECR I-2691 paragraph 27.

> *"Consequently, a national rule cannot take advantage of that derogation unless its practical application helps to achieve the objective of Article 41(1) of the Second Directive.*[39]*"* (underlining added)

Furthermore, the Court of Justice has also held that the national authorities, including national courts, cannot, when assessing the exercise of a right conferred by a provision of EU law, alter the scope of that provision or compromise the objectives pursued by it.[40]

As stated above, no provision of Directive 94/19/EC itself exonerates the Member States from their obligations in exceptional circumstances such as a serious and general financial crisis.

Conversely, Directive 94/19/EC does envisage that exceptional circumstances may be present in a given case. However, such special circumstances may only, as an exception to the rule, justify delays in payment.

Under Article 10(2) of Directive 94/19/EC a guarantee scheme may, *in wholly exceptional circumstances and in special cases*, apply to the competent authorities for an extension of the time limit. Possible extensions are limited to a maximum of three months and cannot, in any event, be granted for longer than nine months in total.

The Icelandic authorities relied on this provision of the Directive when extending the deadline to 23 October 2009.

When enacting the Directive the legislator therefore made a conscious choice as regards the effect of possible exceptional circumstances. The effect of such circumstances was limited to allowing for an extension of the deadline to pay compensation but did not alter the obligation to do so.

One may note that even with the experience of the financial crisis, the EU legislator has left the Directive largely unchanged, only strengthening it by increasing the coverage afforded to depositors and by reducing the payout time, and thus "*[maintaining] depositor confidence and [attaining] greater stability on the financial markets*"[41]. Indeed, Directive 94/19/EC has been, and will continue to be, an important stabilizing factor in times of exceptional circumstances such as the financial crisis.

Accordingly, "exceptional circumstances" do not release the Icelandic Government from its responsibilities under Directive 94/19/EC and in particular from its obligation to ensure payments are made to depositors under Article 7(1) of that Directive.

Finally, Iceland argues that it was faced with an objective financial impossibility to comply with its obligations.

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[39] Joined Cases C-19/90 and C-20/90 *Karella and Karellas,* [1991] ECR I-2691 paragraphs 31-33. See also, Case C-381/89 *Ekklissias v. Greek State*, [1992] I-2111, paragraphs 25 and 26.

[40] Case C-367/96 *Kefalas v. Greek State* [1998] ECR I-2843, paragraph 22.

[41] Recital 3 of Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay.

In that regard, the Authority notes that the Court of Justice has constantly held that Member States may not plead financial difficulties to justify non-compliance with the obligation laid down in Community directives.[42]

It is only when there is a total physical impossibility, for reasons beyond all control of the EEA State, that the Court of Justice has accepted that a Member State is not in breach of its obligation under secondary law. The only example which could be found in the case-law related to an obligation to compile and submit data to the Commission, which could not be fulfilled because the data processing centre had been destroyed by a terrorist attack[43].

However as ruled by the Court:

> *"Although it is true that the bomb attack [...] may have constituted a case of force majeure and created insurmountable difficulties, its effect could only have lasted a certain time, namely the time which in fact would be necessary for an administration showing a normal degree of diligence to replace the equipment destroyed and to collect and prepare the data. The Italian Government cannot therefore rely on that event to justify its continuing failure to comply with its obligations years later."*[44]

In the present case, while Iceland was faced with an unprecedented situation in October 2008, there was, as a matter of fact, no general declaration of unavailability of all deposits throughout the whole of the banking sector in Iceland. The measures taken by the Icelandic Government averted such a general crisis.

Moreover, in any event, the breach as identified by the Authority in these proceedings has never been that Iceland was under an obligation to move all foreign deposits in full over to the new Landsbanki in October 2008. As a result of Iceland relying on Article 10(2) of the Directive, as it was entitled, the obligation only ran out on 23 October 2009, a year after the crisis had unfolded.

At that time, the situation in Iceland was very different from the autumn of 2008 and the Icelandic Government cannot argue that it could not have had access to the funds necessary to fulfil its obligations under the Directive. This is evidenced by the conclusion, in June 2009, of an agreement with the Governments of the United Kingdom and the Netherlands, who were ready to provide the necessary funds to Iceland. Had this agreement been ratified, it would have allowed the Icelandic State to fulfil its obligations according to the Directive, within the time limits provided for in Article 10 of the Directive. Even though the terms might have been regarded as unfavourable, it is unquestionable that it was not impossible to gather the necessary funds to comply with the requirements of the Directive.

Finally, the Authority notes that today, three years after the deposits became unavailable, Iceland has still not paid the depositors in the United Kingdom and the Netherlands or their successors in title in accordance with the requirements of Directive 94/19/EC even

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[42] Case 309/84 *Commission v Italy* [1986] ECR 599, paragraph 17; Case 42/89 *Commission v Belgium* [1990] ECR I-2821, paragraph 24 and Case C-375/02 *Commission v Italy* [2004] not published, paragraph 36-37.

[43] Case 101/84 *Commission v Italy* [1985] ECR 2629.

[44] Case 101/84 *Commission v Italy* [1985] ECR 2629, paragraph 16.

though Iceland also seems to claim that the assets in liquidation are now sufficient to do so.

Thus, financial considerations related to the costs of complying with the obligations under Directive 94/19/EC cannot be invoked to evade the obligations under the Directive. Moreover, the facts of the case do not bear out that Iceland was faced with an absolute impossibility to comply with its obligations under the Directive.

5.5 Non-discrimination

When taking the emergency measures in response to the banking crisis in October 2008, the Icelandic Government made a distinction between depositors in domestic branches and depositors in foreign branches. As a result of the domestic deposits being moved over to the new banks, domestic depositors were covered in full, above and beyond what is required by Article 7(1) of Directive 94/19/EC, whereas the foreign depositors did not even enjoy that minimum guarantee.

By covering domestic deposits at least at the level prescribed by Directive 94/19/EC and in the time limits foreseen by the Directive, without providing foreign depositors with at least that minimum guarantee, Iceland has breached Directive 94/19/EC read in light of Article 4 EEA.

Indeed, the Court of Justice recalled recently in *Sturgeon* that "*[...] all Community acts must be interpreted in accordance with primary law as a whole, including the principle of equal treatment, which requires that comparable situations must not be treated differently [...]*".[45]

Contrary to what is argued by the Icelandic Government[46], the ruling in *Sturgeon* is completely relevant for the interpretation of the EEA Agreement. The principle that all secondary legislation must be interpreted in accordance with primary law as a whole, including the principle of equal treatment, applies also in the EEA Agreement[47].

As ruled by the EFTA Court, "*the principle of homogeneity enshrined in the EEA Agreement leads to a presumption that provisions framed identically in the EEA Agreement and the EC Treaty are to be construed in the same way*". It is only in specific circumstances that the differences in the scope and purpose of the EEA Agreement as compared to the EU Treaties may lead to differences in the interpretation[48].

And there are no specific circumstances which could allow the EFTA States to disregard the principle of equal treatment when applying secondary legislation, a principle enshrined in both Article 4 EEA and Article 18 TFEU, using identical wording:

> *"Within the scope of application of [this Agreement / the Treaties], and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."*

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[45] Joined Cases C-402/07 and C-432/07 *Sturgeon and others*, cited above, paragraph 48.
[46] Letter from the Icelandic Government to the Authority dated 2 May 2011, page 24.
[47] Case E-3/02 *Paranova AS v Merck & Co., Inc. and Others* [2003] EFTA Ct. Rep. 101, paragraph 33.
[48] Case E-3/98 *Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 21; Case E-2/06 *EFTA Surveillance Authority v The Kingdom of Norway* [2007] EFTA Ct. Rep. 164, paragraph 59.

Directive 94/19/EC would therefore only allow the Icelandic Government to treat depositors with domestic branches differently from depositors at branches in other EEA States if they were regarded as not being in a comparable position. The Icelandic Government appears to acknowledge that position, as it is attempting to demonstrate that the two groups are not in a comparable position.

As a matter of law, both groups are in a comparable situation. Indeed, it follows from Article 4(1) of Directive 94/19/EC that all depositors with savings in branches, whether they are situated in the home state or in a host state, are in the same situation as regards the guarantee scheme set up pursuant to the Directive. This is made clear by the third recital to the Directive, which states that in the event of the closure of an insolvent credit institution, the depositors in any branches situated in a Member State other than that in which the credit institution has its head office must be protected by the same guarantee scheme as the institution's other depositors. Therefore, in respect of the protection afforded by the Directive, it is clear that the two are in a comparable position.

By only moving over the deposits of the domestic depositors, thereby covering domestic deposits at least at the level prescribed by Directive 94/19/EC and within the time limits foreseen by the Directive, without providing foreign depositors with at least that minimum guarantee, Iceland has indirectly discriminated against foreign depositors on the basis of nationality, which is prohibited by Directive 94/19/EC read in the light of Article 4 EEA.

Indeed, the latter provision prohibits not only overt discrimination on the basis of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result. Such is the case for discrimination on the basis of residence[49]. And a distinction based on the location of the accounts amounts to a discrimination on the basis of residence.

In its reply, Iceland argues that it did not discriminate between depositors on the basis of residence, but on the basis of objective criteria which it lists.

Firstly, the Authority notes that most of the criteria allegedly distinguishing domestic and foreign depositors were not used as criteria by the Icelandic Government when it decided which depositors would be protected and which would not receive payment of even the minimum amount provided for in the Directive. This is the case, in particular, for the different denomination of deposits, the different overall relationship with the bank, the different availability of set-offs or the different connection to the Icelandic payment system.

Indeed, to the knowledge of the Authority, all depositors from the domestic branches of Landsbanki were carried over into the "new Landsbanki", even those with deposits in foreign currencies, who had no other business with Landsbanki, who had no loans with Landsbanki and who did not have a special connection to the Icelandic payment system.[50]

Secondly, these criteria all favour residents and are essentially just another manner in which to distinguish between resident and non-resident depositors. For example, for the criteria relating to the different rates of return of accounts, the Icelandic Government is simply stating that it decided to discriminate between holders of accounts only available in Iceland and accounts only available in foreign branches. This is precisely what constitutes

[49] Case C-29/95 *Pastoors and Trans-Cap / Belgische Staat* [1997] ECR p. I-285, paragraphs 16-17; Case C-212/99 *Commission / Italy* [2001] ECR I-4923, paragraph 24.
[50] See the FME's decision of 9 October 2008, points 7 and 8.

discrimination on the basis of residence, which is prohibited by Directive 94/19/EC and Article 4 EEA.

The Authority therefore does not alter its conclusion and considers that the holders of deposits in branches in Iceland and the holders of deposits in branches in other EEA States were, in their capacity as deposit holders in Icelandic banks, in a comparable situation as regards the protection granted to them by the Directive.

The purpose of the Directive being to improve consumer protection by ensuring minimum payment of compensation, nothing in the Directive suggests that any distinction may be made based on the location of the deposits and indeed such a distinction would run counter to the entire concept underlying the internal market. Consequently, it is a breach of the Directive to differentiate between depositors protected under the Directive by providing protection for some depositors while leaving others without any or any comparable protection.

The Icelandic Government then argues that even if its actions were discriminatory, they were justified by the need to restore the functioning and credibility of the domestic banking system and thereby Iceland's entire financial system. According to the Icelandic Government, it was necessary and proportionate not to transfer the non-domestic deposits because this would have undermined the credibility of the rescue and stabilising efforts and made them meaningless.

The Authority cannot agree. Firstly, Directive 94/19/EC created a harmonised regime for the protection of depositors, thus depriving states from the possibility to justify rules which discriminate between depositors on the basis of residence in case of the deposits becoming unavailable. The Court of Justice has consistently held that a state cannot rely on any mandatory requirements as a reason for deviating from the harmonisation laid down in a directive in the absence of any express provision which permits the state to do so.[51] As stated above, the Directive only allows exceptional circumstances to be relied upon to extend the deadline for payment of compensation.

Secondly, the present case does not concern whether Iceland was in breach of the prohibition of discrimination for moving over the entirety of deposits of foreign Icesave depositors into "new Landsbanki", like it has done for domestic Landsbanki depositors. The breach is constituted by the failure of the Icelandic Government to ensure that Icesave depositors in the Netherlands and the United Kingdom receive payment of the *minimum amount of compensation provided for in the Directive* within the time limits laid down in the Directive, *like it did for the domestic depositors*. The compensation of domestic and foreign depositors above and beyond that minimum amount has not and is not being discussed in the context of the present proceedings[52].

In that context, the Icelandic Government cannot, as examined above, claim that there was an impossibility to comply with the requirements of the Directive without discriminating against non-domestic depositors. As indicated above, the Icelandic Government could have had access to the necessary funds, without jeopardizing the functioning of the domestic banking system and the real overall economy in Iceland.

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[51] For example, Case 5/77 *Tedeschi* [1977] ECR 1555, paragraph 35, Case C-323/93 *Centre d'insemination de la Crespelle* [1994] ECR I-5077, paragraph 31.

[52] In that regard, the Authority must stress that this is not prejudging its view as to whether the discrimination relating to the compensation of depositors above and beyond the level foreseen by the Directive is justifiable.

This is evidenced by the conclusion, in June 2009, of an agreement with the Governments of the United Kingdom and the Netherlands, who were ready to provide the necessary funds to Iceland. Had this agreement been ratified, it would have allowed the Icelandic State to fulfil its obligations according to the Directive, within the time limits provided for in Article 10 of the Directive.

This is not to say that getting access to the funds would perhaps have entailed high costs for Iceland. But it is settled case law of the Court of Justice and the EFTA Court that mere economic grounds cannot serve as justification for restrictions to the fundamental freedoms[53].

Finally, the Authority fails to understand how Iceland can simultaneously argue that it was financially impossible to comply with the Directive and refer to the fact that the recovery rate of at least 90% from the bankruptcy estate of Landsbanki "*is an important aspect in considering the Icesave issue.*"[54].

As a result of the above, the Authority takes the view that the Icelandic Government cannot advance any viable justification for the discriminatory measures taken against the foreign deposits in the circumstances of this case.

For the sake of completeness, the Authority notes that the fact that the United Kingdom and Dutch authorities have compensated the majority of deposit holders under the respective national deposit guarantee schemes is irrelevant with regard to whether Iceland has complied with its obligations under the Directive. The issue is how Iceland has treated different groups of depositors, not whether as a matter of fact they might be better or worse off.

It follows from the above that even if the provisions of Directive 94/19/EC were interpreted, contrary to the reasoning set out above, as not imposing obligations of result, by treating deposits located in Icelandic branches differently from deposits located in other EEA States, Iceland is in breach of Articles 4(1) and 7(1) of the Directive and/or Article 4 EEA.

Moreover, to the extent this differentiation in treatment of depositors protected by the Directive is not considered a breach of that Directive, it constitutes discrimination on the basis of residency prohibited by Article 4 of the EEA Agreement.

The Icelandic Government invokes the reasons mentioned above to explain why there is no discrimination under Article 4 EEA and, in the alternative, why the discrimination can be justified. It contends that the assessment of discrimination on grounds of nationality is the same under Articles 4(1) and 7(1) of Directive 94/19/EC, on the one hand, and Article 4 EEA on the other. The Authority agrees. Therefore, these reasons the Icelandic Government has invoked as regards Article 4 EEA must be dismissed on the same grounds as for Directive 94/19/EC.

Accordingly, Iceland has failed to fulfil its obligations arising under Articles 3(1), 4(1), 7(1) and 10(1) of Directive 94/19/EC and/or Article 4 of the EEA Agreement by failing to

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[53] See, *e.g.* Case C-367/98, *Commission v Portugal* [2002] ECR I-4731, paragraph 52 and the cases cited therein; Case E-1/04 *Fokus Bank*, cited above, paragraph 33 and Case E-1/09 *the Authority v Liechtenstein*, not yet reported, paragraph 36.

[54] Letter from the Icelandic Government to the Authority dated 2 May 2011, page 10.

ensure payment of compensation of 20 000 EUR to depositors on the so-called Icesave accounts of Landsbanki within the time limits laid down in the Directive.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and in the United Kingdom provided for in Article 7(1) of the Act referred to at point 19a of Annex IX to the Agreement on the European Economic Area (*Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes*) within the time limits laid down in Article 10 of the Act, Iceland has failed to comply with the obligations resulting from that Act, in particular Articles 3, 4, 7 and 10, and/or Article 4 of the Agreement on the European Economic Area.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Iceland the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and in the United Kingdom provided for in Article 7(1) of the Act referred to at point 19a of Annex IX to the Agreement on the European Economic Area (*Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes*) within the time limits laid down in Article 10 of the Act, Iceland has failed to comply with the obligations resulting from that Act, in particular Articles 3, 4, 7 and 10, and/or Article 4 of the Agreement on the European Economic Area.

Pursuant to 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, the EFTA Surveillance Authority requires Iceland to take the measures necessary to comply with this reasoned opinion within *three months* following notification thereof.

Done at Brussels, 10 June 2011

For the EFTA Surveillance Authority

Sabine Monauni-Tömördy
College Member

Xavier Lewis
Director