Case No: 77038
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Decision No: 065/18/COL

EFTA SURVEILLANCE AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION

of 11 July 2018

closing an own initiative case arising from an alleged failure by Iceland to correctly implement and apply Articles 23, 25 and 30(1) of Directive 2001/24/EC of the European Parliament and the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions

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:

On 12 March 2015, the EFTA Surveillance Authority ("the Authority") opened a case against Iceland on the implementation of Articles 23, 25 and 30(1) of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the *reorganisation and winding-up of credit institutions* ("Directive 2001/24" or "the Directive") into Icelandic legislation. The letter was sent following the judgment of the EFTA Court in Case E-28/13 *LBI hf.* v *Merrill Lynch International Ltd* and in light of the interpretation of the Supreme Court of Iceland ("the Supreme Court") in judgments No. 552/2013 and No. 120/2014.

The Icelandic Government replied by letters dated 15 April 2015 (Document No. 754151) and 25 February 2016 (Document No. 794713). In the latter letter, Iceland stated that the implementation of Article 30(1) of the Directive into Icelandic legislation by Article 99(2)(n) of Chapter XII of Act No. 161/2002 on Financial Undertakings ("Act No. 161/2002") was still under consideration in ongoing proceedings before the Icelandic courts in relation to the winding-up of Icelandic credit institutions. The Icelandic Government also informed the Authority of the future revision of the relevant provisions of Chapter XII of the Act, which would take place once the winding-up proceedings of certain Icelandic credit institutions had been concluded, with the aim of implementing Articles 23, 25 and 30(1) of the Directive so as to address the Authority's concerns.

By a letter dated 4 May 2016 (Document No. 803362), the Authority set out its preliminary assessment that Iceland had not correctly implemented Articles 23, 25 and 30(1) of the Directive, as no bill to amend the relevant provisions of Chapter XII of Act No. 161/2002 had been submitted to the Parliament. This position was confirmed in a letter of formal notice (Document No. 789678), dated 6 July 2016.

The Icelandic Government kept the Authority informed of the development and progress of the bill amending Chapter XII of Act No. 161/2002 in informal correspondence from December 2016 to December 2017 (Documents Nos. 835659, 839659 and 872812) and during the package meeting in Iceland on 8 June 2017, where the bill amending Act No. 161/2002 was presented.

The Authority issued a reasoned opinion on 7 February 2018 (Document No. 874136), as the bill had not yet been submitted to the Parliament for consideration.

The Authority noted in the letter of formal notice, dated 6 July 2016, and in its reasoned opinion, dated 7 February 2018, that despite the general principle set out in Articles 3(1) and 10(1) of the Directive, which provides for the law of the home EEA State to be applied to a credit institution's reorganisation or winding-up, Articles 23, 25 and 30(1) contain exceptions to that principle.

As stated in the reasoned opinion, Article 23(1) of the Directive protects a creditor's right to set-off its claim(s) during reorganisation or winding-up proceedings, "where such a set-off is permitted by the law applicable to the credit institution's claim". Article 25 of the Directive provides that netting agreements shall be governed solely by the law chosen by the parties to the agreement as the governing law. This entails that if the governing law grants a broad right of netting, this right should be enforceable against a credit institution (and/or its liquidator), even if the credit institution being wound-up is situated in a jurisdiction which provides for a more limited right of netting.[1]

The Authority noted in the reasoned opinion that, according to the Government's legislative table of correspondence of September 2011, Article 23 of the Directive was implemented into Icelandic law by general provisions on setting-off claims under the Icelandic Bankruptcy Act No. 161/2002, namely Articles 100-106 and 118(3), but concluded that these set out conditions under Icelandic law without the necessary reference to set-off permitted by another applicable law. Further, the table stated that Article 25 was implemented by Article 99(2)(j) of Act No. 161/2002. The latter was however directed at agreements concerning "set-off", without the required reference to "netting agreements", as provided for in the text of the Directive. The Icelandic Supreme Court had demonstrated in its jurisprudence that Article 99(2)(j) was not in practice applied in the relevant circumstances, as such application was considered contrary to Icelandic insolvency rules. The Authority further noted that the Supreme Court had found the Directive of no relevance, as credit institutions' right to set-off was governed by Icelandic law and as conditions for conducting set-off had not been met under Act No. 21/1991.[2]

The Authority further recorded in the reasoned opinion that, according to the table of correspondence, the provisions of Article 30(1) of the Directive were implemented into Icelandic law by Article 99(2)(n) of Act No. 161/2002. The Authority noted that Article 99(2)(n) of Act No. 161/2002 referred solely to rules on the invalidity of legal acts in contract law, cf. Chapter III of Act No. 7/1936 on Contracts, Mandates and Invalid Legal Instruments. However, the Act contained no rules on the rescission of measures taken –

[1] See also Recital 28 of the Directive and Report by European Financial Market Lawyers Group: *Protection for Bilateral Insolvency Set-Off and Netting Agreements under EC Law*, October 2004, pg. 115.

[2] Judgments of the Icelandic Supreme Court in *Commerzbank AG* v *Kaupthing hf.* (Case No. 552/2013, judgment delivered on 28 October 2013) and *De Nederlandsche Bank N.V.* v *LBI hf.* (Case No. 120/2014, judgment delivered on 8 May 2014).

for example - by a bankrupt party within the meaning of Chapter XX of Act No. 21/1991 on Bankruptcy etc.[3]

The Authority therefore concluded in the reasoned opinion that Article 99(2)(n) of Act No. 161/2002 did not correctly implement the substantive elements of the exception in Article 30(1) of the Directive on the application of another law than that of the home State (*lex loci concursus*) of a financial credit institution. The Authority was further of the opinion that correct implementation of Article 30(1) was not secured by jurisprudence of the Icelandic Supreme Court.

By letter dated 4 April 2018 (Doc No 907184), the Ministry informed the Authority that a bill had been submitted to the Parliament, amending the abovementioned provisions, which was approved during the first reading on 22 March 2018. By e-mail dated 26 April 2018 (Doc No 914975), the Icelandic Government informed the Authority that the Act had been adopted, after further reading by the Parliament.

At the package meeting in Iceland on 6 June 2018, the representatives of the Icelandic Government presented the content of the amending Act No. 34/2018 to the Authority's representatives. In the opinion of the Authority, the Act remedies the above-described shortcomings under Act No. 161/2002 and adequately implements Articles 23, 25 and 30(1) of the Directive into national law.

Following receipt of the information referred to above, it appears that the provisions in question, Articles 99(2)(n)-(j) of Act No. 161/2002, have been amended by Act No. 34/2018, and that the current legal framework concerning governing law during reorganisation and winding-up of credit institutions complies with the requirements laid down in Articles 23, 25 and 30(1) of the Directive.

There are, therefore, no grounds for pursuing this case further.

HAS ADOPTED THIS DECISION:

The own-initiative case, arising from an alleged failure by Iceland to comply with Articles 23, 25 and 30(1) of Directive 2001/24/EC, is hereby closed.

For the EFTA Surveillance Authority

Bente Angell-Hansen President	Frank J. Büchel Responsible College Member	Högni Kristjánsson College Member

For Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

[3] In this respect, reference is made to interpretation of the EFTA Court in Case E-28/13 *LBI hf.* v *Merrill Lynch International Ltd.*, judgment of 17 October 2014 [2014] EFTA Ct. Rep. 970.

This document has been electronically authenticated by Bente Angell-Hansen, Catherine Howdle.