

Icesave questions and answers

1 What is ESA's claim ?

ESA's claim is that Iceland failed to ensure that its Deposit Guarantee Fund paid the minimum guaranteed level of payment to depositors in the Icesave branches in the Netherlands and the United Kingdom.

2 What does the Deposit Guarantee Scheme Directive require ?

It requires all states – including the three EEA/EFTA States – to set up a scheme such as a fund (or some other kind of mechanism) to ensure that depositors receive a minimum payment in the event that they lose access to their deposits, if the bank goes bankrupt. In the context of this case, the relevant minimum amount of payment is €20.000 for each depositor.¹

The Deposit Guarantee Scheme Directive seeks to enhance consumer/depositor confidence in the banking system in the event of banks going bankrupt. The whole point is to avoid “runs” on banks, should depositors feel that they could lose their deposits.

The banking system depends on trust and consumer confidence and the Deposit Guarantee Scheme Directive is an key instrument in that respect.

3 But the depositors had accounts in the Netherlands and the UK. Why should Iceland be responsible for them ?

Because that is what the Directive clearly requires.

It distinguishes between deposits with branches and deposits with subsidiaries.

If a bank from state A opens *subsidiaries* in state B, the deposits with subsidiaries are guaranteed by the system of state B, the *host state*. But then those subsidiaries themselves are supervised by the host state financial regulators and have to abide by the banking laws of the host state.

If a bank opens *branches* in another state, the deposits in that state are guaranteed by the *home state* deposit guarantee scheme. It is also the home state's financial regulators which are primarily responsible for supervising those branches.

In this case, Landsbanki opened *branches*, not subsidiaries in the Netherlands and the United Kingdom. Thus, the Icelandic authorities were responsible for their supervision and also for ensuring payment of payment under the Directive.

¹ Article 7 of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes. Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 lifts the minimum amount of payment to €100.000. That amendment has however not yet been made part of EEA law.

4 Why is ESA involved ?

ESA has the task to ensure that the EEA Agreement is respected by Iceland, Liechtenstein and Norway. The Deposit Guarantee Scheme Directive forms part of that agreement since 19 October 1994.

5 Does the Directive apply in such exceptional circumstances ?

Yes.

It has been argued by Iceland that the Directive does not apply in the exceptional circumstances prevalent in Iceland in October 2008 when the banks there failed.

But all bank failures, by their very nature, are exceptional. And the Directive is designed to protect depositors when banks fail. It was designed to deal with exceptional situations.

And there's case law of the Court of Justice to the effect that a directive such as the Deposit Guarantee Scheme Directive still applies in exceptional circumstances.

Finally, the Directive provides for mechanisms "*in wholly exceptional circumstances and in special cases*", allowing the delaying of payment of the €20.000 by one year. Iceland has invoked this provision. But almost three years after the bank failures, Iceland has still not ensured payment of the depositors.

6 Does ESA challenge Iceland's transposition of the Directive ?

The correct transposition of the Directive by Iceland is not the issue here.

Iceland's transposition of the Directive by Act no 98/1999 was not necessarily faulty. But transposing a Directive into national law and then establishing the required organisational framework is only the first step in order to comply with a Directive. A state must also make sure that *in practice*, the result sought by the Directive is attained. This is what this case is all about.

7 Why does ESA act now ?

According to the Directive, the Icelandic Fund should have made payments by 23 October 2009.

After the letter of formal notice was issued in May 2010, Iceland informed ESA that the Government was involved in negotiations with the Dutch and British Governments.

Since the resulting agreements could have resolved the matter and allowed Iceland to comply with its obligations under the Directive, ESA decided to wait and see how this developed.

But in April 2011, once it became clear that these negotiations had not produced an agreement ratified by both parties, ESA requested that Iceland provide its reply to the letter of formal notice by 2 May 2011.

ESA has carefully examined Iceland's reply but disagrees with the arguments presented. Which is why it has now issued this reasoned opinion.

8 At what stage is this case now ?

ESA had issued a letter of formal notice to Iceland in May 2010, which was the first stage in the proceedings. Iceland has replied to that letter, and ESA has very carefully considered that reply. But the arguments presented have not convinced ESA.

What ESA has now done is to issue a reasoned opinion. That is the second stage in the procedure. Iceland now has three months to comply with the reasoned opinion.

9 What's the next stage ?

Iceland has three months in which to comply with the reasoned opinion.

On the basis of Iceland's reaction and the development of the case, ESA will consider taking the case to the EFTA Court.

If ESA decides to take the case to court, that could happen in the autumn.

10 How long will the procedure take ?

It all depends! We will now see what Iceland's reaction to the reasoned opinion is and take it from there. We expect Iceland to comply, or provide a reply, after the summer.

11 And then what ?

If the case goes to the EFTA Court, Iceland will have every opportunity to defend itself and present its arguments to the Court both in writing and orally. After considering the arguments of both sides, the Court will hand down its judgment.

If the EFTA Court accepts ESA's arguments and concludes that there is a breach of EEA law, Iceland has to take the necessary measures to comply with the judgment as rapidly as possible.

12 Why has ESA not waited since the likelihood is that everything will be paid by the bankruptcy estate?

Iceland's obligation was to ensure payment of the depositors who lost their deposits by 23 October 2009 at the latest. The aim of the Directive is to avoid depositors having to rely on bankruptcy proceedings.

ESA's concern is that Iceland has still not complied with that obligation and now should do so quickly. How Iceland finances that obligation is not part of ESA's case.