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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, Kaupping, 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 loan².

Again, on 15 November 2008, the Icelandic Government confirmed in its Letter of Intent and Technical Memorandum of Understanding to the International Monetary Fund³ 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

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](#).