Brussels, 26 May 2010
Case No: 65560
Event No: 557521
Dec. No: 224/10/COL

EFTA SURVEILLANCE AUTHORITY

Icelandic Mission to the EU
Rond-Point Schuman 11
1040 Brussels

Dear Sirs,

Subject: **Letter of formal notice to Iceland for failure to comply with its obligations under the Act referred to at point 19a of Annex IX to the EEA Agreement and Article 4 of the EEA Agreement**

1. Introduction

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 under 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 ("the Fund or 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 EFTA Surveillance Authority ("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" 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 time.

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.

Following the unavailability of Icesave deposits both the UK and Dutch authorities took action as regards depositors at the Landsbanki branches in the UK and the Netherlands and organised for depositors at these branches 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.[2] 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 accountholders of the Landsbanki branch in the Netherlands. Of this amount, EUR 1.34 billion was within the responsibility of the Icelandic deposit guarantee scheme.[3]

The Icelandic Government on the one hand and the UK and Dutch Governments on the other have been negotiating the reimbursements of the part of the UK and Dutch pay-outs to the depositors of Landsbanki that were within the responsibility of the Icelandic deposit guarantee scheme. To date, these negotiations have not resulted in an agreement being reached.

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[1] See Annual Report 2008 from the Dutch Central Bank, page 85-86.
[2] See Annual Report and Accounts 2008/09 from the UK Financial Services Compensation Scheme, page 25.
[3] See Annual Report 2008 from the Dutch Central Bank, page 85-86.

In its letter of 23 March 2010 to the Authority, the Icelandic Government stated after having described the implementing Act no. 98/1999: "*The Icelandic State has therefore fully complied with its obligations under Directive 94/19/EC. The Government has no further obligations based on the Directive than to set up a Guarantee Scheme in line with the Directive.*"[4]

2. 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, (hereafter "Directive 94/19/EC) provides for minimum harmonized rules as regards deposits guarantee schemes.[5]

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;*
>
> *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;*

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[4] Letter from the Icelandic Government to the Authority dated 23 March 2010, page 5.
[5] (OJ No L 135, 31.5.1994, p. 5), incorporated into the EEA by Decision of the EEA Joint Committee No 18/94 of amending Annex IX (Financial Services) to the EEA Agreement of 19 October 1994.

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.
[...]

3. 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*).[6]

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.*

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*

[6] The translation of the Act used here may be found at http://eng.efnahagsraduneyti.is/laws-and-regulations/nr/1165

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.

4. The Authority's assessment

4.1 Obligation of result under Article 7 of Directive 94/19/EC

As will be outlined in detail below, the Authority considers that Directive 94/19/EC imposes obligations of result on the EFTA States:

- to ensure that a deposit guarantee scheme is set up that is capable of guaranteeing the deposits of depositors up to the amount laid down in Article 7(1) of the Directive, 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.

It is clear from the wording of Directive 94/19/EC that it imposes an obligation of result on the States. Article 7(1) of Directive 94/19/EC provides[7] that the aggregate deposits of each depositor must be covered up to EUR 20.000 in the event of deposits being unavailable. Article 10(1) of Directive 94/19/EC requires that the necessary procedures be completed no later than three months after the date on which the competent authorities determine 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 Article allows for an extension of deadline in exceptional circumstances as will be examined below.

The Court of Justice of the European Union (Court of Justice) held in *Paul and others* that Directive 94/19/EC gives a right on depositors to a refund of at least 20.000 EUR each wherever deposits are located in the EU in the event of the unavailability of deposits.[8] Although the Court did not have to rule specifically on the matter, it is evident from the judgment that the Court considers the provisions of Articles 7 and 10 of Directive 94/19/EC to be clear and precise. Consequently, individual depositors have rights conferred on them by the directive.[9]

While Directive 94/19/EC imposes an obligation of result on the Member States, it does not specify how they should achieve it and in particular how they must provide the cover by the national deposit guarantee scheme or schemes. Iceland, together with most States has opted for a scheme which operates a fund to which credit institutions contribute. As stated above, Directive 94/19/EC is implemented into Icelandic law by Act No. 98/1999. That Act establishes the Depositors and Investors Guarantee Fund ("the Fund or Deposit Guarantee Fund" – *Tryggingarsjóður innstæðueigenda og fjárfesta*), entrusts it with the responsibility for payments of the guarantee, grants it special powers to execute its tasks and provides for the method of financing the fund, which is by the credit institutions operating in Iceland at 1% of insured deposits.

The obligation of result imposed by Directive 94/19/EC is apparent not just from its wording but also from its context and objectives. The Court of Justice has consistently held, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part.[10] 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. 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*

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[7] 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.

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

[9] Case C-62/00 *Marks and Spencer plc v. Commissioners of Customs and Excise* [2002] ECR I-6325, paragraphs 22-28.

[10] 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.

protection of depositors within the Community."[11] 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. Moreover, as already stated, the Court of Justice has held in *Paul and others* that depositors enjoy a right to compensation under Directive 94/19/EC of at least 20.000 EUR each.[12]

Article 3 of the Directive requires that the EFTA States introduce and officially recognise one or more deposit-guarantee schemes, which under the terms of Article 7 must cover deposits up to 20.000 EUR. The wording of Article 7(1) is unconditional. It provides for a right to compensation in the event of deposits being unavailable irrespective of the reasons for that being the case. The Directive does not lay down any possibility of derogating from that obligation. Accordingly, the Authority considers that the Article imposes an obligation of result on the Icelandic Government.

Therefore, as neither the Fund nor the Government have 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 obligation under Article 7. The argument that the obligation in Article 7 is only imposed on the deposit guarantee schemes is addressed below.

This conclusion is not called into question by Recital 24 to the Directive, which states: "*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.

[11] Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paragraph 48.
[12] Case C-222/02 *Paul and others*, cited above, paragraph 27.

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.*"[13]

The Court has thus clarified that if the compensation of deposits prescribed by Directive 94/19 is ensured, the State cannot be held liable. From this reasoning, it can be inferred 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.

As a matter of fact, neither the Fund nor the Icelandic state ensured that the depositors in the Netherlands and the United Kingdom whose deposits were unavailable received any compensation from the Fund. 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. In addition, 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 (Article 10 of Directive 94/19/EC). The Icelandic authorities extended the deadline for payment until 23 October 2009.[14] 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.[15]

Finally, the Authority considers that the Fund forms part of the Icelandic State within the meaning of the EEA Agreement although it is, in Icelandic law, constituted as a private foundation, cf. Article 2 of Act No. 98/1999. As a consequence, any breach by the Fund of the Directive is directly attributable to the Icelandic State. The Court of Justice has held that a directive may be relied on as against a State, regardless of the capacity in which the latter is acting, that is to say, whether as employer or as public authority. The entities against which the provisions of a directive that are capable of having direct effect may be relied upon include a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the

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

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

[15] In that respect the Authority notes that the Fund and the British Financial Services Compensation Scheme (FSCS) have entered into a settlement agreement. Under Article 1.1 of that agreement the parties acknowledge that the FSCS has with the Fund's knowledge made payments in accordance with its rules to individual depositors of the UK Branch of Landsbankinn in respect of which the Fund had a compensation obligation under Act No. 98/1999. Similarly, the Fund and the Dutch National Bank have entered into a deed of assignment with regard to claims on Landsbankinn Amsterdam branch paid by the Dutch National Bank.

control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.[16] The Deposit Guarantee Fund was established by law with the sole purpose of fulfilling Iceland's obligations under Directive 94/19 as well as Directive 97/9. The Fund has no other tasks than the fulfilment of this public law obligation. Moreover, all member companies operating in Iceland are obliged to finance the Fund in accordance with Articles 6 and 7 of the Act. Consequently, the Fund is to be regarded, for the purposes of EEA law and Directive 94/19/EC, as an emanation of the Icelandic State.

Even if that were not the case that the Fund is part of the Icelandic State and is 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.

4.2 Directive 94/19/EC and exceptional circumstances

In its letter to the Authority of 23 March 2010 the Icelandic Government referred to a study undertaken by the European Commission with regard to deposit guarantee schemes in the EU Member States. According to the Government, the Commission found that most schemes were capable of dealing with a mid size banking failure. The Government then stated "*[i]t would appear implicit that most of them cannot deal (and are not expected to deal) with anything that goes beyond that, let alone a meltdown of the whole financial system.*"[17] The Icelandic Government would thus appear to argue that the Directive is not applicable if deposits are unavailable because of a major and general banking crisis.

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." [18] 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*

[16] 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 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.

[17] Letter from the Icelandic Government to the Authority dated 23 March 2010, page 5.

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

> *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.*
>
> *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.* (underlining added)[19]

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.[20]

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 12 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.

Consequently, "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. Moreover, the Authority notes that the Court of Justice has rejected that Member States may plead financial difficulties to justify non-compliance with the obligation laid down in Community directives.[21]

In any event, while Iceland was faced with an unprecedented situation in October 2008, there was no general declaration of the unavailability of all deposits throughout the whole

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[19] 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.
[20] Case C-367/96 *Kefalas v. Greek State* [1998] ECR I-2843, paragraph 22.
[21] Case C-42/89 *Commission v Belgium* [1990] ECR I-2821, paragraph 24.

of the banking sector in Iceland. The measures taken by the Icelandic Government averted such a general crisis.

4.3 Directive 94/19/EC and the issue of payment up to the amount available in the fund

In its letter of 23 March 2010 mentioned above, 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]

The Authority considers that the obligation of result laid down in Directive 94/19/EC precludes the argument being made that the national deposit guarantee schemes are only liable to refund depositors to the extent that funds in the scheme so permit. As stated above, Directive 94/19/EC contains no exemption from payment for exceptional circumstances. As regards comparison with deposit guarantee schemes in other EEA States the Authority would first like to observe that such comparison is, as a matter of law, irrelevant with regard to whether Iceland has complied with its obligations under the Directive.[23]

Moreover, 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.

The Court of Justice has held 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.[24] Consequently, if the Deposit Guarantee Fund established under the Directive fails to achieve the result prescribed, the State authorities have the obligation to ensure that the result prescribed is attained. The authorities are free to determine how that result is attained. Nevertheless, it is incumbent on the Icelandic authorities to ensure that payments are made to depositors up to the minimum amount guaranteed by Article 7(1) of the Directive.

Furthermore, no provision of the Directive itself indicates that the obligation to refund deposits can be reduced in any way under any circumstances. Annex II to the Directive sets out a certain number of principles that apply when a bank establishes branches in another Member State. In particular, Annex II to the Directive sets out "guiding principles" on how supplementary cover for branches in another Member State should be apportioned between the home and host States schemes. Annex II makes clear that the host State is only responsible for the supplementary cover given by its, more generous, deposit guarantee scheme. No part of that Annex can be understood as meaning that the home State and its guarantee scheme is exonerated from the minimum guarantee it should

[22] Letter from the Icelandic Government to the Authority dated 23 March 2010, page 5.
[23] Case E-1/03 *the Authority v Iceland* [2003] EFTA Court Report p. 143, paragraph 33.
[24] Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26.

give to depositors of its foreign branches in the event that deposit guarantee scheme of the host state intervenes. On the contrary, Annex II item (c) makes clear that the home State and the host State must "*cooperate fully with each other to ensure that depositors receive compensation promptly and in the correct amounts*".

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.[25] The Court of Justice has consistently held 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.[26] 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.

Finally, it should be noted that according to the information provided to the Authority the Icelandic deposit guarantee scheme has not made any refunds at all within the prescribed deadline, even for part of the deposits in issue according to the means available to the Fund.

4.4 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.

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 [...].*[27] 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. 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

[25] See by analogy Case E-8/07 *Nguyen* [2008] EFTA Court Report p. 226, paragraph 27.
[26] Joined Cases C-402/07 and C-432/07 *Sturgeon and others* judgment of 19 November 2009, not yet reported, paragraph 47 and the cases cited therein.
[27] Joined Cases C-402/07 and C-432/07 *Sturgeon and others*, cited above, paragraph 48.

Directive, it is clear that the two were in a comparable position. By transferring the domestic accounts to new Landsbanki, the Icelandic Government protected those accounts in full thus making recourse to the minimum protection under the Directive unnecessary. The comparability of the two groups has to be assessed from the outset when both were deposit holders in Landsbankinn, which would, without the intervention of the Icelandic Government, have become insolvent leaving all depositors in the same situation. The principle of equal treatment under the Directive would be rendered meaningless if states were permitted to move some depositors out of a failing bank while leaving others there and subsequently claim that the two groups were not in a comparable position as the first one did not suffer the unavailability of their deposits.

Accordingly, the Authority 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.

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

The Authority takes the view that the Icelandic authorities cannot advance any viable justification for the discriminatory measures taken against the foreign deposits in the circumstances of this case. It should be recalled that the discriminatory measure taken by Iceland affected the harmonised minimum protection resulting from the Directive itself. 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.[28] As stated above, the Directive only allows exceptional circumstances to be relied upon to extend the deadline for payment of compensation. For the sake of completeness the Authority notes that the fact that British and the 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 obligation 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 Article 4(1) and 7(1) of the Directive and/or Article 4 EEA.

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[28] 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.

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 ensure payment of compensation of 20.000 EUR to depositors on the so-called Icesave accounts of Landsbankinn within the time limits laid down in the Directive.

5. 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 a 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.

In these circumstances and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority invites the Icelandic Government to submit its observations on the content of this letter within two months following receipt thereof.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Icelandic Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Yours faithfully

Kurt Jaeger
College Member