

Brussels, 14 December 2011
Case No: 70866
Event No: 617209



IN THE EFTA COURT

APPLICATION

Submitted 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 by the

EFTA SURVEILLANCE AUTHORITY

Represented by Xavier Lewis, Director, and Gjermund Mathisen, Officer in the
Department of Legal & Executive Affairs, acting as Agents

AGAINST

ICELAND

Seeking a declaration 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 its Articles 3, 4, 7 and 10, and/or Article 4 of the Agreement on the European Economic Area.

1 Introduction

1. In early October 2008, the three largest Icelandic banks, Kaupþing, Glitnir and Landsbanki collapsed and were taken over by the Icelandic State. The depositors in the foreign branches of Landsbanki lost access to their deposits. Subsequently, those depositors received no compensation from the Icelandic deposit guarantee fund as required by Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes and the Icelandic State took no action to ensure that they did.
2. An important principle is 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 Relevant EEA law

3. 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.¹
4. Article 1 of Directive 94/19/EC reads:

For the purposes of this Directive:

¹ (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.

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;

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.

5. Article 3 states:

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

[...]

6. 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.
[...]

7. 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.

8. 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.
[...]

9. 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.
[...]

10. Article 4 EEA provides:

“Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

3 Relevant national law

11. 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*).²

12. 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.

13. 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.

14. 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

² The translation of the Act used here may be found at [Act No. 98/1999 on Deposit Guarantees and Investor-Compensation Scheme](#).

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.

15. 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.

[...]

16. 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.

17. 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 Fund'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 Antecedents

18. The Icelandic Parliament established a Special Investigation Commission (SIC) in December 2008 to investigate and analyse the processes leading to the collapse of the three main banks in Iceland. The SIC delivered its report on April 12 2010.³ For convenience, Chapters 17 and 18 of the SIC report concerning the depositors' and investors' guarantee fund and deposit guarantees in general are annexed (**Annex A 1 : Chapter 17 of the SIC Report**) (**Annex A 2 : Chapter 18 of the SIC Report**).

19. The Report of the SIC contains a detailed narration of the events leading to the collapse of the banks in Iceland. The Authority will refer to the Report of the SIC below. It does so because the Report permits a greater understanding of the

³ The Report of the SIC is publicly available at the following website: <http://sic.althingi.is/>

circumstances surrounding the present proceedings, provides contemporaneous evidence of how the Icelandic authorities considered their position under Directive 94/19/EC and how the response to the collapse of Icesave was coordinated between the Icelandic Government and the Icelandic Guarantee Fund.

20. Reference is not made to the Report of the SIC for the purposes of establishing whether or not the Icelandic Government entered into legally binding commitments with the Dutch and British authorities.

4.1 Before the Crash

21. In October 2006, one of the large three Icelandic banks Landsbanki Íslands hf. (“Landsbanki”) launched a branch in the United Kingdom which provided online savings accounts under the brand “Icesave”. The fact that the Icesave deposit accounts were located in a branch and not in a subsidiary is significant in two respects. First, deposits in a branch can, according to English law, be moved easily “upstream” from the deposit accounts to the bank’s operations in Iceland, whereas deposits in subsidiaries are less mobile.⁴ Second, deposits in branches are guaranteed, under the terms of Directive 94/19 as will be made clear below, by the deposit guarantee fund established in the home state of the bank, not by the fund set up in the host state of the branch.
22. It became clear from February 2008 onwards that Landsbanki was in a precarious financial situation. In fact, there was a run on the Icesave accounts in the United Kingdom from February to April 2008 as a consequence of negative press coverage and increased scrutiny by the British financial authorities because of the poor financial situation of Landsbanki.

⁴ SIC Report, Chapter 18, p. 38 (all references to the Report of the Special Investigation Commission are to the English language version).

23. Nevertheless, Landsbanki introduced a similar Icesave online deposit branch in the Netherlands which started accepting deposits in Amsterdam on 29 May 2008.⁵ The decision to do so is described in the Report of the SIC as “nearly incomprehensible”.⁶
24. At the start, those online deposit branches attracted considerable deposits. According to the Report of the Special Investigation Commission, deposits in the Icelandic banks amounted to over ISK 250 billion at the beginning of 2000. By October 2008, the time of the collapse of the big three banks, deposits of others than financial institutions amounted to over ISK 3 100 billion. Over ISK 1 700 billion had been deposited with the overseas branches of the Icelandic banks. By the time the three banks collapsed, about half of their deposits were in foreign currencies and deposited with branches of the banks abroad.⁷
25. Iceland had implemented Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (“Directive 94/19/EC” or “the Directive”) by enacting Act no. 98/1999 on Deposit Guarantee and Investor Compensation Scheme. Both of those measures will be described in greater detail below. Act no. 98/1999 set up the Depositors’ and Investors’ Guarantee Fund (“TIF”) which operated from 1 January 2000. When the TIF began working in 2000 it had assets of about ISK 2.9 billion which represented about 1.2% of bank deposits. The Report of the Special Investigation Commission makes clear that while deposits received by Icelandic banks increased enormously, particularly abroad:

“no amendments were made to the Guarantee Fund’s operating rules, including on obligations regarding payment into or disbursements from the Fund. It should be noted, however, that data available to the Special

⁵ SIC Report, Chapter 18, p. 54.

⁶ SIC Report, Chapter 18, p. 61.

⁷ SIC Report, Chapter 17, p. 1