ORDER OF THE PRESIDENT
23 April 2012

(Intervention – Application by the European Commission)

In Case E-16/11,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Gjermund Mathisen, Officer, Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

applicant,

v

Iceland, represented by Kristján Andri Stefánsson, Ambassador, Ministry of Foreign Affairs, acting as Agent, Þóra M. Hjaltested, Director, Ministry of Foreign Affairs, acting as Co-Agent and Tim Ward QC, acting as Counsel,

defendant,

APPLICATION 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 European Economic Area,

THE PRESIDENT

makes the following

Order

I Main proceedings

1 Iceland implemented Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (hereinafter "Directive 94/19/EC" or "the Directive") through the enactment of Act No 98/1999 on Deposit Guarantee and Investor Compensation Scheme. Act No 98/1999 set up the Depositors' and Investors' Guarantee Fund (hereinafter "TIF") which started operations on 1 January 2000.

2 In October 2006, Landsbanki Íslands hf (hereinafter "Landsbanki") launched a branch in the United Kingdom which provided online savings accounts under the brand name "Icesave". A similar Icesave online deposit branch was launched in the Netherlands which began accepting deposits in Amsterdam on 29 May 2008.

3 As a part of a tumultuous worldwide financial crisis, there was a run on the Icesave accounts in the United Kingdom from February to April 2008.

4 In accordance with the division of responsibility laid down under the Directive, deposits at the British and Netherlands branches of Landsbanki were under the responsibility of the Icelandic TIF.

5 From May 2008, Landsbanki opted to take part in the Netherlands deposit-guarantee scheme to supplement its home scheme. At that time, the minimum amount guaranteed under the Netherlands scheme was EUR 40 000 per depositor, later raised to EUR 100 000 per depositor. Similarly, the Landsbanki branch in the United Kingdom joined the UK deposit-guarantee scheme for additional coverage. Deposits at the British branch of Landsbanki in excess of the minimum amount guaranteed by the Icelandic TIF were later guaranteed by the UK scheme to a maximum of GBP 50 000 for each retail depositor.

6 On 6 October 2008, Landsbanki's Icesave websites in the Netherlands and in the United Kingdom ceased to work and depositors at those branches lost access to their deposits.

7 On 7 October 2008, Landsbanki collapsed and the Icelandic Financial Supervisory Authority (hereinafter "FME") assumed the powers of the meeting of Landsbanki's shareholders and immediately suspended the bank's board of directors. FME appointed a winding-up committee which, with immediate effect, assumed the full authority of the board.

8 In order to avoid a potential run on bank deposits on their markets, the Netherlands and UK authorities organised for depositors with the Landsbanki branches in their respective countries to file claims with the deposit-guarantee scheme in the Netherlands and the United Kingdom. The UK Government arranged for the pay-out of all retail depositors in full, while the Netherlands Government arranged for the compensation of all depositors to a maximum of EUR 100 000.

9 According to Article 10 of the Directive, implemented into Icelandic law by Article 7(1) of Regulation No 120/2000 on Deposit Guarantees and Investor-Compensation Scheme, the payments from TIF to depositors should have been made at the latest within three months of 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 Icelandic Regulation No 120/2000).

10 The final deadline for payments expired on 23 October 2009.

11 On 26 May 2010, the EFTA Surveillance Authority (hereinafter "ESA") sent a letter of formal notice to Iceland alleging 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 Directive as amended within the time-limits laid down in Article 10 of the Directive, in breach of the obligations resulting from the Directive and/or Article 4 of the EEA Agreement (hereinafter "EEA").

12 Iceland was requested to submit its observations within two months of the receipt of that letter. At the request of the Icelandic Government, ESA granted extensions to that deadline, first until 8 September 2010, then until 7 December 2010 and finally until 2 May 2011.

13 The Icelandic Government replied to the letter of formal notice on 2 May 2011. In that reply, the Icelandic Government maintained that it was not in breach of its obligations under the Directive or Article 4 EEA.

14 ESA was unconvinced by the reply to the letter of formal notice and delivered a reasoned opinion to Iceland on 10 June 2011.

15 Iceland replied to the reasoned opinion on 30 September 2011 and submitted an additional letter of 13 December 2011 which presented further information on the winding-up of the Landsbanki estate and summarised recent judgments of the Icelandic Supreme Court concerning the reordering of the priority of creditors in that winding-up.

16 By application lodged at the Court on 15 December 2011, ESA brought an action under 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 (hereinafter "SCA") 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 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 EEA and ordering the defendant to bear the costs of the proceedings.

17 On 3 February 2012, the Government of Iceland requested an extension of the period in which to submit its defence. That request was granted on 6 February 2012, setting a time-limit for the submission of the defence of 8 March 2012.

18 In its defence, lodged at the Court on 8 March 2012, Iceland contends that the Court should dismiss the application and seeks an order that ESA pay its costs.

II Application to intervene

19 By document lodged at the Court's Registry on 28 March 2012, the European Commission sought leave to intervene pursuant to Article 36 of Protocol 5 to the SCA on the Statute of the EFTA Court (hereinafter "the Statute") in support of the form of order sought by ESA. The application to intervene was served on the parties in accordance with Article 89(2) of the Court's Rules of Procedure (hereinafter "RoP").

20 In written observations on the application to intervene, lodged at the Court's Registry on 5 April 2012, ESA asserts that the Commission's application was timely and is admissible under the first paragraph of Article 36 of the Statute. ESA submits that the Commission may lodge a statement of case or written observations pursuant to Article 20 of the Statute or, alternatively, intervene pursuant to the first paragraph of Article 36 of the Statute.

21 ESA notes that the President of the Court of Justice of the European Union (hereinafter "ECJ") has in two recent cases, C-542/09 *Commission* v *Netherlands*, order of 1 October 2010, not reported, and C-493/09 *Commission* v *Portugal*, order of 15 July 2010, not reported, issued orders in which applications for leave to intervene made by the Kingdom of Norway and ESA, respectively, were denied. ESA contends that these orders are regrettable since they impoverish the debate before that Court. However, in ESA's view, the principle of procedural homogeneity does not apply in the instant case as Article 36 of the Statute is not identical in substance to Article 40 of the Statute of the ECJ.

22 In written observations on its application to intervene, lodged at the Court's Registry on 12 April 2012, the Commission deals with Article 40 of the ECJ's Statute. According to the second paragraph of that provision, the bodies, offices and agencies of the Union and any other person which can establish an interest in the result of a case may intervene in cases before the ECJ. Moreover, natural and legal persons may not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union. The third paragraph states that, without prejudice to the second paragraph, the States, other than the Member States, which are parties to the EEA, and also ESA, may intervene in cases before the ECJ where one of the fields of application of the EEA is concerned. The Commission considers it questionable that the phrase "without prejudice to the second paragraph" which introduces the third paragraph of Article 40 of the Statute of the ECJ was intended to refer to both restrictions found in the second paragraph of Article 40 of the Statute of the ECJ. Nonetheless, such a general introductory phrase would appear to leave little scope for a different and less restrictive interpretation than was given by the President of the ECJ in the two abovementioned orders.

23 The Commission submits that there is a difference between the Statutes of the two EEA courts as Article 36 of the Court's Statute does not contain a provision equivalent to the third paragraph of Article 40 of the Statute of the ECJ. Consequently, in the Commission's view, those orders of the President of the ECJ are not relevant in assessing the admissibility of the Commission's application.

24 The Commission asserts that it should be deemed to enjoy an unconditional right to intervene in the present case. This is the first time that the Commission has sought leave to intervene rather than confining itself to the lodging of written observations. The Commission states that it wishes to intervene on account of the importance of the case as well as to provide the Court with the benefit of its experience on Directive 94/19/EC and in the preparation and negotiations concerning its recent proposal for reform of the Directive.

25 Iceland submitted written observations on the application to intervene, lodged at the Court's Registry on 17 April 2012. Iceland refers to the Declaration by the European Community on the rights for the EFTA States before the EC Court of Justice annexed to the Final Act to the EEA Agreement. The first paragraph of that declaration states that "[i]n order to reinforce the legal homogeneity within the EEA through the opening of intervention possibilities for EFTA States and the EFTA Surveillance Authority before the EC Court of Justice, the Community will amend Articles 20 and 37 of the Statute of the Court of Justice and the Court of First Instance of the European Communities".

26 Iceland contends that the objective of that declaration was to reinforce legal homogeneity within the EEA by opening the possibilities for intervention to all cases in which EU provisions, similar to the provisions of the EEA Agreement, were at issue. Iceland notes that under ex-Article 37 (now Article 40) of the ECJ Statute, Norway was allowed to intervene in two institutional cases before the ECJ. In Joined Cases C-14/06 and C-295/06 *Parliament and Denmark* v *Commission* [2008] ECR I-1649 Norway intervened in support of the European Parliament and Denmark, and in Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079 Norway intervened in support of the Netherlands.

27 Iceland notes further that, following the orders of the President of the Court of Justice of the European Union in the two recent cases mentioned in paragraph 21 of the present order, neither EFTA States nor ESA may intervene in institutional cases before the ECJ. This decreases the possibilities for ensuring homogeneity within the EEA. Whereas before the Court all EEA States, ESA and the Commission may be heard in an institutional case without having to formally intervene pursuant to Article 36 of the Statute, before the ECJ they can only be heard once they have formally intervened. Iceland submits that the principle of procedural homogeneity, and considerations as to the equality of the Contracting Parties and reciprocity in their benefits, rights and obligations, stated in the fourth recital of the Preamble to the EEA Agreement, point in favour of treating the Commission's application for leave to intervene as ESA's would be treated by the President of the ECJ in a similar case, and dismissed.

28 However, Iceland notes that the recent orders of the President of the ECJ appear to be attributable to the unclear wording of the third paragraph of Article 40 of the Statute of the ECJ, and that such lack of clarity is not reproduced in the wording of Article 36 of the Statute. Iceland considers that it is not clear that those two orders of the President of the ECJ are an example to follow as they are detrimental to the EEA legal order in so far as they decrease the possibilities for ensuring homogeneity and run contrary to the intentions of the Contracting Parties. Moreover, according to Iceland, allowing the intervention may improve the procedural situation of the party not supported by the intervention.

29 In Iceland's view, were the application for intervene to be refused, the consequences would not be the same as before the ECJ, as the Commission would remain entitled to lodge written observations.

30 If the Commission is denied leave to intervene, but then submits written observations, Iceland invites the Court to reconsider the manner in which it applies its procedural rules such as to permit the parties to comment in writing upon observations of that kind. Furthermore, Iceland requests an opportunity to comment

in writing on all written observations submitted in the case pursuant to Article 20 of the Statute.

III Law

31 Pursuant to the first paragraph of Article 36 of the Court's Statute, any EFTA State, ESA, the European Union and the Commission may intervene in cases before the Court.

32 The Court held from the beginning that although it is not required by Article 3(1) SCA to follow the reasoning of the European Union courts when interpreting the main part of that Agreement, the reasoning which led those courts to their interpretation of expressions in Union law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court (see Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 17, paragraphs 32-35). In recent times, the Court has, based on this case-law, recognised the principle of procedural homogeneity (see Cases E-18/10 *ESA* v *Norway* [2011] EFTA Ct. Rep. 202, paragraph 26, and E-15/10 *Posten Norge v ESA*, judgment of 18 April 2012, not yet reported, paragraphs 109 f.; order of the Court in Case E-13/10 *Aleris Ungplan* v *ESA* [2011] EFTA Ct. Rep. 3, paragraph 24; order of the President of 25 March 2011 in Case E-14/10 *Konkurrenten.no AS* v *ESA*, paragraph 9; and order of the President of 15 February 2011 in Case E-15/10 *Posten Norge* v *ESA*, paragraph 8). In this regard, the Court has referred in particular to considerations of equal access to justice and compliance with judgments rendered in infringement proceedings for parties appearing before the EEA courts. The application of this principle cannot be restricted to the interpretation of provisions whose wording is identical in substance to parallel provisions of EU law.

33 In the case at hand, consideration must be given to the fact that the capability for any EEA State, ESA, the European Union and its institutions, including the Commission, to intervene in cases before the Court is of paramount significance for the good functioning of the EEA Agreement. Not only from a textual, but also from a teleological and functional perspective, the first paragraph of Article 36 of the Statute must be construed accordingly.

34 Article 89(1) of the Rules of Procedure provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) of the Rules of Procedure. In accordance with Article 14(6) of the Court's Rules of Procedure, notice of the action was given in the EEA Section of the Official Journal of the European Union on 16 February 2012. The time-limit for submission of an application to intervene was 29 March 2012.

35 The present application to intervene was lodged at the Court's Registry on 28 March 2012, and is therefore timely.

36 As for the request of the Icelandic Government for the opportunity to comment in writing on all written observations submitted pursuant to Article 20 of the Statute, it suffices to note that a party cannot make such a request in the context of an application for intervention pursuant to Article 36 of the Statute and Article 89 of the Rules of Procedure.

37 In light of the above, the European Commission is granted leave to intervene in the case in support of the form of order sought by the applicant.

On those grounds,

THE PRESIDENT

hereby orders:

1. **The European Commission is granted leave to intervene in Case E-16/11 in support of the form of order sought by the applicant and shall receive a copy of every document served on the parties.**

2. **Costs are reserved.**

Luxembourg, 23 April 2012.

Skúli Magnússon
Registrar

Carl Baudenbacher
President