REPORT FOR THE HEARING
in Case E-16/11

APPLICATION to the Court 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 in the case between the

EFTA Surveillance Authority

supported by the

European Commission

and

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.

I Introduction

1. As a part of a tumultuous worldwide financial crisis, Landsbanki's depositors at the branches in the Netherlands and the United Kingdom lost access to their deposits on 6 October 2008. Consequently, Iceland's Depositors' and Investors' Guarantee Fund (hereinafter "TIF" or "Fund") was obliged, in principle, to pay out the minimum guarantee per depositor in accordance with the rules and time-limits set out in the Icelandic law implementing Directive 94/19/EC (hereinafter "Directive 94/19" or "the Directive"). However, no such payments were made to those depositors.

2. By its application, ESA seeks to establish that Iceland has failed to comply with its obligations resulting from the Directive as it failed to ensure payment of the minimum amount of compensation to Icesave depositors in the

Netherlands and in the United Kingdom within the given time-limits. At the heart of the dispute is whether there is an obligation of result upon Iceland to ensure that depositors are compensated as set out in the Directive if all else should fail. The parties also dispute whether, in the event that such an obligation exists, Iceland is excused by virtue of *force majeure*.

3. The other matter at dispute is whether by treating depositors with domestic accounts differently from depositors holding accounts at Landsbanki branches in other EEA States, Iceland has infringed Articles 4(1) and 7(1) of the Directive and/or Article 4 EEA. In the event of such an infringement, the parties also dispute whether this difference in treatment must be regarded as objectively justified.

II Facts

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

5. 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.

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

7. 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, which offered a minimum guarantee of ISK 1.7 million per depositor pursuant to 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.

8. 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.

9. 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.

10. On 6 October 2008, the Althingi, the Icelandic Parliament, adopted Emergency Act No 125/2008. The Emergency Act provided for the creation of new banks and the granting of priority status in the bankruptcy to depositors with claims upon the TIF.

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

12. Between 6 and 9 October 2008, the Icelandic Minister of Finance established new banks under the Emergency Act.

13. Between 9 and 22 October 2008, the FME transferred all domestic deposits and loans to the new banks.

14. In order to avoid a potential run on bank deposits in their markets, the Netherlands and UK authorities organised for depositors with the Landsbanki branches in their respective countries (hereinafter "Icesave depositors") 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.

15. The Icelandic Parliament established a Special Investigation Commission (hereinafter "SIC") in December 2008 to investigate and analyse the processes leading to the collapse of the three main banks in Iceland.

16. According to Article 10 of the Directive, implemented into Icelandic law by Article 7(1) of Regulation No 120/2000 on a Deposit Guarantee and Investor Compensation Scheme, payments from the 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, on each occasion for three months, on the basis of Article 10(2) of the Directive (Article 7(4) of Icelandic Regulation No 120/2000).

17. On 4 October 2009, the TIF published a notice in the Icelandic Legal Gazette calling for claims to be submitted within two months. The Netherlands and UK Governments submitted claims, as did a small number of other depositors, including four institutional investors. Later the TIF wrote to all institutional investors to inform them that it was beginning to pay compensation

under Act No 98/1999, and seeking an assignment of any claim against the banks themselves.

18. On 23 October 2009, the final deadline for payments expired. The SIC delivered its report on 12 April 2010.

19. On 14 December 2011, the Court ruled in Case E-3/11 *Pálmi Sigmarsson* v *Seðlabanki Íslands* that "a national measure which prevents inbound transfer into Iceland of Icelandic krónur purchased on the offshore market is compatible with Article 43(2) and (4) of the EEA Agreement in circumstances such as those in the case before the referring court."

III Legal background

EEA law

20. 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.*

21. 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),[1] as amended, provides for minimum harmonised rules as regards deposit-guarantee schemes.

22. Recital 1 in the preamble to Directive 94/19 reads:

> *Whereas, in accordance with the objectives of the Treaty, the harmonious development of the activities of credit institutions throughout the Community should be promoted through the elimination of all restrictions on the right of establishment and the freedom to provide services, while increasing the stability of the banking system and protection for savers;*

23. Recital 2 in the preamble to Directive 94/19 reads:

> *Whereas, when restrictions on the activities of credit institutions are eliminated, consideration should be given to the situation which might arise if deposits in a credit institution that has branches in other Member States become unavailable; whereas it is indispensable to ensure a harmonized minimum level of deposit protection wherever deposits are located in the Community; whereas such deposit protection is as essential as the prudential rules for the completion of the single banking market;*

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[1] OJ 1994 L 135, p. 5.

24. Recital 3 in the preamble to Directive 94/19 reads:

Whereas in the event of the closure of an insolvent credit institution the depositors at 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;

25. Recital 4 in the preamble to Directive 94/19 reads:

Whereas the cost to credit institutions of participating in a guarantee scheme bears no relation to the cost that would result from a massive withdrawal of bank deposits not only from a credit institution in difficulties but also from healthy institutions following a loss of depositor confidence in the soundness of the banking system;

26. Recital 7 in the preamble to Directive 94/19 reads:

Whereas a branch no longer requires authorization in any host Member State, because the single authorization is valid throughout the Community, and its solvency will be monitored by the competent authorities of its home Member State; whereas that situation justifies covering all the branches of the same credit institution set up in the Community by means of a single guarantee scheme; whereas that scheme can only be that which exists for that category of institution in the State in which that institution's head office is situated, in particular because of the link which exists between the supervision of a branch's solvency and its membership of a deposit-guarantee scheme;

27. Recital 8 in the preamble to Directive 94/19 reads:

Whereas harmonization must be confined to the main elements of deposit-guarantee schemes and, within a very short period, ensure payments under a guarantee calculated on the basis of a harmonized minimum level;

28. Recital 16 in the preamble to Directive 94/19 reads:

Whereas, on the one hand, the minimum guarantee level prescribed in this Directive should not leave too great a proportion of deposits without protection in the interest both of consumer protection and of the stability of the financial system; whereas, on the other hand, it would not be appropriate to impose throughout the Community a level of protection which might in certain cases have the effect of encouraging the unsound management of credit institutions; whereas the cost of funding schemes should be taken into account; whereas it would appear reasonable to set the harmonized minimum guarantee level at ECU 20 000; whereas limited transitional arrangements might be necessary to enable schemes to comply with that figure;

29. Recital 23 in the preamble to Directive 94/10 reads:

Whereas it is not indispensable, in this Directive, to harmonize the methods of financing schemes guaranteeing deposits or credit institutions themselves, given, on the one hand, that the cost of financing such schemes must be borne, in principle, by credit institutions themselves and, on the other hand, that the financing capacity of such schemes must be in proportion to their liabilities; whereas this must not, however, jeopardize the stability of the banking system of the Member State concerned;

30. Recital 24 in the preamble to Directive 94/19 reads:

Whereas this Directive may not result in the Member States' or their competent authorities' 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 recognized;

31. Recital 25 in the preamble to Directive 94/19 reads:

Whereas deposit protection is an essential element in the completion of the internal market and an indispensable supplement to the system of supervision of credit institutions on account of the solidarity it creates amongst all the institutions in a given financial market in the event of the failure of any of them,

32. Article 1 of Directive 94/19 reads:

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;

(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. Companies or firms formed in accordance with the law of an EC Member state or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting parties shall, for the purpose of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.

33. Article 3 of Directive 94/19 reads:

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

34. Article 4 of Directive 94/19 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. ...

35. Article 7 of Directive 94/19 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.

36. Article 8 of Directive 94/19 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.

...

37. Article 10 of Directive 94/19 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.

...

National law

38. Directive 94/19 was implemented into Icelandic law by Act No 98/1999 on a Deposit Guarantee and Investor Compensation Scheme (lög um innstæðutryggingar og tryggingakerfi fyrir fjárfesta).

39. Article 1 of Act No 98/1999 reads:

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.

40. Article 2 of Act No 98/1999 reads:

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.

41. Article 3 of Act No 98/1999 reads:

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.

42. Article 6 of Act No 98/1999 reads:

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. ...

43. Article 9 of Act No 98/1999 reads:

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.

44. Article 10 of Act No 98/1999 reads:

> *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.*
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> *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.*

IV Pre-litigation procedure and procedure before the Court

45. On 26 May 2010, ESA issued a letter of formal notice to Iceland alleging a failure to ensure that Icesave depositors in the Netherlands and the United Kingdom received 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").

46. 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.

47. 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.

48. ESA was unconvinced by Iceland's reply to the letter of formal notice and delivered its reasoned opinion to Iceland on 10 June 2011.

49. Iceland replied to the reasoned opinion on 30 September 2011 and submitted an additional letter on 13 December 2011 which presented further information on the winding-up of the Landsbanki estate including summaries of

recent Icelandic Supreme Court judgments concerning the reordering of the priority of creditors in that winding-up.

50. 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 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 had 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.

51. 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.

52. 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.

53. On 28 March 2012, the European Commission requested leave to intervene in support of ESA.

54. On 10 April 2012, ESA submitted its reply to the defence.

55. Following observations submitted by the parties, the Commission was granted leave to intervene by Order of the President of 23 April 2012.

56. On 7 May 2012, the Samstaða þjóðar (National Unity Coalition), an association registered in Iceland, sought leave to intervene pursuant to Article 36 of Protocol 5 to the SCA on the Statute of the EFTA Court in support of the form of order sought by Iceland.

57. On 9 May 2012, the Government of the United Kingdom submitted written observations.

58. On 11 May 2012, the Government of Iceland submitted its rejoinder. On the same date, the Government of Liechtenstein submitted written observations.

59. On 15 May 2012, the Government of the Netherlands and the Government of Norway submitted written observations. Further, the Government of Iceland submitted an urgent request to receive the written observations. This request was granted by the Registrar on 16 May 2012.

60. On 23 May 2012, the European Commission submitted its statement in intervention.

61. On 15 June 2012, the application for leave to intervene by Samstaða þjóðar was dismissed as manifestly inadmissible by Order of the President.

62. On 20 June 2012, the Government of Iceland submitted its reply to the statement in intervention by the European Commission.

V Forms of order sought by the parties

63. The EFTA Surveillance Authority requests the Court to:

1) Declare 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;

2) Order Iceland to bear the costs.

64. The Icelandic Government requests the Court to:

1) Dismiss the application;

2) Order the EFTA Surveillance Authority to pay the costs of these proceedings.

VI Written procedure before the Court

65. Written arguments have been received from the parties:

- EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Gjermund Mathisen, Officer, Department of Legal & Executive Affairs, acting as Agents;

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

- The European Commission, as intervener, represented by Enrico Traversa, Legal Adviser, Albert Nijenhuis and Karl-Philipp Wojcik, members of its Legal Service, acting as Agents.

66. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- The Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director of the EEA Coordination Unit, and by Frederique Lambrecht, Legal Officer at the EEA Coordination Unit, acting as Agents;

- The Netherlands, represented by Corinna Wissels, Mielle Bulterman and Charlotte Schillemans, head and staff members of the European Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agents;

- The Kingdom of Norway, represented by Kaja Moe Winther, Senior Adviser, Ministry of Foreign Affairs, and Torje Sunde, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents;

- The United Kingdom of Great Britain and Northern Ireland, represented by Heather Walker of the Treasury Solicitor's Department, acting as Agent, and by Mark Hoskins QC.

VII Summary of the pleas in law and arguments of the parties

The applicant

67. The application is based on the plea that, by failing to ensure payment of compensation to Icesave depositors holding deposits in Landsbanki's branches in other EEA States within the time-limits laid down in the Directive, Iceland is in breach of its obligations under Articles 3(1), 4(1) and 7(1) of the Directive and/or under Article 4 EEA.

Obligation of result

68. ESA submits that the Directive imposes an obligation of result on EFTA States to ensure that a deposit-guarantee scheme is set up capable of guaranteeing that, in the event of deposits being unavailable, the aggregate deposits of each depositor are covered in all circumstances up to the amount laid down in Article 7(1) of the Directive. Further, the obligation of result requires EFTA States to ensure that duly verified claims by depositors are paid within the deadline laid down in Article 10 of the Directive.

69. ESA submits that, as regards harmonisation measures, an obligation of result is a well-established technique of EU law.[2] It submits that this obligation of result follows from the wording of the Directive. The Directive does not provide for a derogation or exemption from such. It is simply possible to exclude certain types of deposits from the coverage and to limit coverage up to 90%.[3] Further, even in wholly exceptional circumstances, the time-limit in which necessary procedures have to be completed cannot be extended beyond 12 months after the recognition of the unavailability of the deposits.

70. ESA submits that this interpretation of the Directive is consonant with the case-law of the Court of Justice of the European Union ("the ECJ"). In its view, it is evident from Case C-222/02 *Paul and Others* that, although the facts of the case did not require it to rule on the matter, the ECJ considers that Articles 7 and 10 of the Directive require a clear and precise result to be achieved.[4]

71. ESA submits that Article 7 of Directive 94/19 does not impose an obligation only on the deposit-guarantee fund, but also on the EFTA State itself. These obligations were clear and precise prior to the amendment of Article 7 of the Directive by Directive 2009/14,[5] not implemented in the EEA thus far. In its view, the mere fact that the EU legislative bodies have underlined through the amendment that the obligations set out in Article 7 of the Directive are addressed to the Member States does not lead to a different conclusion. There are no indications that Directive 2009/14 was intended to introduce any substantive changes to Article 7 of the Directive.

72. In this respect, ESA argues further that it follows directly from Article 7 EEA that the obligations set out in directives are addressed to EEA States and not to the bodies that States are obliged to establish or designate in order to comply with their obligations under those directives. Therefore, ESA concludes, the change to the wording of Article 7 of the Directive, introduced by Directive 2009/14, cannot alter the legal obligation laid down in that provision.

73. ESA submits that is also clear from the Directive's wording, context, and from the objectives it pursues that it imposes an obligation of result as described above on the EEA States.

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[2] Reference is made to Case C-134/11 *Jürgen Blödel-Pawlik* v *HanseMerkur Reiseversicherung*, judgment of 16 February 2012, not yet reported, paragraphs 20 and 22.

[3] Article 7(2) and (4) of the Directive.

[4] Reference is made to Case C-222/02 *Paul and Others* [1994] ECR I-9425, paragraphs 26 to 27 and 30.

[5] See 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.

74. ESA argues in this respect that, according to its preamble, the Directive seeks to ensure a high level of protection of retail deposits paid into bank accounts within the common market.[6] According to ESA, notwithstanding the ECJ's finding that the Directive's objective is to remove obstacles to free movement of credit institutions across the internal market,[7] it follows from case-law that the protection of depositors is central to the scheme and aim of the Directive.

75. Further, ESA submits that the system laid down in the Directive rests on the protection of depositors by the schemes of the home state of credit institutions, both for deposits made in the home state and for deposits made in their branches in other Member States.[8] To safeguard financial stability within a European cross-border network of depositor protection, EEA States and depositors must be able to trust that the level of protection will be the same, whatever credit institution is chosen.

76. ESA doubts whether EEA States would have agreed to adopt a directive and thereby to renounce their right to restrict the activities of credit institutions established in another EEA State with insufficient depositor protection, had such a directive required only the establishment of some sort of deposit-guarantee scheme. In its view, the installation of a credible European cross-border network of depositor protection, which is an indispensible condition for a single market of credit institutions, can only be ensured if it is guaranteed that in the event of a bank failure a certain amount will be paid out within a specified deadline. ESA concludes, therefore, that Articles 7 and 10 of the Directive impose an obligation of result, which alone can ensure the credibility of the system and enable the efficient functioning of the single market for credit institutions.

77. In this respect, ESA argues, finally, that it also follows from case-law that the aim and purpose of the Directive is to oblige EEA States to introduce a uniform standard of minimum protection for depositors throughout the internal market. As a result, EEA States can no longer invoke depositor protection in order to impede the activities of credit institutions authorised in other Member States.[9]

78. Furthermore, according to ESA, the fact that guarantee schemes of other EEA States stepped in to compensate depositors of Landsbanki's foreign branches has no bearing on the breach committed by Iceland. Article 4 of the Directive provides that a deposit-guarantee fund established in an EEA State must cover depositors at branches set up by banks in other EEA States. However,

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[6] Reference is made in particular to recitals 7 and 8 in the preamble to the Directive and Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraph 48.

[7] Again reference is made to *Germany* v *Parliament and Council*, cited above, paragraph 13.

[8] As regards the latter, reference is made to *Germany* v *Parliament and Council*, cited above, paragraph 18.

[9] Ibid., paragraphs 17 to 19.

Iceland did not ensure that the depositors in Icesave accounts received compensation from the TIF. In ESA's view, this is the breach which is directly attributable to the Icelandic State.

79. In this regard, ESA adds that the procedures required under Article 10(1) of the Directive were not observed. 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. The deadline for payment under the Directive was extended by the Icelandic authorities until 23 October 2009. However, further steps were not taken and the relevant procedures provided for under national law were not completed.

80. ESA further argues that the TIF forms part of the Icelandic State within the meaning of the EEA Agreement. The TIF was established by law with the sole purpose of providing a public service. It acts within a narrowly defined framework which leaves no genuine margin for independent decisions by its board and has special powers beyond those which result from the normal rules applicable in relations between individuals.

81. None the less, even if the TIF fund were considered to be an independent entity, according to ESA, the State remains under an obligation to ensure full compliance with the Directive and proper compensation of depositors in accordance with the Directive's terms.[10]

82. Moreover, in ESA's view, the facts of the present case show that the TIF and the Icelandic administration were linked to a degree that the TIF cannot be considered a wholly separate entity. This follows from the various factual links between the TIF and the Icelandic State, regardless of the TIF's legal structure under Icelandic law.

83. Having regard to Chapter 17 of the Icelandic Parliament's SIC Report, ESA notes that an agreement between the Fund and the Central Bank of Iceland (hereinafter "CBI") had been in force since the establishment of the Fund until the failure of the large Icelandic banks at the beginning of October 2008. According to the SIC Report, that agreement provided that an officer of the CBI should be employed as the Fund's managing director.[11] It follows also from that report that the Ministry of Business Affairs exercised supervision over the activities of the Fund and had appointed a staff member as Chairman of the Board of Directors of the Fund ever since the TIF's establishment.[12] As a consequence, in ESA's view, any breach of the Directive by the Fund is attributable directly to the Icelandic State, both in law and in fact.

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[10] Reference is made to Case C-356/05 *Elaine Farrell* v *Alan Whitty and Others* [2007] ECR I-3067, paragraph 40, and the case law cited therein, and Case C-157/02 *Rieser Internationale Transporte GmbH* v *Asfinag* [2004] ECR I-1477.

[11] Reference is made to the SIC Report, Chapter 17, p. 30.

[12] Ibid., p. 66.

84. ESA concludes that Iceland has failed to comply with its obligations under Articles 7 and 10 of the Directive as it has not ensured payment directly or through the Fund to those depositors in the Netherlands and the United Kingdom whose deposits became unavailable within the meaning of the Directive.

Obligation of transposition

85. ESA contends that Iceland has not fulfilled all its obligations simply by transposing the Directive into national law and setting up and recognising a deposit-guarantee scheme, regardless of whether compensation of depositors is, in fact, ensured under the conditions prescribed in the Directive.

86. ESA argues that EEA States are obliged to ensure the full application of a directive even after the adoption of such measures.[13] This entails in the present case that the compensation of the aggrieved depositors must be ensured under the conditions laid down in the Directive, i.e. that the Directive imposes such an obligation of result on EEA States.

87. ESA notes that in its Staff Working Document of 12 July 2010 the Commission has described various means of funding a deposit-guarantee fund, including ex ante contributions, ex post contributions, State loans or direct state interventions. In this connection, ESA observes, however, that the Directive does not specify how the funds should be financed. Moreover, it notes that it is for the national authorities to determine how to achieve the result given in a directive, in the manner in which they deem most appropriate.

88. ESA submits further that by amending national insolvency law through the adoption of the Emergency Act Iceland cannot be regarded as having fulfilled its obligations under the Directive. As a result of the Emergency Act, depositors' claims were given priority status in insolvency proceedings. However, the adjustment of domestic bankruptcy law cannot be deemed to amount to compliance with the Directive since the latter's very purpose is to avoid the situation that depositors have to rely on bankruptcy proceedings in order to receive the minimum amount of EUR 20 000.

89. In that regard, ESA also argues that, as a matter of law, it is irrelevant whether Iceland's transposition of the Directive was comparable to the manner in which other EEA States have implemented it.[14] Moreover, in its view, the measures taken by Iceland were, in fact, not comparable to those taken by other EEA States during the financial crisis that struck in the autumn of 2008. The other EEA States took measures to avoid deposits from becoming unavailable by recapitalising banks. In addition, no other EEA State made a distinction between domestic depositors and depositors with accounts at foreign branches. ESA notes

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[13] Reference is made to Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 27, and Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraphs 116 to 117.

[14] Reference is made to Case E-1/03 *ESA* v *Iceland* [2003] EFTA Ct. Rep. 143, paragraph 33.

that it was only the depositors holding Icesave accounts with Landsbanki's branches in the Netherlands and the United Kingdom that did not receive minimum compensation from the deposit-guarantee scheme responsible for those deposits under the Directive.

State responsibility

90. ESA finds fault with Iceland for not having taken any measures at all to ensure that depositors protected by the Fund receive the minimum amount that is guaranteed by the Directive. However, in response to Iceland's submissions on the point, it avers that it never claimed that the Directive requires EEA States to guarantee the amount set out in Article 7 of the Directive. In its view, EEA States have an obligation to achieve the result envisaged by the Directive and to take all appropriate measures to ensure the fulfilment of that obligation. If all else should fail, it may be the case that the EEA State will be responsible for the compensation of depositors up to the amount provided for in Article 7 of the Directive, in order to discharge its duties under the Directive.

91. ESA submits that the Icelandic authorities themselves contemplated a number of different measures including the facilitation of a loan, as envisaged by Article 10 of Act No 98/1999, or even the provision of a State guarantee to ensure the payment of the minimum guaranteed amount within the time-limit specified by Article 10 of the Directive. It observes that, in practice, however, nothing was done.

92. ESA argues further that the Directive cannot be interpreted as precluding the provision of a State guarantee should a deposit-guarantee fund have inadequate resources to meet its minimum obligations.

93. In this regard, ESA refers to recital 24 in the preamble to the Directive. In its view, it follows from that recital that an EEA State may be liable to depositors if it has not ensured the introduction of one or more schemes that are capable of guaranteeing the compensation or protection of depositors under the conditions prescribed by the Directive. In ESA's view, it does not suffice to set up and officially recognise a deposit-guarantee scheme.

94. ESA contends that its view is also confirmed by case-law.[15] ESA notes from the ECJ's judgment in *Paul and Others* that, if the compensation of depositors prescribed by the Directive is ensured, the EEA State in question cannot be held liable for further damages under the Directive, e.g. for a failure to properly supervise banks. From this, it infers that compensation must be ensured by the EEA State and their competent authorities. How this is achieved in practice is left to them and is not limited to the grant of a State guarantee.

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[15] Reference is made to *Paul and Others*, cited above, paragraphs 30 to 31.

95. Furthermore, ESA refutes Iceland's submissions that it follows from the Commission Staff Working Document of 12 July 2010[16] that the Directive does not require a State guarantee. In ESA's view, the Commission Staff Working Document is based on the presumption that deposit-guarantee schemes are adequately financed to meet their obligations. It observes further that the Working Document mentions *ex ante* and *ex post* contributions, State loans and direct state interventions as means of financing guarantee schemes.[17]

96. ESA accepts that a State injection of capital to refinance a deposit-guarantee scheme may constitute State aid within the meaning of Article 61 EEA. In ESA's view, however, this would appear to be compatible with the State aid rules.

97. ESA adds in this respect that the Icelandic authorities never approached it to discuss the compatibility of any form of State intervention in this case. Furthermore, it observes that the State aid rules did not constrain Iceland from transferring national deposits to the new Landsbanki.[18]

98. In response to concerns raised that a State guarantee for the Fund might distort competition, ESA submits that the minimum harmonisation provided for in the Directive, even prior to its amendment by Directive 2009/14, mitigates the distortion of competition caused by varying levels of protection in different EEA States. Were there no harmonisation in place to guarantee a minimum payment, EEA States would compete over the best form of guarantee in order to attract deposits. That form of competition is reduced, however, if deposits are ensured at least to the minimum amount set in the Directive.

99. ESA disagrees with the assertion that a comparison between the obligations imposed under Directive 80/987/EC[19] and the Directive leads to the conclusion that EEA States are not obliged under the Directive to make payments themselves.[20] ESA also denies that such a conclusion follows from the ECJ's case-law on Directive 80/987.[21] ESA emphasises in particular that this cannot be

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[16] Commission Staff Working Document of 12 July 2010, SEC(2010) 834 final.

[17] Ibid., p. 19. Reference is also made to Chapter 17, pp. 71-73, of the Report of the SIC, according to which the issue of a state guarantee was discussed at various points within the Icelandic administration were the Fund to have inadequate monies to meet its legal obligations. ESA observes that, according to the Report, no clear position was taken on this issue.

[18] Reference is made to Commission Decision in Case N 17/2009 SoFFin guarantee for Sicherungseinrichtungsgesellschaft deutscher Banken – Germany, paragraphs 18 and 28.

[19] Directive 80/987/EEC of the Council of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ 1980 L 283, p. 23.

[20] Reference is made to Case C-477/09 *Charles Defossez* v *Christian Wiart and Others*, judgment of 10 March 2011, not yet reported, paragraph 32.

[21] ESA rejects the view that such a conclusion can be drawn from the findings of the ECJ in Case C-278/05 *Robins and Others* [2007] ECR I-1053, arguing that there were differences in the questions addressed and in the scope of the provisions at issue. Reference is made to paragraphs 42 and 45 of the judgment.

inferred from the judgment in *Francovich and Bonifaci* v *Italy* since the circumstances there and the claims sought by those plaintiffs were different to those in the present case.[22] In that case, Italy had already failed to implement Directive 80/987, whereas, here, Iceland has implemented the Directive in question. Moreover, as there was no fund available, the plaintiffs sought a subrogation of their claim. This was rejected, however, because Directive 80/987 did not provide that the fund to be established must be financed entirely by public funds.

Exceptional circumstances and *force majeure*

100. ESA argues that the Directive is also applicable in a financial crisis including one of the magnitude experienced in Iceland in the autumn of 2008. Exceptional circumstances are already catered for in the provisions of the Directive itself.

101. ESA argues that the EU legislative bodies made a conscious choice as regards the effect of possible exceptional circumstances. Such circumstances were not to alter the obligation to compensate depositors in accordance with Article 7(1) of the Directive. In contrast, Article 10(2) of the Directive expressly mentions “exceptional circumstances” as allowing for certain extensions of the deadline to pay compensation. Thus, in ESA’s view, the effect of “exceptional circumstances” is limited to justify certain payment delays.

102. In ESA’s view, it could not have been the intention of the legislative bodies that the greater the risk for depositors, the lower the protection provided by the national guarantee schemes.

103. ESA argues that the ECJ has held that an EU 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.[23]

104. Moreover, ESA continues, neither the reaction of the EU legislative bodies to the financial crisis nor the Commission Staff Working Document support the view that the Directive cannot apply in the event of a systemic banking crisis, whether as a matter of principle or because of the way different funds are financed. Even following the experience of the financial crisis, the Directive has been largely left unchanged. In fact, the Directive has been strengthened with an increase in the coverage afforded to depositors and a reduction in the pay-out time. In ESA’s view, the legislative objective was to maintain the Directive as an important stabilising factor in times of exceptional circumstances, such as a financial crisis. As for the conclusions reached in the

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[22] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* v *Italy* [1991] ECR I-5357. Particular reference is made to paragraph 25 of that judgment. Reference is also made to the Opinion of Advocate General Geelhoed in Case C-494/01 *Commission* v *Ireland*, cited above.

[23] Reference is made to Joined Cases C-19/90 and C-20/90 *Karella and Karellas* [1991] ECR I-2691, paragraphs 26 to 27.

Commission Staff Working Document, ESA simply notes that the document expressly takes the view that the Directive is applicable regardless of whether there is a systemic crisis.[24]

105. ESA argues further that the doctrine of *force majeure* does not apply in the present case and, in any event, does not release Iceland from its obligations under the Directive.[25]

106. ESA submits that, according to consistent case-law, EEA States may not plead financial difficulties to justify non-compliance with obligations laid down in directives.[26] It asserts that is only when there is a total physical impossibility, for reasons beyond all control of the State that a Member State is not in breach of its obligations under secondary law.[27] Further, it continues, that exoneration may be limited in time.[28]

107. In the present case, ESA points out that, while Iceland was faced with an unprecedented situation in October 2008, there was no general declaration of unavailability of all deposits throughout the whole of the banking sector in Iceland. The Icelandic Government took measures to avert a general run on the banks in the domestic market and a general loss of access to domestic deposits.

108. ESA notes that as regards deposits held in Icesave accounts of Landsbanki's UK and Netherlands branches Iceland relied on Article 10(2) of the Directive, as it was entitled to, in order to extend the deadline for payment until 23 October 2009, a year after the crisis had unfolded.

109. At that time, ESA observes, the situation in Iceland was very different to that in autumn 2008. It doubts whether the circumstances in which Iceland found itself on 23 October 2009 were unforeseeable. In ESA's view, given the manner and circumstances in which the Icelandic authorities extended the deadline for payment in accordance with Article 10 of Directive 94/19, it was certainly clear that the TIF was under an obligation to make the minimum payments to depositors by that date.

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[24] Reference is made to Staff Working Document of 12 July 2010, Document SEC(2010) 834 final, page 20.

[25] Reference is made to the Opinion of Advocate General Jacobs in Case C-236/99 *Commission* v *Belgium* [2000] ECR I-5657, points 16 and 22.

[26] Reference is made to Case 309/84 *Commission* v *Italy* [1986] ECR 599, paragraph 17, Case C-42/89 *Commission* v *Belgium* [1990] ECR I-2821, paragraph 24, and Case C-375/02 *Commission* v *Italy*, judgment of 9 September 2004, not published in English, paragraphs 36 to 37.

[27] Reference is made to Case 101/84 *Commission* v *Italy* [1985] ECR 2629.

[28] Ibid., paragraph 16.

110. Furthermore, ESA contends that the Icelandic Government cannot argue that it did not have access to the funds necessary to fulfil its obligations under the Directive at the time. In ESA's view, this is proven by the Icesave Agreement of June 2009.

111. According to that Agreement, so ESA submits, the Governments of the United Kingdom and the Netherlands were ready to provide the necessary funds to Iceland. Had this Agreement been ratified, it would have allowed the Icelandic State to fulfil its obligations under the Directive within the time-limits provided for in Article 10 of the Directive. Even though the terms might have been regarded as unfavourable, in ESA's view, it is clear that it was not impossible to obtain the necessary funds to comply with the requirements of the Directive.

112. In this respect, ESA adds that the assets to be realised in Landsbanki's winding-up were estimated in 2009 to cover a substantial part of the amount owed by the TIF to the depositors. Consequently, Iceland would have had the possibility to use those assets,[29] together with the TIF's improved position as preferred creditor in the winding-up process, to refinance the TIF once payments to depositors had been made. ESA contends, therefore, that Iceland has failed to show that it was impossible, despite the exercise of all due care, to raise the capital that was required to enable the TIF to meets its payment obligations at the proper time.

113. ESA notes that Iceland has still not paid the depositors in the United Kingdom and the Netherlands, or their successors in title, in accordance with the requirements of the Directive, even though Iceland appears to claim that the assets in liquidation of Landsbanki are now sufficient to do so.

Non-discrimination

114. ESA submits that, even if, contrary to its argument, the provisions of Directive 94/19 are interpreted as not imposing obligations of result, Iceland is in breach of Articles 4(1) and 7(1) of the Directive and/or Article 4 EEA by treating depositors with domestic accounts differently to depositors with accounts held at Landsbanki branches in other EEA States. The former received full protection while the latter were left without any or any comparable protection.

115. ESA notes that, when emergency measures were taken in response to the banking crisis in October 2008, the Icelandic Government made a distinction between domestic deposits and deposits in foreign branches. The domestic deposits were moved to the new banks and were covered in full. Meanwhile, foreign depositors did not even enjoy the minimum guarantee laid down in the Directive.

[29] Reference is made to the procedure laid down in Article 10 of Act No 98/1999.

116. ESA argues that the principle of equal treatment laid down in Article 4 EEA is applicable in the present case. Moreover, it submits that within the EFTA pillar all secondary legislation must be interpreted in accordance with primary law as a whole, including the principle of equal treatment.[30] Consequently, in its view, the Directive only allows domestic depositors to be treated differently to depositors at branches in other EEA States if those two groups are not regarded as being in a comparable position.

117. ESA submits that, as a matter of law and fact, both groups are in a comparable situation. It follows from Article 4(1) and the third recital in the preamble to the Directive that depositors with savings in branches in other EEA States enjoy the same protection as domestic depositors in the event of the closure of an insolvent credit institution. Further, all relevant depositors were in the same factual situation on or before 5 October 2008. All were depositors in a failing bank, likely to lose access to their deposits.

118. ESA considers that the treatment accorded to the foreign depositors amounts to indirect discrimination on the basis of nationality and residence as only domestic deposits were moved to the new banks and depositors holding accounts in foreign branches were not provided with at least the minimum guarantee specified under the Directive. In this regard, ESA observes that Iceland took two measures in favour of depositors with domestic accounts but none for depositors holding accounts in Landsbanki's EEA branches. First, all domestic deposits were transferred to the "new Landsbanki", even those of depositors that had no special connection to the Icelandic payment system. Second, the Icelandic Government issued a declaration on 6 October 2008 that it would guarantee domestic deposits in full.

119. ESA submits further that nothing in the Directive suggests that any distinction may be made based on the location of the deposits. Such a distinction would run counter to the entire concept underlying the internal market. Consequently, to differentiate between depositors protected under the Directive by providing protection for some depositors while leaving others without any or any comparable protection constitutes an infringement of the Directive's provisions.

120. ESA contends that the measures taken by the Icelandic Government cannot be regarded as justified by the need to restore the functioning and credibility of the domestic banking system and thereby Iceland's entire financial system. It disagrees with the Icelandic Government's assessment that it was both necessary and proportionate not to transfer the non-domestic deposits as to have done so could have undermined the credibility of the rescue and rendered the stabilising efforts meaningless.

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[30] As regards the applicability of that principle, see Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923. For its applicability under the EEA Agreement, see Case E-3/02 *Paranova AS* v *Merck & Co., Inc. and Others* [2003] EFTA Ct. Rep. 101, paragraph 33.

121. ESA argues that the harmonisation of the protection of depositors envisaged by the Directive deprives EEA States from the possibility of justifying rules which discriminate between depositors on the basis of residence where deposits become unavailable. It observes that EEA States 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.[31] The level of harmonisation does not alter that. If the contested measures fall within the harmonised field, as is the case in the present proceedings, an EEA State cannot rely on mandatory requirements to justify an infringement of the directive in question.

122. ESA reiterates that according to settled case-law mere economic grounds cannot serve to justify restrictions on the fundamental freedoms. In its view, under the Icesave Agreements, Iceland had access to the necessary funds to meet its obligations under the Directive without jeopardising the functioning of the domestic banking system and the real economy. The fact that the Agreements may have entailed high costs cannot be advanced to justify Iceland's breach of its obligations.

123. In ESA's view, given the magnitude of the financial crisis, there is no reason why that case-law should not apply. It contends that Iceland cannot argue by reference to the decision in *Campus Oil*[32] that its actions were justified for the maintenance of the overall economy, society's institutions, essential public services, public policy and public security. Iceland has failed to indicate why the basic fabric of Icelandic institutions, public life and security could only be preserved by leaving foreign depositors in Icesave branches without the minimum protection required by the Directive.

124. Furthermore, ESA contends that its submission on this point is not undermined by its correspondence and Decision concerning a complaint lodged by commercial creditors of the Icelandic banks.[33] That case deals with a different issue, namely the Emergency Act adopted on 6 October 2008 and the administrative decision adopted pursuant thereto.

125. Accordingly, ESA submits that, in the circumstances of the present case, the Icelandic Government cannot advance any viable justification for the discriminatory measures taken against the foreign deposits.

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[31] Reference is made to Case 5/77 *Tedeschi* v *Denkavit Commerciale s.r.l.* [1977] ECR 1555, paragraph 35, and Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077, paragraph 31.

[32] See Case 72/83 *Campus Oil Ltd and Others* [1984] ECR 2727.

[33] Reference is made to the correspondence and Decision of ESA mentioned in footnote 6 on page 10 of Iceland's reply of 30 September 2011 to the reasoned opinion.

The European Commission

126. The Commission emphasises that the Directive is binding upon the Member States (Article 288(3) TFEU) and not on bodies that are created by the Member States in order to comply with their obligations under the relevant directives.

127. In this case, the Commission submits that Directive 94/19 imposes obligations of result on the EEA States on the basis of the wording of Articles 3, 4, 7 and 10 of the Directive. In its view, that conclusion is supported by the objectives established in recitals 2, 8 and 9 of the preamble to the Directive.

128. The Commission asserts that, following the introduction of a scheme, obligations of result include the obligation to ensure that the deposit-guarantee scheme is capable of ensuring the repayment of the covered deposits. In the event of a bank collapse, depositors are covered up to EUR 20 000. In its view, if a deposit-guarantee scheme does not have sufficient funding, the Member State concerned is regarded as having infringed the Directive.

129. In the Commission's view, any other interpretation would render the provision ineffective to ensure the objective of the Directive which is to provide a guarantee to depositors when deposits become unavailable, as depositors would not be able to rely on deposit-guarantee schemes. Such an interpretation would also fail the purpose of ensuring last resort protection.

130. The Commission asserts further that its interpretation is in line with the case-law of the ECJ. In its view, Case C-222/02 *Paul and Others* confirmed that there is an obligation to ensure compensation under the terms of the Directive.[34]

131. The Commission underlines the fact that EEA States are free to decide how deposit-guarantee schemes are funded in order to pay compensation in accordance with the Directive. In its view, a State could determine, for example, that the remaining banks as well as newly created banks are required to contribute to the refinancing of the scheme to the extent necessary for ensuring the repayment of depositors, or that the schemes take out long-term loans at market rates. Such options would reflect the objective expressed in recital 23 in the preamble of the Directive, namely, that the costs of the schemes must in principle be borne by credit institutions.

132. According to the Commission, the possibility cannot be excluded, however, that an EEA State has no other choice than to resort to State funding. It reiterates that this is a matter which is within the discretion of the EEA State itself.

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[34] Reference is made to *Paul and Others*, cited above.

133. The Commission wishes to emphasise the fact that the present case concerns the obligation of an EEA State under the Directive to ensure the compensation prescribed by the Directive, and hence involves an action brought by ESA against an EFTA State.

134. Any State liability vis-à-vis individual depositors for not having ensured the compensation prescribed by the Directive is a different issue. Such liability has to be established by a national court. The Commission refers in this respect to Case C-6/90 *Francovich* and Case 22/87 *Commission* v *Italy* which set out the conditions under which State liability for breach of EU law is to be established.[35]

Absence of force majeure

135. The Commission asserts that no provision of the Directive allows Member States to disregard its rules in exceptional circumstances, such as a financial crisis. It observes that the Directive was devised precisely to deal with the exceptional occurrence of a bank failure, including circumstances in which supervision has not proved sufficient to save a bank. It notes that the legislature did not include any additional derogation over and above what is provided for in Article 10(2) of the Directive.

136. Moreover, the Commission considers that also on the basis of case-law Iceland's *force majeure* plea must be rejected.

137. The Commission notes by reference to the report drafted by the SIC that, while most financial markets and economies in the world were affected in autumn 2008 by an almost unprecedented financial crisis, the particular intensity of the collapse of the Icelandic banking system was alleged to be due to pre-existing domestic shortcomings in the banking sector, and made possible by "mistakes and negligence" committed by the Icelandic authorities.[36]

138. The Commission notes further that balance sheets of the Icelandic banks grew quickly to nine fold of Iceland's gross domestic product. According to experts, such growth was not sustainable and should have alerted Icelandic supervisory bodies. The capacity of the FME and the CBI was outgrown by the booming banking sector and not reinforced. Even within the reach of their capacity, the SIC highlights that the FME and the CBI did not use their authority.

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[35] Reference is made to *Francovich*, cited above, and Case 22/87 *Commission* v *Italy* [1989] ECR 143.

[36] Reference is made to the SIC Report.

139. Consequently, the Commission concludes that it is not possible for Iceland to argue that it could not have avoided the consequences brought about by the crisis by exercising due care, in accordance with the obligations arising from Directive 2006/48/EC, to regulate and supervise banks.[37]

Discrimination

140. The Commission supports ESA's view that by transferring the deposits of domestic depositors only, thereby covering domestic deposits at least to the level prescribed by, and within the time-limits specified by the Directive, without providing foreign depositors with at least the minimum guarantee, Iceland has discriminated indirectly against foreign depositors on the basis of nationality, prohibited by the Directive read in the light of Article 4 EEA.

141. The Commission asserts that nothing in the Directive suggests that any distinction may be made between depositors based on the location of the deposits. Article 4 of the Directive does not contain any derogation to the obligation to cover the depositors of branches of banks in other Member States.

142. The Commission notes that, although the deposit-guarantee scheme did not pay out any of the depositors of Landsbanki, by transferring domestic deposits to the new bank, *de facto* continuous access to covered deposits was preserved for domestic depositors only. As a result, Iceland has discriminated between domestic and foreign depositors and consequently infringed Article 4 of the Directive.

143. The Commission also supports ESA's position that the difference in treatment is not justified. The Directive created a harmonised regime for the protection of depositors, thus depriving States of the possibility to justify rules which discriminate between depositors on the basis of residence in the event that deposits become unavailable. In addition, it is settled case-law that mere economic grounds cannot serve as justification for restrictions on the fundamental freedoms.

144. The Commission argues that, after setting up new and re-capitalised banks, Iceland should, and could, have imposed upon such new and financially sound banks the obligation to pay appropriate contributions to the deposit-guarantee scheme in order to enable it to fulfil its obligations under the Directive. Thus, the difference in treatment between domestic and foreign depositors was neither proportionate nor necessary.

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[37] Reference is made to recitals 21, 36, 43, 46, 48 and 50 in the preamble to Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ 2006 L 177, p. 1.

Iceland's arguments arising out of the Impact Assessment (Commission Staff Working Document)

145. The Commission refutes the assertion that its 2010 Impact Assessment indicates that in the event of a systemic crisis the EEA States are not obliged to compensate depositors within the time frame laid down in the Directive.

146. The Commission notes that, after it learned that European deposit-guarantee schemes were not sufficiently funded prior to the financial crisis in 2008, it proposed to review the Directive in order to strengthen the funding of the schemes. In light of that review, the Commission concludes that deposit-guarantee schemes should have at their disposal funds equivalent to at least a minimum target level of 1.5% of eligible deposits of their member banks (*ex ante* funds), and if necessary, some *ex post* funds collected during a crisis situation.

147. The Commission argues further that if a Member State considers the minimum target level of 1.5% too low, it can set a higher target level that better reflects their specific situation. This means that a scheme is responsible not only for reaching a given target level, but ultimately for protecting depositors irrespective of the target fund level.

148. The Commission adds in this context that section 4.1.1. on page 9 of the Impact Assessment does not concern competitive distortions resulting from the funding of deposit-guarantee schemes in order to ensure compensation to depositors. It concerns distortions of competition resulting from divergences between coverage levels, which is a different matter.

The Government of Iceland

149. In essence, Iceland contends that the Directive imposes no obligation of result on the State to use its own resources in order to guarantee the pay-out of a deposit-guarantee scheme in the event that "all else fails". The obligations incumbent upon the State are limited to ensuring the proper establishment, recognition and a certain supervision of a deposit-guarantee scheme.

150. In the alternative, Iceland submits that even if the Directive did impose strict obligations upon the State to fund the guarantee scheme in the event of its collapse, which is disputed, Iceland was prevented from doing so by *force majeure*.

151. Moreover, Iceland submits that it did not breach the principle of non-discrimination. Iceland contends that ESA's application does not argue for equal treatment. Instead ESA argues for different treatment of allegedly comparable situations. As such the basis of the claim is incoherent. ESA has also failed to identify the legal basis for the application of the rules on non-discrimination contained in the EEA Agreement to the specific facts of this case. Furthermore, ESA's argument amounts to an impermissible attempt to extend the specific

requirements of the Directive. Even if any *prima facie* discrimination occurred, which Iceland disputes, it was none the less justified.

The operation of the Directive in practice

152. Iceland infers from a comparison with the information given in the Commission Staff Working Document (Impact Assessment) on how funding is provided in practice within the EU that the funding of the TIF was well within the range of EEA norms.[38]

153. In this respect, Iceland argues further that such a comparison with the implementation of the Directive in other EEA States is relevant as regards the interpretation of EEA law.[39] Iceland adds, however, that the Commission's assessment is not to be considered binding upon the Court in any way.

154. According to Iceland, the Impact Assessment further shows that the existing system of deposit-guarantee schemes across the EU proved insufficient to deal with the worldwide financial crisis.[40] Even after the amendments proposed by the Commission, the harmonisation achieved by the Directive would protect only against a mid-sized bank failure.[41]

155. It also follows from the Impact Assessment, Iceland continues, that the costs of the deposit-guarantee schemes have to be borne by the banks and not the EEA States. There is no obligation under the Directive for EEA State intervention, and, in any event, such State intervention has to be in accordance with State aid rules.[42]

156. Iceland refers in that regard to the Commission's original 1992 proposal for the Directive[43] and submits that this proposal anticipated that State assistance might be required in case the resources of a deposit-guarantee scheme were exhausted. However, Iceland argues, the Commission made clear that this was not desirable as a general rule and is subject to compliance with State aid rules. Thus, it cannot be that an automatic obligation arises by virtue of the Directive itself.

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[38] Reference is made to Commission Staff Working Document of 12 July 2010, section 4.4.1.

[39] Reference is made to Case E-2/95 *Eilert Eidesund* v *Stavanger Catering A/S* [1995/1996] EFTA Ct. Rep. 1, paragraph 15.

[40] Reference is made to Commission Staff Working Document of 12 July 2010, p. 5, paragraph 3, and p. 20, paragraph 3.

[41] Ibid., p. 53, paragraph 2, and p. 58, final paragraph.

[42] Ibid., pp. 8-9.

[43] Proposal for a Council directive on deposit-guarantee schemes COM(92) 188 final, pp. 5 and 8.

157. In Iceland's view, the Impact Assessment also makes clear that the provision of a State guarantee was not an automatic or anticipated consequence of the Directive. Rather, it was a source of concern, as it gave rise to significant distortions of competition.[44]

158. Iceland argues further that the Commission's Impact Assessment illustrates that the mechanism established under the Directive does not provide the means to tackle system-wide banking failure. However, in the present proceedings the Commission is arguing that through the adoption of the Directive the EEA States have committed to ensure that compensation is paid even in the event of a complete bank failure of 100% of covered deposits. Yet it previously recognised in its Impact Assessment that even a funding for 7.25% of deposits was too costly to be politically acceptable.[45]

159. Thus, Iceland rejects the Commission's argument that the Directive is the "last element in a chain of measures established in EU law against bank failure". Iceland regards the Directive as only one "element in the safety net", as the Commission itself described it in its proposal for the Directive. A systemic crisis requires a set of measures that lie far beyond the scope of the Directive.

160. In addition, Iceland contends that the Commission's arguments fail to acknowledge that even States may not be capable of guaranteeing a deposit-guarantee fund during economic crises. Costs of the guarantee would be extremely high for consumers and/or the EEA State and even a State guarantee may not be entirely reliable as the falling credit ratings of some EEA States demonstrate.

The provisions of the Directive

161. Iceland submits that it follows from an analysis of the Directive's provisions that an EEA State's obligation is limited to establishing, recognising and supervising the deposit-guarantee scheme.

162. With reference to the first three recitals in the preamble to the Directive, Iceland submits that the Directive pursues linked objectives of eliminating obstacles to the right of establishment and freedom to provide services by means of consumer protection. It observes that the ECJ held in *Germany* v *Parliament and Council* that the Directive only seeks to ensure a high level and not an absolute level of consumer protection even where "all else fails".[46] In its view, it

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[44] Reference is made to Commission Staff Working Document of 12 July 2010, p. 9.

[45] Ibid., pp. 7-8 and pp. 52 to 58.

[46] Reference is made to *Germany* v *Parliament and Council*, cited above, paragraph 47.

is not possible for a deposit-guarantee scheme to borrow sufficient funds to meet a substantial banking crisis, or for the surviving banks to provide such funds.[47]

163. Having regards to recital 16 in the preamble to the Directive, Iceland contends that the Directive strikes a balance between the cost of funding a deposit-guarantee scheme and the benefits of consumer protection. Such a balance must be struck if the banking system is to function in the interests of consumers and the economy. A less onerous scheme may, in fact, serve consumers better.

164. Iceland submits further that recital 23 in the preamble to the Directive recognises the need for proportionate funding, but again cautions against the risk that might arise if the requirements of a scheme were too onerous. Moreover, the moral hazard that might occur if the level of protection were as high as to encourage unsound management of credit institutions must also be avoided.

165. Thus, Iceland concludes, nothing in those objectives justifies a conclusion that an EEA State must bear financial responsibility for the functioning of a deposit-guarantee scheme.

166. Iceland submits further that it follows from recitals 4, 23 and 25 in the preamble to the Directive that the cost of guarantee schemes has to be borne by credit institutions.

167. Moreover, Iceland asserts, the Directive does not contain any provision that expressly imposes on the EEA States an obligation of result as ESA appears to suggest. Instead, the reality is that the Directive does not deal at all with the circumstances in which a guarantee scheme is unable to pay compensation.

168. In this regard, Iceland observes that recital 4 in the preamble to the Directive deals with a widespread failure in financial markets. However, that recital is limited to highlighting the schemes' deterrent effect on depositors in relation to their assumed loss of confidence.

169. Article 7(6) of the Directive, Iceland submits, is the only operative provision that deals with the scenario that a deposit-guarantee scheme might be unable to pay duly qualified claims. However, the solution contemplated by this provision in the case of non-payment is an action against the scheme and not the EEA State.

170. As regards recital 24 in the preamble to the Directive, Iceland argues that its sole purpose is to exclude State liability if the compensation of depositors is ensured. Iceland notes that this is confirmed by the ECJ's judgment in *Paul* v

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[47] Reference is made to the Report of the University of Iceland, Institute of Economic Studies, 6 March 2012, pp. 3 to 7.

Germany.[48] There, Iceland notes, the ECJ dealt explicitly with the circumstances in which liability is excluded and not those in which liability occurs. Such liability arises only where the three conditions specified in *Brasserie du Pêcheur*[49] are met, that also apply in the EFTA pillar of the EEA.[50] Further, in the judgment in *Paul* v *Germany*, having regard to recital 24, the ECJ held that the first condition is not satisfied if the compensation of depositors is ensured.[51] Thus, as has been stated before, recital 24 is limited to establishing an exception to the general rule of liability.

171. In that regard, Iceland refers also to the German version of recital 24 in the preamble to the Directive. That language version makes clear that the schemes are responsible for ensuring the compensation of depositors, whereas an EEA State cannot be held liable if it has provided for the introduction and recognition of the scheme. Iceland observes that, according to settled case-law, where the different language versions diverge, the most liberal interpretation must prevail as long as it is sufficient to achieve the objectives pursued.[52] In Iceland's view, the German version is sufficient to achieve the objectives pursued by the Directive.

172. Iceland continues its assessment with Article 3(1) of the Directive. In its view, it follows from that provision that the duty on EEA States is to ensure that a guarantee scheme is introduced and recognised. It is not for the EEA State itself to provide such a guarantee. Iceland concedes in that respect that, pursuant to Article 3(2) to (5) of the Directive, EEA States have certain supervisory obligations. However, it notes that a breach of this duty is not alleged.

173. It also does not follow from Article 7, Iceland continues, that EEA States should cover the minimum guarantee sum "if all else fails". It concedes, however, that a purely formal deposit-guarantee scheme would clearly contradict the Directive's objectives, *inter alia*, because it would not provide for the necessary assurance to other EEA States and consumers envisaged in recitals 1 to 3 in the preamble to the Directive.

174. In the present case, Iceland submits that its Government ensured that a scheme was established, recognised and supervised that could offer a guarantee of substance and was pre-funded at a level that was entirely in accordance with international and EEA norms.

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[48] See *Paul and Others*, cited above. Particular reference is made to paragraphs 25 to 32 of that judgment.

[49] Reference is made to Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 51.

[50] Case E-9/97 *Sveinbjörnsdottir* v *Iceland* [1998] EFTA Ct. Rep. 95, paragraph 66.

[51] Reference is made to *Paul and Others*, cited above, paragraph 50.

[52] Reference is made to Case 29/69 *Stauder* v *City of Ulm* [1969] ECR 419, paragraph 4.

175. Ultimately, Iceland concedes, the TIF was unable to cope with the demands placed upon it, but no scheme could have done so. In addition, it was not required to do so, since the EU legislature placed a much more limited obligation upon the State. An obligation of result, as contended by ESA and the Commission, would require the clearest possible language, but the Directive is silent on this matter.

176. Iceland adds in this regard that it does not claim that the Directive provides for an exception in the case of a systemic collapse of the banking system. However, in Iceland's view, the State's obligation of result is limited to ensuring the proper establishment, recognition and supervision of a deposit-guarantee scheme.

177. In Iceland's view, ESA confuses the obligation of result involved in the full and proper transposition and implementation of a Directive's provisions with an obligation to guarantee the results which those provisions are intended to produce.

178. It is not in dispute, Iceland submits, that the obligation of result is a well-known and well-used technique in EU harmonisation measures. What is crucial is the nature and extent of the obligations of result placed on the State itself, and not the obligations of institutions established under such a directive.

179. The fact that ESA relies on the ECJ's judgment in Case C-134/11 *Blödel-Pawlik* in this respect, Iceland continues, demonstrates its confusion in relation to these two very different aspects.[53] In that case, the obligation of result that was imposed on the State by Directive 90/314 was to ensure that the travel organiser was liable to the consumer for proper performance of the contract. However, it did not involve an obligation upon the State itself to pay compensation if a travel organiser cannot meet its obligations.

180. Finally, Iceland argues as regards Article 10 of the Directive that this provision is limited in scope to imposing procedural obligations upon the deposit-guarantee schemes. That view is supported by the German version of the Directive which refers only to the schemes "taking precautions" in order to make such payments within the period specified in the Directive. Again, Iceland submits, the most liberal interpretation has to prevail.[54]

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[53] Reference is made to *Blödel-Pawlik*, cited above, in particular paragraph 21.

[54] Reference is made to *Stauder* v *City of Ulm*, cited above, paragraph 4.

Directive 80/987 and *Francovich*

181. Iceland submits that a comparison between the Directive and Directive 80/987[55] and the case-law on the latter demonstrate that there is no obligation on Iceland to fund the TIF in the present case, even if "all else fails".

182. Iceland notes that Directive 80/987, which has now been repealed and replaced, was a harmonisation measure adopted on the basis of Article 100 EEC[56] that served in particular to guarantee employees the payment of their outstanding claims in the event of the insolvency of their employer.[57]

183. Iceland submits that, pursuant to Article 1 of Directive 80/987, that directive applied to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency, as defined in that directive. Moreover, Directive 80/987 envisaged that the required guarantee would be provided through a guarantee institution and that Member States should ensure that institution's guarantee.[58]

184. Iceland notes that the wording of the latter imposes an explicit obligation on the Member State to "ensure that guarantee institutions guarantee", unlike the wording of Article 3 of the Directive, which requires only that Member States ensure that guarantee schemes are "introduced and officially recognised".

185. Furthermore, Iceland explains, Article 5(b) of Directive 80/987 specifically provided for the option that guarantee institutions might be funded by public authorities, although it imposed no requirement to that effect. In the present case, however, the Directive does not harmonise the rules for funding deposit-guarantee schemes. It plainly proceeds on the expectation that deposit-guarantee schemes will be funded by credit institutions.

186. Iceland also refers to the judgments of the ECJ in *Francovich and Bonifaci* v *Italy*[59] and *Robins* v *Secretary of State for Work and Pensions*.[60] In Iceland's view, the judgments demonstrate that even under the regime of Directive 80/987 a State could only be held directly liable for employees' claims if the state chose to undertake the liability of the guarantee institution itself. Thus, Iceland asserts, it is impossible to imply an obligation of result on the EEA States under a directive such as the one at issue in the present case that neither places an express obligation of guarantee upon an EEA State nor provides

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[55] Directive 80/987/EEC has been repealed and replaced by Directive 2009/94/EC.

[56] Now Article 115 TFEU.

[57] Reference is made to recital 1 in the preamble and Article 1 of Directive 80/987.

[58] Ibid., Articles 2 and 3.

[59] Reference is made to *Francovich*, cited above, paragraphs 9, 18, 25 and 26.

[60] Reference is made to *Robins*, cited above, paragraph 35.

explicitly for an option in that regard. The only express requirements under Directive 94/19 are to set up, recognise, and supervise a guarantee scheme.

187. Moreover, Iceland argues, seeking to imply an obligation on the State to fund the guarantee scheme, where no such obligation appears on the face of the Directive, is an attempt to circumvent the liability system established in *Francovich* and to undermine the clear principles repeatedly applied by the European courts.

188. In this respect, Iceland notes also that ESA does not seek to rely upon a claim of liability against the Icelandic State for failure to properly implement the Directive in accordance with the principles established in *Francovich* or *Sveinbjörnsdottir*.[61] Instead, ESA appears to seek to establish the responsibility of the EEA State as an automatic consequence of the terms of the Directive itself.

Emanation of the State

189. In Iceland's view, whether or not the TIF was an emanation of the State is of relevance neither in relation to the present case nor for the question whether there was an obligation on the State to fund the guarantee scheme after it became impossible for the TIF to make the guaranteed payments.

190. Iceland notes that the issue of an emanation of State arises where an individual seeks to demonstrate that a directive gives rise to directly effective rights against a particular entity under certain conditions. According to case-law, "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 control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals".[62]

191. Iceland contends that ESA's case is not concerned with direct effect and, in any event, the test for "emanation of the State" is not satisfied, i.e. the entity at issue is not under the control of the State.[63]

192. It appears to Iceland undisputed that, pursuant to Articles 2 and 4 of Act No 98/1999, the TIF is a private fund. Private institutions nominate four and the Minister of Commerce two of the six members of its board. Thus, the State does not have the required majority to exercise control over the board.

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[61] See *Francovich* and *Sveinbjörnsdóttir*, both cited above.

[62] *Farrell*, cited above, paragraph 40.

[63] Ibid., paragraph 41.

193. Iceland argues further that even if the SIC Report were treated as having probative value in this regard it might show at most that the Ministry of Business Affairs had an influence in the running of the TIF. However, given the facts mentioned above, it contends that ESA has failed to demonstrate that any influence of that kind amounted to State control to a degree sufficient to render the TIF an emanation of State.

State aid

194. Iceland infers from the Commission's Impact Assessment[64] that an injection of State resources into the banking system of the kind discussed in the present case would amount to State aid. The Commission makes clear that if States are required to intervene in a systemic crisis where deposit-guarantee schemes may reach their limits then the State aid rules must be observed. Therefore, in Iceland's view, such use of State resources must be subject to supervision by the Commission or ESA, to ensure that it does not distort competition.[65]

195. Consequently, Iceland concludes that the submissions that an EEA State is obliged to make payments of that kind as an automatic result of the Directive if "all else fails" is plainly incompatible with the Commission's earlier position. It observes that, according to case-law, payments made by a State as a requirement of EU legislation are not to be considered State aid.[66] Thus, if a payment obligation on Iceland were to arise from the Directive itself, such payments could not be regarded as State aid.

196. In that respect, Iceland underlines the fact that the obligation of result for which ESA contends would remove the State guarantee from the scope of State aid supervision. In the absence of an express wording that such an obligation of result arises from the Directive, Iceland cautions against drawing a conclusion of that kind. Furthermore, the true construction of the Directive reveals that there is no such obligation.

197. In this connection, Iceland stresses the fact that in its proposal for the Directive and its Impact Assessment the Commission recognised that public sector funding would be subject to State aid rules and that there would be no obligation to provide such. Currently, however, the Commission argues that there is a duty on States to ensure that compensation is paid if all else has failed. Consequently, Iceland considers the Commission to be incoherent in its assessment.

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[64] Commission Staff Working Document of 12 July 2010.

[65] Reference is made to Commission Decision in Case N 17/2009 SoFFin guarantee for Sicherungseinrichtungsgesellschaft deutscher Banken – Germany, paragraph 28.

[66] Reference is made to Case T-351/02 *Deutsche Bahn* v *Commission* [2006] ECR II-1047, paragraphs 99 to 102.

198. Moreover, Iceland continues, a further outcome of ESA's position is that large injections of State funds into the banking system would fall entirely outside the scope of State aid supervision. Yet the ability of such injections to seriously distort competition is self-evident. Bearing in mind the wide implications of State funding of that kind, Iceland doubts that the Commission's concern can be limited to the impact on competition of different levels of protection between Member States, as ESA appears to suggest. Having regard to the major impact on competition that would result, Iceland submits that had the legislature intended an exclusion of that kind, it would have expressly provided for such.

199. Iceland also denies that its case entails a risk of regulatory competition to provide the best guarantee. As the Commission's Impact Assessment has demonstrated, material differences in the level of funding for deposit-guarantee schemes already exist as a result of a lack of harmonisation in this field. Moreover, Article 3(1) of the Directive itself seeks to forestall any competition of that kind by specifically precluding the Contracting Parties from implementing the Directive by means of a State guarantee system.

200. With reference to the Commission's submissions, Iceland notes that if an automatic responsibility arises from the Directive in the present case, it must also arise in a range of other cases where directives require the EEA States to guarantee that certain market operators provide benefits to a particular group, whether consumers, workers or others. Iceland considers that such an interpretation is not desirable.

Force majeure

201. Iceland notes that the Icelandic State was under no obligation to compensate depositors in light of the failure of the deposit-guarantee scheme. However, even had there been such an obligation, which is disputed, it would have been defeated by virtue of *force majeure*.

202. In Iceland's view, it is not only when there is a total physical impossibility, for reasons beyond all control of the EEA State, that it is accepted that an EEA State is not in breach of its obligations under secondary law. Case-law shows that the doctrine is far broader and more flexible than ESA seeks to suggest.[67] In fact, case-law does not preclude the possibility that the circumstances giving rise to *force majeure* may be essentially economic, if they are sufficiently severe.[68]

203. Iceland argues further that the decisive question is essentially the same whether circumstances are financial or otherwise, namely, could the State have overcome those difficulties by adopting "appropriate measures" and without

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[67] Reference is made to the Opinion of Advocate General Jacobs in Case C-236/99 *Commission* v *Belgium*, cited above, point 17.

[68] Reference is made to Case C-42/89 *Commission* v *Belgium*, cited above, paragraph 24.

"unreasonable sacrifices"?[69] In the present case, Iceland's response is that it wholly lacked the resources to do so.

204. Iceland submits that although the circumstances of the present case are wholly exceptional, it nevertheless falls squarely within the established case-law. According to that case-law, *force majeure* contains an objective element and a subjective element.[70] The objective element requires only "abnormal and unforeseeable" events and not "physical impossibility". The subjective element is fulfilled if the abnormal and unforeseeable events could not have been avoided even if all due care had been taken. Iceland asserts that "all due care" is not equivalent to "strict liability". Instead, it requires "appropriate steps" that can be taken "without making unreasonable sacrifices".

205. Iceland argues that the worldwide financial turmoil in 2008 and the collapse of the Icelandic banking system plainly satisfy the objective element.

206. As to the subjective element, Iceland contends that ESA has not sought to argue that the Icelandic State should or could have prevented the Icelandic bank crash. Moreover, in its view, nor could any deposit-guarantee scheme have been devised that was capable of withstanding such a collapse, at least without making unreasonable sacrifices in terms of the banks' ability to conduct their business. ESA's argument that by the conclusion of the Icesave Agreements the Icelandic Government could have had access to the funds necessary to fulfil its obligations under the Directive within the time-limits provided therein entirely mischaracterises the nature of the Icesave Agreements. They were not agreements to provide funds to Iceland at all. They were simply agreements governing repayment to those states for the compensation that they were providing. They provided for repayment to take place long after the period of one year allowed by the Directive.

207. In Iceland's view, there were no appropriate steps that the Icelandic Government could have taken to pay the depositors without making unreasonable sacrifices. Iceland did not have the financial resources to pay the depositors nor could it have raised that money on the capital markets.

208. Iceland did not have ISK 659 billion to pay to depositors. That represented approximately one and a half years' tax revenue of the Icelandic State. Nor could it have raised that money on the capital markets.

209. Iceland submits that, at the end of October 2009, the gross size of the foreign reserves of the Central Bank amounted to ISK 451 billion. When taking into account the Central Bank's external liabilities, the net foreign assets

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[69] Reference is made to Case C-314/06 *Société Pipeline Méditerranée et Rhône (SPMR)* v *Administration des douanes et droits indirects and Direction nationale du renseignement et des enquêtes douanières (DNRED)* [2007] ECR I-12273, paragraph 24.

[70] Ibid., paragraph 23, and the case law cited.

amounted to ISK 169 billion. In addition, the central government's foreign debt amounted to ISK 356 billion at the end of 2009.

210. Moreover, Iceland notes that it is now anticipated that 100% of all outstanding claims will paid out of the assets of Landsbanki itself. However, those are not the assets of the Icelandic State, or even under its control, but are subject to an independent winding-up process governed by Directive 2001/24/EC.

211. According to Iceland, therefore, it cannot be seriously suggested that it should have appropriated those assets. They are to be paid out to creditors (including the United Kingdom and Netherlands Governments) as soon as the winding-up board judges the time right to ensure a 100% return. No other option is realistically open.

212. Iceland also denies that a crash on the scale that occurred, within a very short period of days, was "foreseeable", or indeed foreseen.

213. Iceland contends that Article 10(2) of the Directive is not relevant to the present case as it is a procedural rule imposed upon deposit-guarantee schemes, and not the EEA States. Thus, Iceland argues that the limitation in Article 10(2) addresses only the circumstances in which the deposit-guarantee scheme itself may approach the national authorities to seek an extension of time. It does not address the obligation of the national authorities themselves.

214. Finally, Iceland submits that the applicability of the doctrine of *force majeure* is not precluded in the present case simply because Article 10(2) of the Directive provides for what may happen in "wholly exceptional circumstances".

215. Iceland observes that Article 10(2) of the Directive permits a deposit-guarantee scheme "in wholly exceptional circumstances" to apply to the competent authorities for an extension of time of up to nine months in which to pay verified claims. However, it notes that that provision is addressed to deposit-guarantee schemes, not the Contracting Parties.

216. If, as contended by ESA and the Commission, the Directive were to place an obligation on the State to provide compensation "if all else fails", this obligation is not included in the express provisions of the Directive. In fact, those provisions do not address this situation at all. Thus, Iceland asserts, Article 10(2) cannot be invoked to preclude a State from relying upon *force majeure* if it is unable to meet such an obligation.

Non-discrimination

217. Iceland denies that it breached the principle of non-discrimination by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and the United Kingdom. In its view, such a claim is entirely misconceived.

218. Iceland contends that the alleged difference in treatment falls outside the scope of the Directive. In the circumstances of a bank failure, it is legitimate for Member States to intervene to rescue banks, or branches which are necessary to the functioning of the banking system, but there is no obligation to do so.

219. Iceland argues that there has been no discrimination at all in the manner in which the deposit-guarantee fund itself has been operated. The two groups that are compared by ESA, i.e. depositors with domestic branches and depositors with foreign branches of Landsbanki, have been treated equally. None has received any payments under the guarantee scheme.

220. Iceland notes further that ESA is arguing for different treatment by claiming that it was discriminatory not to provide the minimum compensation afforded by the Directive to the overseas depositors because the domestic depositors were “covered” by virtue of a transfer of their deposits to the new banks. That is not to argue for equal treatment. As a basis for a discrimination claim, it is, in Iceland’s view, incoherent.

221. Furthermore, Iceland argues, what is regarded as discrimination in the present case are in reality the different consequences that have flowed as a result of the fact that the domestic branches of Landsbanki were essential to the rescue of the Icelandic financial system and have formed part of the restructuring of the domestic banks. However, as, indeed, ESA has never questioned, it was not possible to extend this rescue to the overseas branches.

222. Iceland contends that the restructuring of the Icelandic banks had no link to the payment of compensation by the TIF for the purposes of the Directive. Although the Directive is a consumer protection measure, it does not address in any way the regulation of bank insolvency and restructuring – they are entirely beyond its scope. Moreover, it notes that the deposits held with domestic branches also never became unavailable within the meaning of the Directive.

223. Iceland concedes that the principle of equality entails that a deposit-guarantee scheme must be set up, and must function, in a non-discriminatory manner. However, such a form of unequal treatment has not been pleaded in the present case. On the other hand, Iceland asserts, other forms of different treatment, arising from measures which are outside the scope of the Directive, are not precluded.

224. Furthermore, Iceland submits that if ESA’s first plea is accepted, i.e. that the Directive itself requires the State to make payments, which Iceland denies, the question of discrimination never arises.

225. In any event, Iceland adds, it is unclear whether the transfer of domestic deposits to the new banks led to a better position of the depositors holding such accounts. These account holders were made subject to strict capital controls, and were unable to convert their (severely depreciating) Icelandic krónur into any

other currency. By contrast, the priority claimants in the Landsbanki winding up now stand to be fully reimbursed in a fully convertible currency.

226. Thus, Iceland concludes, ESA has failed to establish a legal basis under the Directive for its claim of discrimination. It has not been demonstrated that the difference in treatment it alleges falls within the scope of the Directive.

227. As regards a breach of Article 4 EEA alone, the second legal basis identified by Iceland in relation to the non-discrimination plea, Iceland submits that such a claim has not been made out. It has been simply asserted that Article 4 EEA is applicable without seeking to demonstrate that the legal conditions for its application are made out.

228. Moreover, Iceland argues, the plea is plainly unsustainable since it would create an obligation upon an EEA State to ensure minimum compensation under the Directive in circumstances in which the partially harmonised regime created by the Directive does not require it.

229. In any event, Iceland continues, any difference in treatment between the two groups was objectively justified.[71] It asserts that although pure economic aims cannot constitute sufficient justification, clear public interest objectives may constitute a legitimate aim even where that public interest has economic ends.[72]

230. As to the nature of the objective pursued in the present case, Iceland notes that, in a dismissal of a complaint about the Emergency Act, ESA held "… the objective of the emergency measures not [to be] merely economic but rather to safeguard the functioning of the domestic banking system and the real overall economy in Iceland". It continued: "The functioning of a country's banking system is of systemic significance for the proper functioning of the State's real overall economy and that of society… Therefore, the objective of the emergency measures is an overriding requirement in the general interest capable of justifying restrictions to the free movement of capital, provided that the measures taken can be regarded as proportionate to the attainment of the objective pursued."[73]

231. Iceland concurs with that assessment. Although the issue that arose in those complaints was not precisely the same as that at issue in the present proceedings, the same objective was at stake. It was plainly legitimate, and the measures adopted were suitable to the attainment thereof.

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[71] Reference is made to Case E-5/10 *Kottke* v *Präsidial Anstalt und Sweetyle Stiftung* [2009/2010] EFTA Ct. Rep. 320, paragraph 40.

[72] Reference is made to ESA Decision No 501/10/COL of 15 December 2010 to close seven cases against Iceland commenced following the receipt of complaints against the State in the field of capital movements and financial services; to the Opinion of Advocate General Tesauro in Case C-158/96 *Raymond Kohll* v *Union des caisses de maladie* [1998] ECR I-1931, point 53, and Case E-1/09 *EFTA Surveillance Authority* v *Liechtenstein* [2009/2010] EFTA Ct. Rep. 46, paragraph 36.

[73] Reference is made to ESA's Decision No 501/10/COL of 15 December 2010, paragraph 89.

232. Iceland adds that the rescue was carried out through a package of measures including the creation of new banks and the granting of priority in the bankruptcy to depositors with claims upon the TIF. The practical effect of this rescue was to save the domestic branches of the failed banks, but not the Icesave branches in the UK and the Netherlands.

233. The reason for the difference in treatment, Iceland adds, was the fact that the failure of the domestic branches posed a systemic risk to the Icelandic economy through the collapse of the banking system, whereas a collapse of the banks' overseas branches did not pose the same risk.

234. In Iceland's view, what ESA is attacking is its wide margin of appreciation to determine what was necessary to safeguard its banking system.[74]

235. On the question of proportionality, Iceland argues that the assessment reached by ESA in Decision No 501/10/COL and Decision No 493/10/COL approved the proportionality of the emergency measures[75] and, in its view, essentially the same considerations apply in the present case.

236. In this respect, Iceland submits further that the Icelandic Government carried out a wholly exceptional form of intervention designed to secure the functioning of the Icelandic banking system. The stakes for Icelandic society in the rescue were enormously high. The Icelandic Government had very few resources. It was in no position to pay out the sums guaranteed by the TIF. It was simply not possible to move the overseas accounts to the new banks. Any attempt to have done so would have undermined the rescue of the domestic branches.

237. According to Iceland, in assessing the proportionality of this approach, it is also necessary to have regard to the fact that the Emergency Act granted the depositors and the United Kingdom and Netherlands Governments priority claims. The practical effect is that they will recover far more than the sums guaranteed by the Directive, albeit rather later than the Directive requires.

238. As regards ESA's argument that the Icelandic Government did not go far enough in its actions, as it did not extend additional measures to the overseas branches, Iceland submits that such exceptional measures of State intervention have the potential to distort competition, and must conform to EEA law, and in particular, the State aid rules.[76] As a result, such measures must not exceed what

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[74] Reference is made to Case E-3/11 *Sigmarsson* v *Central Bank of Iceland*, judgment of 14 December 2011, not yet reported, paragraph 50.

[75] Reference is made to ESA Decision No 501/10/COL of 15 December 2010, paragraphs 94 to 97; Decision No 493/10/COL of 15 December 2010 opening the formal investigation procedure into State aid granted in the restoration of certain operations of (old) Landsbanki Islands hf. and the establishment and capitalisation of New Landsbanki Islands (NBI hf.), paragraph 3.1.2.

[76] Reference is made in that regard to ESA's guidance on "The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis", paragraph 15.

is strictly necessary to achieve the State's legitimate purpose. Consequently, it is simply mistaken to suggest that Iceland needs to justify its failure to go further and extend the scope of its intervention.

239. As regards the Commission's submissions that the justification fails because the difference in treatment was not "necessary", Iceland contends that ESA has not sought to advance such an argument. The Commission proposed that Iceland should have imposed an obligation upon the "new and financially sound banks". Iceland observes that such a suggestion is inconsistent with recital 23 in the preamble to the Directive, which states that the cost of financial deposit-guarantee schemes "must not jeopardise the stability of the banking system of the Member State concerned".

240. Consequently, viewed in the context of the factual situation, Iceland concludes that its approach satisfied the requirements of proportionality.

The Kingdom of Norway

241. Norway emphasises that a general and automatic State responsibility for the compensation of depositors as a last resort would impose an extensive financial burden on EEA States, require substantial contingency planning, and would potentially have a major impact on the national budget and the taxpayers. Thus, in Norway's view, such an onerous obligation cannot be imposed on EEA States without a clear and precise wording in the Directive.

242. Norway agrees with the submission that Article 7(1) of the Directive expressly places the obligation of compensation upon the deposit-guarantee schemes. However, in its view, this is an obligation on the deposit-guarantee schemes and not the EEA States.

243. Norway argues that an obligation on States of that kind does not follow from the preamble to the Directive or the Directive's preparatory works. On the contrary, the wording of recital 24 in the preamble to the Directive appears to exclude automatic state responsibility. Furthermore, Norway makes reference to the Commission's comments in its 2010 Staff Working Document (Impact Assessment), in which it stressed that there is no legal obligation on the EEA States to intervene if a systemic crisis results in the deposit-guarantee schemes' funding proving insufficient.[77]

The Netherlands

244. The Netherlands contends that Directive 94/19 is applicable notwithstanding the "system-wide banking failure". Even with the experience of the financial crisis, the EU legislative bodies have left the Directive largely unchanged, and have even strengthened its rules.

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[77] Reference is made to Commission Staff Working Document of 12 July 2010, p. 8.

245. The Netherlands argues further that the obligation to comply with the result sought by the Directive follows from general obligations under EEA law and the obligation of the State in relation to a directive.

246. The Netherlands regards the case as focusing on Iceland's obligations as an EEA/EFTA State. In its view, the present proceedings seek to determine whether Iceland is in breach of the relevant obligations under EEA law.

247. The Netherlands considers that the defence of *force majeure* is not available to Iceland because the Directive itself provides for an express derogation in Article 10(2) and a Member State may only rely on the derogations provided by the Directive itself.[78] The Netherlands emphasises that the wording of Article 10(2) provides only for an extension of the deadline for payment of compensation in special and exceptional circumstances, but does not justify a complete failure to ensure payment under the deposit-guarantee scheme.

248. The Netherlands further considers that, even if the Directive were to allow for *force majeure* as a defence for a complete failure, Iceland cannot successfully rely on *force majeure* as it failed to inform ESA of its difficulties and did not suggest appropriate solutions as is required by the case-law of the ECJ.[79]

249. Furthermore, the Netherlands argues that Iceland's defence cannot succeed as financial difficulties are not accepted as justification under EEA law.[80] The Directive provides a set of rules specifically intended for financial difficulties encountered by banks and seeks to ensure compensation for depositors. To allow financial difficulties as a defence would unjustly weaken the effectiveness of the Directive.

250. In the view of the Netherlands, Iceland has also failed to prove a *force majeure* defence on the merits. In order to prove the existence of *force majeure*, "specific evidence" concerning "wholly exceptional" circumstances,[81] which are beyond the control of the State, should be provided.[82] The Netherlands considers that Iceland's statements fail to meet this requirement as the evidence provided is largely general in nature and based on assertion rather than proof.

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[78] Reference is made to Case C-56/90 *Commission* v *United Kingdom* [1993] ECR I-4109, paragraphs 40 to 46, Case C-92/96 *Commission* v *Spain* [1998] ECR I-505, paragraphs 27 to 28, and Case C-307/98 *Commission* v *Belgium* [2000] ECR I-3933, paragraphs 47 to 54.

[79] Reference is made to Case C-217/88 *Commission* v *Germany* [1990] ECR I-2879, paragraph 33, and Case C-99/02 *Commission* v *Italy* [2004] ECR I-3353, paragraphs 16 to 18.

[80] Reference is made to Case C-42/89 *Commission* v *Belgium*, cited above, paragraph 24.

[81] Reference is made to the Opinion of Advocate General Fennelly in Case C-52/95 *Commission* v *France* [1995] ECR I-4443, point 32.

[82] Reference is made to *Commission* v *Spain*, cited above, paragraph 32.

251. The Netherlands submits further that Iceland has not proven that there was an "absolute impossibility" to establish any form of deposit-guarantee scheme that would have been able to ensure the result sought by the Directive.

252. The Netherlands and the United Kingdom were ready to provide financial assistance to cover protected deposits, as evidenced, for example, by the Memorandum of Understanding between the Netherlands and Iceland and the subsequent loan agreements. Therefore, the Netherlands is not convinced by Iceland's statement that it simply lacked the resources to pay the sums in question by 23 October 2009.

253. In this respect, the Netherlands contends that it is irrelevant that Iceland (or the TIF) itself would not have received funds under the Agreements. In the view of the Netherlands, a pre-financed pay-out on behalf of the responsible party is also a method of providing funds.

The Principality of Liechtenstein

254. The Principality of Liechtenstein wishes to bring to the attention of the Court certain elements that, in its view, are essential for the assessment of the obligations arising from Directive 94/19.

255. The Principality of Liechtenstein strongly supports the dual objective of Directive 94/19, as formulated in the proposal for a Council Directive on deposit-guarantee schemes, namely "to protect the depositors of each credit institution and to ensure the stability of the banking system as a whole".[83]

256. The Principality of Liechtenstein emphasises, however, that this dual objective clearly has to be seen within the limitations inherent to the Directive accepted at that time and to deposit-guarantee schemes, which are neither intended nor able to deal with systemic banking crises. Furthermore, it notes that recital 24 in the preamble to the Directive makes clear that no general and automatic state liability can be derived from the Directive.

257. The Principality of Liechtenstein interprets the wording used in the proposal for a Council Directive on deposit-guarantee schemes[84] to indicate that Directive 94/19 was intended to deal with the failure of individual banks, not with the collapse of an entire banking system.

258. Thus, the Principality of Liechtenstein asserts that the EU legislature failed at the time to establish an adequate legal framework to ensure sound and effective deposit-guarantee schemes.

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[83] Reference is made to the proposal for a Council directive on deposit-guarantee schemes COM(92) 188 final, p. 2.

[84] Ibid.

259. The Principality of Liechtenstein contends that the Commission confirmed this view in its 2010 Staff Working Document "Impact Assessment accompanying a proposal for a recast directive on Deposit Guarantee Schemes".[85]

260. The Principality of Liechtenstein also emphasises that, despite the fact that deposit-guarantee schemes in some Member States were not able to cover the costs of the failure of a large bank, let alone to deal with a comprehensive system crisis, the Commission confirmed that every Member State had implemented the Directive. It observes that the Commission did not take any action against Member States for failure to comply with their obligations resulting from the Directive.

261. In the view of the Principality of Liechtenstein, this illustrates that, at the time, a general and automatic state liability covering the costs of the failure of the whole banking system was not considered to arise from the Directive.

262. The Principality of Liechtenstein observes further that even under the new financing requirements proposed by the Commission in July 2010 it is envisaged that each deposit-guarantee scheme should have enough funds in place to deal only with a medium size bank failure, and that these levels of funding will have to be achieved by 2020 only.[86]

263. The Principality of Liechtenstein finally concludes by observing that any other interpretation would go against the clear intention of the EU legislature.

The United Kingdom

264. The United Kingdom submits that EEA legislation, case-law and highly recognised legal publications have established and recognised a continuing obligation on EEA States to ensure the effective application in practice of the rights and obligations established by the transposed Directive.[87]

265. The United Kingdom interprets the Directive as imposing an obligation on EEA States to ensure that, in specific cases, the relevant deposit-guarantee scheme should pay, within the applicable time-limit, a sum of up to EUR 20 000 to each eligible depositor in the event of their deposit becoming unavailable within the meaning of the Directive.

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[85] Reference is made to Commission Staff Working Document of 12 July 2010, p. 8.

[86] Reference is made to the Commission proposal of July 2010 for a recast directive on deposit-guarantee schemes, COM(2010) 368 final.

[87] Reference is made to Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraphs 19 to 23, and Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraphs 52 and 58 to 60. Reference is also made to Prechal, *Directives in EC Law* (Oxford, 2nd ed.), pp. 51-54 and the cases cited therein.

266. The United Kingdom further claims that arguments relating to *force majeure* should be dismissed, as an EEA State may only rely on the derogations provided in the Directive itself. An EEA State is not entitled to rely on particular circumstances to justify a failure to fulfil its obligations.[88]

267. In the present case, the United Kingdom acknowledges that Article 10(2) of the Directive provides for derogation "in wholly exceptional circumstances and in special cases". It follows, therefore, that, as a matter of law, the defence of *force majeure* is not available to Iceland in this case.

268. The United Kingdom contends further that, were *force majeure* available as a defence in relation to this Directive, where a Member State wishes to rely on such a defence, it must, in accordance with the obligation of cooperation, inform ESA of its difficulties and suggest appropriate solutions.[89] The United Kingdom notes that Iceland has failed to take any such steps.

269. The United Kingdom also underlines the fact that Iceland's purported defence is based on financial difficulties, circumstances that are not available as a defence to infraction proceedings.[90]

270. The United Kingdom argues that Iceland has also failed to prove its defence on the merits. Such a defence could only be made out "in wholly exceptional" circumstances.[91] In order to prove the existence of absolute impossibility, Iceland would be required to show that it would have been absolutely impossible for Iceland to establish any form of deposit-guarantee scheme under the Directive.

271. The United Kingdom further submits that the defence of absolute impossibility must be established by reference to "specific evidence".[92] The "evidence" offered by Iceland in support of its case is, in the view of the United Kingdom, largely general in nature and based on assertion rather than evidence.

272. The United Kingdom also underlines the fact that specific evidence in this case wholly precludes reliance on a defence of absolute impossibility as the United Kingdom was prepared to lend the TIF sufficient funds to fulfil its obligations under the Directive towards depositors in the Landsbanki branch in

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[88] Reference is made to *Commission* v *United Kingdom*, paragraphs 40 to 46, *Commission* v *Spain*, paragraphs 27 to 28, and Case C-307/98 *Commission* v *Belgium*, paragraphs 47 to 54, all cited above.

[89] Case C-217/88 *Commission* v *Germany*, paragraph 33, and Case C-99/02 *Commission* v *Italy*, paragraphs 16 to 18, both cited above.

[90] Reference is made to Case C-42/89 *Commission* v *Belgium*, cited above, paragraph 24.

[91] Reference is made to the Opinion of Advocate General Fennelly in *Commission* v *France*, cited above, point 32.

[92] Reference is made to *Commission* v *Spain*, cited above, paragraph 32.

the United Kingdom. This is clear from the terms of the Loan Agreement dated 5 June 2009 between the TIF, Iceland and the United Kingdom Treasury.[93]

273. Furthermore, the United Kingdom argues that Iceland has failed to prove the defence of "absolute impossibility" as Iceland only alleged that it was not possible to pay depositors "without making unreasonable sacrifices".

Carl Baudenbacher
Judge-Rapporteur

[93] These conditions were met by means of an Acceptance and Amendment Agreement dated 19 October 2009 between TIF, Iceland and the United Kingdom Treasury.