REPORT FOR THE HEARING

in Case E-18/11

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Héraðsdómur Reykjavíkur (Reykjavík District Court), in the case between

Irish Bank Resolution Corporation Ltd

and

Kaupthing Bank hf.

concerning the interpretation of Article 14 of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

I Introduction

1. By a letter dated 22 December 2011, registered at the EFTA Court on 22 December 2011, the Héraðsdómur Reykjavíkur (Reykjavík District Court) made a request for an Advisory Opinion in a case pending before it between the Irish Bank Resolution Corporation Ltd (hereinafter "IBRC" or "Plaintiff") and Kaupthing Bank hf. (hereinafter "Kaupthing" or "Defendant").

2. The winding-up committee of Kaupthing issued an invitation to its creditors to lodge claims regarding the winding up of the Defendant which was first published in the Icelandic Legal Gazette on 30 June 2009. All those claiming debts of any sort, or other rights against Kaupthing, or assets controlled by it, were urged to submit their claims in writing to the winding-up committee within six months. The latter rejected the claims of IBRC, which was not individually informed by the winding-up committee, because their claims were submitted on 14 April 2010 although the period in which to submit claims set by the winding-up committee had already expired on 30 December 2009.

3. This case raises the question, first, whether the winding-up committee was obliged, as a matter of Icelandic law, including rules which are derived from the EEA Agreement, to inform the Plaintiff, as a known creditor residing in a EEA State, of the Defendant's winding up, when the time limit for the lodging of claims was to expire and the consequences of not lodging within the time limit. In addition, the question is further raised whether, given that the Plaintiff was not individually notified of the winding up by the winding-up committee, it was obliged to accept its claim as valid in the Defendant's winding-up proceedings even though it was received subsequent to the expiry of the time limit.

4. The dispute arose because of an apparent inconsistency between the Icelandic text of Article 14 of the Directive 2001/24/EC (hereinafter "the Directive") and other versions of the provision in languages referred to in Article 129 of the EEA Agreement (hereinafter "EEA").

II Legal background

EEA law

5. Article 2(a) EEA reads as follows:

> *For the purposes of this Agreement:*
>
> *(a) the term "Agreement" means the main Agreement, its Protocols and Annexes as well as the acts referred to therein;*

6. Article 119 EEA reads as follows:

> *The Annexes and the acts referred to therein as adapted for the purposes of this Agreement as well as the Protocols shall form an integral part of this Agreement.*

7. Article 129(1) EEA reads as follows:

> *1. This Agreement is drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Icelandic, Italian, Norwegian, Portuguese, Spanish and Swedish languages, each of these texts being equally authentic.*
>
> *Pursuant to the enlargements of the European Economic Area the versions of this Agreement in the Bulgarian, Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Romanian, Slovak and Slovenian languages shall be equally authentic.*
>
> *The texts of the acts referred to in the Annexes are equally authentic in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages as published in the Official Journal of the European Union and shall for the authentication thereof be drawn up in the Icelandic and*

Norwegian languages and published in the EEA Supplement to the Official Journal of the European Union.

Directive 2001/24/EC[1]

8. The English language version of recital 20 reads as follows:

Provision of information to known creditors on an individual basis is as essential as publication to enable them, where necessary, to lodge their claims or submit observations relating to their claims within the prescribed time limits. This should take place without discrimination against creditors domiciled in a Member State other than the home Member State, based on their place of residence or the nature of their claims. Creditors must be kept regularly informed in an appropriate manner throughout winding-up proceedings.

9. The English language version of Article 7 of the Directive reads as follows:

Duty to inform known creditors and right to lodge claims

1. Where the legislation of the home Member State requires lodgement of a claim with a view to its recognition or provides for compulsory notification of the measure to creditors who have their domiciles, normal places of residence or head offices in that State, the administrative or judicial authorities of the home Member State or the administrator shall also inform known creditors who have their domiciles, normal places of residence or head offices in other Member States, in accordance with the procedures laid down in Articles 14 and 17(1).

2. Where the legislation of the home Member State provides for the right of creditors who have their domiciles, normal places of residence or head offices in that State to lodge claims or to submit observations concerning their claims, creditors who have their domiciles, normal places of residence or head offices in other Member States shall also have that right in accordance with the procedures laid down in Article 16 and Article 17(2).

10. The English language version of Article 13 of the Directive reads as follows:

Publication

The liquidators or any administrative or judicial authority shall announce the decision to open winding-up proceedings through publication of an extract from the winding-up decision in the Official Journal of the European Communities and at least two national newspapers in each of the host Member States.

---

[1] of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ 2001 L 125, p. 15.

11. The English language version of Article 14 of the Directive reads as follows:

Provision of information to known creditors

1. When winding-up proceedings are opened, the administrative or judicial authority of the home Member State or the liquidator shall without delay individually inform known creditors who have their domiciles, normal places of residence or head offices in other Member States, except in cases where the legislation of the home State does not require lodgement of the claim with a view to its recognition.

2. That information, provided by the dispatch of a notice, shall in particular deal with time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims or observations relating to claims and the other measures laid down. Such a notice shall also indicate whether creditors whose claims are preferential or secured in re need lodge their claims.

12. Directive 2001/24/EC was incorporated into Annex IX to the EEA Agreement at point 16c.[2] Directive 2001/24/EC was published in the Icelandic language in the EEA Supplement to the Official Journal of the European Communities.[3]

13. The Icelandic language version of recital 20 reads as follows:

Upplýsingamiðlun til þekktra lánardrottna, hvers þeirra um sig, er jafnmikilvæg og birting til að gera þeim kleift, þegar það á við, að lýsa kröfum eða gera athugasemdir varðandi kröfur sínar innan tilskilinna tímamarka. Þetta ætti að fara fram án mismununar gagnvart lánardrottnum með lögheimili í aðildarríki öðru en heimaðildarríkinu, eftir því hvar þeir hafa búsetu eða hvers eðlis kröfur þeirra eru. Lánar-drottnum skulu reglulega, og á viðeigandi hátt, gefnar upplýsingar á meðan á slitameðferð stendur.

14. The Icelandic language version of Article 7 of the Directive reads as follows:

Skyldan til að veita þekktum lánardrottnum upplýsingar og rétturinn til að lýsa kröfum

1. Þegar krafist er samkvæmt löggjöf heimaaðildarríkis að kröfum sé lýst eigi að taka þær gildar eða kveðið er á um að lögboðið sé að tilkynna lánardrottnum, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu sína í því ríki, um ráðstöfunina skulu stjórnvöld eða dómsmálayfirvöld heimaaðildar-ríkisins eða stjórnandi einnig tilkynna það þekktum lánardrottnum, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu sína í öðrum aðildarríkjum, í samræmi við málsmeðferðina sem mælt er fyrir um í 14. gr. og 1. mgr. 17. gr.

2. Þegar löggjöf heimaaðildarríkis kveður á um réttindi lánardrottna, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu sína í því ríki, til að lýsa kröfum sínum eða leggja fram athugasemdir varðandi þær skulu lánardrottnar, sem hafa lögheimili, fasta

---

[2] Inserted by Decision of the EEA Joint Committee No 167/2002 (OJ 2003 L 38, p. 28, and EEA Supplement No 9, 13.2.2003, p. 20). Entered into force on 1 August 2003.

[3] EEA Supplement No 29, 10.6.2004, p. 198.

búsetu eða aðalskrifstofu sína í öðrum aðildarríkjum, einnig hafa þann rétt í samræmi við málsmeðferðina sem mælt er fyrir um í 16. gr. og 2. mgr. 17. gr.

15. The Icelandic language version of Article 13 of the Directive reads as follows:

Birting

Skiptastjórar eða stjórnvöld eða dómsmálayfirvöld skulu tilkynna um þá ákvörðun að hefja slitameðferð með birtingu útdráttar úr slitaákvörðuninni í Stjórnartíðindum Evrópu-bandalaganna og í a.m.k. tveimur innlendum dagblöðum í hverju gistiaðildarríki.

16. The Icelandic language version of Article 14 of the Directive reads as follows:

Tilhögun upplýsingamiðlunar til þekktra lánardrottna[4]

1. Þegar slitameðferð hefst skulu stjórnvöld eða dómsmálayfirvöld heimaðildarríkisins eða skiptastjórinn upplýsa án tafar alla lánardrottna, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu í öðrum aðildarríkjum, um það nema í tilvikum þegar í löggjöf heimaaðildarríkis þess er ekki krafist að kröfunni sé lýst til að hún fáist viðurkennd.[5]

2. Þessar upplýsingar skulu gefnar í formi auglýsingar þar sem fram koma tímamörk og viðurlög ef þau eru ekki virt, hvaða aðili hefur vald til að taka við kröfum sem lýst er eða athugasemdum sem eru lagðar fram varðandi kröfur og aðrar ráðstafanir sem mælt er fyrir um. Í auglýsingunni skal einnig koma fram hvort þeir sem eiga forgangskröfur eða kröfur sem eru tryggðar samkvæmt hlutarétti þurfi að lýsa þeim.[6]

National law

17. According to Article 3 of Act No 2/1993 on the European Economic Area, acts and rules shall be interpreted, to the extent appropriate, in accordance with the EEA Agreement and the rules which are derived from it.

18. Directive 2001/24/EC has been implemented in Icelandic law by Act No 161/2002 on Financial Undertakings. The second paragraph of Article 102 of that Act reads:

Once a Winding-up Committee has been appointed for a financial undertaking, the Committee must without delay issue and have published in the Legal Gazette an

---

[4] Translation taken from the written observations submitted by the Plaintiff: "Arrangements for the disclosure of information to known creditors".

[5] Translation taken from the written observations submitted by the Plaintiff and Defendant: "When winding-up proceedings are opened, the administrative or judicial authorities of the home Member State or the liquidator shall without delay inform all creditors, which have their domicile, permanent residence or head offices in other Member States, thereof except in cases where the legislation of the home Member State does not require the lodgement of the claim with a view to its recognition".

[6] Translation taken from the written observations submitted by the Plaintiff: "This information shall be provided in the form of an advertisement, which includes time limits and the penalty for non-observance of the time limits, the party empowered to take delivery of lodged claims or observations submitted regarding claims and other stipulated measures. The advertisement shall also indicate whether holders of preferential claims or claims secured under in re need to lodge such claims."

invitation to lodge claims in connection with the winding-up. The same rules shall apply concerning the substance of the invitation to lodge claims, the time limit for lodging claims and notifications or advertisements for foreign creditors as apply in insolvency proceedings.

19. Those rules referred to are found, for instance, in the first paragraph of Article 86 of Act No 21/1991 on Bankruptcy *et al.* ("Bankruptcy Act") which reads:

In addition to issuing an invitation to lodge claims, as provided for in Article 85, a liquidator may seek knowledge especially as to whether any party who may have a claim against the estate is domiciled abroad. If evidence appears of such, the liquidator may inform the party concerned as soon as possible of the insolvency proceedings, when the time limit for lodging claims expires and what consequences it can have if a claim is not lodged within the time limit.

20. According to the first paragraph of Article 102 of Act No 161/2002, as regards claims against the undertaking, on the winding up of a financial undertaking essentially the same rules apply as in the case of insolvency proceedings. Therefore, Article 118 of Act No 21/1991 applies to such claims, including point 2 of that Article. This provides for an exception to the cancellation of a claim against an insolvent estate which has been lodged after the expiration of the time limit for lodging claims "if the creditor resides abroad and neither knew or should have known of the insolvency winding-up, provided its claim is lodged without undue delay and before a meeting of creditors is convened to consider a proposal for distributions from the estate".

21. Article 104 of Act No 161/2002 sets out special rules for the winding up of a credit institution with a head office in Iceland and branches in another EEA State. When that provision was first inserted into the Act, by Article 11 of Act No 130/2004, its fourth paragraph stated:

If a known creditor of a credit institution is resident in another state of the European Economic Area, the liquidator shall, without delay, notify the creditor of the commencement of the winding up. The notification shall state the time limit for lodging claims, where claims shall be directed and the consequences of improperly lodging claims, as provided for in rules set by the Minister.

22. On the adoption of Act No 108/2006, the first sentence of the provision was amended, replacing the words "in another state of the European Economic Area" with the words "in another Member State".

23. On the basis of that provision, the Icelandic Minister of Commerce subsequently issued a Regulation on the notification and publication of decisions on reorganisation and winding up of credit institutions. This is Icelandic Regulation No 872 of 5 October 2006. In excerpt, Article 4 of the Regulation states:

If a known creditor of a credit institution is resident in another Member State of the European Economic Area ... the liquidator shall notify the creditor of the commencement of the winding up. The notification shall be in the form of an advertisement, providing information on the time limit for lodging claims, where the claims shall be directed and penalties for improperly lodged claims. The advertisement ... shall be published in Icelandic. The heading of the advertisement shall be "Invitation to lodge claims in insolvency proceedings, time limit for lodging claims", in all languages of Member States of the European Economic Area.

III Facts and procedure

24. By a letter dated 22 December 2011, registered at the EFTA Court on 22 December 2011, Reykjavík District Court made a request for an Advisory Opinion in a case pending before it between the Irish Bank Resolution Corporation Ltd and Kaupthing Bank hf.

25. On 9 October 2008, the Icelandic Financial Supervisory Authority took over the power of the shareholders' meeting of Kaupthing, dismissed its board of directors and appointed a resolution committee which immediately assumed control of the bank.

26. Anglo Irish Bank Corporation plc held two Kaupthing bonds. It was nationalised by the Irish State on 21 January 2009. Anglo Irish Bank Corporation Limited was renamed Irish Bank Resolution Corporation Limited on 14 October 2011.

27. On 25 May 2009, Reykjavík District Court approved a request from the resolution committee and appointed a winding-up committee for the estate.

28. On 30 June 2009, the Defendant issued and published an invitation for creditors to lodge claims according to the winding-up procedure in the Icelandic Legal Gazette (Lögbirtingablað). All those claiming debts of any sort, or other rights against Kaupthing, or assets controlled by it, were urged to submit their claims in writing to the Winding-Up Committee within six months of the publication of the notice. The invitation stated that if a claim were not submitted within the aforementioned time limit, it would have the same legal effect as if it were not properly submitted. Such a claim would therefore be deemed to be null and void against Kaupthing unless certain exceptions applied. At the same time several invitations were published in daily newspapers in Iceland and in the countries Kaupthing had done business, including, *inter alia*, the United Kingdom, Germany, Spain, the Netherlands, Austria and Ireland. In Ireland, the invitation to lodge claims was published in the *Irish Times* on 21 July 2009.

29. On 22 July 2009 and 18 November 2009, as the holder of two bonds, the Plaintiff received two notifications through the Clearstream securities service of the invitation to lodge claims.

30. Additionally, the invitations were published in the *Financial Times* and the Official Journal of the European Union[7] on 15 August 2009 and on Kaupthing's website.

31. The time limit within which to lodge claims expired on 30 December 2009.

32. On 14 April 2010, IBRC filed claims with the Winding-up Committee concerning two bonds, for a total amount of EUR 15 558 733. The Plaintiff demanded that it be recognised that the claims had been received within the time limit for lodging claims and be added to the list of claims in the bank's winding-up proceedings.

33. The Defendant rejected the Plaintiff's claim as out of time, on the grounds that an email communication from the Plaintiff of 29 October 2008 could not be considered a claim lodged within the meaning of the relevant national provisions.

34. Meetings took place on 27 May and 29 June 2010 at which the parties' dispute could not be resolved. Thereafter, a decision was taken to refer the dispute to Reykjavík District Court, where the case was filed by the Winding-Up Committee on 24 September 2010.

35. At the oral hearing on 7 September 2011, the Plaintiff requested the District Court to seek an advisory opinion from the EFTA Court to establish whether the provision set out in the first paragraph of Article 86 of Act No 21/1991 was in conformity with the substance of Directive 2001/24/EC. Kaupthing objected to IBRC's request. The Plaintiff contends that, according to that provision, the Defendant should have sent the Plaintiff, as a known creditor, notification with information on the winding-up proceedings. The Defendant maintains that the provision did not imply any obligation to do so, but instead constituted a recommendation to the appointed liquidator to send such an invitation to lodge claims.

36. This case raises the question, first, whether the Winding-Up Committee was obliged, as a matter of Icelandic law, including rules which are derived from the EEA Agreement, to inform the Plaintiff, as a known creditor residing in a EEA State, of the Defendant's winding up, when the time limit for the lodging of claims was to expire and the consequences of not lodging within the time limit. In addition, the question is further raised whether, given that the Plaintiff was not individually notified of the winding up by the Winding-Up Committee, it was obliged to accept its claim as valid in the Defendant's winding-up proceedings even though it was received subsequent to the expiry of the time limit.

---

[7] OJ 2009 C 192, p. 16.

37. Following oral submissions from both parties on 19 October 2011, Reykjavík District Court granted the request that an advisory opinion should be sought. Kaupthing referred Reykjavík District Court's ruling to the Supreme Court of Iceland by way of appeal on 21 November 2011, arguing that the District Court's decision should be set aside. On 16 December 2011, the Supreme Court upheld the decision to seek an advisory opinion but substantially amended the questions asked.

IV Questions referred

38. Reykjavík District Court decided to make a preliminary reference on 8 November 2011 and posed the following questions:

> 1. **Does it accord with the provision of Article 14 of Directive 2001/24/EC of 4 April 2001, on the reorganisation and winding up of credit institutions, to publish an invitation to lodge claims for known creditors which have their domicile, permanent residence or head offices in other Member States in the manner practised by the Winding-up Board of Kaupthing Bank hf. which is described in this Ruling?**
>
> 2. **If the reply to the first question is that sufficient regard was not had for the rules of Article 14 of the Directive when issuing an invitation to lodge claims, an opinion is requested as to what impact this has on the winding-up proceedings of the credit institution.**

39. Following the Supreme Court of Iceland's judgment of 16 December 2011, the Reykjavík District Court referred on 22 December 2011 the following amended questions to the Court:

> **1. In the case of a discrepancy between the text of the EEA Agreement or rules based upon it, in different languages, so that the substance of individual provisions or rules is unclear, how should their substance be construed in order to apply them in resolving disputes?**
>
> **2. Having regard to the answer to question 1, does it comply with paragraph 1 of Article 14 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions that the national legislation of a state, which is a member of the European Economic Area, vests the Winding-up Board or other competent authority or agency with competence to decide whether information should be disclosed on the aspects described in the provision, with an advertisement published abroad instead of individually notifying all known creditors?**

40. In the submitted written observations, the parties have not unanimously addressed those questions referred by the Reykjavík District Court, as amended by the Supreme Court of Iceland.

V Written observations

41. 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 Plaintiff, represented by Eggert B. Ólafsson, District Court Attorney;
- the Defendant, represented by Þröstur Ríkharðsson, District Court Attorney;
- the Icelandic Government, represented by Þóra M. Hjaltested, Director, Ministry of Economic Affairs, acting as Agent, and Áslaug Árnadóttir, District Court Attorney, acting as Counsel;
- the Estonian Government, represented by Marika Linntam, Director, European Union Litigation Division of the Legal Department, Ministry of Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority (hereinafter "ESA"), represented by Xavier Lewis, Director, and Maria Moustakali, Temporary Officer, of the Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (hereinafter "Commission"), represented by Albert Nijenhuis and Julie Samnadda, members of its Legal Service, acting as Agents.

VI Summary of the arguments submitted

The Plaintiff

The first question

42. The Plaintiff considers that Reykjavík District Court is seeking in essence to establish whether Article 14 of Directive 2001/24/EC as it appears and is published in Icelandic in the EEA Supplement of the Official Journal of the European Union (hereinafter "Official Journal") reflects the correct meaning of the provision in EEA law. The Plaintiff submits that, in the national proceedings, it demonstrated that the wording of Article 14 in Directive 2001/24/EC published in Icelandic in the EEA Supplement was not consistent with the wording of the English version of the Article published in the Official Journal. Arguing that Article 14 as it appears in Icelandic in the EEA

Supplement is at odds with the substance of the provision as provided for in EEA law, the Plaintiff asserted before the national court that Article 86 of the Icelandic Bankruptcy Act and Icelandic Regulation 872/2006 as interpreted and applied by the Defendant are incompatible with the Directive.

43. The Plaintiff submits that discrepancies in wording between different language versions of EEA acts are not uncommon. EEA case-law provides for three main methods of construction when the problem of divergence between EEA texts arises. These involve: (i) a comparison of the text in question in the various EEA languages; (ii) an analysis of the purpose and objective of the provision in question; and (iii) a consideration of the drafting language and the preparatory works. The Plaintiff contends that the first two methods of construction reveal unequivocally that the correct meaning of Article 14 of the Directive is that found in the English version of the Directive. While the third method is not available to the Plaintiff, there is no reason to assume that the result would be different.

Comparison of different language versions

44. The Plaintiff contends that the Court of Justice of the European Union (hereinafter "ECJ") has held that the wording contained in the majority of the language versions should be accepted.[8] This approach was taken by the EFTA Court in Case E-9/97 *Sveinbjörnsdóttir*, in which it stated "[I]n the case of differing authentic language versions, a preferred starting point for the interpretation will be to choose one that has the broadest basis in the various language versions".[9]

Purpose and general scheme of the rules

45. The Plaintiff submits that when there is a divergence between language versions concerning the meaning of a provision that provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part. The Plaintiff notes that in *CILFIT* the ECJ held that every provision of Community law must be placed in its context and be interpreted in the light of Community law as a whole, having regard to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.[10]

46. Having regard to recital 20 in the preamble to the Directive, the Plaintiff contends that the general scheme of the Directive is to contribute to the furtherance of the

---

[8] Reference is made to Case C-64/95 *Konservenfabrik Lubella Friedrich Buker* GmbH & Co v *Hauptzollamt Cottbus* [1996] ECR I-5105, paragraph 18.

[9] Reference is made to Case E-9/97 *Erla María Sveinbjörnsdóttir* v *Iceland,* [1998] EFTA Ct. Rep. 95, paragraph 28.

[10] Reference is made to Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA* v *Ministry of Health* [1982] ECR 3415, paragraph 20.

objectives of freedom of establishment and the freedom to provide financial services by ensuring, *inter alia*, the equal treatment of creditors of credit institutions and refers in that connection to recitals 12 and 16 to the Directive.

47. The Plaintiff submits that, unlike the English, Norwegian or German versions of Article 14(1) of the Directive, the Icelandic version does not contain the word "individually". Therefore, unlike those three versions, the Icelandic text does not convey a duty to individually notify known creditors.

48. Similarly, the Plaintiff asserts that there are similar differences in meaning between the Icelandic and English, Norwegian and German versions of Article 14(2) of the Directive.

49. The Plaintiff contends that the French, Danish and Swedish versions of Article 14 provide that known EEA creditors outside the home Member State shall be informed on an individual basis by the dispatch of a notification.

50. Therefore, and having regard to the purpose and general scheme of the Directive, the Plaintiff submits that the correct meaning of Article 14(2) of the Directive is to be found in the English language version. Consequently, the Plaintiff asserts that the Defendant's application of the relevant provisions of Icelandic law in the Kaupthing winding-up proceedings is incompatible with the requirements of Article 14 of the Directive.

51. The Plaintiff submits that the answer to the first question should be that: -

> *"Article 14 of Directive 200l/24/EC as it appears and is published in Icelandic in the EEA Supplement to Official Journal of The European Union does not reflect the correct meaning of Artilclel4 of Directive 2001/24/EC. The provision provides (i) that when winding-up proceedings are opened, the administrative or judicial authority of the home Member State or the liquidator shall without delay individually inform known creditors who have their domiciles, normal places of residence or head offices in other Member States, except in cases where the legislation of the home State does not require lodgement of the claim with a view to its recognition, and (ii) that the information referred to in paragraph (i) is to be provided by the dispatch of a notice that in particular shall deal with time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgment of claims or observations relating to claims and the other measures laid down. Such a notice shall also indicate whether creditors whose claims are preferential or secured in re need lodge their claims"*

The second question

52. The Plaintiff submits that the second question referred by Reykjavík District Court essentially seeks to establish what consequences, if any, there are for the winding-up proceedings of an EEA financial undertaking if the competent authority fails to dispatch a notification as prescribed in Article 14(2) of the Directive to each known creditor in other Member States under circumstances in which the lodgement of a claim is a requirement for its recognition under the national legislation governing the winding-up proceedings.

53. The Plaintiff submits that the principle of freedom of establishment and the freedom to provide services within the EEA entitles financial undertakings to set up branches and to offer their services throughout the EEA. However, within the EEA, some rules applicable to the reorganisation and winding up of financial undertakings are country specific, divergent and remain non-harmonised. These include the rules on the handling of claims and the consequences of not filing a formal proof of a claim in winding-up proceedings. In the Plaintiff's view, this contradicts the objectives of the internal market by creating unequal conditions for creditors, depending on their location and contributes to the uncertainty of creditors when dealing with financial institutions from EEA States other than their own due to unfamiliarity with their legislation and thereby hampers the provision of cross-border services.

54. The Plaintiff contends that the purpose of Directive 2001/24/EC is to address, to the extent possible, the problems and risks which divergent national rules have, in this regard, on the internal market. Therefore, Article 16(1) establishes the principle that EEA creditors outside the home Member State of the credit institution shall have the right to lodge claims or to submit written observations relating to claims. To facilitate that right, Article 14 of the Directive sets out mandatory rules on the provision of information to EEA creditors known to the institution being wound up.

55. The Plaintiff submits that Article 118, point 2, of the Icelandic Bankruptcy Act provides that a foreign creditor who has not filed a claim within the prescribed deadline has the possibility of having his claim accepted under certain conditions. However, these conditions are stringent and strictly applied.[11]

56. In the national proceedings, the Plaintiff contended that as it had not received an individual notification, as prescribed in Article 14 of the Directive, the rejection of its claims was without foundation and that, therefore, its claims remain valid against the estate. It submits that the rejection of its claims entails an unlawful restriction of its right under Article 16(1) of the Directive, and, at the same time, a corresponding violation by the Defendant of that right.

---

[11] Reference is made to the ruling of the Supreme Court of Iceland in case 619/2010, translated paragraphs of which are attached in Annex 3 to the Plaintiff's submissions.

57. The Plaintiff notes that Iceland, as an EEA State, has an obligation to apply its national law in a manner which conforms to EEA law in the relevant field.[12] It submits that the Winding-Up Board of Kaupthing has the status of a public authority in Iceland. The Board's tasks and responsibilities are set out in the Bankruptcy Act and the Act on Financial Undertakings. The Board makes decisions, which may be referred to the courts, concerning the rights and interests of creditors. In adopting those decisions, the Winding-Up Board applies and interprets the relevant law. Individually, each member of the Winding-Up Board, appointed by Reykjavík District Court, acts in the capacity of a public official subject to the applicable rules pertaining to his tasks and duties.

58. The Plaintiff notes that the preamble to the EEA Agreement emphasises that an important objective of the Agreement is to ensure that individuals and economic operators are equally treated, have equal conditions of competition, and have adequate means of enforcement.[13] Moreover, national courts are obliged to "consider any relevant element of EEA law, whether implemented or not, when interpreting national law".[14]

59. According to the Plaintiff, a provision of EEA law that is both unconditional and (sufficiently) precise is capable of conferring upon individuals and economic operators, rights and obligations which can be relied upon before national courts of EFTA/EEA States. While in EU law, this principle is introduced through case-law, under the EEA Agreement the same principles apply as a result of the objectives of the Agreement as set out, *inter alia*, in recitals 4 and 15 in the preamble to the Agreement.

60. Article 14 of the Directive, the Plaintiff submits, contains a clear and precise substantive provision setting out the duties of an administrator of a failed bank in relation to known EEA creditors outside the home Member State of the bank in question when winding-up proceedings commence. In its view, the wording of Article 14 of the Directive leaves no room for a choice of measures when it comes to informing known creditors of the opening of winding-up proceedings and the consequences of not lodging a claim within the deadline.

61. The Plaintiff submits that the Court's reply to the second question should be that: -

62. *"competent authorities in charge of winding-up proceedings of a financial undertaking within an EFTA State that is a Contracting Party to the EEA Agreement and whose legislation requires the lodgment of a claim with a view to its recognition is obliged to apply the relevant legislation in such a way that substantively conforms with the requirement of Article 14 of Directive 2001/24/EC. In view of the right of creditors*

---

[12] Reference is made to Article 3(2) EEA.

[13] Reference is made to *Sveinbjörnsdóttir*, cited above, paragraph 63.

[14] Reference is made to Case E-4/01 *Karl K. Karlsson hf.* v *The Icelandic State* [2002] EFTA Ct. Rep. 240, paragraph 28.

who have their domicile, normal place of residence or head office in a Member State other than the home Member State, to lodge claims as enshrined in Article 16(1) of Directive 2001/24/EC, any execution of winding-up proceedings that does not meet the requirements of Article 14 of Directive 2001/24/EC may not have the consequence that a creditor be deprived of his right to lodge a claim."

The Defendant

The first question

63. The Defendant submits that Reykjavík District Court is seeking essentially to establish how the substantive content of Article 14 of the Directive should be determined taking into account the discrepancy between the English and Icelandic versions of the Directive and the fact that both versions form a part of the EEA Agreement and are equally authentic.[15]

64. The Defendant notes that the Directive has been incorporated into the EEA Agreement[16] and that the Icelandic version of the Directive was published in the EEA supplement to the Official Journal.[17] The Icelandic version of the Directive forms a part of the EEA Agreement.[18]

65. The Defendant submits that the English and Icelandic versions of the Directive are both equally authentic. The two versions cannot be considered equally authentic if only one version is applied and not the other. Therefore, the Plaintiff's contention that the English version of the Directive must be applied would infringe Articles 2, 119 and 129 EEA. Moreover, the Defendant stresses, it would be incompatible with the requirement for the uniform application of EEA law if one language version were to override another.[19]

66. The Defendant contends that Article 14 of the Directive should be interpreted by reference to the purpose and general scheme of the Directive.[20] Similarly, the Defendant rejects the view that a majority of language versions of a directive should override a particular language version in case of a divergence. Making reference to case-law, it

---

15 Reference is made to Articles 2 and 129 EEA.

16 Reference is made to Decision of the EEA Joint Committee No 167/2002 of 6 December 2002.

17 Reference is made to EEA Supplement No 29 to the Official Journal of the European Union, 10.6.2004, p. 198.

18 Reference is made to Articles 2, 119 and 129 EEA.

19 Reference is made to Case C-149/97 *The Institute of the Motor Industry* v *Commissioners of Customs and Excise* [1998] ECR I-7053, paragraph 16.

20 Reference is made to Case 30/77 *Regina* v *Pierre Bouchereau* [1977] ECR 1999, paragraph 14, and Case C-372/88 *Milk Marketing Board of England and Wales* v *Cricket St. Thomas Estate* [1990] ECR I-1345, paragraphs 18 and 19.

observes that examples exist where a single language version has been favoured over the majority.[21]

67. The Defendant submits that, where a discrepancy is found between the Icelandic and English language versions of Article 14 of the Directive, the Icelandic version should be interpreted by reference to the purpose and general scheme of that version of the Directive. Therefore the Court should answer the first question as follows: -

> *"[I]n the case of discrepancy between the text of the EEA Agreement or rules based upon it, in different languages, one language version of the EEA Agreement or rules based on it does not override another language version. In such cases substantive provisions and rules shall be construed by reference to the purpose and general scheme of the rules of which it forms a part."*

The second question

68. The Defendant notes that Reykjavík District Court essentially seeks to ascertain whether, under EEA law, the provision included in Article 14 of the Directive, which provides that a liquidator "shall without delay individually inform known creditors", is to prevail over Article 86 of the Icelandic Bankruptcy Act, which vests, *inter alia*, a liquidator with the power to determine how information should be disclosed to creditors.

69. The Defendant notes, by reference to the Icelandic Supreme Court's judgment of 16 December 2011, that this case concerns a legal dispute between the Plaintiff and Defendant on various matters of fact and law, most importantly provisions of the Icelandic Bankruptcy Act. In addition, it observes that proceedings under Article 34 SCA are based on a clear separation of functions between the Court and national courts. It falls to the national court to ascertain the facts and interpret disputed provisions of national legislation. The EFTA Court has jurisdiction to give an advisory opinion on the EEA Agreement, its Protocols and Annexes.[22]

70. The Defendant submits that directives incorporated into the EEA Agreement by the EEA Joint Committee are binding, as to the result to be achieved, upon a Member State, but leave the choice of form and methods to the national authorities.[23] Member States are obliged, when transposing a directive, to ensure that it is effective whilst retaining a broad discretion as to the choice of methods of implementation. However, the

---

[21] Reference is made to Case 76/77 *Auditeur du travail* v *Bernard Dufour, SA Creyf's Interim and SA Creyf's Industrial* [1977] ECR 2485, paragraphs 15 and 16, and Joined Cases 233/78, 234/78 and 235/78 *Benedikt Lentes and Others* v *Germany* [1979] ECR 2305, paragraphs 13 and 14.

[22] Reference is made to Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 78, and Case E-16/10 *Philip Morris Norway AS* v *Staten v/Helse- og omsorgsdepartementet* [2011] EFTA Ct. Rep. 330, paragraph 87.

[23] Reference is made to Article 7 EEA.

transposition of a directive does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation.[24] The Defendant submits that such discretion has been employed by Iceland in the case at hand and observes that it relied on the relevant laws and regulations when initiating the winding-up proceedings.

71. The Defendant submits, having regard to the answer it proposes to the first question, that when interpreting Article 14 of the Directive, a particular emphasis should be put on the purpose and the general scheme of the directive. It submits that recitals 16 and 17 to the Directive emphasise the sole jurisdiction of the home Member State in the winding-up process.

72. The Defendant submits further that articles of the Directive concerning the reorganisation of credit institutions are also of importance. In particular, Article 7 of the Directive contains a provision dealing with "known creditors". The Defendant notes the emphasis, in Article 7(1) of the Directive, placed on the home Member State's discretion with regard to how claims should be lodged. In its view, this approach reflects the objectives set out in recitals 16 and 17 to the Directive and demonstrates that the Directive is not intended to harmonise the legislation of the Member States, but rather to ensure the mutual recognition of the reorganisation and winding-up procedures of the Member States. Further, the Defendant notes that Article 10(2)(f) to (g) of the Directive provides that the law of the home Member State shall determine, first, which claims are to be lodged against the credit institution and the treatment of claims arising after the opening of winding-up proceedings, and, second, the rules governing the lodging, verification and admission of claims.

73. The Defendant notes that the term "known creditors" is not to be found in Article 14(1) of the Icelandic version of the Directive, with "all creditors" being used instead. In that regard, it stresses, however, the heading given in Icelandic to Article 14 of the Directive "Tilhögun upplýsingamiðlunar til þekktra lánardrottna" which means "Provision of information to known creditors". Therefore, in its view, when interpreting the concept of "all creditors" in Article 14(1) of the Directive this should be understood as meaning "all known creditors".

74. The Defendant observes that, although Article 14(1) of the English version of the Directive prescribes that a liquidator shall without delay "individually inform known creditors", which is to be done, according to Article 14(2), by "the dispatch of a notice", the Directive does not prescribe where this notice is to be sent. Therefore, according to the Defendant, a Member State has considerable discretion as to how this is done and it may be left to a liquidator to decide on a case-by-case basis how foreign creditors are to be individually notified.

---

[24] Reference is made to Case C-388/07 *The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England)* v *Secretary of State for Business, Enterprise and Regulatory Reform* ("*Age Concern England*") [2009] ECR I-1569, paragraph 42.

75. The Defendant notes that the Plaintiff holds bonds issued by the Defendant which can be freely sold without the direct knowledge of the Defendant. Therefore, in its view, an advertisement, as prescribed by paragraph 2 of Article 86 of Act No 21/1991 and paragraph 4 of Article 104 of Act No 161/2002 on Financial Undertakings in conjunction with paragraph 2 of Article 4 of Icelandic Regulation 872/2006, can be more effective in informing creditors about the winding-up proceedings. Moreover, the Defendant avers that its approach, that is, to notify securities services companies, which host the negotiable instruments electronically, can be particularly effective. In that way a statement is posted on every bond issued by the Defendant and all current bond holders are informed simultaneously.

76. In the Defendant's view, an interpretation of Article 14(1) of the Directive which required the individual notification of known creditors at their domicile would exclude purchasers of a credit institution's bonds on the secondary market as the credit institution does not know the identity of those purchasers.

If national law is found to be incompatible with Directive 2001/24/EC

77. The Defendant submits that, if the Court concludes that a provision of national law vesting power in a liquidator to decide how known creditors are notified is incompatible with the Directive, the question arises whether the present case concerns the non-implementation or incorrect implementation of EEA law. In neither case, the Defendant submits, can Article 14(1) of the Directive override provisions of national law.

Non-implementation of the Directive

78. According to the Defendant, EEA law provides that the EFTA States are obliged to ensure that EEA rules that have been implemented prevail over national legal provisions. The EEA Agreement does not require any Contracting Party to transfer legal powers to any institution of the EEA and, moreover, the homogeneity of the EEA must be achieved through national procedures.[25] However, if EEA rules have not been implemented into national law, they cannot take precedence over conflicting national law provisions.[26] Therefore, if the Court concludes that Article 14(1) of the Directive has not been implemented into national law, it cannot take precedence over the relevant articles of the Icelandic Bankruptcy.

Implementation incompatible with the Directive

79. In the Defendant's view, individuals and economic operators are entitled to claim that EEA rules take precedence over provisions of national law when conflict arises

---

[25] Reference is made to the preamble to Protocol 35 to the EEA Agreement, and *Karlsson*, cited above, paragraph 28.

[26] Reference is made to Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 40.

between implemented EEA rules and national law provisions. An entity which invokes rights derived from the EEA Agreement must be an "individual or economic operator" and the relevant provision of a directive must be "unconditional and sufficiently precise".[27] The Defendant contends that neither of these two requirements is fulfilled in the present case.

80. First, the Defendant asserts that the Plaintiff is not an economic operator in the traditional sense of the concept as it was nationalised in January 2009 and is now fully owned and controlled by the Irish State.[28] Moreover, the Plaintiff is "an asset recovery bank, committed to running the Bank in the public interest and in a manner that minimizes the cost to the Irish taxpayer".[29]

81. In the alternative, if the Plaintiff is an economic operator, it cannot in any event enforce a right under Article 14(1) of the Directive against another economic operator, the Defendant, before a national court.[30]

82. Second, Article 14(1) of the Directive lacks clarity on the manner in which known creditors should be individually notified. This lack of "sufficient precision" precludes the Directive from taking precedence over national law, and ensures that EEA Member States retain discretion in deciding how known creditors are to be "individually notified".

83. The Defendant submits that the second question referred should be answered as follows: -

84. *"[A]s paragraph 1 of Article 14 of Directive 2001/24/EC does not prescribe how all known creditors of a credit institution should be notified, the national legislation of a Member State of the European Economic Area can vest a Winding-up Board or other competent authorities with competence to decide whether information should be disclosed with an advertisement or other similar notifications."*

Government of Iceland

The first question

85. The Government of Iceland submits that Directive 2001/24 is a part of the EEA Agreement, as it was incorporated into the Agreement by EEA Joint Committee Decision No 167/2002 of 6 December 2002, amending Annex IX to the EEA Agreement. The

---

27 Reference is made to *Restamark*, cited above, paragraph 77.

28 Reference is made to http://www.ibrc.ie/About_us/Nationalisation/.

29 Reference is made to http://www.ibrc.ie/About_us/.

30 Reference is made to Case C-91/92 *Paola Faccini Dori* v *Recreb Srl* [1994] ECR I-3325, paragraphs 22 and 24-25, Case C-192/94 *El Corte Inglés SA* v *Cristina Blázquez Rivero* [1996] ECR I-1281, paragraphs 15-21, and Case C-168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I-4705, paragraphs 33-38.

Icelandic version of Directive 2001/24/EC was published in the EEA Supplement of the Official Journal of the European Union on 10 June 2004.

86. The Government of Iceland submits that the Icelandic version of the Directive forms a part of the EEA Agreement,[31] and is as authentic as other versions of the Directive in other languages.

87. The Government of Iceland notes that in case of divergence between the different language versions of an European Union text, the provision in question must be interpreted by reference, *inter alia*, to the purpose and general scheme of the rules of which it forms a part.[32] Therefore, in its view, Article 14 of the Directive should be interpreted by reference to the purpose and general scheme of the Directive.

88. The Icelandic Government refers to cases where a single language version has been preferred over the majority[33] and rejects arguments to the effect that, in the case of divergence, the majority of language versions of a directive are to override a minority of language versions.

89. The Icelandic Government submits that the first question referred, as modified by the Supreme Court of Iceland, should be answered as follows: -

> *"[I]n the case of a discrepancy between the text of the EEA Agreement or rules based upon it, in different languages, one language versions of a the EEA Agreement or rules based upon it, should not override another language version. In cases of divergence provisions should be interpreted by reference to the purpose and general scheme of the rules of which it forms a part."*

The second question

90. The Icelandic Government submits that there is a clear discrepancy between the language versions of the Directive. The Icelandic Government submits that the Directive is based on three main principles: unity, universality and non-discrimination, as clearly follows from the recitals to the Directive.[34]

91. The Icelandic Government contends that the main aim of the Directive is to ensure equal treatment of creditors of financial undertakings in winding-up proceedings, and to ensure that the same law applies to all creditors whether they reside in the home Member

---

31 Reference is made to Articles 2, 119 and 129 EEA.

32 Reference is made to Case C-351/10 *Zollamt Linz Wels* v *Laki DOOEL*, judgment of 16 June 2011, not yet reported, paragraph 39, and Case C-340/08 *The Queen, on the application of M and Others* v *Her Majesty's Treasury* [2010] ECR I-3913, paragraph 44.

33 Reference is made to *Dufour*, cited above, paragraphs 15 and 16.

34 Reference is made to recitals 16 and 17 in the preamble to Directive 2001/24/EC.

State of the financial undertaking or in a different Member State. Consequently, it asserts, the aim of the Directive is not to harmonise Member States' legislation, but to ensure mutual recognition of reorganisation and winding-up procedures among the Member States. The Directive also prescribes that the home Member State shall have sole jurisdiction in the winding-up proceedings.

92. The Icelandic Government observes that Directive 2001/24/EC was implemented into Icelandic law by Act No 130/2004 of 22 December 2004. Article 14 of the Directive was transposed by Paragraph 4 of Article 104 of the Act on Financial Undertakings No 161/2002 and Article 4 of Icelandic Regulation 872/2006. Moreover, ESA received a table of correspondence in relation to the Directive on 30 April 2006.

93. The Icelandic Government notes that the Directive was further implemented by Act No 44/2009. The table of correspondence for that implementation was sent to ESA on 29 October 2009. Subsequently, according to the Icelandic Government, ESA conducted a conformity assessment on the implementation of the Directive into the Icelandic legal order. That assessment raised certain issues and was followed by an exchange of information between ESA and the Icelandic Government. However, ESA did not raise any questions regarding the implementation of Article 14 at that time. The Icelandic Government observes that, following the referral of the present case to the EFTA Court, ESA has for the first time sent it a letter inquiring about the implementation of Article 14 of Directive 2001/24.

94. The Icelandic Government stresses that it is for the Government to implement the Directive into the Icelandic legal order.[35] It notes that, according to the ECJ, the implementation of a directive may, depending on its content, be effected in a Member State by way of general principles or a general legal context, provided that they are appropriate for the purpose of guaranteeing in fact the full application of the directive and that, where a provision of the directive is intended to create rights for individuals, the legal position arising from those general principles or that general legal context is sufficiently precise and clear and the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.[36]

95. The Icelandic Government submits that it has considerable discretion when it comes to the method of implementing directives. It asserts that the implementation of Directive 2001/24/EC into Icelandic law is appropriate for the purpose of guaranteeing full application of the Directive and that the Icelandic legislation is sufficient, precise and clear for the aims of the Directive to be achieved.

---

[35] Reference is made to Article 7 EEA.

[36] Reference is made to Case C-388/07 *Age Concern England*, cited above, paragraph 42, Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23, and Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraph 7.

96. The Icelandic Government asserts that Article 14(1) of the English version of the Directive does not really prescribe how "known creditors" should be "individually informed". Although Article 14(2) of the English version of the Directive stipulates that the information should be provided "by the dispatch of a notice", the Directive is silent as to how, or where this notice should be dispatched. Consequently, it contends that the Directive gives Member States considerable discretion in determining how such notices should be dispatched.

97. In the view of the Icelandic Government, Icelandic legislation conforms to the Directive. Article 104(4) of the Act on Financial Undertakings provides that if a known creditor of the credit institution is resident in another Member State, the administrator shall, without delay, "inform the creditor" of the commencement of the winding up. Meanwhile, Article 86(1) and (2) of the Icelandic Bankruptcy Act, which applies to the winding up of financial undertakings in accordance with Article 102(1) of the Act on Financial Undertakings, provides that the liquidator should investigate whether any party who potentially has a claim against the bankruptcy estate is domiciled abroad and, if that is the case, he should "notify the party in question". The equal treatment of creditors is ensured as the same rules apply to all creditors irrespective of the Member State of residence.

98. The Icelandic Government submits that the second question referred, as modified by the Supreme Court of Iceland, should be answered as follows: -

> *"[A]s Article 14 of Directive 2001/24/EC on the reorganization and winding-up of credit institutions does not prescribe in detail how known creditors of a credit institution should be notified, the national legislation of a state, which is a member of the European Economic Area, can vest the Winding-up Board or other competent authority or agency with the competence to decide how information should be disclosed and whether it should be disclosed with an advertisement or other similar notifications."*

Government of Estonia

99. The Estonian Government takes the view that the reference for an advisory opinion has mainly arisen due to a difference in the Icelandic version of Article 14 of the Directive. It considers that a uniform interpretation of the Article is of great importance.

100. The Government of Estonia submits that all language versions of the Directive are authentic. However, the different language versions of EU law must be uniformly interpreted. In that context, it stresses that "in the case of divergence between the different language versions of a provision, the provision in question must be interpreted

by reference to the purpose and general scheme of the rules of which it forms part",[37] and by reference to the real intention of the legislature.

101. On the basis of both the wording and the aim of the provision, the Government of Estonia submits that Article 14 of the Directive should be interpreted as a non-discretionary requirement on the administrative or judicial body of the home Member State to send individual notices to all known creditors who have their domiciles, normal place of residence or head offices in the Member State other than the home Member State.

102. The Estonian Government notes that the same wording as the English version of Article 14 of the Directive has been used in the Estonian, French, German, Italian, Finnish and Swedish language versions, which all include the requirement to individually inform all known creditors. It notes that use of the wording "the liquidator shall", provides a strong indication that the Article imposes an obligation and not a discretion on the liquidator to individually notify all known creditors. In its view, the phrase "individually inform" should be interpreted as a requirement to send an individually addressed notice to a known creditor.[38] It submits that this understanding of Article 14 of the Directive is supported by the wording of recital 20 to the Directive.

103. The Estonian Government contends that nothing in Article 14 or the rest of the Directive implies that the competent authority could have a discretion whether or not to individually inform creditors.

104. The Estonian Government stresses that foreign creditors are in a weaker position in comparison to creditors of the home Member State. It contends that the objective of the Directive is to create a legal framework to protect the interests of creditors who are not resident in the Member State in which winding-up proceedings are initiated.[39] In its view, this explains why Article 14 of the Directive requires that all foreign creditors be individually informed.

105. The Estonian Government notes that, pursuant to Article 13 of the Directive, in order to ensure that known creditors have the possibility of lodging their claims within the prescribed time limits, the liquidator or relevant authority must publish a decision to open winding-up proceedings in the Official Journal of the European Union and in local newspapers of the host Member States. In addition, pursuant to Article 14, when the

---

[37] Reference is made to Case C-426/05 *Tele2 Telecommunication GmbH* v *Telekom-Control-Kommission* [2008] ECR I-685, paragraph 25, and Case C-56/06 *Euro Tex Textilverwertung GmbH* v *Hauptzollamt Duisburg* [2007] ECR I-4859, paragraph 27.

[38] Reference is made to the Oxford English Dictionary definition of "individual".

[39] Reference is made to the Statement of the Council's Reasons included in Council Common Position No 43/2000, OJ 2000 C 300, p. 13, II Objectives, and III. D Analysis of the Common Position Title III.

winding-up proceedings are opened, the administrator has to individually notify all known creditors.

106. The Estonian Government considers that these two requirements are complementary and cumulative. It stresses that the duties set out in Articles 13 and 14 of the Directive cannot be regarded as alternative duties but are independent and absolute obligations which the national legislation must achieve. In its view, these obligations cannot be subject to the discretion of the competent authority. Moreover, it submits, individually informing a known creditor by a "notice" should not be understood as a general newspaper advertisement or any other means of notification intended to notify more than one person at once.[40]

107. The Estonian Government concludes that: -

> *"taking into account the purpose, general scheme as well as the wording of the Directive in most language versions, that have been analysed, it does not comply with paragraph 1 of Article 14 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions if the national legislation of a state, which is a member of the European Economic Area, vests the Winding-up Board or other competent authority or agency with competence to decide whether information should be disclosed on the aspects described in the provision, with an advertisement published abroad instead of individually notifying all known creditors."*

The EFTA Surveillance Authority

The first question

108. ESA notes that the order by Reykjavík District Court which formulates the request for the advisory opinion indicates the discrepancy between both the wording and meaning of the English and Icelandic versions of the Directive. ESA submits that there are two differences between the two versions. The first distinction is the reference to "known" creditors and the implicit distinction between "known" and "unknown" creditors in Article 14 of the English version of the Directive. ESA indicates that the Icelandic version makes no reference to "known" or "unknown" creditors and so does not make this distinction.

109. The second difference, ESA continues, is linked to the first and refers to the difference in treatment between known and unknown creditors. ESA notes that, pursuant to the English version of the Directive, the competent authorities of the home Member State or the liquidator have the legal obligation to notify individually each known creditor. In that connection, Article 14(2) of the Directive sets out the information that

[40] Reference is made to recital 20 in the preamble to the Directive.

known creditors must receive. Conversely, the Icelandic version of the Directive does not provide for an obligation for individual notification to known creditors.

110. Given the divergence in the wording – and consequent legal obligations – in the Icelandic and English versions of the Directive, ESA submits that legal certainty is jeopardised.

111. ESA contends that the different language versions must be given a uniform interpretation and, hence, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.[41] Moreover, in construing a provision of secondary EU law, preference should as far as possible be given to the interpretation which renders the provision consistent with the general principles of EU law and, more specifically, with the principle of legal certainty.[42] It observes that, according to case-law, the wording used in one language version of a European law provision cannot serve as the sole basis of the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement for the uniform application of European law.[43]

112. ESA submits that the substance of the rule in Article 14 of the Directive must be construed by reference to the other language version of the Directive as well as to the purpose and general scheme of the rules of which it forms part.

113. ESA notes the differences between Article 14 of the Icelandic version of the Directive and the English, French, German, Spanish, Italian, Greek and Norwegian versions which provide for a difference in treatment in relation to known creditors in the sense that in relation to known creditors, individual notification is required.

114. ESA contends that Article 14 of the Directive must be read in light of the purpose set out in recital 20 to the Directive, which is identical in all language versions, including Icelandic. It submits further that the general scheme of the rules provided for by the

---

[41] Reference is made to Case C-341/01 *PlatoPlastik Robert Frank GmbH* v *Caropack Handelsgesellschaft mbH* [2004] ECR I-4883, paragraph 64, and *M and Others*, cited above, paragraph 44.

[42] Reference is made to *M and Others*, cited above, and Case C-1/02 *Privat-Molkerei Borgmann GmbH & Co. KG* v *Hauptzollamt Dortmund* [2004] ECR I-3219, paragraph 30.

[43] Reference is made to *Institute of the Motor Industry*, cited above, paragraph 16; Case C-408/06 *Landesanstalt für Landwirtschaft* v *Franz Götz* [2007] ECR I-11295, paragraph 30; Case C-239/07 *Julius Sabatauskas and Others* [2008] ECR I-7523, paragraph 38; and Case C-187/07 *Criminal proceedings against Dirk Endendijk* [2008] ECR I-2115, paragraph 23. Further reference is made to Case C-63/06 *UAB Profisa* v *Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos* [2007] ECR I-3239, paragraphs 13 and 14, with reference to further case-law: Case 26/69 *Erich Stauder* v *City of Ulm* [1969] ECR 419, paragraph 3; Case 55/87 *Alexander Moksel Import und Export GmbH & Co. Handels-KG* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1988] ECR 3845, paragraph 15; Case C-296/95 *The Queen* v *Commissioners of Customs and Excise, ex parte EMU Tabac SARL and Others* [1998] ECR I-1605, paragraph 36; *Bouchereau*, cited above, paragraph 14; Case C-482/98 *Italy* v *Commission* [2000] ECR I-10861, paragraph 49; and *Borgmann*, cited above, paragraph 25.

Directive demonstrates that the European legislature clearly intended to establish an obligation of individual information for known creditors. In its view, this is illustrated by the separation and distinction made in Articles 13 and 14 of the Directive between the considerations and conditions which govern the announcement of the decision to open winding-up proceedings and the provision of information to known creditors.

115. ESA submits that, in light of the above, the competent authorities or the liquidator of the home Member State shall provide the information listed in Article 14(2) of the Directive to known creditors on an individual basis and the Icelandic version of the Directive should be read in this light.

116. ESA stresses that the email the Plaintiff sent to the Kaupthing winding-up board on 29 October 2008, intending to lodge claims over the estate, although apparently not a proper method of lodging a claim, clearly indicates that the Plaintiff was a known creditor. In that regard, ESA contends further that, as the Plaintiff is a credit institution established in the EEA, its domicile, place of residence, or head office could be identified even if it were not already known.

117. ESA submits that, as the Plaintiff was a known creditor, the Defendant should have individually informed it regarding the specific conditions for the lodging of its claims. That it did not do so means that the Plaintiff's rights to receive individual notification containing the requisite information as provided for under the Directive have not been respected. ESA contends that the answer to the first question referred must be that: -

> *"it does not accord with the provisions of Article 14 of Directive 2001/24/EC of 4 April 2001, on the reorganisation and winding up of credit institutions, to publish an invitation to lodge claims for known creditors which have their domicile, permanent residence or head offices in other Member States in the manner effected by the Winding-Up Board of Kaupthing Bank hf. which is described in the order for reference".*

The second question

118. ESA considers that the second question referred by Reykjavík District Court in the wording of 8 November 2011 contains a certain ambiguity. The question could either be read as asking whether the EEA Agreement requires Article 14 of Directive 2001/24 that has been made part of the EEA Agreement to be directly applicable and take precedence over the national rule that fails to transpose the relevant EEA rule correctly into national law or it could simply refer to the practical conclusions which the winding-up board should draw in the proceedings before it.

119. On the matter of direct applicability, ESA submits that, although it could be argued that Article 7 EEA and Protocol 35 to the EEA Agreement are relevant, neither provision provides an answer to the question posed.

120. ESA submits that, according to the Court's case-law, it is inherent in the objectives of the EEA Agreement that national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law.[44] It contends that the obligation of harmonious interpretation requires a national court to interpret national law in the light of an inadequately implemented or a non-implemented directive even in a case against an individual[45] or between individuals, as in the case at hand. The national court must apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule.[46] However, in its view, this duty of harmonious interpretation cannot lead to a *contra legem* interpretation or lead to the judicial re-writing of legislation.

121. ESA submits that, if the harmonious interpretation of the implementing measure with the text and purpose of the Directive is not possible, the second question referred becomes more complicated as the EEA Agreement does not entail a transfer of legislative powers or require that non-implemented EEA rules take precedence over conflicting national rules, including those which fail to transpose the relevant EEA rules correctly into national law.[47] In that regard, it submits that EEA law does not require that individuals and economic operators be able to rely directly on non-implemented EEA rules before national courts.[48] ESA contends that this must be interpreted to mean that EEA law does not have direct effect. Therefore, in its view, Article 14 of the Directive cannot take precedence over the conflicting Icelandic rules which fail to transpose the provision correctly into the Icelandic legal order.

122. ESA observes that, according to case-law, in cases of conflict between national law and non-implemented EEA law, the EFTA States may decide whether, under their national legal order, national administrative and judicial organs can apply the relevant EEA rule directly and thereby avoid the violation of EEA law.[49] Alternatively, the EFTA

---

[44] Reference is made to Case C-160/01 *Karen Mau* v *Bundesanstalt für Arbeit* [2003] ECR I-4791, paragraph 34, Joined Cases C-397/01 to C-402/01 *Bernhard Pfeiffer and Others* v *Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835, paragraph 114, and Case C-555/07 *Seda Kücükdeveci* v *Swedex GmbH & Co. KG* [2010] ECR I-365, paragraphs 45-48.

[45] Reference is made to Case C-106/89 *Marleasing SA* v *La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, paragraphs 7 and 8.

[46] Reference is made to *Criminal proceedings against A*, cited above, paragraph 39.

[47] Ibid., paragraph 40.

[48] Reference is made to *Karlsson*, cited above, paragraph 28.

[49] Reference is made to *Criminal proceedings against A*, cited above, paragraph 41.

State is obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability, which is integral to the EEA Agreement.[50] As a further alternative, ESA notes that, although pursuant to Article 31 SCA it may become involved by commencing proceedings against Iceland, this possibility may not be of great practical value to the parties to the main proceedings.

123. As regards the practical consequences for the winding-up board, ESA stresses that, under the principle of effectiveness, the detailed procedural rules governing actions for safeguarding an individual's rights under EU and EEA law must not make it, in practice, impossible or excessively difficult to exercise the rights conferred by EU law.[51] Likewise, according to the principle of equivalence, the rights conferred on the Plaintiff by Article 14 of the Directive must be respected in a way which is not less favourable than the manner in which the national legal order protects similar rights under purely domestic legislation.[52] Moreover, if Icelandic bankruptcy law permits a winding-up board to admit a claim that has been lodged late due to a procedural error committed by the board, ESA submits that such a solution should be extended to remedy the problem in the present case. However, in this regard, ESA considers that the order for reference contains insufficient information to offer further guidance.

124. ESA proposes that the second question referred be answered as follows: -

> *"the national court has an obligation of harmonious interpretation of the national measure inadequately transposing Directive 2001/24/EC in the Icelandic legal order in so far as that is possible according to the interpretative methods that are recognised by national law. The principles of equivalence and effectiveness require that the detailed national procedural rules governing actions for safeguarding rights which individuals derive from EEA law must be such that they are not less favourable than those governing similar national actions and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EEA law."*

The European Commission

The different language versions

125. The Commission submits that the differences between the Icelandic version of the Directive and the English and other versions are material. These differences have a direct

---

[50] Ibid., paragraph 42, with further reference to *Sveinbjörnsdóttir*, paragraph 62 et seq., and *Karlsson*, paragraphs 25 and 37-48, both cited above.

[51] Reference is made to Case C-279/09 *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH* v *Bundesrepublik Deutschland*, judgment of 22 December 2010, not yet reported, paragraph 28.

[52] Reference is made to Joined Cases C-89/10 and C-96/10 *Q-Beef and Bosschaert*, judgment of 8 September 2011, not yet reported, paragraph 32.

bearing on both the present dispute and Iceland's obligations in transposing the Directive into national law.

126. The Commission notes that while the title of Article 14 of the English version of the Directive is entitled "Provision of information to known creditors", the Icelandic version makes no reference to "known" or "unknown" creditors. Unlike the English version, the Icelandic version of the Directive does not provide for an obligation to individually notify known creditors.

127. The Commission submits that, according to settled ECJ case-law, the different language versions of a text of EU law must be given an uniform interpretation and, hence, in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules which it forms a part.[53] In construing a provision of secondary EU law, preference should as far as possible be given to the interpretation which renders the provision consistent with the general principles of EU law and, more specifically, with the principle of legal certainty.[54]

128. Moreover, the Commission continues, it is settled case-law that the wording used in one language version of an EU measure cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement for the uniform application of European law.[55] In addition, the Commission notes that Article 129(1) EEA states that the texts of the acts referred to in the Annexes to the Agreement "are equally authentic" in all EU official languages. Those acts are then translated into Icelandic and Norwegian "for the authentication thereof".

129. The Commission notes that, according to settled case-law, the various language versions of a provision of EU law must be uniformly interpreted, and, thus, in the case of divergence between those versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.[56]

---

[53] Reference is made to *PlatoPlastik Robert Frank*, paragraph 64, and *M and Others*, paragraph 44, both cited above.

[54] Reference is made to *M and Others* and *Borgmann*, paragraph 30, both cited above.

[55] Reference is made to *Institute of the Motor Industry*, paragraph 16; *Götz*, paragraph 30; *Sabatauskas and Others*, paragraph 38; and *Endendijk*, paragraph 23, all cited above.

[56] Reference is made to *Profisa*, cited above, paragraphs 13 and 14, with reference to further case-law: *Stauder* v *City of Ulm*, cited above, paragraph 3; *Moksel Import und Export*, cited above, paragraph 15; *EMU Tabac and Others*, cited above, paragraph 36; *Bouchereau*, cited above, paragraph 14; *Italy* v *Commission*, cited above, paragraph 49; *Borgmann*, cited above, paragraph 25; Case C-449/93 *Rockfon A/S* v *Specialarbejderforbundet i Danmark* [1995] ECR I-4291, paragraph 28; and Case C-236/97 *Skatteministeriet* v *Aktieselskabet Forsikrinsselskabet Codan* [1998] ECR I-8679, paragraph 28.

130. However, the Commission contends that, in the light of the purpose and general scheme of the rules of which it forms part, the Icelandic version does not suffice for a proper interpretation of the obligations set out in Article 14 of the Directive.

The Directive

131. The Commission submits that the objective of the Directive is clearly stated in recitals 3, 4 and 16 thereto. Under Article 9 of the Directive, winding-up proceedings are to be opened and conducted by the responsible authority of the home Member State, that is, the State in which in the credit institution has been authorised.[57] It notes that the Directive requires that all claims by creditors, whether domestic or foreign, must be processed in the same proceedings. Article 16(1) of the Directive provides that any creditor who has his domicile, normal place of residence or head office in a Member State other than the home Member State has the right to lodge claims in the proceedings. Article 16(2) of the Directive sets out the principle of equal treatment of creditors irrespective of nationality and provides that the claims of all creditors whose domiciles, normal places of residence or head offices are in Member States other than the home Member State shall be treated in the same way and accorded the same ranking as claims of an equivalent nature which may be lodged by domestic creditors. Article 10(2)(f) and (g) of the Directive establishes that the law of the home Member State shall determine the claims that are to be lodged against the credit institution and the rules governing the lodging, verification and submission of claims.

132. The Commission asserts that the Directive did not aim to harmonise national legislation but to ensure the mutual recognition of Member States' reorganisation measures and winding-up proceedings as well as the necessary cooperation. In particular, national law determines the nature (administrative or judicial) of reorganisation measures. This, it asserts, is borne out by recitals 3, 4, 16 and 20 to the Directive. The substance of recital 20 of the Directive is identical in all language versions, including the Icelandic version.

133. The Commission submits that Article 14 of the Directive is not a mere "information obligation". In its view, this follows also from the wording of recital 20. It notes that Article 13 of the Directive envisages the publication of the announcement of the decision "to open winding-up proceedings" in the Official Journal of the European Union and at least two newspapers in each host Member State. Consequently, according to the Commission, Article 14 of the Directive should be interpreted as establishing an obligation on the liquidator to notify individually known foreign creditors, as national law usually provides for notification to known domestic creditors, of the opening of the winding-up proceedings and of the deadline for the submission of claims. Conversely, in its view, Article 13 of the Directive provides the means for informing unknown creditors

[57] Reference is made to Article 4(7) of Directive 2006/48/EC, OJ 2006 L 177, p. 1.

of the commencement of proceedings and of their rights through the Official Journal of the European Communities and in at least two national newspapers in each host Member State. As a result, the Commission asserts that Articles 13 and 14 of the Directive have different purposes but are not substitutable. It notes that, similarly, in relation to reorganisation proceedings Articles 6 and 7 of the Directive set out the requirement to give notice to creditors in these two different manners.

134. The Commission submits that, although the Directive does not define either "known creditor" or "creditor", it does not expressly leave the determination of this to national law. In that regard, it observes that, pursuant to Article 2 of the Directive, the terms "winding-up proceedings" and "administrative or judicial authority" are defined by reference to national law. As a result, it asserts that the terms "known creditor" and "creditor" have to be determined by reference to the object and purpose of the rules established in the Directive. It submits that whether any natural or legal person is a known creditor is capable of objective determination particularly by professionals appointed as liquidators.

135. The Commission submits that the exception provided for in Article 14(1) of the Directive, that is, dispensing with the requirement to individually notify foreign creditors where the legislation of the home State does not require lodgement of the claims with a view to their recognition, must be construed restrictively. The Commission asserts that Article 14(1) read together with the recitals and Article 13 of the Directive expressly requires that, once a decision is taken to open proceedings, there is a strict obligation to inform on an individual basis known creditors and that this should be done in a manner which ensures equal treatment of creditors in the host and home Member States. The general scheme of the rules of the Directive, the Commission asserts, leads to the conclusion that the European legislature intended to establish a strict obligation of individual information for known creditors and that, therefore, Article 14(1) of the Directive requires actual notice to known creditors.

136. In the light of the final sentence of recital 20 to the Directive, the Commission submits that there is an ongoing obligation, once proceedings are opened and known creditors have been individually informed, to keep all creditors "regularly informed in an appropriate manner throughout winding-up proceedings". In its view, while the Member States would appear to enjoy some discretion as to how creditors are regularly informed, there is no such discretion in relation to the primary obligation in Article 14 of the Directive.

137. The Commission concludes that the Icelandic version of Article 14 of the Directive is deficient. While an invitation to lodge claims was published in Ireland, where the Plaintiff's head office is located, in the *Irish Times* on 21 July 2009, in the Commission's view, this does not comply with the requirements of Article 14(1) or 14(2) of the Directive. It submits that, as the Plaintiff was a known creditor which was capable

of being objectively ascertained, the strict obligation of Article 14(1) of the Directive should have applied and, accordingly, the Plaintiff should have been individually informed of the matters required by Article 14(2) of the Directive.

138. The Commission submits that the answer to the first question referred should be that: -

> *"[I]t does not accord with the provisions of Article 14 of Directive 2001/24/EC of 4 April 2001, on the reorganisation and winding up of credit institutions, to publish an invitation to lodge claims for known creditors which have their domicile, permanent residence or head offices in other Member States in the manner practised by the Winding-up Board of Kaupthing Bank hf which is described in the Ruling as Article 14 imposes a strict obligation to individually inform known creditors".*

The second question

139. The Commission considers that the national authorities must interpret national law in conformity with the Directive (and not the Icelandic version thereof). It stresses that it is inherent in the objectives of the EEA Agreement that national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law.[58] It asserts that the obligation of harmonious interpretation requires a national court to interpret national law in the light of an inadequately implemented or a non-implemented directive even against an individual.[59] In that regard, national courts must apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule.[60]

140. In the case in hand, therefore, the Commission asserts that an interpretation should be adopted that makes it feasible to inform known creditors and, so far as possible, to allow known creditors who would have been in a position to do so to lodge a claim. If it is no longer possible to lodge a claim under national law, taking into account all the circumstances, including the fact that the Plaintiff was precluded from exercising its rights, according to the Commission, there should be a remedy available under national law for the known creditors. Any such remedy should take account of the time limits specified in accordance with Article 14(2) of the Directive and the penalties for failing to adhere to such time limits including any objective justification for imposing those time limits. In summary, therefore, the national court is obliged to interpret the national

---

[58] Reference is made to *Mau*, paragraph 34, and *Pfeiffer and Others*, paragraph 114, both cited above.

[59] Reference is made to *Marleasing*, cited above, paragraphs 7-8.

[60] Reference is made to *Criminal proceedings against A*, cited above, paragraph 39.

measure which transposed the Directive so far as this is possible in order to give effect to the proper obligations set out in the Directive.

141. The Commission submits that the answer to the second question referred should be that: -

> *"[W]here sufficient regard was not had for the rules in Article 14 of the Directive, the national court has an obligation to interpret the national measure which transposed the Directive in the Icelandic legal order, so far as possible in order to give effect to the proper obligations set out in the Directive".*

Carl Baudenbacher
Judge-Rapporteur