



JUDGMENT OF THE COURT

14 December 2011*

(Free movement of capital – Article 43 EEA – National restrictions on capital movements – Jurisdiction – Proportionality – Legal certainty)

In Case E-3/11,

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 of

Pálmi Sigmarsson

and

the Central Bank of Iceland

concerning the interpretation of Article 43 of the EEA Agreement,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur), and Benedikt Bogason (ad hoc), Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

- Pálmi Sigmarsson (“the Plaintiff”), represented by Stefán Geir Þórisson, Supreme Court Attorney;
- the Central Bank of Iceland (“the Defendant”), represented by Gizur Bergsteinsson, District Court Attorney;
- the Icelandic Government, represented by its Agent Bergþór Magnússon, assisted by Þóra M. Hjaltested, Director, Ministry of Economic Affairs, and Peter Dyrberg, advokat;

* Language of the request: Icelandic.

- the EFTA Surveillance Authority (“ESA”), represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Deputy Director, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission (“the Commission”), represented by Elisabetta Montaguti and Nicola Yerrell, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Stefán Geir Þórisson; the Defendant, represented by Gizur Bergsteinsson; the Icelandic Government, represented by its agent, Þóra M. Hjaltsted, and by Peter Dyrberg; ESA, represented by its agents, Xavier Lewis and Maria Moustakali; and the Commission, represented by its agent, Nicola Yerrell, at the hearing on 7 October 2011,

gives the following

Judgment

I Legal background

EEA law

- 1 Article 40 of the EEA Agreement reads as follows:

Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.

- 2 Article 43(2) and (4) of the EEA Agreement provides as follows:

Article 43

...

(2) If movements of capital lead to disturbances in the functioning of the capital market in any EC Member State or EFTA State, the Contracting Party concerned may take protective measures in the field of capital movements.

...

(4) Where an EC Member State or an EFTA State is in difficulties, or is seriously threatened with difficulties, as regards its balance of payments

either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardize the functioning of this Agreement, the Contracting Party concerned may take protective measures.

- 3 Article 44 EEA provides that the Community, on the one hand, and the EFTA States, on the other, shall apply their internal procedures, as provided for in Protocol 18 to the EEA Agreement, to implement the provisions of Article 43 EEA. Pursuant to Protocol 18, in conjunction with Protocol 2 to the Agreement on a Standing Committee of the EFTA States, an EFTA State which intends to take measures in accordance with Article 43 EEA must give notice “in good time” to the Standing Committee of the EFTA States (“the EFTA Standing Committee”). In cases of secrecy or urgency, notice must be given to the other EFTA States and to the EFTA Standing Committee at the latest by the date of entry into force of the measures. The EFTA Standing Committee is required to examine and deliver an opinion on the introduction of the measures, keep the situation under review and issue recommendations, as appropriate.
- 4 Article 45 EEA sets out that decisions, opinions and recommendations related to the measures laid down in Article 43 EEA shall be notified to the EEA Joint Committee. Moreover, the measures shall be the subject of prior consultations and exchange of information within the EEA Joint Committee. Protective measures may nevertheless be taken without prior consultation in accordance with Article 45(3) and (4) EEA on grounds of secrecy and urgency and where a sudden crisis in the balance of payments occurs. It follows from Article 45(5) EEA that in those cases notice of the protective measures must be given at the latest by the date of their entry into force, and the exchange of information and consultations must take place as soon as possible thereafter.

National law

- 5 In Iceland, Act No 87/1992 on Foreign Exchange (“the 1992 Act”) lays down certain rules concerning capital movements, imports and foreign investment. According to Article 3, the Central Bank of Iceland (“the Central Bank”) may decide, in consultation with the Ministry of Economic Affairs, to “restrict or suspend for a period of up to six months” certain listed categories of capital movements “if short-term capital movements to and from Iceland create, in the Bank’s opinion, exchange-rate and monetary instability”. The import and export of domestic currency is mentioned in point 5 of Article 3.
- 6 Article 7 of the 1992 Act permits the Central Bank, upon application by a party, to grant exemptions from restrictions imposed on capital movements. According to that Article, the Central Bank shall in this regard assess the consequences which restrictions on capital movements have for the applicant, the objectives behind the restrictions and the impact which an exemption will have on exchange rate and monetary stability. A refusal to grant an exemption may be referred to the Ministry of Economic Affairs.

- 7 On 28 November 2008, the Icelandic Parliament adopted Act No 134/2008, which amended the 1992 Act, adding, *inter alia*, a temporary provision authorising the Central Bank to adopt rules which “restrict or temporarily suspend” certain listed capital movements and related foreign exchange transactions, including the import and export of domestic currency, “if the Bank considers that such movements of capital to and from the country would cause serious and significant instability in exchange rates and monetary issues”. On the same day, the Defendant issued the Rules on Foreign Exchange No 1082/2008. The rules restricted cross-border movements of capital and required domestic parties that acquired foreign currency to deposit such holdings with domestic financial undertakings within a certain time-limit.
- 8 On 30 October 2009, the Defendant adopted the Rules on Foreign Exchange No 880/2009 (“the Rules”). According to Article 1, the purpose of the Rules is “to restrict or stop, on a temporary basis, certain types of cross-border capital movements or foreign exchange transactions related thereto that, in the Central Bank’s estimation, cause serious and substantial monetary and exchange rate instability”.
- 9 According to the first subparagraph of Article 2 of the Rules, cross-border movement of capital means the transfer or transport of capital between residents and non-residents. Pursuant to the third subparagraph of Article 2, cross-border movement of capital denominated in domestic currency is prohibited, subject to certain exceptions.
- 10 Article 3 of the Rules provides that foreign exchange transactions between residents and non-residents are prohibited if domestic currency is part of the transaction. Residents in Iceland are prohibited from purchasing foreign currency at a financial undertaking in Iceland when payment is made in domestic currency, unless it is demonstrated that the funds will be used, *inter alia*, for transactions with goods and services, including travel, or for certain movements of capital, including payment of interest, dividends, contractual instalments, gifts to individuals, and subsidies to charitable organisations.
- 11 Article 15 of the Rules sets out that Article 7 of the 1992 Act, which permits the Central Bank to grant exemptions from restrictions imposed on capital movements, applies also to the restrictions imposed by the Rules.

II Facts and pre-litigation procedure

- 12 By a letter of 8 February 2011, registered at the Court on 14 February 2011, the Reykjavík District Court requested an Advisory Opinion in a case pending before it between Pálmi Sigmarsson and the Central Bank of Iceland.
- 13 The Plaintiff is an Icelandic national resident in the United Kingdom. On 16 November 2009, he purchased ISK 16 400 000 on the offshore market in exchange for pounds sterling. On 8 December 2009, in order to transfer those krónur to Iceland, the Plaintiff applied to the Defendant for an exemption from

the currency controls laid down in Article 2 of the Rules. The Defendant rejected the Plaintiff's application on 26 February 2010. This conclusion was upheld by a ruling of the Ministry of Economic Affairs on 8 October of the same year.

- 14 The Plaintiff sought judicial review of the Defendant's decision before the Reykjavík District Court, claiming that this decision contravenes Icelandic law and is incompatible with the rules on free movement of capital established in the EEA Agreement.
- 15 On the latter issue, the Reykjavík District Court decided in a ruling of 3 January 2011 that it was necessary to request an Advisory Opinion from the Court on the proper interpretation and application of Article 43 of the EEA Agreement. An appeal against this ruling was lodged with the Supreme Court of Iceland, which in a judgment of 7 February 2011 upheld the District Court's ruling.
- 16 The following question was submitted to the Court:

Is it compatible with paragraphs 2 and 4 of Article 43 of the EEA Agreement that the Icelandic State should prevent an Icelandic national, resident in Britain, from transferring Icelandic krónur, which he has purchased on the offshore market in Britain, to Iceland?

- 17 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III The question

Jurisdiction

Observations submitted to the Court

- 18 The Defendant, supported by the Icelandic Government, argues that an assessment of the necessity of a measure taken under Article 43 EEA falls outside the normal surveillance and judicial review mechanisms of the Agreement, and thus outside the jurisdiction of the Court pursuant to Article 34 SCA.
- 19 Given the utmost importance of the macroeconomic public interests at stake, recourse to Article 43 EEA is subject to specific conditions, which do not find their parallel under the provisions concerning the other freedoms. Thus, Articles 44 and 45 EEA set out special procedures to apply when the State has to enact such measures. In the EFTA pillar, under the provisions of Article 44 EEA and Protocol 18 to the EEA Agreement, scrutiny of the measures adopted by an EFTA State pursuant to Article 43 EEA is entrusted to the EFTA Standing Committee. According to the Defendant and the Icelandic Government, since scrutiny is not entrusted to ESA, the normal surveillance procedures do not apply and, as a consequence, ESA cannot open infringement procedures against the

notifying State. Moreover, so they argue, ESA has no powers in relation to the EFTA Standing Committee.

- 20 Since an EFTA State's recourse to Article 43 EEA is "implemented" through "procedures", it follows, according to those parties, that where an EFTA State observes those procedures it may rely on the fact that its measures are permitted under the EEA Agreement. Given the gravity of the circumstances envisaged by Article 43 EEA, there is an imperative need for the EFTA State concerned to ascertain in advance that its acts are in accordance with the Agreement.
- 21 Furthermore, there is no provision that provides for the judicial review of the acts of the EFTA Standing Committee. Judicial scrutiny must be limited, therefore, to an assessment whether the EFTA State concerned followed the procedures prescribed in Articles 44 and 45 EEA.
- 22 The Plaintiff contends that the Court has jurisdiction to review the legality of measures taken under Article 43 EEA. He observes that Article 34 SCA states that the Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement. If a particular area of EEA law, such as derogations from the rules on the free movement of capital were to be excluded from the jurisdiction of the Court, such exclusion would have to be explicitly set out in the relevant provisions. EEA citizens cannot be deprived of their individual rights, conferred upon them by the EEA Agreement, and the judicial defence of such rights, as a consequence of purely formal requirements under Articles 44 and 45 EEA. A mere act of notification and a non-binding opinion concerning a particular internal procedure of an EFTA State are clearly insufficient in this respect. In addition, neither the Court nor the Court of Justice of the European Union has held that rules derogating from the free movement of capital may be exempted from their respective jurisdictions.
- 23 ESA and the Commission argue that the implementation of measures adopted pursuant to Article 43 EEA is subject to judicial review by the Court. Admittedly, under the procedure provided for in Protocol 18 to the EEA Agreement, notice of the implementation of measures taken pursuant to Article 43 EEA is to be given to the Standing Committee of the EFTA States, and not to ESA. However, in the view of ESA and the Commission, an EFTA State cannot be accorded unfettered powers to introduce such restrictions on the fundamental freedoms. It remains for the Court to assess whether such measures are, for example, manifestly disproportionate. In their view, there is, in principle, no legal barrier to *ex post* scrutiny by ESA or the Court of a measure taken by an EFTA State under Article 43 EEA. However, given the complexity of the economic assessments involved and the type of measures at issue, EFTA States must necessarily enjoy a certain margin of discretion when implementing measures under Article 43 EEA.

Findings of the Court

- 24 The Court notes that by its question the national court essentially seeks to establish whether restrictions on cross-border movements of capital implemented in Iceland are compatible with Article 43(2) and (4) EEA, which provides for the adoption of derogations from the free movement of capital.
- 25 As described in paragraphs 3 to 4 above, measures taken in accordance with Article 43 EEA are implemented by means of a special procedure, whereby, as provided for in Articles 44 and 45 EEA, the EFTA Standing Committee and the EEA Joint Committee are to be notified or consulted prior to the implementation of the measures. It is common ground that Iceland has respected the relevant notification procedures. The parties disagree, however, whether the existence of the special procedure prevents the Court from having jurisdiction to assess whether the substantive requirements laid down in Article 43 EEA are fulfilled.
- 26 According to Article 34 SCA, the Court has jurisdiction to give advisory opinions on the “interpretation of the EEA Agreement”. Pursuant to Article 1(a) SCA, the term “EEA Agreement” includes “the main part of the EEA Agreement, its Protocols and Annexes as well as the acts referred to therein”.
- 27 The fact that measures adopted in accordance with Article 43 EEA are implemented through a special procedure cannot entail that judicial review of the compatibility of those measures with Article 43 EEA falls outside the scope of the Court’s jurisdiction.
- 28 First, nothing in the EEA Agreement, the SCA or other relevant legal instruments suggests that any provision governing the functioning of the EFTA Standing Committee or the EEA Joint Committee is excluded from the jurisdiction of the Court under Article 34 SCA (see, as regards the EEA Joint Committee, Case E-6/01 *CIBA and Others* [2002] EFTA Ct. Rep. 281, paragraph 22).
- 29 Second, the structure and content of Article 40 EEA suggest that measures implemented in accordance with Article 43 EEA must be subject to judicial review. Article 40 EEA prohibits restrictions between the Contracting Parties on the movement of capital belonging to persons resident in the EEA, and discrimination based on the nationality or the place of residence of natural or legal persons or on the place where such capital is invested. It is settled case-law that this Article confers a right upon individuals and economic operators to market access (see Cases E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 25, and E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 32). The EEA Agreement aims at securing equal treatment for individuals and economic operators and equal conditions of competition throughout the European Economic Area, as well as adequate means of enforcement, including at the judicial level (see the fourth and fifteenth recital in the Preamble to the EEA Agreement and Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraphs 57-58). In this regard, the Court has emphasised that access to justice is an essential element of the EEA legal framework. This is evidenced by the

eighth recital in the Preamble to the EEA Agreement which stresses the value of the judicial defence of rights conferred by the Agreement on individuals and intended for their benefit (see Cases E-2/02 *Bellona* [2003] EFTA Ct. Rep. 52, paragraph 36, and E-5/10 *Dr Kottke* [2009-2010] EFTA Ct. Rep. 320, paragraph 26).

- 30 Further to this, it must be borne in mind that although the special notification procedure provided for in Article 44 EEA, in conjunction with Protocol 18 to the EEA Agreement, and Article 45 EEA, has no equivalent in the EU pillar of the EEA, the rules governing the free movement of capital in the EEA Agreement are in substance essentially identical to those of the TFEU (see *Fokus Bank*, cited above, paragraph 23, and Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 28). In light of the objective of the EEA Agreement to provide for a homogeneous European Economic Area, this applies equally to rules prohibiting restrictions on the free movement of capital and rules governing any possible justification (see *Piazza*, cited above, paragraph 39).
- 31 Against this background, the Court holds that it has jurisdiction to review whether measures taken pursuant to Article 43 EEA satisfy the requirements of that provision.

Substance

Observations submitted to the Court

- 32 The Plaintiff argues that there is nothing to suggest that the safeguard clauses established in Article 43 EEA have a broader scope than restrictions authorised under other provisions of the EEA Agreement, or that the EFTA States have a wider margin of discretion when implementing such safeguard measures. In his view, the only difference relates to form, as the safeguard clauses established in Article 43 EEA refer to temporary measures and may be invoked only under certain circumstances.
- 33 In the Plaintiff's view, safeguard measures adopted in accordance with Article 43 EEA may not disregard fundamental principles of European law. However, the national legislation applied by the Central Bank and the Icelandic Government is incompatible with Article 43(2) and (4) EEA, since it delegates unrestricted powers to a state-owned entity, thereby violating the principle of legal certainty. Moreover, EEA States may not unilaterally determine the scope of restrictions on the fundamental freedoms. Finally, according to the Plaintiff, the national legislation is incompatible also with the principles of proportionality and necessity.
- 34 As regards legal certainty, the Plaintiff argues that a system for granting exemptions from restrictions on a fundamental freedom must be transparent and foreseeable and the conditions on which approval is granted should be defined, as should the extent of the rights and obligations of individuals. It supports that view by reference to Case C-463/00 *Commission v Spain* [2003] ECR I-4581,

paragraphs 33 to 36. According to the Plaintiff, the contested system of rules governing the grant of exemptions to the restrictions on capital movements does not contain any objective criteria. The national legislation provides that, when assessing a request for an exemption, the Central Bank shall look to the effects of the restrictions of the capital movements for the applicant, the objectives of the restrictions, and which effect an exemption has on the stability in currency and monetary matters. In the Plaintiff's view, those requirements do not establish criteria to determine which transactions pose an actual threat to monetary and exchange rate stability. Instead, the purpose of the restrictions itself constitutes the only substantive standard. In his view, such a general, open delegation of power to a state-owned institution such as the Central Bank opens the possibility of arbitrary decision-taking.

- 35 As for proportionality, the Plaintiff asserts that the authorities have not proven that there is a risk that the transaction in question will endanger the objective of the legislation, and, as a consequence, that the restriction is necessary. There is, he contends, no evidence or indication that, where a small amount is to be transferred, it is necessary to deny an exemption from the restrictions. Moreover, no substantial inspection or research has been carried out by the Icelandic Government to establish the need for the safeguard measures taken.
- 36 In addition, the Plaintiff argues that the restrictions on capital movements in question are discriminatory, since non-Icelandic financial entities that own Icelandic krónur cannot sell their krónur for foreign currency, whereas Icelandic financial institutions may do so.
- 37 The Defendant, the Icelandic Government, ESA and the Commission contend that there is nothing to suggest that the prohibition on the inbound transfer of krónur violates the EEA Agreement.
- 38 The Defendant and the Icelandic Government submit that an EFTA State taking protective measures under Article 43 EEA enjoys a wide margin of discretion in deciding, first, whether conditions for resorting to such measures are satisfied, and, second, whether other measures are likely to cause less disturbance in the functioning of the EEA. They argue by reference to Joined Cases C-111/88, C-112/88 and C-20/89 *Greece and Crete Citron Producers' Association v Commission* [1990] ECR I-1559 that where a complex assessment of economic factors is called for, the judicial instances cannot invalidate the assessment made unless there are gross or manifest errors.
- 39 In any event, they contend that it is clear that the collapse of Iceland's banking system together with the Central Bank's limited foreign currency reserves entailed that a situation envisaged in Article 43(2) and (4) EEA existed. This allowed Iceland to take protective measures in the form of a prohibition on the inbound transfer of krónur. From late 2008, the Defendant's foreign exchange reserves diminished day by day until the inbound transfer of Icelandic krónur was prohibited in late October 2009. Without those measures, the currency could not have been stabilised.

- 40 The Defendant and the Icelandic Government assert that the rules restricting the inbound transfer of Icelandic krónur are not discriminatory, since they apply equally to Icelandic as well as non-Icelandic citizens and irrespective of whether the owner of the krónur is resident in Iceland or not. It is simply the nature of the funds – offshore krónur – which is decisive, and not the nationality or the residence of the holder of those funds.
- 41 As regards legal certainty and proportionality, the Defendant argues that these principles are not relevant. In the view of the Defendant, the principle of proportionality applies only as regards measures applied in accordance with Article 43(3) EEA. In any event, the rules on capital control did not and do not prevent the Plaintiff from paying off his debt. Moreover, the volume of offshore Icelandic krónur the Plaintiff wishes to import has no bearing on the case.
- 42 ESA and the Commission submit that application of the conditions established in Article 43(2) and (4) EEA calls for a complex assessment of various macroeconomic factors. This suggests, they continue, that EFTA States enjoy a certain margin of discretion when it comes to determining whether the conditions are satisfied and, if so, the exact measures to be taken. In many cases this determination concerns fundamental choices of economic policy.
- 43 At any rate, there is, in their view, little doubt that, in the case in hand, in the wake of the financial crisis, the situation in the Icelandic economy met the conditions for the application of Article 43(2) and (4) EEA.
- 44 ESA and the Commission argue that the measures taken by Iceland did not discriminate on the basis of nationality or residence. The protective measures in question were targeted to protect a specific currency, the Icelandic krónur. The rationale for emergency exchange controls is precisely to protect a specific currency.
- 45 With respect to legal certainty, ESA submits that there is nothing to suggest that the rules in question, including the conditions for granting exemptions, were not transparent or objective. On the contrary, it appears to ESA that their scope was clearly delineated leaving to the Central Bank no margin for arbitrary decisions. Likewise, the Commission takes the view that the principle of legal certainty has not been infringed.
- 46 Both ESA and the Commission assert that the measures taken are proportionate. ESA notes that the restrictions referred only to Icelandic krónur. The Plaintiff could have transferred the funds to Iceland in a different currency without any restriction. Thus, ESA is of the opinion that the restriction did not go further than was necessary to address the disturbances in the Icelandic currency market due to the financial crisis.
- 47 The Commission submits that the prohibition does not deprive an individual of the possibility to pay his debts. It merely places an additional financial burden upon him by requiring him to do so via the onshore market, thus, denying him

the opportunity to take advantage of the more favourable offshore market. As regards the Plaintiff's submission that an exemption should have been granted in his case because the amounts involved were relatively small. A transfer to Iceland could not properly be considered to affect the stability of the krónur. The Commission asserts that such argument fails to take account of the fact that if all holders of offshore krónur sought to carry out the same type of operation as the Plaintiff, the impact would clearly be considerable. Moreover, in the Commission's view, the existence of an exemption scheme as such tends to reinforce the view that the measures satisfy the requirements of proportionality.

Findings of the Court

- 48 Article 43 EEA provides for derogations from the free movement of capital established in Article 40 EEA. Article 43(2) EEA provides that if movements of capital lead to disturbances in the functioning of the capital market in any EFTA State, the State concerned may take protective measures in the respective field. Moreover, it follows from Article 43(4) EEA that where an EFTA State is in difficulties, or is seriously threatened with difficulties, as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardize the functioning of the EEA Agreement, the State concerned may take protective measures.
- 49 As described above in paragraphs 3 to 4, the EFTA Standing Committee and the EEA Joint Committee are, pursuant to Article 44 EEA in conjunction with Protocol 18 to the EEA Agreement, and Article 45 EEA, to be notified and consulted prior to the implementation of the protective measures. Moreover, the EFTA Standing Committee is required to examine and deliver an opinion on the introduction of the measures, keep the situation under review and issue recommendations, as appropriate. However, neither committee has been vested with a competence to issue binding decisions to determine whether the protective measures are compatible with Article 43 EEA.
- 50 The substantive conditions laid down in Article 43(2) and (4) EEA call for a complex assessment of various macroeconomic factors. EFTA States must therefore enjoy a wide margin of discretion, both in determining whether the conditions are fulfilled, and the choice of measures taken, as those measures in many cases concern fundamental choices of economic policy.
- 51 The protective measures in question, the Rules restricting importation of offshore Icelandic krónur, were adopted to prevent transactions which would cause serious and substantial monetary and exchange rate instability. According to the facts presented to the Court, a critical situation existed in Iceland after the financial crash in late 2008. This situation was characterised, *inter alia*, by substantial reductions in the international value of the króna and of Iceland's foreign exchange reserves. In those circumstances, the substantive conditions required for taking protective measures under Article 43(2) and (4) EEA were satisfied at the time when the Rules were adopted (October 2009), as well as

when the Plaintiff was finally denied an exemption from the prohibition on the importation of offshore krónur (October 2010). It appears that the Plaintiff does not dispute the facts as presented to the Court nor the fact that the conditions for introducing protective measures were satisfied at the time when the measures were taken.

- 52 For a restriction on the free movement of capital to be justified, the national rules adopted must be suitable for securing the objective they pursue and must not exceed what is necessary in order to achieve it, so as to accord with the principle of proportionality (see *Piazza*, cited above, paragraph 39, and, for comparison, Case C-174/04 *Commission v Italy* [2005] ECR I-4933, paragraph 35). In addition, measures must satisfy the principle of legal certainty (see *Fokus Bank*, cited above, paragraph 37).
- 53 The Court has not been provided with information to suggest that the measures taken are not in conformity with the principle of proportionality. On the contrary, it appears that it was only when the rules prohibiting inbound transfer of offshore krónur were enacted that the króna and the foreign exchange reserves were stabilised. This suggests that the measures did not go beyond what was necessary to attain the objective pursued. Moreover, as noted by the Commission, the prohibition on the transfer of offshore krónur to Iceland does not render it impossible for individuals, such as the Plaintiff, to pay off debt in Iceland. It merely entails that more favourable exchange rates for Icelandic krónur on the offshore market cannot readily be obtained. Finally, the argument advanced by the Plaintiff, to the effect that the amount of funds in question is small, and that, consequently, it is disproportionate not to grant him an exception, is flawed. If all holders of offshore krónur were to carry out the same type of transaction as the Plaintiff, this would, taken together, have a major impact.
- 54 With regard to the Plaintiff's assertion that the measures in question cannot be regarded as necessary, the Court notes that it is inherent in the principle of proportionality that derogations from a fundamental freedom can only be upheld if they are necessary. However, what is at stake in the case at hand is not the question whether the necessity requirement is fulfilled today, but whether it was fulfilled at the relevant time.
- 55 The contested measures and the scheme providing for exemptions thereto also do not contravene the principle of legal certainty. All inbound transfer of offshore krónur is prohibited, save where an exemption is granted. When considering applications for exemptions, the national rules provide that an assessment must be made of the consequences the restrictions on capital movements will have for the applicant, the objectives behind the restrictions and the impact which an exemption will have on exchange rate and monetary stability. Consequently, applicants are given sufficient indication of the circumstances on the basis of which applications for exemption will be decided.
- 56 In light of the foregoing, the answer to the referring court's question must be 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.

IV Costs

- 57 The costs incurred by the Icelandic Government, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Héraðsdómur Reykjavíkur, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Héraðsdómur Reykjavíkur hereby gives the following Advisory Opinion:

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.

Carl Baudenbacher

Per Christiansen

Benedikt Bogason

Delivered in open court in Luxembourg on 14 December 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President