



## **REPORT FOR THE HEARING**

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 paragraphs 2 and 4 of Article 43 of the EEA Agreement.

### **I Introduction**

1. By a letter of 8 February 2011, registered at the EFTA Court on 14 February 2011, the Reykjavík District Court made a request for an Advisory Opinion in a case pending before it between Pálmi Sigmarsson (“the Plaintiff”) and the Central Bank of Iceland (“the Defendant”).

2. The case before the Reykjavík District Court concerns the decision by the Defendant not to grant the Plaintiff permission to import into Iceland domestic currency in the amount of ISK 16 400 000.

### **II Legal background**

*EEA law*

3. 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.*

...

4. 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.*

5. Article 44 EEA provides that the Community, on the one hand, and the EFTA States, on the other, shall apply their internal procedures to implement the provisions of Article 43 EEA. In the case of the EFTA States, Protocol 18 to the EEA Agreement on internal procedures for the implementation of Article 43, together with Protocol 2 to the Agreement on a Standing Committee of the EFTA States, provide that notice of measures must be given “in good time” to the Standing Committee of the EFTA States (“the EFTA Standing Committee”). However, 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 deliver an opinion, keep the situation under review and issue recommendations, as appropriate.

6. Article 45 EEA sets out that decisions, opinions and recommendations related to the measures laid down in Article 43 EEA must be notified to the EEA Joint Committee. Moreover, the measures must be the subject of prior consultations and exchange of information within the EEA Joint Committee. When measures are taken in accordance with Article 43(2) and (4) EEA, notice thereof 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\**

7. Act No 87/1992 on Foreign Exchange (“the 1992 Act”) lays down certain rules concerning capital movements, imports and foreign investments. According to Article 3, the Central Bank of Iceland 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.

8. 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 point 2 of that Article, the Central Bank of Iceland 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.

9. On 28 November 2008, the Icelandic parliament passed Act No 134/2008, which amended the 1992 Act, adding, *inter alia*, a transitional provision authorising the Central Bank to adopt, until 30 November 2010, 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.

10. 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*”.

11. Article 2 of the Rules provides as follows:

*For the purposes of these Rules, cross-border movement of capital shall mean the transfer or transport of capital between residents and non-residents.*

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\* Translations of national provisions are based on translations contained in the documents of the case

*All cross-border movement of foreign-denominated capital according to the Paragraph 1 of Temporary Provision 1 of Act No 87/1992 is prohibited unless it is for the purchase of goods or services or is particularly exempted according to these Rules.*

...

12. Article 3 of the Rules reads as follows:

*Foreign exchange transactions between residents and non-residents are prohibited if domestic currency is part of transaction.*

*Residents are prohibited from purchasing foreign currency at a financial undertaking in Iceland, when payment is remitted in domestic currency, unless they demonstrate that the funds will be used for transaction with goods and services, including travel, or for movements of capital according to Article 10 and Article 11.*

...

13. 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.

### **III Facts and procedure**

14. 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, the Plaintiff applied to the Defendant for an exemption from the currency controls laid down in Article 2 of the Rules on Foreign Exchange No 880/2009, in order to be able to transfer those krónur to Iceland. The Defendant rejected the Plaintiff's application on 26 February 2010, and this conclusion was upheld by a ruling of the Ministry of Economic Affairs on 8 October of the same year.

15. The Plaintiff has sought judicial review of the Defendant's decision before the Reykjavik District Court, claiming that it is both in breach of Icelandic law and incompatible with the free movement of capital provided for by the EEA Agreement.

16. On the latter issue, the Reykjavik District Court decided in a ruling of 3 January 2011 that it was necessary to request an advisory opinion from the EFTA 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.

17. 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?**

#### **IV Written observations**

18. 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 Stefán Geir Þórisson, Supreme Court Attorney;
- 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;
- the EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Ólafur Jóhannes Einarsson, Deputy Director, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission, represented by Elisabetta Montaguti and Nicola Yerrell, members of its legal service, acting as Agents.

#### *The Plaintiff*

19. The Plaintiff notes that all transactions concerning Icelandic krónur between Icelandic residents and non-residents are prohibited, unless an exemption is granted. As a result, the Plaintiff contends that the issue at hand requires an assessment of whether the exemption framework is compatible with the substantive rules of the EEA Agreement.

20. He submits that the derogations to the right to free movement of capital permitted under Article 43 EEA are materially analogous to and not substantively distinguishable from other derogations in the chapter on capital or more generally from derogations concerning other fundamental freedoms. There is, he continues, no indication that the safeguard clauses under Article 43 have a broader scope than restrictions authorised under other provisions of the Agreement, or that the EEA 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 relate to temporary measures and can only be invoked under certain circumstances.

21. The Plaintiff argues that although the safeguard clauses provided for in Article 43 EEA give EEA States the opportunity to apply protective measures, these measures may not disregard fundamental principles of European law.<sup>1</sup> He submits that the derogations set out in Icelandic legislation are not in conformity with Article 43(2) and (4) EEA, since (i) they delegate unrestricted powers to a state-owned entity, thereby violating the principle of legal certainty,<sup>2</sup> (ii) EEA States cannot determine unilaterally the scope of restrictions on the fundamental freedoms, and (iii) they are contrary to the principles of proportionality and necessity, and the obligation of EEA States to take the least restrictive measures.

22. As regards points (i) and (ii), the Plaintiff submits that restrictive measures may be taken only if the means justify the ends. In the Plaintiff's view, the contested system for restricting movement of capital and the system of rules on exemptions thereto do not contain any objective criteria.

23. The Plaintiff asserts that, according to the Court of Justice of the European Union ("ECJ"), a system for granting exemptions from restrictions on fundamental freedoms must be transparent and foreseeable; the conditions on which approval is granted should be defined, as should the extent of the rights and obligations of individuals.<sup>3</sup>

24. The aim of the protective measures taken by the Defendant was to prevent "serious and substantial monetary and exchange rate instability". Although this aim falls within the ambit of Article 43(2) and (4) EEA, there are no criteria to be found in the rules to determine which transactions pose an actual threat to monetary and exchange rate stability.

25. The Plaintiff contends further that derogations from the fundamental freedoms must include principles which lay down the extent and limitation of the use of restrictions. In the Plaintiff's view, Article 7 of the 1992 Act gives the Defendant authorisation to grant exemptions without any limitation, other than that it must take into account the aim of the restrictions, the consequences of the restrictions for the applicant, and the impact which an exemption will have on exchange rate and monetary stability. In the Plaintiff's view, such a general, open delegation of power to a state-owned entity paves the way for arbitrary decision-taking.

26. In the view of the Plaintiff, the decisions of the Defendant and the Ministry contain no reasoning on why, pursuant to the rules on exemptions, he is ineligible for such. He argues that no reference is made to the consequences that the restriction will have for him, although they are clearly extremely onerous.

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<sup>1</sup> The Plaintiff refers to Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paragraph 42.

<sup>2</sup> In this regard, the Plaintiff refers to Case C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraphs 33 to 36.

<sup>3</sup> *Ibid.*, paragraphs 36 to 37.

27. As for point (iii), the Plaintiff submits that the decision to refuse his application was based merely on the purpose of the restriction and that the authorities have not proven that there is a risk that the transaction in question will endanger the objective of the legislation, and that the restriction is, thus, necessary. There is, he contends, no evidence or indication that, where a minor amount is to be transferred, it is necessary to deny an exemption from the restrictions.

28. The Plaintiff argues further that it must be examined whether the objective pursued could have been achieved through less restrictive means.<sup>4</sup> In this connection, the Plaintiff submits that the provisions of Chapter 4 in Part III of the EEA Agreement have direct effect.<sup>5</sup>

29. Against this background, the Plaintiff proposes that the Court should answer the question as follows:

*It is not compatible with paragraphs 2 and 4 of Article 43 of the EEA Agreement that the Icelandic State prevents an Icelandic national, resident in Britain, from transferring Icelandic krónur, which he purchased on the offshore market in Britain, to Iceland.*

#### *The Defendant*

30. As a preliminary point, the Defendant notes that foreign exchange transactions in Iceland have been subject to capital controls ever since the country's banking system collapsed in late 2008. The loss of confidence triggered by the collapse was bound to cause large capital outflows likely to seriously threaten the reconstruction of the banking system and have adverse effects on an already weakened exchange rate of the Icelandic krónur.

31. The Defendant notes further that in October 2008, Iceland requested economic assistance from the International Monetary Fund ("the IMF") to restore the country's economic stability. On 19 November 2008, the IMF's Executive Board approved a USD 2.1 billion Stand-By Arrangement for Iceland. In the view of the Defendant, it was a precondition for the Stand-By Arrangement that Iceland would impose capital controls, which were necessary for an orderly reconstruction of the banking system, given the complete lack of confidence, domestically and abroad, in the Icelandic krónur and the Icelandic Government's ability to refinance its foreign debt, especially given the large amount of offshore krónur.

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<sup>4</sup> The Plaintiff refers to Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraphs 21 to 22, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 22 to 28, and Case E-3/06 *Ladbroke's* [2007] EFTA Ct. Rep. 86, paragraph 58.

<sup>5</sup> Reference is made to *Sanz de Lera and Others*, cited above, paragraphs 41 to 47, Case C-464/98 *Stefan* [2001] ECR I-173, and Case C-213/04 *Burtscher* [2005] ECR I-10309.

32. The exchange rate of Icelandic krónur was, the Defendant continues, extremely volatile in the months following the introduction of the capital controls, and its almost continuous slide did not come to an end until 30 October 2009 when the Defendant issued the Rules on Foreign Exchange No 880/2009. In its opinion, the single most important amendment introduced in the new rules consisted in the outright prohibition on inbound transfer of Icelandic krónur bought on the offshore market.

33. Furthermore, the Defendant points to the fact that on the same day as it issued its first rules restricting cross-border movements of capital, 28 November 2008, the Icelandic Government presented the EFTA Standing Committee as well as the EEA Joint Committee with notifications of protective measures under Article 43 EEA. Neither committee reacted unfavourably to the protective measures. On 1 April 2009, the committees were notified of developments regarding the protective measures. Furthermore, on 30 October 2009, 16 June 2010, and 1 July 2010, the committees were notified of amendments to the protective measures. None of these notifications resulted in any criticism from the committees.

34. The Defendant observes that, on 26 May 2009, the EFTA Surveillance Authority (“ESA”) received a complaint against Iceland regarding the capital controls. According to the complaint, the legal measures restricting movement of capital infringed the EEA Agreement. Moreover, on 30 December 2009, ESA received a complaint concerning the restrictions on inbound transfers of Icelandic krónur based on the Central Bank’s Rules on Foreign Exchange No 880/2009. On 17 November 2010, ESA decided to close the cases, stating, *inter alia*, that it had not been presented with any information that might suggest that the conditions for Iceland to apply Article 43(2) and (4) EEA were not fulfilled, and, moreover, that the measures had been notified to the EEA Joint Committee in accordance with Article 45 of the EEA Agreement.

35. The Defendant submits that the rules restricting inbound transfer of Icelandic krónur equally apply to Icelandic as well as non-Icelandic citizens and irrespective of whether the owner of the krónur is resident in Iceland or not. In its view, the question referred to the EFTA Court is consequently not one of discrimination.

36. Moreover, the Defendant asserts that since the EEA Joint Committee and the EFTA Standing Committee were presented with notifications on the day the protective measures were introduced and, subsequently, have been notified of amendments thereto the process followed conforms to the requirements of Protocol 18 to the EEA and is in accordance with Articles 44 and 45 EEA.

37. In this regard, the Defendant submits that the notifications, exchange of information, and consultations would be rendered meaningless if the outcome of such a process were irrelevant in legal terms. Therefore, it continues, an



assessment of the necessity of the measures falls outside the jurisdiction of the EFTA Court pursuant to Article 34 SCA.

38. However, should the Court consider it appropriate to assess the necessity for Iceland to prohibit inbound transfer of Icelandic krónur, the Defendant submits that the collapse of Iceland's banking system together with the Central Bank's limited foreign currency reserves entailed (i) that a situation governed by Article 43(2) and (4) EEA existed, (ii) that such situation was liable in particular to jeopardise the functioning of the EEA, and (iii) that this allowed Iceland to take protective measures without prior consultations and exchange of information.

39. The Defendant proposes that the Court should answer the question as follows:

*Articles 43, 44 and 45 of the EEA must be interpreted as not precluding an EFTA State from taking protective measures pursuant to national rules, which have been enacted in accordance with those provisions, under which the inbound transfer of the EFTA State's domestic currency, obtained outside of the purview of the domestic authorities, is prohibited.*

#### *The Icelandic Government*

40. The Icelandic Government notes that Article 43 EEA sets out public interest grounds – macroeconomic reasons – on the basis of which an EEA State may depart from the principle of free movement of capital. In its view, Article 43 EEA differs from other provisions in the Agreement under which restrictions on fundamental freedoms may be justified, e.g. Articles 13 and 33 EEA, in that the circumstances that it contemplates cannot be anything but extraordinary. Whereas restricting the free movement of goods for public health reasons is a recurrent matter; balance of payment difficulties is not. Therefore, it continues, measures introduced under Article 43 EEA are, by their very nature, temporary, and the EEA State concerned introduces them out of dire necessity, and not out of wish.

41. In its view, 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.

42. According to the Icelandic Government, since an EEA State's recourse to Article 43 EEA is "implemented" through "procedures", it follows that an EEA State that observes those procedures may rely on the fact that its measures are permitted under the EEA Agreement. Given the gravity of the circumstances envisaged by Article 43, it continues, there is an imperative need for the EEA State to ensure in advance that its acts are in accordance with the Agreement.

43. The Icelandic Government notes that, for the purposes of the EFTA pillar, scrutiny of the measures adopted by an EEA State pursuant to Article 43 EEA is entrusted to the EFTA Standing Committee. In its view, since the scrutiny is not entrusted to ESA, the normal surveillance procedures do not apply and, as a consequence, ESA will not be able to open infringement procedures against the notifying State. Nor has ESA any powers in respect of the EFTA Standing Committee. Moreover, according to the Icelandic Government, examination of the compatibility with Article 40 EEA of measures that have been introduced under Articles 43 EEA and, in accordance with the procedures referred to in Article 44 EEA, scrutinised by the EFTA Standing Committee and the EEA Joint Committee, is, for the purposes of the EFTA pillar, beyond the remit of judicial review. In other words, judicial scrutiny must be limited to an assessment of whether the EEA State concerned followed the procedures prescribed. However, in its view, if the actions of an EEA State are not in conformity with the opinions of the EFTA Standing Committee or the EEA Joint Committee, the State will be liable to the application of Articles 111 to 114 EEA (on the settlement of disputes and safeguard measures).

44. Against this background, the Icelandic Government submits that the issue subject to judicial review in the present case is simply whether the enactment of the measures at issue – Rules on Foreign Exchange No 880/2009 – complied with the procedural requirements established in Articles 44 and 45 EEA. In its view, this question must be answered in the affirmative.

45. Should the Court take a different view and, consequently, seek to assess the necessity of the measures taken, the Icelandic Government asserts that the measures are clearly necessary, as without those measures the stabilisation of the currency would not have taken place. In any case, it would be for the referring court to apply the necessity test as the order for reference does not contain the elements sufficient for the Court to carry out that assessment.<sup>6</sup>

46. The Icelandic Government proposes that the Court should answer the question as follows:

*Articles 43 and 44 EEA must be interpreted as not to preclude national rules that have been enacted in accordance with those provisions, such as those at issue in the main proceedings, under which an Icelandic national, resident in the United Kingdom, may not transfer to Iceland Icelandic krónur, purchased on the offshore market in the United Kingdom.*

#### *The EFTA Surveillance Authority*

47. ESA observes that the main proceedings raise the question whether the requirements of Article 43(2) and (4) EEA were fulfilled when Iceland put in

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<sup>6</sup> Reference is made to Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraph 57.

place currency controls following the financial crisis that hit the country in the autumn of 2008. More specifically, it raises the issue whether the requirements were met in relation to the prohibition on import into Iceland of Icelandic krónur bought on the offshore market; a prohibition introduced through the enactment of Rules on Foreign Exchange No 880/2009, which entered into force on 31 October 2009.

48. In ESA's view, the order for reference contains very limited factual information on the elements relevant for the purposes of determining whether the conditions established in Article 43(2) and (4) EEA were fulfilled. ESA observes that these provisions of the EEA Agreement were based on Article 73(1) and Article 108(1) of the EEC Treaty. However, in ESA's view, the case-law of the ECJ on those latter provisions is of limited value for the purposes of giving a ruling in the present case because those judgments dealt with issues very different to those which fall to be examined in the present case.<sup>7</sup>

49. ESA contends that in submitting the notifications of 30 October 2009 to the EFTA Standing Committee and the EEA Joint Committee, in which the Icelandic Government notified the changes made to the currency controls by the Rules on Foreign Exchange No 880/2009, the Icelandic Government complied with its procedural obligations under Article 1 of Protocol 2 to the Agreement on a Standing Committee and Article 45 EEA when enacting those rules. It has not come to ESA's attention that any of the other EEA States disputed the fact that the conditions for having recourse to those procedures were fulfilled. Moreover, the order for reference does not contain any indications to that effect.

50. As regards the substance of the conditions established by Article 43(2) and (4) EEA, according to ESA, application of those conditions calls for a complex economic assessment of various macroeconomic factors. In its view, there can, in principle, be little doubt that in the wake of the financial crisis, the situation in the Icelandic economy met the conditions for the applications of those provisions. The inherent complexity involved in the assessment of Article 43(2) and (4) EEA suggests to ESA that the EEA State in question enjoys a certain margin of discretion when determining whether those conditions are satisfied and the exact measures to be undertaken as they may in many cases concern fundamental choices of economic policy. This conclusion is also supported by the fact that the other EEA States have an opportunity to make their views on the measures known through the procedure laid down in Article 45 EEA and that the EFTA Standing Committee may, according to Article 2 of Protocol 2 to the Agreement on a Standing Committee, make recommendations regarding amendments to the measures notified to it. In this regard, ESA notes that, to the best of its knowledge, the Icelandic notifications did not result in any response from the other EEA States or recommendations from the EFTA Standing Committee.

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<sup>7</sup> Reference is made to Case 203/80 *Casati* [1981] ECR 2595 and Case 157/85 *Brugnoli* [1986] ECR 2013.

51. Moreover, ESA notes that it has dealt with a complaint concerning the restrictions on capital movements in question, which it closed by a decision of 17 November 2010. In that decision, ESA held that it “has not been presented with any information that might suggest that the conditions for Iceland to apply Articles 43(2) and 43(4) were not fulfilled”. In ESA’s view, the order for reference in the present case contains no information capable of leading to a different conclusion.

52. ESA proposes that the Court should answer the question as follows:

*Consideration of the question raised has disclosed no factor of such a kind as to suggest that it is incompatible with Article 43(2) and (4) of the EEA Agreement for the Icelandic State to have prevented an Icelandic national, residing in Britain, from transferring to Iceland, Icelandic krónur which he had purchased on the offshore market in Britain.*

#### *The European Commission*

53. The European Commission (“the Commission”) notes that Article 43(2) and (4) EEA expressly permits an EEA State to take “protective measures” where there is either a disturbance in the functioning of its capital market, or the State is in difficulties as regards its balance of payments. It asserts that a detailed assessment of the existence of such a situation is primarily a matter for the EFTA Standing Committee under Protocol 18 to the EEA Agreement and for ESA. The Commission observes that it is clearly not in a position to be able to comment on this in detail. It notes, however, that within the Union context, the former safeguard clause for disturbances in the capital markets was invoked only once, by Denmark in the period 1979-1984. In its view, it would be difficult to suggest that this situation was as severe or critical as that affecting Iceland in 2008.

54. The Commission notes further that the protective measures adopted by Iceland were designed to prevent transactions which would “cause serious and substantial monetary and exchange rate instability”, primarily by encouraging foreign currency into the domestic market to increase foreign currency reserves to stabilise the exchange rate of the Icelandic krónur. In its view, the imposition of such a system of exchange control, including the specific prohibition on importing krónur into Iceland, is clearly capable of constituting a “protective measure” within the meaning of Article 43(2) and (4) EEA. In this regard, it adds that the measures taken by Iceland apparently reflect commitments made to the IMF as a condition for receiving financial assistance.

55. As regards the proportionality of the prohibition on import of krónur into Iceland, the Commission notes that an individual such as the Plaintiff who wishes to pay off debts in Iceland may continue to do so, since Article 3 of the Rules expressly enables non-residents to purchase krónur from Icelandic financial institutions, that is, on the onshore market. Putting it another way, it submits that the prohibition does not deprive an individual of the possibility to pay his debts,

but merely places an additional financial burden upon him by effectively requiring him to do so via the onshore market rather than by “taking advantage” of the more favourable offshore market.

56. The Commission notes that the Plaintiff has sought to argue that an exemption should be granted in his case because the amounts involved were relatively small and a transfer to Iceland could not properly be considered to affect the stability of the krónur. In the Commission’s view, however, 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, there would clearly be a major impact.

57. In this regard, the Commission submits that, in the absence of further information on the criteria for granting exemptions, simply the existence itself of an exemption scheme tends to reinforce the view that the measures comply with the requirements of proportionality.

58. The Commission proposes that the Court should answer the referring court’s questions as follows:

*A measure such as that contained in the Rules on Foreign Exchange No 880/2009 which prevents an Icelandic national resident in the UK from transferring Icelandic krónur purchased on the offshore market in the UK to Iceland is in principle compatible with Article 43(2) and (4) of the EEA Agreement.*

Per Christiansen  
Judge-Rapporteur