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Judgment in Case E-16/11 *EFTA Surveillance Authority* v *Iceland* (*"Icesave"*)

APPLICATION OF THE EFTA SURVEILLANCE AUTHORITY IN THE CASE OF ICESAVE DISMISSED

During a worldwide financial crisis in 2008 the Icelandic banking sector collapsed. As part of the financial crisis, the depositors of Landsbanki Íslands hf. ("Landsbanki") at its branches in the Netherlands and the United Kingdom lost access to their deposits in the autumn of 2008. This included the so-called Icesave-on-line savings accounts. Consequently, Iceland's Depositors' and Investors' Guarantee Fund should have been obliged to pay the minimum guarantee per depositor according to the rules and time limits as set out in the Icelandic law implementing Directive 94/19/EC on deposit-guarantee schemes ("the Directive"). However, no such payments were made to those depositors. The UK and Netherlands authorities arranged for a pay out of retail depositors from their own deposit-guarantee schemes. On the other hand, domestic deposits in Landsbanki had been transferred to a new bank "new Landsbanki" which was established by the Icelandic Government.

Against this background the EFTA Surveillance Authority ("ESA") lodged an application with the EFTA Court. ESA sought a determination that Iceland had failed to comply with its obligations resulting from the Directive, in particular Articles 3, 4, 7 and 10 thereof, (first plea) and/or Article 4 EEA (second and third pleas) since it did not ensure payment of the minimum amount of compensation (EUR 20 000) to Icesave depositors in the Netherlands and the United Kingdom within the given time limits. The application was supported by the European Commission as intervener.

Written observations were submitted by the Principality of Liechtenstein, the Kingdom of the Netherlands, the Kingdom of Norway and the United Kingdom. These EEA States limited their observations to the first plea only.

In today's judgment, the Court dismissed the application.

As regards the first plea, the Court noted at the outset that the nature of the result to be achieved is determined by the substantive provisions of the particular directive. Moreover, it noted that as a result of the crises, the regulatory framework of the financial system had been subject to revision and amendment in order to enhance financial stability. However, the present judgment had to be based on the Directive as it stood at the relevant time, without these amendments and without the improved protection of depositors.

The Court held that the Directive did not envisage the alleged obligation of result to ensure payment to depositors in the Landsbanki branches in the Netherlands and the United Kingdom in a systemic crisis of the magnitude experienced in Iceland. How to proceed in a case where the guarantee scheme was unable to cope with its payment obligations remained largely unanswered by the Directive. The only operative provision that deals with non-payment is Article 7(6) according to which depositors have the possibility to bring an action against the responsible scheme. An action against or an

obligation on the EEA State in question, though, was not envisaged in the Directive's provisions. Moreover, neither case law nor a comparison with secondary law supported the first plea.

However, it was stated that this did not mean that depositors necessarily remain unprotected in such a case. Depositors may fall within the remit of other parts of the safety net. They may benefit from other provisions of EEA law regarding financial services, as well as the activities of supervisory bodies, central banks, or governments. The question in the present case, however, was whether the EEA States are legally responsible under the Directive in case of such an enormous event.

Concerning the second plea, it was held that the principle of non-discrimination requires that there is no difference in treatment of depositors by the guarantee scheme itself and the way in which it uses its funds. Insofar, discrimination under the Directive is prohibited. However, the transfer of domestic deposits from the old Landsbanki into the new Landsbanki was made before the Icelandic Financial Supervisory Authority, Fjármálaeftirlitið, rendered its declaration that triggered the application of the Directive. Thus, depositor protection under the Directive never applied to depositors in Icelandic branches of Landsbanki. Accordingly, the transfer of domestic deposits – whether it leads in general to unequal treatment or not – did not fall within the scope of the non-discrimination principle as stipulated by the Directive and could not lead to an infringement of the aforementioned provisions of the Directive read in light of Article 4 EEA. Consequently, the second plea was dismissed.

As regards the third plea, the Court noted that it is settled case law that the principle of non-discrimination, which has its basis in Article 4 EEA, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. Moreover, it was held that ESA had expressly limited the scope of its application. In ESA's view the breach had been constituted by the failure of the Icelandic Government to ensure that Icesave depositors in the Netherlands and the United Kingdom received payment of the minimum amount of compensation provided for in the Directive within the time limits laid down in the Directive, as it did for domestic depositors. ESA added that the compensation of domestic and foreign depositors above and beyond that minimum amount is not to be discussed in the context of the present proceedings.

Thus, considering ESA's self-limitation, the Court was bound to assess whether Iceland was under a specific obligation to ensure that payments were made to Icesave depositors in the Netherlands and the United Kingdom. However, since the Court had already held that the Directive, even read in light of Article 4 EEA, imposes no obligation on the defendant to ensure that payments are made in accordance with the requirements of the Directive to Icesave depositors in the Netherlands and the United Kingdom, it was found that such an obligation of result could only be deemed to exist if it followed directly from Article 4 EEA itself. The Court held that this is not required under the principle of non-discrimination. A specific obligation upon the defendant that would not even establish equal treatment between domestic depositors and those depositors in Landsbanki's branches in other EEA States could not be derived from that principle. Consequently, the third plea, and the application as a whole was dismissed.

The full text of the judgment may be found on the Internet at: www.eftacourt.int.

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