Luxembourg, 28 September 2012

PRESS RELEASE 12/2012

Judgment in Case E-18/11 *Irish Bank Resolution Corporation Ltd and Kaupthing Bank hf.*

ACCORDING TO ARTICLE 14 OF DIRECTIVE 2001/24/EC, NATIONAL LEGAL PROVISIONS MAY NOT DENY THE VALIDITY OF THE CLAIM OF A KNOWN EEA CREDITOR WHO HAS NOT BEEN INDIVIDUALLY NOTIFIED OF THE OPENING OF WINDING-UP PROCEEDINGS IN A CREDIT INSTITUTION, EVEN IF AN INVITATION TO LODGE CLAIMS HAS BEEN PUBLISHED.

COURTS OF EFTA STATES AGAINST WHOSE DECISION THERE IS NO JUDICIAL REMEDY UNDER NATIONAL LAW WILL TAKE DUE ACCOUNT OF THE FACT THAT THEY ARE BOUND BY THE DUTY OF LOYALTY WHEN DECIDING ON WHETHER TO MAKE A REFERENCE TO THE COURT.

In a judgment delivered today, the EFTA Court gave judgment on questions referred to it by the Reykjavík District Court (Héraðsdómur Reykjavíkur) regarding 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.

In October 2008, Kaupthing Bank entered winding-up proceedings. As a part of this process, the Defendant, Kaupthing, issued and published an invitation for creditors to lodge claims in various daily newspapers across the EEA, the Official Journal of the European Union and on its website. All those claiming debts of any sort, or other rights against Kaupthing, were told to submit their claims in writing within six months.

In the proceedings before the Reykjavík District Court, Irish Bank Resolution Corporation Limited, which holds two Kaupthing bonds, contends that its claims, lodged after the deadline had expired, be recognised as having been received within the time-limit and be added to the list of claims in the bank's winding-up proceedings, as it had not been individually notified.

Following Reykjavík District Court's reference for an Advisory Opinion, the Defendant appealed the decision to refer to the Supreme Court of Iceland (Hæstiréttur Íslands). The Supreme Court upheld the decision to make a reference to the Court but substantially amended the questions posed.

The Court recalled that Article 34 SCA establishes a special means of judicial cooperation between the Court and national courts with the aim of providing the national courts with the necessary interpretation of elements of EEA law to decide the cases before them. The Court held that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for an Advisory Opinion in order to enable it to deliver judgment and the relevance of the questions which it submits.

The Court noted that the relationship between the Court and the national courts of last resort is, pursuant to Article 34 SCA, more partner-like than the relationship between the ECJ and the highest courts of the EU Member States. Nevertheless, courts against whose decisions there is no judicial remedy under national law will take due account of the fact that they are bound to fulfil their duty of loyalty under Article 3 EEA and that EFTA citizens and economic operators benefit from the obligation of courts of the EU Member States against whose decision there is no judicial remedy under national law to make a reference to the ECJ.

The Court recalled that the provisions of the EEA Agreement as well as procedural provisions of the Surveillance and Court Agreement are to be interpreted in the light of fundamental rights. The Court noted that when a court or tribunal against whose decisions there is no judicial remedy under national law refuses a motion to refer a case to another court, it cannot be excluded that such a decision may fall foul of the standards of Article 6(1) ECHR. In particular this may be the case if the decision to refuse is not reasoned and must therefore be considered arbitrary. These considerations may also apply when a court or tribunal against whose decisions there is no judicial remedy under national law overrules a decision of a lower court to refer the case, whether in civil or criminal proceedings, to another court, or upholds the decision to refer, but amends the questions asked by the lower court.

Therefore, the Court considered the two questions as amended by the Supreme Court together with the original first question of the Reykjavík District Court, in order to give as complete and as useful a reply as possible to the referring court in the framework of the close cooperation under Article 34 SCA.

The Court found that the Icelandic version of Article 14 of the Directive differs materially from inter alia the English, Norwegian, German, French, Danish, Swedish, Italian, and Spanish language versions. The Estonian Government and ESA have furthermore noted that it also differs materially from the Estonian and Finnish language versions, and the Greek language version respectively.

The Court held that in the case of differing authentic language versions of a provision, a preferred starting point for the interpretation will be to choose one that has the broadest basis in the various language versions. In the case of divergence between the language versions, the provision must be interpreted, autonomously and uniformly, by reference to the purpose and general scheme of the rules of which it forms a part so as to be consistent, as far as is possible, with the general principles of EEA law. The version which reflects the purpose and the general scheme of the rules provided for by the Directive as well as the general principles of EEA law must be deemed to express the meaning of an EEA law provision.

Consequently, the Court held that Article 14 of Directive 2001/24/EC precludes a rule of national law which, following the publication of an invitation to lodge claims directed towards known creditors who have their domicile, permanent residence or head offices in other EEA States, allows for the cancellation of claims that have not been lodged even if these creditors have not been individually notified.

The Court noted that the objective of establishing a dynamic and homogeneous European Economic Area can only be achieved if EFTA and EU citizens and economic operators enjoy, relying upon EEA law, the same rights in both the EU and EFTA pillars of the EEA.

The Court held that the national court is bound to interpret domestic law, so far as possible, in the light of the wording and the purpose of the Directive in order to achieve its intended result so that an individual or economic operator who is a known creditor but who has not been individually notified through the dispatch of a notice, such as the Plaintiff, may be able to lodge a claim with the responsible national winding-up authority within the applicable time-limits established under national law.

Where that is not possible, the Court noted that in cases of violation of EEA law by an EEA State, the EEA State is obliged to provide compensation for loss and damage caused to individuals and economic operators.

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

This press release is an unofficial document and is not binding upon the Court.