



**ROYAL MINISTRY  
OF FOREIGN AFFAIRS**

To the EFTA Court

Oslo, 15 May 2012

**WRITTEN OBSERVATIONS**

**BY**

**THE GOVERNMENT OF NORWAY**

represented by Ms. Kaja Moe Winther, Senior Adviser, Ministry of Foreign Affairs, and Mr. Torje Sunde, Advocate, Office of the Attorney General (Civil Affairs), acting as agents, submitted, pursuant to Article 20 of the Statute of the EFTA Court, in

**Case E-16/11**

**EFTA Surveillance Authority**

**v**

**Iceland**

**\*\*\*\***

## 1. INTRODUCTION

1. By an Application dated 14 December 2011 the EFTA Surveillance Authority ("the Authority") initiated proceedings before the EFTA Court seeking a declaration that by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and in the United Kingdom provided for in Article 7(1) of the Act referred to in point 19a of Annex IX to the Agreement on the European Economic Area (*Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit guarantee schemes*), within the time limits laid down in Article 10 of the Act, Iceland has failed to comply with the obligations resulting from that Act, in particular its Articles 3, 4, 7 and 10, and/or Article 4 of the Agreement on the European Economic Area ("the EEA Agreement").
2. The Authority submits in its Application that Directive 94/19/EC ("the Directive") imposes obligations of result on the EFTA States to ensure that a deposit guarantee scheme, capable of guaranteeing the deposits of depositors up to the amount laid down in Article 7(1) of the Directive, is set up, and to ensure that duly verified claims by depositors of unavailable deposits are paid within the deadline laid down in Article 10 of the Directive.<sup>1</sup>
3. Iceland has in its Defence dated 8 March 2012 contended that the claim is entirely misconceived and that the Authority has misunderstood the true nature and extent of the obligations imposed by the Directive.<sup>2</sup>
4. The Authority has in its Reply dated 10 April 2012 further elaborated on its claim, whereas Iceland has supplemented its defence in a Rejoinder of 11 May 2012.
5. The Government of Norway ("the Government") avails itself of the opportunity as provided for in Article 20 of the Statute of the EFTA Court to present written observations in this case. The observations are limited to the general issue of the interpretation of Directive 94/19/EC, as incorporated into the EEA Agreement, with regards to the obligations of the State. The Government will not comment on the specific assessment of the case at hand between Iceland and the Authority.

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<sup>1</sup> The Application, paragraph 71

<sup>2</sup> The Defence, paragraph 2

## 2. OBSERVATIONS

6. The Authority claims in its Application that the Directive imposes an obligation of result on the States which in essence is twofold: The States are to ensure both that a deposit guarantee scheme is set up, and that duly verified claims by depositors of unavailable deposits are paid within the deadline laid down in Article 10 of the Directive.<sup>3</sup> The Authority holds that the States must take all appropriate measures to ensure fulfilment of that obligation.<sup>4</sup>
7. The Authority, despite underlining that it does not seek a declaration that Iceland must compensate depositors from public funds<sup>5</sup>, nevertheless asserts that the States' obligation of result

*“may mean, should all else fail, that the state will ultimately be responsible for the compensation of depositors up to the amount provided for in Article 7, in order to discharge its duties under Directive 94/19/EC”.*<sup>6</sup>
8. In the Government's view, this can for all practical purposes be regarded as a claim that the Directive imposes an obligation on the State to guarantee compensation to depositors through its own funds, as a last resort.
9. The Government disagrees with such a reading of the Directive, and will submit its observations in the following.
10. According to Article 3(1) of the Directive, each Member State shall ensure that within its territory one or more deposit guarantee schemes are introduced and officially recognised.
11. The Directive then imposes certain obligations on the deposit guarantee schemes. First, the deposit guarantee schemes shall stipulate that the aggregate deposits of each depositor must be covered up to 20 000 Euro in the event of deposits being unavailable (Article 7(1)). Second, the deposit guarantee schemes shall be in a position to pay duly verified claims by depositors in respect of unavailable deposits within three months (Article 10(1)).
12. According to Article 7(6), the State must ensure that the depositor's rights to compensation may be the subject of an action by the depositor against the deposit guarantee scheme. The duty of the State in this respect is to ensure that

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<sup>3</sup> The Application, paragraphs 71 and 72

<sup>4</sup> Ibid, paragraph 133

<sup>5</sup> The Reply, paragraph 33

<sup>6</sup> The Application, paragraph 133

if the deposit guarantee scheme should fail to meet its obligations, the depositor should be able to take action against the scheme.

13. These provisions clearly show that the Directive differentiates between the obligations of the States and the obligations of the deposit guarantee schemes.
14. In general, when implementing a directive, this must be done in a way *“that guarantee the full application of the directive”*.<sup>7</sup> Furthermore, the principle of *effet utile* obliges the Member States to ensure that the national law, implementing the directive, is indeed practical and effective.
15. In the opinion of the Government, this does not, however, mean that if a deposit guarantee scheme is incapable of compensating the depositors up to the amount provided for in Article 7(1), the State will be responsible for this compensation.
16. As illustrated above, Article 7(1) expressly places the obligation of compensation upon the deposit guarantee schemes. There is no wording in the Directive that implies that the State is ultimately responsible, if the schemes were to fail in carrying out this obligation. Such a responsibility would thus not be equal to ensuring the effectiveness of the Directive. Rather, it would entail the creation of a new obligation not found in the Directive.
17. Nor can the Government see that such an obligation stems from the Preamble or the preparatory works of the Directive. On the contrary, Recital 24 of the Preamble seems to exclude this, when stating that

*“this Directive may not result in the Member States' or their competent authorities' being made liable in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognized”*.

18. It must also be recalled that the Commission's Proposal for the Directive did address the

*“question of whether the public sector would be able to provide assistance for guarantee schemes in emergency situations of exceptional gravity and when the schemes' resources have been exhausted”*.<sup>8</sup>

The Commission held that:

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<sup>7</sup> Case C-361/88, *Commission v. Germany*, paragraph 15

<sup>8</sup> COM(92) 188 final – SYN 415, page 8.

*“[i]t did not seem appropriate in the proposal for a Directive, to prohibit such assistance, which could prove necessary in practice, although it is not desirable as a general rule (...)”.*<sup>9</sup>

19. This clearly illustrates that the Directive was not intended to establish an obligation for the States to compensate the depositors if the schemes prove incapable of doing so. The Directive does, on the other hand, not forbid such intervention from the States. If the Directive itself required state intervention, it would be unnecessary to assert that such assistance was not prohibited by the Directive.

20. Furthermore, the Commission has in its 2010 Staff Working Document *“Impact Assessment accompanying a proposal for a recast directive on Deposit Guarantee Schemes”*, underlined:

*“DGS [i.e. deposit guarantee schemes] are financed by banks and the Commission intends to maintain that requirement. That means that the budget of Member States is not directly concerned by the DGS directive. The recent crisis has shown that in a systemic crisis, DGS may reach their limits. However, even if in such cases governments stepped in under strict obedience of state aid rules, this would not be triggered under a legal obligation in the DGS Directive (...)”.*<sup>10</sup>

Notably, and of crucial importance, in this Assessment the Commission stresses that there is no legal obligation for the States to intervene if a systemic crisis should result in the deposit guarantee schemes' funding proving insufficient. Such an intervention would also unquestionably affect the budget of the States.

21. Also, the Commission has in the same Assessment stated that *“[i]f DGS have insufficient funds, depositors may be paid out only after a very long delay or not paid out at all”*.<sup>11</sup> It is not mentioned that the Directive ultimately requires state responsibility for the compensation of depositors if all else should fail, in contrast to the Authority's claim quoted above in paragraph 7.

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<sup>9</sup> Ibid, page 8 (emphasis added)

<sup>10</sup> SEC(2010) 834/2, page 8 (emphasis added). The wording in Directive 94/19/EC which is relevant to the present case has in essence not been amended by Directive 2009/14/EC, and is generally maintained in the proposed recast of the deposit guarantee scheme directive. Descriptions of the obligations of the State related to the latter two directives are thus relevant for the interpretation of Directive 94/19/EC.

<sup>11</sup> SEC(2010) 834/2, page 20

22. Both the Authority and Iceland have referred to C-222/02 *Paul and others*.

However, in the view of the Government, that case does not answer the question arising from this case, as it concerns a different matter. In C-222/02 the Court of Justice for the European Union was asked to give a preliminary ruling on *inter alia* whether the Directive confers on depositors, in addition to the right to be compensated by a deposit guarantee scheme, the more far-reaching right to have the competent authorities take supervisory measures in their interest. This question was answered in the negative by the Court in so far as “*the compensation of depositors prescribed by Directive 94/49 is ensured*”.<sup>12</sup>

23. It is not correct, as the Authority asserts, that the Court in paragraph 30 of its judgment held that the Directive

“*[prescribes that] ‘compensation of depositors is ensured in the event that their deposits are unavailable’.*”<sup>13</sup>

The Court merely states that “*if the compensation of depositors is ensured (...), as prescribed by the Directive*”<sup>14</sup>, Article 3(2) to (5) does not confer on depositors a right to have the authorities take supervisory measures in their interest. The Court refers to “*the rules laid down in that directive and more specifically in Article 7 thereof*”<sup>15</sup>, but says nothing more about what those rules actually entail.

24. A conclusion to the contrary, i.e. that the Directive is construed to ultimately require State responsibility for the compensation of depositors, would prove financially very burdensome, require substantial contingency planning, and would potentially have a major impact on the national budget and the tax payers. It cannot lightly be assumed that such onerous commitments - the exact scale of which cannot easily be foreseen – are imposed on the States without clear wording. It is certainly not enough that the Directive, in the words of the Authority “*cannot be interpreted as precluding the provision of a state guarantee*”.<sup>16</sup> Hence, obligations of this scale must be clearly expressed in the legislative act imposing such a requirement. As illustrated above, Directive 94/19/EC contains no such clear wording. Such decisions regarding the national budget must thus be left for national authorities to make in accordance with national legal procedures.

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<sup>12</sup> Case C-222/02, *Paul and others*, paragraph 32 (emphasis added)

<sup>13</sup> The Application, paragraph 78

<sup>14</sup> C-222/02, *Paul and others*, paragraph 30

<sup>15</sup> *Ibid*, paragraph 29

<sup>16</sup> The Application, paragraph 121

25. The question of what Directive 94/19/EC requires must be clearly distinguished from the question whether a State would choose to provide state support to a deposit guarantee scheme in a given case. As illustrated above, there is nothing in the Directive which precludes voluntary state support to a deposit guarantee scheme. This may be deemed necessary by the State, and introduced on the State's own initiative (in accordance with EEA State Aid rules), for example in a crisis situation such as the international financial crisis in the autumn of 2008.

#### **4. CONCLUDING REMARKS**

26. It follows from the clear wording of Directive 94/19/EC that the States shall introduce and officially recognise one or more deposit guarantee schemes. The Directive then imposes certain obligations on the schemes.

27. In the event that a deposit guarantee scheme, despite it being set up in compliance with the criteria in the Directive, would be unable to cover the minimum amount of all unavailable deposits, the Directive cannot be construed to entail an obligation on the States to compensate the depositors. Such a far-reaching obligation does not follow from the wording of the Directive, the Preamble or the preparatory works. There is further no support to be found for an obligation of this kind in the subsequent documents relating to the proposed recast of the Directives. On the contrary, the Commission itself has stressed that there is no legal obligation for the States to intervene if a systemic crisis should result in the deposit guarantee schemes' funding being insufficient.<sup>17</sup>

28. A legal obligation for the States to compensate the depositors as a last resort would impose an extensive financial burden on the States. Such an onerous obligation cannot be imposed on the States without a clear and precise wording in the Directive.

29. Based on the foregoing, the Government respectfully requests the EFTA Court to reject an interpretation in which Directive 94/19/EC is found to entail a legal obligation for the States to compensate the depositors in cases where the deposit guarantee schemes prove incapable of doing so, despite being set up in accordance with the criteria set forth in the Directive.

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<sup>17</sup> See paragraph 20 above.

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Oslo, 15 May 2012



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