Samanburður á niðurstöðum Icesave dómsins við greinaskrif Stefáns Más Stefánssonar prófessors og Lárusar Blöndal hæstaréttarlögmanns.

Málsgreinar 124-126, 130-132 og 134-135

124 At the outset, the Court notes that as a result of the crisis, the regulatory framework of the financial system has been subject to revision and amendment in order to enhance financial stability. As regards the Directive, those amendments dealt, inter alia, with the improvement of depositor protection and the maintenance of depositors' confidence in the financial safety net (see Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the pay-out delay, OJ 2009 L 68, p. 3). However, the judgment in the present case must be based on the Directive as it stood at the relevant time. Then, it did not encompass those amendments and the improved protection of depositors. Those revisions are not yet part of the EEA Agreement.

125 The aim pursued by the Directive is, on the one hand, the freedom of establishment and freedom to provide services in the banking sector, and the stability of the banking system and protection for savers, on the other (compare the Opinion of Advocate General Léger in Case C-233/94 Germany v Parliament and Council [1997] ECR I-2405, point 35).

126 This dual objective is expressed in the first recital of the Directive which states that the harmonious development of the activities of credit institutions throughout the Community should be promoted through the elimination of all restrictions on the right of establishment and the freedom to provide services, while increasing the stability of the banking system and protection for savers. In this regard, the effect of the machinery established by the Directive is to prevent the EEA States from invoking depositor protection in order to impede the activities of credit institutions authorised in other EEA States (see, for comparison, Germany v Parliament and Council, cited above, paragraph 19).

130 It follows from Article 3(1) of the Directive that an EEA State is under an obligation to ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognised.

131 The system introduced by Article 3(1) of the Directive is not one of absolute constraint. It leaves the EEA States free to introduce and recognise several deposit-guarantee schemes within their territory, thereby allowing the credit institutions to choose the model that will best suit them. The Commission's proposal for the Directive expressly states that "[a]fter receiving the assurance that the financing arrangements were sufficiently sound to pay off all depositors covered, including those at branches in another Member State, it was not considered necessary to harmonize rules which are closely linked with the management of the schemes in question" (Commission proposal for a Council Directive on deposit-guarantee schemes, COM(92) 188 final, p. 8).

132 Pursuant to Article 3(2) to (5) of the Directive, the competent national authorities that have issued authorisations to credit institutions are – in cooperation with the deposit-guarantee scheme – obliged to ensure that the credit institutions comply with their obligations as members of a scheme. Where appropriate, under the conditions specified in Article 3(5) of the Directive, they must adopt a decision revoking the authorisation of the institution in question.

134 The Directive does not exhaustively regulate the unavailability of deposits under EEA law, but simply requires EEA States to provide for a harmonised minimum level of deposit protection (compare the Opinion of Advocate General Stix-Hackl in Paul and Others, cited above, point 117). It is therefore clear that national authorities have considerable discretion in how they organise the schemes.

135 In view of the above, pursuant to Article 3 of the Directive, EEA States have to introduce and officially recognise a deposit-guarantee scheme. Moreover, they have to fulfil certain supervisory tasks in order to ensure the proper functioning of the deposit-guarantee scheme. However, it is not envisaged in that provision that EEA States have to ensure the payment of aggregate deposits in all circumstances.

- Ábyrgð ríkisins á innlánum – Er í fullu samræmi
- Er Evrópusambandið skaðabótaábyrgt? – Er í fullu samræmi
- „Lagatæknileg rök“ um innistæðutryggingar. – Er í fullu samræmi
- Í hvaða liði eru stjórnvöld? – Er í fullu samræmi
- Áskorun til þingmanna. – Er í samræmi
- Icesave-samningarnir – Er í samræmi
- Lagarök um Icesave – Er í fullu samræmi
- Möguleg bótaskylda ESB – Er í samræmi
- Icesave og stjórnarskráin, (ásamt Sigurði Líndal) – Er í fullu samræmi
- Áminning ESA – Er í fullu samræmi

Málsgreinar 139-146 og 149

139 It appears that under the new version of the provision EEA States are obliged to ensure a certain level of coverage. Whether this obligation is limited to a banking crisis of a certain size would require further assessment. However, that question can be left open here since, as mentioned above (see paragraph 124), Directive 2009/14 is not applicable in the present case.

140 At any rate, the rewording of Article 7 of the Directive shows that the European legislature considered substantial change necessary to extend the responsibility of the EEA States beyond the establishment of an effective framework.

141 This supports the view that the obligation on the EEA States under the version of the provision applicable in the case at hand is limited to ensuring that national rules which require a coverage level of at least EUR 20 000 are maintained or adopted.

142 Pursuant to Article 7(6) of the Directive, EEA States have to ensure that the depositor's right to compensation may be the subject of an action by the depositor against the guarantee schemes. The scope of this provision encompasses the scenario that a deposit-guarantee scheme might be unable to pay duly qualified claims.

143 However, the obligation on the EEA States is limited to the maintenance or adoption of rules that provide for an effective right to file an action against the guarantee scheme particularly in the case of non-payment (compare Paul and Others, cited above, paragraph 27).

144 Consequently, it must be held that Article 7 of the Directive does not lay down an obligation on the State and its authorities to ensure compensation if a depositguarantee scheme is unable to cope with its obligations in the event of a systemic crisis.

145 Article 10 of the Directive establishes time limits for the payments of guarantee schemes to depositors. This follows from the exceptions provided for in Article 10(3) and (5) which refer expressly to "the time limit laid down in paragraphs (1) and (2)".

146 However, the mandatory language of the English version of Article 10(1) of the Directive, i.e. "[d]eposit-guarantee schemes shall be in a position to pay ... within three months of the date on which the competent authorities ...", establishes merely a procedural obligation, as it refers only to the binding nature of the threemonth period prescribed therein.

149 In view of the above, the Court finds that the obligation on EEA States under Article 10 of the Directive is limited to provide for a mandatory and effective procedural framework with respect to time limits.

- Ábyrgð ríkisins á innlánum – Er í fullu samræmi
- Er Evrópusambandið skaðabótaábyrgt? – Er í fullu samræmi
- „Lagatæknileg rök" um innistæðutryggingar – Er í samræmi
- Í hvaða liði eru stjórnvöld? – Er í fullu samræmi
- Áskorun til þingmanna – Er í samræmi
- Mismunun og Icesave – Er í samræmi
- Icesave-samningarnir – Er í fullu samræmi
- Lagarök um Icesave – Er í fullu samræmi
- Möguleg bótaskylda ESB – Er í fullu samræmi
- Icesave og stjórnarskráin, (ásamt Sigurði Líndal) – Er í fullu samræmi
- Áminning ESA – Er í fullu samræmi

Málsgreinar 150-151

150 Furthermore, reference should be had to Articles 1(3) and 9(3) and recitals 3, 10 and 25 in the preamble to the Directive. However, these provisions show that the Directive deals – at least primarily – with a failure of individual banks and not with a systemic crisis.

151 Even as regards the important objective to avoid bank runs, the wording of recital 4 in the preamble to the Directive is limited to a failure of a single credit institution that may lead to massive withdrawals also from healthy institutions.

- Ábyrgð ríkisins á innlánum – Er í fullu samræmi
- Er Evrópusambandið skaðabótaábyrgt? – Er í fullu samræmi
- Í hvaða liði eru stjórnvöld? – Er í fullu samræmi
- Icesave-samningarnir – Er í samræmi
- Lagarök um Icesave – Er í fullu samræmi
- Icesave og stjórnarskráin, (ásamt Sigurði Líndal) – Er í fullu samræmi
- Áminning ESA – Er í fullu samræmi

Málsgrein 154

154 Moreover, the mechanism and level of funding of the schemes have not been harmonised. The Directive does not contain any substantive provision that deals with those organisational matters.

- Ábyrgð ríkisins á innlánum – Er í fullu samræmi
- Er Evrópusambandið skaðabótaábyrgt? – Er í fullu samræmi
- Í hvaða liði eru stjórnvöld? – Er í samræmi
- Icesave-samningarnir – Er í samræmi
- Lagarök um Icesave – Er í fullu samræmi
- Möguleg bótaskylda ESB – Er í samræmi
- Icesave og stjórnarskráin, (ásamt Sigurði Líndal) – Er í fullu samræmi
- Áminning ESA – Er í fullu samræmi

Málsgreinar 155-160

155 Recital 23 in the preamble states that it is not indispensable, in the Directive, to harmonise the methods of financing schemes guaranteeing deposits or credit institutions themselves. According to the same recital, this follows from the fact, inter alia, that the financing capacity of such schemes must be in proportion to its liabilities. The Directive contains no definition of what is considered to be proportionate funding.

156 It is clear from recital 23 in the preamble to the Directive as well as from recitals 4 and 25 that the cost of financing such guarantee schemes must be borne, in principle, by credit institutions and not the EEA States.

157 Recital 23 in the preamble to the Directive aims to strike a balance between the cost of funding a deposit-guarantee scheme, the stability of the national banking system and consumer protection. The objective is that the banking system should function in the interests of consumers and the economy as a whole.

158 However, the provision of private funding to enable the guarantee scheme to cover deposits in a systemic crisis up to the maximum coverage level would clearly undermine the objective laid down in recital 23, that is, not to jeopardise the stability of the banking system itself. Accordingly, the cost of the guarantee schemes must not be too onerous for the member credit institutions.

159 The payment obligation thus lies with the deposit-guarantee fund, and the guarantee funds are to be financed entirely by the credit institutions. In circumstances where the fund cannot meet depositors' claims in the event of a default by a member of the scheme, it is for the remaining credit institutions to make up the difference. In other words, the bankruptcy of a financial institution is covered – as in classic insurance systems – by the rest of the institutions active in the market.

160 How to proceed in a case where the guarantee scheme is unable to cope with its payment obligations remains largely unanswered by the Directive. The only operative provision that deals with non-payment is Article 7(6) of the Directive, according to which depositors must have the possibility to bring an action against the relevant scheme. However, an obligation on

the State or a possible action against the State in those circumstances is not envisaged in the Directive's provisions.

- Ábyrgð ríkisins á innlánum – Er í fullu samræmi
- Er Evrópusambandið skaðabótaábyrgt? – Er í fullu samræmi
- „Lagatæknileg rök" um innistæðutryggingar – Er í samræmi (vísað til fyrri greina)
- Í hvaða liði eru stjórnvöld? – Er í fullu samræmi
- Áskorun til þingmanna – Er í samræmi
- Icesave-samningarnir – Er í samræmi
- Lagarök um Icesave – Er í fullu samræmi
- Möguleg bótaskylda ESB – Er í fullu samræmi
- Icesave og stjórnarskráin, (ásamt Sigurði Líndal) – Er í fullu samræmi
- Áminning ESA – Er í fullu samræmi

Málsgrein 164

164 Where an EEA State legally obliged to ensure the compensation of depositors where a recognised deposit-guarantee scheme is unable to cope with its payment obligations, the negative effect on competition would be comparable. Consequently, it is likely that, had the European legislature sought to adopt a different approach as regards the funding of deposit-guarantee schemes, this would have been expressly stated in the Directive.

- Ábyrgð ríkisins á innlánum – Er í fullu samræmi
- Er Evrópusambandið skaðabótaábyrgt? – Er í fullu samræmi (vikið sérstaklega á samkeppnissjónarmiðum)
- Í hvaða liði eru stjórnvöld? – Er í fullu samræmi
- Áskorun til þingmanna – Er í samræmi
- Icesave-samningarnir – Er í samræmi
- Lagarök um Icesave – Er í fullu samræmi (vikið sérstaklega að samkeppnissjónarmiðum)
- Möguleg bótaskylda ESB – Er í samræmi
- Icesave og stjórnarskráin, (ásamt Sigurði Líndal) – Er í fullu samræmi (vikið sérstaklega að samkeppnissjónarmiðum)
- Áminning ESA – Er í fullu samræmi (vikið sérstaklega að samkeppnissjónarmiðum)

Málsgreinar 167-168 og 170

167 An additional aspect to which regard must be had is mentioned in recital 16 in the preamble to the Directive. There, the European legislature states that it would not be appropriate to impose a level of protection "which might in certain cases have the effect of encouraging the unsound management of credit institutions". This points to the concept of moral hazard. In economic literature the lesson of moral hazard has been described with the words that "less is more". Professor Joseph E. Stiglitz has formulated in this respect: "[T]he more and better insurance that is provided against some contingency, the less incentive individuals have to avoid the insured event, because the less they bear the full consequences

of their actions". ("Risk, Incentives and Insurance: The Pure Theory of Moral Hazard", The Geneva Papers on Risk and Insurance, 8 (No 26, January 1983), 4, at p. 6.)

168 It is recalled that, in a crisis of a magnitude such as the one experienced in Iceland, an EEA State would have very limited options to ensure compensation to depositors that is, first, it could provide a State guarantee for a loan taken out by the scheme itself, or, second, it could directly fund the scheme or its depositors. Thus, moral hazard would also occur in the case of State funding, serving to immunise a deposit-guarantee scheme from the costs which have, in principle, to be borne by its members.

170 Accordingly, consumer protection under the Directive does not entail full protection (compare, as regards the coverage level, Germany v Parliament and Council, cited above, paragraph 48), since increasing consumer protection may reach a point where the costs outweigh the benefits.

- Ábyrgð ríkisins á innlánum – Er í samræmi
- Er Evrópusambandið skaðabótaábyrgt? – Er í samræmi
- ,,Lagatæknileg rök" um innistæðutryggingar – Er í samræmi
- Í hvaða liði eru stjórnvöld? – Er í samræmi
- Icesave-samningarnir – Er í samræmi
- Lagarök um Icesave – Er í samræmi
- Möguleg bótaskylda ESB – Er í samræmi
- Icesave og stjórnarskráin, (ásamt Sigurði Líndal) – Er í samræmi
- Áminning ESA – Er í samræmi

Málsgreinar 171 og 173-178

171 Finally, the question arises whether recital 24 in the preamble to the Directive can be said to support the alleged obligation of result. That recital states that the liability of EEA States and their competent authorities is excluded if they ensure the compensation or protection of depositors under the conditions prescribed in the Directive. The Court notes that this recital may be necessary to allow for a proper delineation of the scope of the principle of State liability.

173 However, "the conditions prescribed in this Directive" are not further defined. As has been stated above, the funding obligation imposed on the members of a guarantee scheme is limited under the Directive and must not be too onerous in order not to jeopardize the stability of the banking system.

174 The result to be achieved by the EEA States themselves follows from their above mentioned general obligation, that is, to ensure that the provisions of the Directive are fully effective, i.e. that the specific obligations are given practical effect.

175 However, in light of the present assessment of the Directive, the result to be achieved is limited, particularly having regard to the fact that the Directive aims at minimum harmonisation in relation to the level of coverage and does not provide for any harmonisation as regards the level and mechanisms of funding.

176 Accordingly, the reservation set out in recital 24 in the preamble to the Directive aims expressly to preclude an excessive shifting to the State of the costs arising from a major

banking failure. (See, by way of illustration, Michel Tison, “Do not attack the watchdog! Banking supervisor’s liability after Peter Paul”, Working Paper Series, Financial Law Institute, Universiteit Gent 2005, p. 25, including footnote 81).

177 Consequently, recital 24 in the preamble to the Directive does not support the existence of the alleged obligation of result.

178 In view of the above, the Court holds that the Directive does not envisage that the defendant itself must ensure payments to depositors in the Icesave branches in the Netherlands and the United Kingdom, in accordance with Articles 7 and 10 of the Directive, in a systemic crisis of the magnitude experienced in Iceland.

- Ábyrgð ríkisins á innlánum – Er í fullu samræmi
- Er Evrópusambandið skaðabótaábyrgt? – Er í fullu samræmi
- „Lagatæknileg rök“ um innistæðutryggingar – Er í fullu samræmi
- Í hvaða liði eru stjórnvöld? – Er í fullu samræmi
- Áskorun til þingmanna – Er í fullu samræmi
- Mismunun og Icesave – Er í samræmi
- Icesave-samningarnir – Er í fullu samræmi
- Lagarök um Icesave – Er í fullu samræmi
- Um mismunun á grundvelli þjóðernis – Er í samræmi
- Möguleg bótaskylda ESB – Er í fullu samræmi
- Icesave og stjórnarskráin, (ásamt Sigurði Líndal) – Er í fullu samræmi
- Áminning ESA – Er í fullu samræmi

Málsgreinar 181-184

181 The applicant and the intervener have argued that the TIF, a private foundation under Icelandic law, is an emanation of the State.

182 However, the case at hand concerns whether there is an obligation of result placed upon the State under the Directive, in the manner described in ESA’s application.

183 Hence, the question is of no significance for the assessment of the first plea.

184 For the sake of good order, the Court simply adds that, in any event, the applicant has adduced insufficient evidence to support its claim that the TIF is directly or indirectly operated by public authorities, i.e. under the control of the Icelandic State (see, for comparison, Case C-356/05 Farrell [2007] ECR I-3067, paragraph 41).

- Ábyrgð ríkisins á innlánum – Er í fullu samræmi
- Er Evrópusambandið skaðabótaábyrgt? – Er í fullu samræmi
- „Lagatæknileg rök“ um innistæðutryggingar – Er í fullu samræmi
- Í hvaða liði eru stjórnvöld? – Er í fullu samræmi
- Áskorun til þingmanna – Er í samræmi
- Mismunun og Icesave – Er í samræmi
- Mismunun og Icesave – Er í samræmi
- Icesave-samningarnir – Er í fullu samræmi

- Lagarök um Icesave – Er í fullu samræmi
- Um mismunun á grundvelli þjóðernis – Er í samræmi
- Möguleg bótaskylda ESB – Er í fullu samræmi
- Icesave og stjórnarskráin, (ásamt Sigurði Líndal) – Er í fullu samræmi
- Áminning ESA – Er í fullu samræmi

Málsgreinar 205 og 208-216

205 Article 4 EEA applies independently only to situations governed by EEA law for which the EEA Agreement lays down no specific rules prohibiting discrimination (see Case E-1/00 Íslandsbanki-FBA [2000-2001] EFTA Ct. Rep. 8, paragraphs 35 and 36, and case law cited).

208 It follows from Article 4 of the Directive read in light of recital 3 in the preamble that depositors at any branches established by credit institutions in other EEA States shall belong to the guarantee scheme introduced and officially recognised in the home EEA State.

209 Moreover, the treatment of foreign and domestic depositors by the deposit guarantee scheme must be equal as regards payment of minimum compensation under the Directive in the event of the closure of an insolvent credit institution.

210 Thus, the principle of non-discrimination requires that there is no difference in the treatment of depositors by the guarantee scheme itself and the way it uses its funds. Thus, to that extent, discrimination under the Directive is prohibited.

211 In the case at hand, it is undisputed that Landsbanki collapsed on 7 October 2008. Domestic deposits were transferred to New Landsbanki which was established by the Icelandic Government between 9 and 22 October 2008. The transfer was based on an FME decision of 9 October 2008.

212 The TIF was not involved in the transfer of the deposits. The transfer was part of the restructuring of the Icelandic banks that was achieved by a series of measures under the Icelandic Emergency Act.

213 On 27 October 2008, that is, within the 21 days prescribed in Article 1(3) of the Directive, the FME made a statement that triggered an obligation for the TIF to make payments as regards foreign deposits in branches of Landsbanki.

214 Moreover, domestic deposits did not become unavailable within the meaning of Article 1(3) of the Directive. The transfer of domestic deposits to New Landsbanki was made before the FME made its declaration triggering the application of the Directive. Accordingly, depositor protection under the Directive never applied to depositors in Icelandic branches of Landsbanki.

215 As has been stated above, the principle of non-discrimination inherent in the Directive requires that there should be no difference in the way a deposit guarantee scheme treats depositors, and the way it pays out its funds.

216 In the present case, difference in treatment of this kind was not possible. Consequently, the transfer of domestic deposits – whether it leads in general to unequal treatment or not – does not fall within the scope of the nondiscrimination principle as set out in the Directive.

- Ábyrgð ríkisins á innlánum – Er í samræmi

- „Lagatæknileg rök“ um innistæðutryggingar – Er í samræmi
- Mismunun og Icesave – Er í fullu samræmi
- Icesave-samningarnir – Er í samræmi
- Stjórnarskráin og Icesave-samningarnir (ásamt Sigurði Líndal) – Er í samræmi
- Lagarök um Icesave – Er í samræmi
- Um mismunun á grundvelli þjóðernis – Er í fullu samræmi
- Icesave og stjórnarskráin (ásamt Sigurði Líndal) - Er í samræmi
- Áminning ESA – Er í fullu samræmi

Málsgreinar 218, 220 og 223-227

218 As regards the third plea, 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. Discriminatory treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued (see, inter alia, Case E-15/11 Arcade Drilling, judgment of 3 October 2012, not yet reported, paragraph 60, and case law cited).

220 As regards the further assessment of the third plea, it must be recalled that the application seeks only one declaration, namely, 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 Directive within the time limits laid down in Article 10 of the Directive, the defendant has infringed its obligations under EEA law. This application is based on three pleas: (i) an infringement of the alleged obligation of result under the Directive itself, (ii) an infringement of the Directive and Article 4 EEA and (iii) an infringement of Article 4 EEA alone.

223 Thus, having regard to the applicant’s self-limitation, the Court is bound to assess whether the defendant was under a specific obligation to ensure that payments were made to Icesave depositors in the Netherlands and the UK.

224 The Court has 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 UK.

225 Thus, such an obligation of result could only be deemed to exist if it were to follow directly from Article 4 EEA itself. Were this the case, the transfer of domestic deposits to New Landsbanki would have led to an obligation to ensure the payment of minimum compensation, as specifically provided for in the Directive.

226 This, however, is not required under the principle of non-discrimination. Article 4 EEA requires that comparable situations must not be treated differently. A specific obligation upon the defendant that, in any event, would not establish equal treatment between domestic depositors and those depositors in Landsbanki’s branches in other EEA States cannot be derived from that principle. Consequently, this plea cannot succeed on the basis of Article 4 EEA.

227 For the sake of completeness, the Court adds that even if the third plea had been formulated differently, one would have to bear in mind that the EEA States enjoy a wide

margin of discretion in making fundamental choices of economic policy in the specific event of a systemic crisis provided that certain circumstances are duly proven. This would have to be taken into consideration as a possible ground for justification. In the earlier case of Sigmarsson, the applicant itself underlined this point (see Sigmarsson, cited above, paragraphs 42 and 50).

- Ábyrgð ríkisins á innlánum – Er í samræmi
- „Lagatæknileg rök“ um innistæðutryggingar – Er í samræmi
- Mismunun og Icesave – Er í fullu samræmi
- Icesave-samningarnir – Er í samræmi
- Stjórnarskráin og Icesave-samningarnir (ásamt Sigurði Líndal) – Er í samræmi
- Lagarök um Icesave – Er í samræmi
- Um mismunun á grundvelli þjóðernis – Er í fullu samræmi
- Icesave og stjórnarskráin (ásamt Sigurði Líndal) - Er í samræmi
- Áminning ESA – Er í fullu samræmi