

The Icesave bank of Iceland; from rock-solid to volcano hot – Is the EU deposit guarantee scheme resisting financial meltdown?

Peter Orebech¹

”market disturbances could be caused by branches of credit institutions which offer levels of cover higher than those offered by credit institutions authorized in their host Member States; whereas it is not appropriate that the level of scope of cover offered by guarantee schemes should become an instrument of competition”.

Directive 94/19/EC on deposit guarantee scheme, the preamble, the 14th recital

Content

1.	The topic for discussion.....	2
2.	The case: a short review	3
2.1	The background	4
2.2	The EFTA Surveillance Authority’s position – a presentation	5
3.	The “main road” solution of deposit guarantee schemes.....	6
3.1	Iceland: Domestic provisions on deposit guarantee schemes.....	7
3.2	The Icesave agreement: an overview	8
3.3	The ESA position – a discussion.....	11
3.3.1	The “obligations of result”	11
3.3.2	Is Tryggingasjóður "a twin of" the Government of Iceland?.....	14
3.3.3	Depositors' legal interest.....	15
3.3.4	Is it a minimum deposit, a maximum, or both?	15
3.3.5	Does Iceland discriminate against foreign depositors?.....	17
4.	Taking "the alternative route": Iceland domestic bankruptcy law	18
5.	Conclusion.....	19

Abstract

The Icelandic internet bank Icesave went bankruptcy late 2008. The insufficient Icelandic deposit guarantee scheme (Tryggingasjóður) did not resist the Icelandic financial meltdown and failed to compensate British and Dutch depositors the guarantee sum of 20.887 €as settled in Directive 94/19/EC, which according to the European Economic Area Agreement (EEA) regulates Iceland financial sector. The British and Dutch deposit schemes paid out guarantees to its national Icesave depositors on behalf of the Icelandic scheme.

Subsequently an agreement was made between Iceland, United Kingdom and the Netherlands. As part of the arrangement the Icelandic government guaranteed the reimbursement of the British and Dutch bridging loan. The Icelandic referendum of 6th February 2010 turned down the agreement and the Icesave-act, which also torpedoed the Icesave reimbursement plan. The EFTA Surveillance Authority (ESA) prompted a formal reprimand to Iceland, which however has not been followed by any infringement procedure as provided for by the EEA agreement. My position is that The ESA position is resulting from a confusion of regulatory commitments with pecuniary liabilities.

¹ Ingolfur Arnason (now professor of economics at Jubail Industrial College in Saudi Arabia) has assisted in gathering information and translated Icelandic texts. I am indebted to Professor of Law Stefán Már Stefánsson (University of Iceland) for valuable comments and to leading Icelandic Bank CEO and politicians for sharing information with me during two visits to Reykjavik in 2009 and one in 2010. I am also grateful to anonymous peer review for good advice as to structure and analysis. Conclusions, deductions and arguments are however the sole responsibility of this author.

The key point is whether the Icelandic guarantee is according to the EU Directive 94/19/EC. The directive requirement propels the legislator *to act*. It is not a directive to force the Government *to pay*, c.f. Directive 94/19/EC Article 3.1. This provision contributes to the fulfillment of the ban on member states against guarantee schemes that distort competition. The schemes are self-financing, fully paid by the financial institutions. In case of lacking coverage all depositors are due to equal – pro rata – reduction of compensation as no scheme guarantee for full payment of the deposit guarantee sum of 20.887 € Governmental aid to “topping up” the fund is illicit, whether it is the purpose or impact. As the EU-amendment is missing the Icelandic government cannot repair the schemes insufficiency by granting money to the fund. As this has not happened and since the EU enjoys the exclusive autonomy over its external relations, member states cannot bilaterally arrange for such a solution.

Thus, depositors not fully reimbursed are stuck with the Iceland bankruptcy procedure. Claims are considered by the administrators according to the Icelandic Act on bankruptcy for the outstanding debt not paid by the deposit guarantee scheme.

1. The topic for discussion

Is deposit guarantee schemes (here named the “main road” solution; see Section 3) the safe haven to depositors that trusted their funds to failing financial institutions? Is national states' bailout the answer, or is perhaps ordinary bankruptcy procedure the only way (the Section 4 “alternative route”)?

This article debates the appropriateness of state intervention to the financial sector with respect to subsidization, focusing on the Icesave bankruptcy, the trilateral agreement between Iceland, United Kingdom and the Netherlands² and the EFTA Surveillance Agency criticisms of Iceland,³ in particular. Different opinions have occurred on the validity of the Icesave-agreement.⁴ My position as elaborated in this article is that the trilateral agreement between Iceland, the UK and the Netherlands, amount to illicit state aids and cannot, therefore, be according to EU/EEA law.

While it is clear that “[t]here may be state financing at this level... [it] only requires that *if* that option is chosen, *EU state aid rules are complied with.*”⁵ The purpose of this article is to search for competition law regulations *in casu* what solutions results from Directive 94/19/EF,⁶ the Treaty on the Function of the EU (TFEU) Article 107 and the EEA Agreement Article 61 (state aid limitations).

² Agreement of 19. oktober 2009 between UK, the Netherlands and Iceland, cf. Letter of Intent between Iceland and United Kingdom of June 5th 2009.

³ In a Letter of formal notice to Iceland, the EFTA Surveillance Authority May 26th 2010 accused Iceland of breaching the EU directive 94/19, Case Ni 65560 – Dec. No. 224/10/COL.

⁴ A spokesperson for the UK H.M. Treasury said in The Guardian 6. June 2009: “The government welcomes Iceland's commitment to recognise its obligations under the EC deposit guarantee scheme to repay depositors in Icesave”. For an opinion in the opposite direction, see professor of economy John Kay, Financial Times 24. februar 2010 who characterized the Icesave agreement as “shameful bullying”.

⁵ Press Conference 3rd August 2010; with Chantal Hughes, Spokesperson of the European Commission (Brussels): Answers to questions by various journalists on the Icesave and Deposit Guarantee Schemes. On the record statement on deposit guarantee schemes.

⁶ The 1994 Directive is altered by Direktiv 2009/14/EC of 11. March 2009. It got a follow up late 2009, see Financial services: Commission launches call for evidence on review of Investor Compensation Schemes Directive (IP/09/230) of 09/02/2009: Internal Market and Services Commissioner Charlie McCreevy said: “We want to gather information on the practical application of the Investor Compensation Schemes Directive since it entered into force ten years ago, especially in light of the current financial crisis. This will help us to assess

It is an undisputed fact that the Icelandic deposit guarantee scheme (Tryggingarsjóður innistæðueigenda og fjárfesta, hereinafter Tryggingarsjóður, the fund or scheme) was liable to cover all depositors' loss, upward limited to the sum of 20.887 € (which is similar to 1.7 mill Icelandic krónur at a fixed, agreed exchange rate). However, since the total sum available was no more than 10.8 billion Icelandic krónur (68 mill €) funding was insufficient to cover all the losses which was approximately 3,75 billion €. Thus, the trilateral arrangement instigated a loan to the disposal of the fund for the purpose of reimbursing British and Dutch depositors in full (20.887 €). As the growth expectancy of the Icelandic fund was modest, the British and Dutch parties demanded that the Iceland government guaranteed the correct contract performance, which in practice meant that Icelandic citizens were liable for the payment. The key point however is whether the Directive 94/19/EC entitles such a public participation.

Obviously, the EU-law perspective was present during the negotiations. As told by the Icelandic Special Investigation Commission the British and Dutch parties to the – however failing⁷ – agreement had "no problem to find support in European regulation for stopping the irresponsible Icelandic banking activities ... this "was the common understanding all over in Europe".⁸ However law abidance is an untidy game, especially when public authorities like De Nederlandsche Bank (The central bank of the Netherlands) exposed the following position: "The deposit-guarantee schemes in the European Economic Area are a mess".⁹

While law and economics is an extensively important sector of jurisprudence, my effort here is neither to chase legislative issues on good governance within financial sector, nor to predict the ultimate outcome of the EU ongoing political discussion on the banking policy revision. This article is mainly legal dogmatic and relates to the question of illicit state aid to the banking sector. Is the Government of Iceland breaching EEA-law when agreeing to reimburse Dutch and British deposit guarantee schemes?

This article progresses as follows: Section 2 presentats some basic facts. Section 3 considers the legality of the proposed trilateral agreement with a special emphasis on the governmental reimbursement guarantee. Section 4 outlines the legal status of the alternative route under Icelandic bankruptcy provisions. Section 5 is concluding the article.

2. The case: a short review

“The race to the bottom had begun in late 2007, as central banks globally beginning to lower collateral standards for open market operations ... Ireland surprisingly in September 2008 removed any limits on bank deposit insurance coverage, which prompted Germany to follow suit and left Britain confronted with the threat of large deposit outflows. Soon much of the rest of Europe was raising coverage limits. Rather than containing the rush to nationalization of the bank funding base, the EU Economic and Financial Affairs Council fueled the race by proposing to massively expand minimum coverage to 50,000 [euro] and shorten payout periods

whether and how the Directive should be modified in order to better protect investors. I encourage all interested parties to give us their views",

⁷ See EFTA Surveillance Authority [ESA] Letter of formal notice to Iceland of May 26th 2010 p. 2; "To date, these negotiations have not resulted in an agreement being reached".

⁸ Rannsóknarnefnd Alþingis – The Special Investigation Commission (SIC) – Report of 12 April 2010 by Páll Hreinsson, Tryggvi Gunnarsson, og Sigríður Benediktisdóttir, according to Althing Act No.142/2008 Chapter 18 Deposits in financial institutions p. 59.

⁹ Op.cit. s. 58.

while allowing member states to keep increasing their coverage without limit and cover non-retail depositors”.

Hans-Joachim Dubel¹⁰

2.1 The background¹¹

Icesave – a filial of the Icelandic bank of Landsbanki – was established 2006 as a purely internet bank, capturing customers at first in United Kingdom and later (spring 2008) in the Netherlands. Its potential resulted from aggressive marketing offering sky high interests rates. Icesave operating in United Kingdom and the Netherlands was recipient of a tremendous sum of depositions due to its deposits policy. While the average Central Bank of England discount rate was 4,75 % at the time of the British start-up, Icesave offered interests at 6,2 %. The Dutch – following the European Central Bank (ECB) discount rate at 3,75 % - became the sacrifice of Icesave "predator" interests of 5,25 %, which resulted in billions of Euro in fresh money to the Icelandic banking industry. This aggressive policy led to a strong "dissatisfaction within the Central Banks in those European countries where the Icelandic banks had started raising deposits with high interest rates".¹²

Icelanders however were not offered such advantageous terms. This resulted in an inflow of Dutch and British funds to the benefit of the Icelandic Landsbanki, the owner of Icesave.

Due to the still not fully harmonized EU rules on bank compensation schemes,¹³ national funds may offer different coverage save that all financial institutions operating within one state is under a national treatment scheme; i.e. that all banks enjoy the right of "topping up". While Tryggingarsjóður's guarantee covers up to 20.887 €, the coverage of the British fund (Financial Services Compensation Scheme, FSCS) is 36.000 £ (equals 43.000 €). The Dutch fund offers a compensation of up to 100.000 €

Clearly the British and Dutch Icesave bank depositions were the sole result of the Icelandic predator interest rate: "Not only did the deposit volume fall off when the banks stopped offering best-in-market interest rates..."¹⁴

Due to the failing Icesave refund of Dutch depositions (total deposited €1.7 billion, for repayment €1.3 billion) and British (total deposited €4.1 billion, to be repaid €2.35 billion), the two host states decided to honor in full all domicile depositors: "Icesave savers qualify for compensation of up to EUR 100,000 each".¹⁵ And in United Kingdom; the depositors "will receive their money in full"¹⁶ (i.e. 36.000 £). The explanation was simply that solutions to the contrary would result in furious reactions among people in United Kingdom and the Netherlands. Despite of lacking Icelandic coverage, the necessity of politics overruled strict dogmatic law.

¹⁰ "Europe's second pillar: a European deposit insurance system, complementing monetary union, can help to contain the European race" Entrepreneur magazine fall 2008, at

http://www.entrepreneur.com/tradejournals/article/191646692_3.html

¹¹ For a detailed presentation of the factual background see http://en.wikipedia.org/wiki/Icesave_dispute

¹² Op.cit. s. 63.

¹³ Which is however about to happen: The Former Norwegian Ministry of Finance Kristin Halvorsen argued in a letter to the EU-commission of 4th September 2009 that Norway was eligible to – within the frames of the EEA – to keep the special Norwegian deposit scheme roof on 2 mill. Norwegian kroner (250.000 €) and thus refuse to abide by the draft EU limitation to (max 100.000 €). The Commission letter of October 1st 2009 (Charlie McCreevy – jnr. 001582), is however in the negative: "If a neighbouring EEA country could apply a 135 % higher coverage level, this would lead to a significant competitive distortion" (p. 1).

¹⁴ Vidauki 3 til Rannsóknarnefnd Alþingis – the Special Investigation Commission (SIC) rapport; Mark J. Flannery, Iceland's Failed Banks: A Post Mortem (November 2009) s. 106.

¹⁵ Se De Nederlandsche Bank, vedtak av 11. desember 2008: <http://www.dnb.nl/en/news-and-publications/news-and-archive/news-2008/dnb208600.jsp>

¹⁶ Se HM Treasury decision of October 9th 2008 http://www.hm-treasury.gov.uk/press_103_08.htm

Subsequently, these domestic British and Nederland policies led up to the trilateral agreement of which the Icelandic voters turned their ballots – overwhelmingly; as 98,4 % voted no – down.

2.2 The EFTA Surveillance Authority's position – a presentation

The EFTA Surveillance Authority (ESA) expressed in the letter of formal notice – as a first step of the infringement procedure as provided for by EEA agreement¹⁷ – a criticism to the Iceland deception of the trilateral agreement. Among its central premises is the following:

1. Directive 94/19/EC "imposes obligations of result on the EFTA States".¹⁸ ... Accordingly, the Authority considers that the Article imposes an obligation of result on the Icelandic Government".¹⁹ The result is to honor the guarantee, which never happened; "To the Authority's knowledge no payments at all have been made by the Fund".²⁰
2. The "Authority considers that the fund forms part of the Icelandic State within the meaning of the EEA Agreement although it is, in Icelandic law, constituted as a private foundation".²¹
3. Such a result is to ensure that a "deposit guarantee scheme is set up that is capable of guaranteeing the deposits of depositors up to the amount laid down in Article 7(1)".²²
4. The wording of Article 7 (1) is unconditional. It provides for a right to compensation in the event of deposits being unavailable²³
5. There is no "specific legislative provision" in the Directive 94/19/EC to justify exceptional circumstances to derogate from the above mentioned effects.²⁴
6. No provision of the Directive 94/19/EC indicates that the obligation "to refund deposits can be reduced in any way under any circumstance".²⁵
7. While domestic depositors "were covered in full ... the foreign depositors did not enjoy that minimum guarantee... The principle of equal treatment... would be rendered meaningless if states were permitted to move some depositors out of a failing bank while leaving others there".²⁶

From these premises the ESA draws the following conclusion: "Therefore, as neither the Fund nor the government have ensured payment to those depositors in the Netherlands and the United Kingdom whose deposits became unavailable ... Iceland has failed to comply with its obligations under Article 7".²⁷

I am not convinced by these arguments, as revealed in the following discussion (Section 3.3). Here I follow the position of distinguished Icelandic legal scientists: "All in all these arguments show that the Icelandic government is without responsibility for deposits made in

¹⁷ By the date of October 18th 2010 the ESA has not yet decided to deliver a reasoned opinion on the Icelandic alleged breaches of the Directive 94/19/EC, see the ESA letter of Formal Notice of May 26th 2010, p. 15.

¹⁸ Op.cit. p. 7. That same view is made even more explicit in the ESA Press release of May 26th 2010; "Iceland is obliged to ensure payment of the minimum compensation to Icesave depositors in the United Kingdom and the Netherlands, according to the Deposit Guarantee Directive".

¹⁹ Op.cit. p. 8.

²⁰ Op.cit. p. 9.

²¹ EFTA Surveillance Authority, Letter of formal notice to Iceland of May 26th 2010 p. 9.

²² EFTA Surveillance Authority, Letter of formal notice to Iceland of May 26th 2010 p. 6-7. In the same direction; President Per Sanderud, ESA in a press conference of May 26th 2010.

²³ EFTA Surveillance Authority, Letter of formal notice to Iceland of May 26th 2010 p. 7.

²⁴ Op.cit. p. 10 -11.

²⁵ Op.cit. s. 12

²⁶ Op.cit. p. 13

²⁷ Op.cit. p. 8. See also the conclusion at p. 15.

domestic banks foreign filial at the time of the bankruptcy. No liability for the national state cannot result from a view that directives are breached".²⁸ In the same direction the Director of the Norwegian Deposit Guarantee Scheme: "In case Landsbankinn was under Norwegian jurisdiction, the bank's filial abroad had not been included in our national scheme".²⁹

Before I coming to these issues please let me first introduce the reader to a short description of the EEA competition law, as implemented by Iceland:

3. The "main road" solution of deposit guarantee schemes

"In your letter you propose "topping up" and an export ban as remedies for competitive distortions. However ... [f]rom a European perspective topping-up agreements pose difficulties as they introduce a discrepancy in the European financial safety net framework... These arguments plead for removing topping-up and for full application of the home country principle – which will effectively be in place with the full harmonisation of the coverage level as of end 2010".

Charlie McCreevy³⁰

Iceland is member of the EEA and obliged by its provisions. The internal market seek to satisfy equality and non-discrimination of traders in all métiers, hereunder also the financial sector: "Where domestic rules governing the capital market and the credit system are applied to the movements of capital liberalized in accordance with the provisions of this Agreement, this shall be done in a non-discriminatory manner" (EEA Article 42.1). The EU-acquis of Directive 94/19/EC is incorporated into the EEA by the EEA-committee decision No. 18/1994 and 12/1998. One main obstacle to domestic financial sector subsidization is the directive's preamble, the 13th recital: "the retention in the Community of schemes providing cover for deposits which is higher than the harmonized minimum may, within the same territory, lead to disparities in compensation and unequal conditions of competition between national institutions and branches of institutions from other Member States ... whereas it is not appropriate that the level of scope of cover offered by guarantee schemes should become an instrument of competition". A legal study has indicated that deposit security schemes have fetched the interest of the competition directorate's interest in the cause of illicit subsidization:

"Late 2008 the Irish decided that during the two subsequent years, national state guarantees under Irish deposit guarantee schemes should increase to the benefit, of depositions. The Irish scheme is similar to the Icelandic. This decision included six Irish banks solely. The British and several other Member States took the position that Irish policy contradicted the EU competition law, since it implies state aid, which resulted in distortion of competition. As a consequence, the common ground for financial sector competition in Europe was shaken... Accordingly; the position among the dominant EU

²⁸ Lárus Blöndal, Sigurður Líndal & Stefán Már Stefánsson; Stjórnarskráin og Icesave-samningarnir [The Constitution and the Icesave-agreements] (Morgunblaðið den 2. December 2009).

²⁹ Arne Hyttnes in the Icelandic newspaper Morgunbladid 18. februar 2010

³⁰ The EU commission letter (Charlie McCreevy) of 1st Oktober 2009, j.no. 001582 to the Norwegian (former) Minister of Finance Kristin Halvorsen.

member states, at the end of September 2008, is the rebuttal of borrowing arrangements that is guaranteed by the national state”.³¹

Iceland transformed and implemented the EC Directive No 94/19 by Act No. 98/1999 on deposit guarantee scheme and investment compensation system; cf. Trade Department Statute of February 21st 2000. The key point is whether Iceland lives up to the rules of the game, which will be discussed in the continuation.

3.1 Iceland: Domestic provisions on deposit guarantee schemes

The basic question relates to the territorial reach of the Icelandic rules: Do we face extraterritorial effects – a long arm reach to the deposit guarantee schemes? Do Icelandic rules embrace depositors living in UK and the Netherlands? Since the Icelandic scheme is transforming the EC Directive 94/19, the reach closely follow the EU-acquis: “Deposit-guarantee schemes introduced and officially recognized in a Member State in accordance with Article 3 (1) shall cover the depositors at branches set up by credit institutions in other Member States”.

Thus there is no doubt – foreign branches like the Icesave activity in the Netherlands and UK is included. *In concreto*; Icelandic deposit guarantee covers the first 20.887 € The topping up of the British or Dutch scheme is covered by these countries schemes respectively.

The deposit guarantee scheme of Iceland establish oneself in Lög um innstæðutryggingar og tryggingakerfi fyrir fjárfesta (Act on deposit guarantee fund and investment compensation fund) of 27. December 1999 No. 98 (hereinafter Icelandic Act No. 98/1999) and Ministry of Trade Statute of 21. February 2000. The implementation of which materialized by the establishment of Tryggingasjóður. Subsequently Iceland established the Financial Supervisory Authority (FME) to supervise the depositor guarantee scheme: “Each Member State shall ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognized (Article 3.1). Further it is clear that the Member State i.a. shall check that branches, such as the Icesave branch of Landsbanki, operating abroad “have cover equivalent to that prescribed in this Directive” (Article 6.1).

This fund covers all deposits within the upper limit of 20.887 € Under Article 2 is the status as private fund stated. All banks offering services in Iceland is obliged to become parties. This is manifest also for foreign branches operating here according to Article 13, if that foreign bank apply for membership and its domestic membership do not cover the Icelandic level of guarantee. In the latter case membership is compulsory (Article 15). The contingent connection to a specific deposit guarantee fund should communicate to the banks’s depositors (Article 12 i.f.)

The fund’s objective is to raise sufficient capital to resist financial meltdown in the banking-sector. The emphasize is on the private financing of the fund (0,15 % of bank deposits per the previous year according to Article 6), the minimum of which is 100 mill. Islandic kroner (Article 7). The provisions limit the national state engagements, as the objective is a self-fluxing finance sector independent from state aid or funding of guarantee schemes.

Some seem to think that all depositors enjoy a legal claim to the deposit guarantee sum, in casu the Tryggingasjóður estimate of 20.887 €³²

³¹ Lárus Blöndal, Sigurður Líndal & Stefán Már Stefánsson; Stjórnarskráin og Icesave-samningarnir [The Constitution and the Icesave-agreements] (Morgunblaðið den 2. December 2009 The Irish action prompted heavy criticism by Hans-Joachim Dubel (founder of Finpolconsult, Berlin) – see citation supra note 10.

Ruling out the estimate compensation, the starting point is that Tryggingasjóður should pay the depositor the amount equivalent to “the value of his stocks, shares and cash deposits” (Article 9 first indent). This provision should be read in the context of Article 10 which regulates the situation of insufficient funds. Then the scheme reimbursement should refund all depositors upward limited to 1,7 mill Icelandic kroner (which rate of exchange vis-a-vis Euro should calculate according to the rate by January 5th 1999; i.e. 20.887 €). The surplus should split equally between all depositors. The explicit amount per capita is determined by the fund’s total size. Claims directed to the fund are final. Thus a person that fails to regain his deposit by the claims settlement is also unable to gain from future recovery to the fund. The settlement date therefore marks the ultimate reimbursement claim, which also indicates that the guarantee sum of 20.887 € is nothing but a apportioned, limited service. No depositors may receive payment in full if the fund is insufficient.

There is no obligation for the Icelandic state to top up the private foundation of Tryggingasjóður (Act No. 98/199 Article 2). But does the government of Iceland have the right to contribute monetary support to the fund? Is an agreement with the British and Dutch government an option? Is it according to the EU-competition acquis to contribute money to the Icelandic fund?

The answer results from Directive 94/19/EC read in connection with other competition law provisions. We are here in the midst of the EU common policies. Competition law prompts the EU exclusive autonomy; i.e. the preemptive force of the EU-law: There are no remaining competencies in the Member States. This includes as well domestic- as well as foreign relations.³³ State aid is valid according to the TFEU Article 107(3) litra e, "by decision of the Council on a proposal from the Commission". Such decision is necessary as Directive 94/19/EC presuppose that deficiency redeem the competency to borrow money, and no other options. The possibility to deviate from such ban provokes the need for the involved member states of the EU to proceed with a bill according to Article 107(3) litra e. This is however not the case. No such proposals exist. Thus a trilateral agreement between Iceland, UK and the Netherlands is insufficient.

Even more compelling is the Icelandic situation since this country is party to the EEA only. To legally adapt to the challenging situation in the aftermath of the Icesave bankruptcy one need to implement a possible new EU solution in the EEA according to procedures as displayed in EEA Part VII, Chapter 2, see especially Article 102-104.

Clearly, the direct tri-lateral contact and negotiations does not live up to the required procedure. Thus Iceland enjoys no right of intervention into the decisions of Tryggingasjóður.

3.2 The Icesave agreement: an overview

First of all, some few comments on the legal setting: Trade in services belongs to the exclusive autonomy of the EU, the consequence of which is the pre-emptive force of the EU acquis, not only internally but also externally: Internal EU competency is mirrored by parallel external relations competency that resulted from the case law developed principles of parallelism and implied power. Despite lack of express power, the EU enjoys external competency that matches its internal common policies.³⁴ Clearly trade in banking services is fully under the EU competency.

³² Which is displayed in the Norwegian newspaper Aftenposten by professor of law Per Christiansen 12th January 2010, cf. note 3.

³³ For a general discussion on the EU exclusive autonomy, see Peter Orebeck; The EU Competency Confusion: Limits, “Extension Mechanisms,” Split Power, Subsidiarity, and “Institutional Clashes” (Journal of Transnational Law and Policy, The Florida State University College of Law vol. 13, 2003, p. 99-151)

³⁴ See, e.g. Case 22/70 ERTA E.C.R 1971 p. 263. For the exclusive EU competency see Opinion 1/75, Local Cost Standards, 1975 E.C.R. 1355, 1363; Opinion 2/91, ILO Convention 170 on Chemicals at Work, 1993

The agreement between Iceland, United Kingdom and Nederland was signed October 19th 2009. The EU was not involved, at least not formally. The text builds on a Letter of Intent with United Kingdom of June 5th 2009. Formally is the agreement a civil law loans from United Kingdom (2.35 bill £) and Netherland (1.33 bill. €) granted to the non-governmental Icelandic fund (Tryggingarsjóður).

It builds on the fact that Member States that retained its own Deposit Guarantee Schemes, which required that foreign banks operating abroad was invited to “topping up” its guarantee by becoming parties to the host country scheme so as to equalize guarantees for all banks competing at the same market; as prescribed in the Directive 94/19/EC: “Whereas the retention in the Community of schemes providing cover for deposits which is higher than the harmonized minimum may, within the same territory, lead to disparities in compensation and unequal conditions of competition between national institutions and branches of institutions from other Member States; whereas, in order to counteract those disadvantages, branches should be authorized to join their host countries' schemes so that they can offer their depositors the same guarantees as are offered by the schemes of the countries in which they are located” (the preamble, 13th recital). This provide for the guarantee system abroad – at the host state of the foreign branch, and not the system at home (here Iceland). I.e. a provision related to banks operating abroad, *in casu* the Icesave branch of Landsbanki in its UK and Dutch operations. Secondly; the “topping” is carry out by branches abroad by contributing membership fees of 0,15 % of its share capital.

Icesave bank become member of the UK and Dutch deposit guarantee scheme, and which subsequently qualified the Icesave depositors to the UK and Dutch reimbursement. For the British fund; the following is told on the Landsbanki subscription to the British deposit guarantee scheme: “The firms that have topped up into the UK Scheme are listed below with their FSA reference numbers and the month and year FSCS or the predecessor scheme accepted their application to top up. In Iceland, Landsbanki Islands...”³⁵

Since Tryggingarsjóður was hopelessly out of funding, the UK and Dutch funds reimbursed all UK and Dutch depositors in full, with a view to claim Iceland for the refund. In practical terms this means that the Icelandic compensation scheme should pay out all depositors at the maximum level of 20.887 €³⁶ The Agreement ensured that “UK taxpayers are refunded for the compensation the UK Government paid out via the Financial Services compensation Scheme (FSCS) on behalf of the Icelandic Depositors’ ... Fund ... to Icesave retail depositors with the UK branch of Landsbanki”. The government of Iceland guaranteed the reimbursement within a period of 15 years upon which Iceland enjoyed a respite for the first 7 years. In the last 8 years refund of loan and interests should take place. As it became clear to everyone that Tryggingarsjóður due to the slow growth in funding according to the modest deposits in Icelandic banks of today would not be capable of servicing the debt, the guarantee of the Icelandic state is the salient point. It is further agreed upon a system of pay back to the FSCS of any compensation from the administrators in the Landsbanki bankruptcy that devolves on Tryggingarsjóður.

As pointed out by Iceland the validity of the Agreement depends upon the national ratification process. This ratification never took place because of the compulsory sanction by the Icelandic President according to Iceland Constitution Article 26, was denied.

The Agreement launches the understanding that both United Kingdom and Netherland recognizes – as part of the Icesave Agreement – the Icelandic Icesave Act of August 28th 2009

E.C.R. I-1061; Case C-268/94, Portuguese Republic v. Council, 1996 E.C.R. I-6177 (Cooperation Agreement between the European Community and the Republic of India).

³⁵ Financial Service Authority accept Landsbanki Islands hf (FSA No. 207250 / juli 2006)

http://www.fscs.org.uk/consumer/making_a_claim/deposits/EEA_firms_that_have_topped_up/

³⁶ Press release by the Government of the Netherlands; October 13th 2009

(No 96/2009). This Act was amended December 30th 2010 (Act No.1/2010 on the State Guarantee for loan by Security Schemes to the benefit of depositors).³⁷ The UK position on these amendments was as follows: "Iceland reaffirms its binding guarantee of the obligations of the Icelandic Deposit Guarantee Fund to compensate UK and Dutch depositors with Icesave without admitting any pre-existing legal obligation to provide that support".³⁸ Thus the British position is that Iceland stands to its guarantee without regard to what might have been prior conditions. However; these things are – due to the referendum of March 6th 2010³⁹ – out of scope here, and will not be considered in this article.⁴⁰

Does the Icelandic action prior to the agreement with United Kingdom and the Netherlands instigate legal obligations for Iceland? Could one say that "talks" and diplomatic action, *aide memoirs* etc. produces more or less contingent obligations for the Iceland state to comply with? "The UK government has made it clear repeatedly that this decision to protect UK depositors in Icelandic banks was made after extensive conversations with the Icelandic government."⁴¹ The political contact between Iceland's Minister of Finance Arni Mathiesen and U.K. Secretary of Treasury Alistair Darling resulted in the following: "At no point does the Icelandic finance minister state unequivocally that Iceland would not honour its obligations. Instead, Mr Mathiesen says that Iceland plans to use its compensation scheme to try to meet obligations to British depositors". On direct questions from Mr. Darling, Mr. Mathiesen said the following: "*We have the [deposit] insurance fund according to the Directive and how that works is explained in this letter [to the UK] and the pledge of support from the government to the fund.*" Mr. Darling followed up: "*So the entitlements the people have which I think is about £ 16,000, they will be paid?*" Ari Mathiesen answered: "*Well, I hope that will be the case. I cannot state that or guarantee that now but we are certainly working to solve this issue. This is something we really don't want to have hanging over us.*" Clearly, any legally binding international obligation cannot follow from this conversation.

A Dutch presentation on Icesave told the following: "the deposit-guarantee scheme is predicated on an EU directive that obligates governments to ensure that "the minimum deposit insurance protection of € 20.000 is provided for ... We are aware that in a response to a request for clarification regarding the governmental backing of the Icelandic deposit guaranty scheme, the government of Iceland has at least in one instance issued a letter: - clarifying its role in the funding of that scheme and – reiterating its obligation pursuant to the relevant EU directive".⁴² The latter citation illustrates the Landsbanki understanding of the public liabilities of Iceland. No additional obligation in addition to EC directive 94/19 is out of question.

The still ongoing joint considerations and negotiations on the reimbursement illustrates that no agreement is reached and that the Iceland referendum is recognized by the UK and the Dutch: "Over the past several weeks there has been a steady progress toward a settlement. In the context of these new talks, the British and Dutch Governments have indicated a willingness to accept a solution that will entail a significantly lower cost for Iceland than that

³⁷ Althingi decision 30. December 2009 (33 yes – 30 no)

³⁸ Se H.M. Treasury Press release No 94/09 (19 October 2009) paragraph 10.

³⁹ 98,4 % voted no and 1,6 % yes. Voter turnout was 62,4 %.

⁴⁰ Se Government of Iceland, pressemelding 6. mars 2010 "Work continues on a mutually acceptable solution to Icesave", der det heter at "Early figures indicate a decisive result and assuming final results in line with these figures, Act 1/2010 will be automatically repealed pursuant to Article 26 of the Constitution of the Republic of Iceland".

⁴¹ This is a transcript from a telephone conversation in Financial Times 23. oktober 2008.

⁴² Rannsóknarnefnd Alþingis – The Special Investigation Commission (SIC) – Report of 12. April 2010 by Páll Hreinsson, Tryggvi Gunnarsson, og Sigríður Benediksdóttir, Althing Act No.142/2008 chapter 18; Deposits in financial institutions p. 57.

envisaged in the prior agreement. ... The three governments have declared their intention to continue the talks and find a solution to the matter”.⁴³

In conclusion I would like to add that the former Minister of Finance Ari Mathiesen maintained that the Iceland responsibility was limited to the EEA Agreement provisions.⁴⁴ The consistent position is mirrored by an Icelandic Press Release:⁴⁵ ”During the talks the Icelandic negotiating team has also put forward a proposal which entails that Iceland guarantees full payment of deposits up the minimum laid down by EEA rules.” Thus, Iceland admit its obligations within the limits of the EU-directives; especially the EC Directive 94/19. For new obligations to occur, a new agreement is needed. As any solution now is "out in the blue" the correct position is that the state of the law is mirrored by the above mentioned directive.

The following discussion relates the analysis of the EEA/EU competition law compared to the Iceland legislation on bankruptcy and deposit guarantee funds.

3.3 The ESA position – a discussion

This section is elaborating on the ESA criticism of Iceland. Is the ESA position based on safe legal grounds? I am here considering the issues raised in the ESA Letter of Formal Notice of May 26th 2010. A basic difficulty is what the problem for discussion is all about: One issue is whether domestic Icelandic provisions may preclude individuals from claiming compensation for damages resulting from defective supervision on the part of that authority. Another is whether the Iceland achievements have resulted in the required objectives.

Clearly Member States to the directive has an obligation to achieve the results envisaged in the directive. There is no disagreement that Member States should take all necessary measures to ensure fulfilment of its obligation accordingly, as stated by the European Court of Justice at several occasions: "to take all appropriate measures, whether general or particular, to ensure the fulfillment of that obligation".⁴⁶ I have no difficulty in adhering to that position. The discussion however goes to the reach of the national obligations according to the directive 94/19/EC. This is under consideration in the continuation.

3.3.1 The “obligations of result”

1. ESA’s understanding is that the EEA requirements of Member States to produce “obligations of result”⁴⁷ is not satisfied in the case of Iceland: "the objective of the Directive to enhance depositor protection would be compromised if the Directive were interpreted as only obliging Member States to set up a deposit guarantee scheme without any obligations to actually ensure that the aggrieved depositors are provided with compensation".⁴⁸ The ESA position is that since "neither the Fund nor the Government have ensured payment to those depositors ... whom deposits became unavailable within the meaning of Directive, Iceland has failed to comply with its obligation under Article 7".⁴⁹ Therefore; the competent authorities – in Iceland the FME – should not only verify the credit institutions compliance with the conditions of Directive 94/19/EC but also make certain that depositors *de facto* enjoy

⁴³ Se Government of Iceland, Press Release of 6th March 2010.

⁴⁴ In a conversation with the author of this text in Althingi primo January 2009.

⁴⁵ Reykjavik 6th March 2010.

⁴⁶ See the von Colson Case, ECJ 14/83 paragraph 26, ECJ Rep. 1984 p. 1891.

⁴⁷ Letter of formal notice to Iceland, the EFTA Surveillance Authority May 26th 2010 p. 6.

⁴⁸ Op.cit. p. 13.

⁴⁹ Letter of formal notice to Iceland, the EFTA Surveillance Authority May 26th 2010 p. 8.

compensation in full: “From this reasoning, it can be inferred that if compensation of depositors prescribed by the Directive is not ensured in the event that deposits become unavailable... the State should be held liable”.⁵⁰

The EU seems to be supportive of ESA here: "The Commission considers that in the specific case of Iceland, the liability of the Icelandic State for the reimbursement due by the Icelandic Deposit Guarantee Scheme to the EU depositors stems from the *defective implementation of the Directive in Iceland*. The capacity of the scheme was not proportionate in relation to the size and risks posed by the Icelandic banking sector" (italics added).⁵¹

I disagree:⁵² My position derives from the directive preamble, 24th recital which reads as follows: “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”. The “proportionate capacity” meaning that Tryggingarsjóður should fully refund all deposits *from day one*, is not among the liabilities of the Directive 94/19/EC (see paragraph 3.3.4).

2. While ESA is mainly arguing its case on the basis of the directive's preamble the 24th recital, the answer to the national state obligations follows from Article 3.1 read in connection with the 13th and the 23rd recital. As clearly indicated – and which have escaped the ESA considerations – the actual financing of the system is nothing but a private enterprise: “[T]he cost of financing such schemes must be borne, in principle, by credit institutions themselves” (Directive 94/19/EC, the preamble, 23rd recital). This is further elaborated in Article 3.1 (which is neither emphasized by ESA): “the system must not consist of a guarantee granted to a credit institution by a Member State itself or by any of its local or regional authorities” This provision should be read in the context of the preamble, the 13th recital: “Whereas the retention in the Community of schemes providing cover for deposits which is higher than the harmonized minimum may, within the same territory, lead to disparities in compensation and unequal conditions of competition between national institutions and branches of institutions from other Member States”. This text clearly indicated that the deposit guarantee scheme is banned from any steps that may lead to distortion of competition, which very well may result if member states to the EU/EEA is allowed to throw money into its own schemes: “Nearly all countries regulate their banking industries quite heavily. In part, such regulation reflects formal and informal government policies that choose to subsidize troubled banks instead of letting them fail. Some regulation is motivated by the belief that government will not permit their banks to fail and impose losses on depositors”.⁵³ Such policies are not according to EU competition goals: The financial sector should unshackle from state subsidization and other discriminatory practices; otherwise “the race to the bottom” is a close possibility.⁵⁴

⁵⁰ Op.cit. p.9.

⁵¹ Press Conference 3rd August 2010; with Chantal Hughes, Spokesperson of the European Commission (Brussels): Answers to questions by various journalists on the Icesave and Deposit Guarantee Schemes. On the record statement on deposit guarantee schemes.

⁵² In the same direction; Larus Blöndal, Sigurður Línal & Stefán Már Stefánsson (supra note. 28); p. 11: ” The national State’s responsibility according to Directive No 94/19 is manifest only if the State fails to establish provisions or failed to comply with commitments deriving from the Directive. In case State liability is a possibility and compensation may result if prerequisites are fulfilled. No indication exists however that confirm its existence“.

⁵³ Mark J. Flannery, The importance of government supervision in producing financial services (Reykjavik 2009) s. 3: Vidauki 8 til Rannsóknarnefnd Alþingis – the Special Investigation Commission (SIC) rapport.

⁵⁴ See Hans-Joachim Dubel, supra note 10.

3. The competition law bans “unequal conditions of competition between national institutions and branches of institutions from other Member States” (Directive 94/19/EC – the preamble, 13th recital). Clearly it “is not appropriate that the level of scope of cover offered by guarantee schemes should become an instrument of competition” (the preamble, 14th recital). If the Directive is interpreted so as to place the Government of Iceland with the pecuniary responsibility this Member State has breached the ban on state subsidization.

The EU Directive on depositor guarantee schemes do not imply any duty on Iceland to “top up” or in any way provide monetary support to the fund. There is no provision that makes the Government of Iceland liable to pay 20.887 € to the British and Dutch depositors as a result of the failing depositor guarantee fund, but to the contrary ban national states from contributing to the fund: In case of insufficient funds due to collapses or bankruptcy, the answer is private insurances against insufficiency (Article 7). Thus, Directive 94/19/EC does not entitle the establishment of any reimbursement system.

The directive 94/19/EC does not provide any other route to the rescue of the Icesave bank depositors. Thus; whether private depositors are excluded from any action, Iceland and other national states may not by its own effort pump in money to the failing fund. No directive provision is prohibiting states from granting money to depositors

4. The position of the Icelandic government is that it has “fully complied with its obligations under Directive 94/19/EC. The Government has no further obligation based on the Directive than to set up a Guarantee Scheme in line with the Directive”.⁵⁵ The role of the national state is to establish, supervise, control and sanction the depositor guarantee scheme: “Each Member State shall ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognized (Article 3.1). Further it is clear that the Member State i.a. shall check that branches, such as the Icesave branch of Landsbanki, operating abroad “have cover equivalent to that prescribed in this Directive” (Article 6.1). It is however not the responsibility of the national state to inform depositors of the “amount and scope of cover offered by the guarantee scheme” (Article 9.1). This responsibility rests on – not even the Fund – but the credit institutions of the financial industry.

Here the question is whether Iceland depository protection schemes are construed as ordained in the directive. Iceland has by domestic Act No. 98/1999 on deposit guarantee scheme and investment compensation system and the Trade Department Statute of February 21st 2000 transposed the EEA-rules of Directive 94/19/EC. Accordingly, both the establishment of Tryggingasjóður and the existence of a guarantee sum were in place. So was the agency supervision of Tryggingasjóður; the Icelandic Financial Supervisory Authority, Fjármálaeftirlitsins (FME). The required fee system of funding the deposit guarantee scheme was established – c.f. the 0, 15 % tax on bank deposits per the previous year the minimum of which is 100 mill Icelandic kronúr. And when it comes to the Iceland enforced performance, it is a common understanding that “[a]s Icesave was operated under a Landsbanki branch, EU/EEA rules stipulate that control of its activities shall be in principle the responsibility of the FME in Iceland, although, pursuant to the same rules, the FSA UK was to supervise the liquidity management of the branch and, furthermore, was authorised to intervene in the branch's market behaviour related to Icesave”.⁵⁶

5. How to judge whether or not the national scheme is according to the provisions? Some arguments derive from the Case of Peter Paul & others:

⁵⁵ Letter from the Icelandic Government to the Authority of March 23rd 2010, p. 5.

⁵⁶ Rannsóknarnefnd Alþingis: Special Investigation Commission (SIC) Report April 12th 2010 Chapter 18 p. 5.

"Directive 94/19, Article 3(2) to (5) thereof does not confer on depositors a right to have the competent authorities take supervisory measures in their interest... That interpretation of Directive 94/19 is supported by the 24th recital in the preamble thereto, which states that the directive may not result in the Member States' or their competent authorities' being made liable in respect of depositors if they have ensured the compensation *or* protection of depositors under the conditions prescribed in the directive..." (Italics added)⁵⁷

The salient point is whether governmental responsibilities – by the ESA named obligations of result – relate to *pecuniary refunding* or *regulatory activity*, or both. As stated the obligation is fulfilled *either* by ensuring the compensation *or* protection of depositors as prescribed in directive 94/19/EC. If so, such Member State action preempts the depositors' legal proceedings. The deposit guarantee scheme is as stated in the 23rd recital; fully self-financing. Tryggingasjóður is a private fund. Accordingly it suffices that the fund's domicile state has arranged for *the necessary protection* according to the 94/19/EC prescriptions. Consequently; as stated in Article 3.1; *it is a directive to the legislator to act. It is not a directive to the Government to pay*; "the system must not consist of a guarantee granted to a credit institution by a Member State itself or by any of its local or regional authorities".

Thus two conclusions seems appropriate: First of all the EEA or EU member state should not contribute monetarily to the establishment of the fund. Secondly; no public payment is entitled if insufficient funding is demonstrated by the time of a bank collapse.

3.3.2 Is Tryggingasjóður "a twin of" the Government of Iceland?

Or – as formulated otherwise – should the deposit guarantee fund of Iceland include not only Tryggingasjóður but the entire Iceland treasury? The ESA understanding is that Member States obligation goes further: Not only is it a system that initiate and implement requirements. The Government of Iceland – so goes the ESA comprehension – is liable to a *de facto* remuneration of depositors. Despite the Guarantee Scheme's private foundations (Article 3.1), the ESA identifies Tryggingasjóður with the Government of Iceland: "Finally, the Authority considers that the Fund forms part of the Icelandic State within the meaning of the EEA Agreement although it is, in Icelandic law, constituted as a private foundation".⁵⁸ As a result; "the Fund is to be regarded, for the purposes of EEA law and Directive 94/19/EC, as an emanation of the Icelandic State".⁵⁹

From this platform ESA construes a national state liability – additional to the Tryggingasjóður to ensure that the results prescribed is attained "if the Deposit Guarantee Fund established under the Directive fails to achieve the result prescribed".⁶⁰

The implication of this is that national state with its assets *in toto* is responsible for the remuneration of depositors in case of financial crisis. Thus the ruin of equal competition that resulted from unilateral topping up of deposit guarantee schemes which was so heavily criticized,⁶¹ is instantly put into effect by the ESA interpretation. My position is that the ESA confuses the statutory subjects. No provision invites to the mixing of a private fund's obligation to pay to that of a public agency. As stated above (paragraph 3.3.1), there is no way that the directive 94/19/EC imposes *pecuniary* obligations on the domicile state.

⁵⁷ Case C-222/02 paragraph 30-31.

⁵⁸ See Letter of formal notice to Iceland, the EFTA Surveillance Authority May 26th 2010 p. 9.

⁵⁹ Op.cit. p. 10.

⁶⁰ Op.cit. p. 12.

⁶¹ As documented Supra note 10.

3.3.3 Depositors' legal interest

The ESA view is that “individual depositors have rights conferred on them by the directive”.⁶² If that is the case, question arises whether these rights are versus the Icelandic government. Clearly rights exist in relation to Tryggingarsjóður. The directive does however not promote analogies from the Fund's depositor liability to the liability of the national state. As justified in *Peter Paul & Others* the liability *ratio jurisdictione personae* is limited,

“if the compensation of depositors prescribed by Directive 94/19 is ensured, Article 3(2) to (5) thereof cannot be interpreted as precluding a national rule to the effect that the functions of the national authority responsible for supervising credit institutions are to be fulfilled only in the public interest, which under national law precludes individuals from claiming compensation for damage resulting from defective supervision on the part of that authority (paragraph 30-32).

Since the provisions are issued by the means of a directive, its main addressee is the Member State and not its citizens, if not otherwise follow from a close interpretation of the directive text.⁶³ The Member State liability is to prescribe a compensation system as construed by Directive 94/19/EC that should be ensured, not the compensation as such. Thus; private depositors owe no right to reimbursement vis-à-vis national authorities, if the national state otherwise satisfy its obligations according to the directive. As it is clear from the domestic legislation and political statements, Iceland has had no intention of transforming or implementing excessive requirements beyond the directive.⁶⁴ Thus, depositors can raise no liability claims against the Government of Iceland. Accordingly, the ESA position here is ill-considered and out of touch with legal realities.

3.3.4 Is it a minimum deposit, a maximum, or both?

Alternatively, if "obligations of result on the EFTA States"⁶⁵ is not met in the case of the Icesave collapse, the question is whether the *de facto* refund of depositors' money as guaranteed in Directive 94/19/EC is measured by the minimum or by the maximum upon which the reimbursement is fully effective?

The answer here relates to whether the national state owes any obligation to the reimbursement of depositors' assets of the minimum sum of 20.000 €. The textual interpretation is clear: It is the sum of "up to" 20.000 € that is guaranteed. Does an amount of i.a. 5.000 € 10.000 € etc. satisfies the provision?

The ESA position implies that the sum of 20.887 € is a minimum. Seemingly this is supported by text in the preamble: “whereas it would appear reasonable to set the harmonized minimum guarantee level at ECU 20 000; whereas limited transitional arrangements might be

⁶² Letter of formal notice to Iceland, the EFTA Surveillance Authority May 26th 2010 p. 7.

⁶³ As stated by the European Court of Justice in *case 1974/41, van Duyn*, provisions – if the text is explicit enough – may enjoy direct application.

⁶⁴ See the transcript *Supra* note 40 from a telephone conversation between finance ministers Arni Mathiesen and Alistair Darling in *Financial Times* 23. oktober 2008

⁶⁵ *Op.cit.* p. 7. That same view is made even more explicit in the ESA Press release of May 26th 2010; “Iceland is obliged to ensure payment of the minimum compensation to Icesave depositors in the United Kingdom and the Netherlands, according to the Deposit Guarantee Directive”.

necessary to enable schemes to comply with that figure” (Directive 94/19/EC – the preamble, 16th recital). Clearly; the founding fathers of this text is considering the 20.000 ECU (now Euro or €) as a suitable guarantee sum. As I understand this text, the 20.000 is the ultimate target of the deposit guarantee schemes to be fulfilled in the years to come: Since the text is a *directive* – and not a Regulation – the provisions are pointing out directions and objectives to be reached, but not an exact non-discretionary legal claim. The idea is that time is needed to work up a basic capital (of which the Iceland Fund at the date of bank collapse possessed 17,5 mill. €). There is no timeframe, upon which a sufficient funding should be installed, see the Article 3.1 notion; “Each Member State shall ensure that within its territory one or more deposit-guarantee schemes *are introduced and officially recognized*” (italics added). The national state liability is to establish legal systems of compulsory membership to such funds and also to license the Funds. This is what the requirements are all about. Clearly; there are no provision forcing upon the Member States a fully functional system “lock, stock and barrel” from day one. See also Article 7.4: it is a question of “percentage guaranteed” to relate to the “aggregate deposits until the amount to be paid under the guarantee reaches the amount referred to in paragraph 1”. Again, it is implicitly said that the guarantee sum is not fixed – but accumulative and increasing, until it has reached its maximum level of 20.000 €

The EU recognizes that the set up of fully workable schemes may take time: “certain classes of credit institutions which take only an extremely small proportion of deposits, the introduction of such a system may in some cases take longer than the time laid down for the transposition of this Directive; whereas in such cases a transitional derogation from the requirement to belong to a deposit-guarantee scheme may be justified; whereas, however, should such credit institutions operate abroad, a Member State would be entitled to require their participation in a deposit-guarantee scheme which it had set up”.⁶⁶ Thus, for financial institutions that operates abroad – and who suffer from insufficient guarantees at home, foreign systems of deposit security schemes should come to rescue. If we call to mind the Icesave case, we see that national Icelandic coverage was failing while British and Dutch schemes took care of its own domestic depositors by the Icesave membership in these schemes – the topping up procedure.

The Case of Peter Paul & others do not support the minimum position:⁶⁷ “The depositor's right to compensation ... is governed by Article 7(1) and (6) of that directive. Article 7(1) determines the *maximum* amount of compensation...” (Paragraph 27 – italics added). And this maximum is stipulated as follows “aggregate deposits of each depositor must be covered up to ECU 20 000” (Article 7(1)).

This amount is not – as is the ESA position – a *minimum* reimbursement obligation. It is a conditional minimum and a maximum at the same time. The minimum should be read under a *ratione jurisdictione terminae* limitation: This understanding is supported by the reading of the second paragraph of Article 7 (1): “Until 31 December 1999 Member States in which, when this Directive is adopted, deposits are not covered up to ECU 20 000 may retain the maximum amount laid down in their guarantee schemes, provided that this amount is not less than ECU 15 000”. Here – for former guarantee schemes older than year 2000 ancient schemes may be retained, however not if below the 15.000 € This means that the 15.000 is the maximum for countries that would like to retain its previous maximum level. The provision does however not say anything on the minimum in such countries.

In case the Member State maximum deposit guarantee is less than 15.000 this country is liable to increase the fund “up to” 20.000 € As stated i.a. in Directive 94/19/EC Article 3.1 *it is a directive to the legislator to act. It is not a directive to the Government to pay*; “the

⁶⁶ L.c.

⁶⁷ ECJ Case C-222/02, Peter Paul and Others v. Bundesrepublik Deutschland.

system must not consist of a guarantee granted to a credit institution by a Member State itself or by any of its local or regional authorities”.

No minimum limit relates to new schemes founded during this last decennium. Thus, while the 20.000 € is *a goal* upon which Member States should direct its regulations, it does not require that such a sum is instantly in place, and that the Fund is *de facto* capable to reimburse depositors in case of financial breakdown. It takes time to work up a capital. Member States are allowed to take its time, see as an illustration the case described in the preamble recital 16; the “limited transitional arrangements”. This includes the Icelandic scheme of Tryggingasjóður, which was in a build-up phase.

As the Fund pay out is final, this solution is supported by the fact that deposit guarantee fund is in case of lacking coverage, distributed to depositors on a *pro rata* scaling-down basis.

3.3.5 Does Iceland discriminate against foreign depositors?

1. ESA claims that the “domestic depositors of Landsbanki were transferred to a new bank “new Landsbanki” ... The domestic depositors had thereby access to their funds in full at all the time”⁶⁸. The discrimination argument seems at first sight to carry. As said in Directive 94/19/EC the preamble 3rd recital: “in the event of the closure of an insolvent credit institution the depositors at any branches situated in a Member State other than that in which the credit institution has its head office must be protected by the same guarantee scheme as the institution's other depositors”. Accordingly, foreign depositors as well are protected by Tryggingasjóður. No one seems to object to this perception.

However; as the case stands before ESA, this is not the puzzle. One thing is the Iceland regulatory competences which happen to bring about disadvantages to foreigners contradictory to the EEA Agreement Article 4,⁶⁹ another is the civil law acquisitions, which is the case here: My position is that the EEA agreement do not ordain which investments to do. National states similar to private enterprises may possess industries – hereunder also financial institutions – which according to the EEA Agreement Article 125 is beyond the scope of the agreement.⁷⁰ The Government of Iceland is fully sovereign as to which commercial engagement to make. Iceland and other national states enjoy full autonomy in its commercial considerations. The take over of Landsbanki does not necessitate the take over of Icesave. This is my primarily position.

2. Alternatively; a possible position is to say that the Iceland takeover bid for Landsbanki that leaves out Icesave, is in itself not discriminatory in a national sense, as all foreign depositors in old Landsbanki were offered identical solutions to the domestic depositors. This includes all depositors, whether these are domiciled in Iceland or not. Icelandic citizens abroad might deposit money in Icesave.

I concur to the Blöndal, Línal and Stefánsson's views:⁷¹ As a starting point, no subsidiary EU statutes (directives or regulations) may contradict the EU treaties (here TFEU Article 107 – illicit state aid),⁷² neither may national provisions. The situation is similar under the EEA Article 61, with regard to Iceland, Liechtenstein and Norway. State aid is prohibited

⁶⁸ ESA Letter of formal notice to Iceland, the EFTA Surveillance Authority May 26th 2010 p. 2

⁶⁹ For a closer look at the provision, see Sven Norberg & Karin Hökberg al. The European Economic Area. EEA Law. A Commentary on the EEA Agreement (Fritzes 1993) in particular p. 102-103.

⁷⁰ Peter Orebech, Hjemfall

⁷¹ Larus Blöndal, Sigurður Línal & Stefán Már Stefánsson (supra note. 28); p. 11.

⁷² The ESA misses out the state aid perspective. No where is subsidization up for discussion; see Letter of formal notice to Iceland, the EFTA Surveillance Authority May 26th 2010.

if not otherwise explicitly decided by the Council (or the Commission). As it is commonly acknowledged that illegal subsidization relates to the consequences, not the intentions,⁷³ we are fully established on the effects of national state guarantees on the Deposit Guarantee Schemes

The salient point is whether the Icelandic Guarantee Scheme, which require that the Icelandic state to “top up” the fund is contradictory to the EC Directive No 94/19. Since the Directive is decisive, one does not need to include the TFEU/EEA treaties interpretations. The Directive is drafted under the influence of competition law precautions; nor shall “schemes providing cover for deposits which is higher than the harmonized minimum ... within the same territory, lead to disparities in compensation and unequal conditions of competition between national institutions and branches of institutions from other Member States” (the preamble, 13th recital) or consist of “a guarantee granted to a credit institution by a Member State itself or by any of its local or regional authorities (Article 3.1)”:

4. Taking "the alternative route": Iceland domestic bankruptcy law

If not otherwise arranged for in the legislation, creditors are in case of insolvency and insufficiency subject to the bankruptcy law procedures for sharing remaining possessions on equal footing.

The owner of the Icesave internet bank, *Landsbanki Islands* is under investigation that may end up in composition or bankruptcy. The Iceland Finance Surveillance Committee sat the bank under administration the October 7th 2008 according to Lög um fjármálafyrirtæki [act on financial industries] of December 20th 2002 No. 161 Article 100 a. Administrators in bankruptcy is established. It is expected that the procedure will remain going for several years.⁷⁴

The bankruptcy is treated according to the Iceland Lög um gjaldþrotaskipti o.f. [bankruptcy] of 26th March 1991 No. 21, cf. Act of Financial Institutions Article 98 second indent which explicitly states that Act on Bankruptcy relates to "a financial institution right to sue for period of grace or composition". We are told that "The general bankruptcy rules is valid for the liquidation of finance industry with regard to mutual contractual rights and obligations”.

The position of depositors is improved resulting from amendments that took place in the aftermath of the Icesave failure: secured creditors replaced the unsecured creditors: Accordingly “the amendments result in account-holder gaining strength in the final distribution of assets (dividends)”.⁷⁵ One issue only should be considered, and that is the possibility of setting aside a debtor's fraudulent preference, if conditions are satisfied, see Chapter XX in Lög um gjaldþrotaskipti [Act on Bankruptcy]. Thus; implementing such instruments the depositors’ losses will remain where it belongs, by the Chief executive officers (CEO) that plunged the financial institutions of Iceland over the cliff.

Following this line of thought, depositors only option is through bankruptcy procedure, to chase the possessions of the failing bank Landsbanki. Hereby depositors are forced to follow the general account of all failing companies. As always; the option of special treatment to bankruptcy debtors need special arrangements. However; no special arrangements is

⁷³ Jo Shaw: The European Union Law (Palgrave 2000) p. 30.

⁷⁴ According to Professor Thoralfur Matthiasson (University of Island) in newspaper Aftenposten 6th January 2010.

⁷⁵ Lárus Blöndal, Sigurður Líndal & Stefán Már Stefánsson; Stjórnarskráin og Icesave-samningarnir [The Constitution and the Icesave-agreements] (Morgunblaðið den 2. December 2009).

construed or singled out under Icelandic competition law with regard to the implementation of the EC Directive 94/19.

5. Conclusion

The EU/EEA sector of finance is in principle self-financing, a position that however is not shared by the ESA.⁷⁶ Funding the depositor guarantee schemes is subtracted from the 0,15 % taxation of the Icelandic bank's total assets. In case of insufficiency the scheme may borrow money, whether private or public. Another option is to insure against unexpected and uncovered losses. There are no other ways. Going for a national state guarantee prompted by the insufficiency as such, as is the case for Tryggingasjóður in the Icesave case, is in breach of the Directive 94/19/EC.

However, an agreement on the Icesave reimbursement – financed by loans taken by Tryggingasjóður – stripped by any guarantees from the Iceland government, is clearly legal. I.e. the growing scheme alone should service the loan.

Since the depositor guarantee scheme may not operate as means of competition, it is equally prohibited to implement legal systems *the effect* of which is distortion of competition. State funding cannot bring in to national depositors guarantee schemes, as stated in the Directive 94/19/EC. In case of lacking coverage all depositors suffers from a *pro rata* scaling-down. National state "topping up" is clearly unwarranted. A possible new system requires amendments to this directive. Such amendments should transform into EEA-law, to become binding in Iceland. No initiative is yet taken to fill that gap, I am afraid.⁷⁷

Thus the following is the result of this survey: Neither the government nor the people of Iceland should pay for the failing Icesave bank. The Landsbanki – Icesave CEO's responsibility is redoubtable. As stated in Directive 94/19/EC, the preamble recital 19, one vital objective is "to encourage depositors to look carefully at the quality of credit institutions". Depositors should critically assess bank leadership before trusting private funding to the bank. The bank deposit rules are published and notified. Persons seeking high profits are also seeking high risks.

This solution places responsibility where it belongs, to the leadership in the banks, to the CEO that failed to run the company and keep it afloat. Such a solution does not spoil the expectations of depositors.

⁷⁶ To the contrary; Letter of formal notice to Iceland, EFTA Surveillance Authority May 26th 2010 p. 9.

⁷⁷ Direktiv 2009/14/EC of 11th March 2009 do not introduce state aid as appropriate instrument. To the contrary: A new harmonized deposit guarantee scheme system will result, se Financial Services: Commission launches call for evidence on review of Investor Compensation Schemes Directive (IP/09/230) of 09/02/2009 – supra note 6.