

## **Icesave**

### **The unanswered questions**

On the 8<sup>th</sup> of October 2008 the banking system in Iceland collapsed. A few days later representatives of the government of the Netherlands and the United Kingdom demanded that Iceland sign a statement they had prepared to confirm that the Icelandic state would repay, together with high interest, amounts which the governments of Netherlands and the United Kingdom intended to hand to holders of Icesave deposit accounts in their respective countries. The statement to the Dutch government was signed but later withdrawn. No signed statement was given to the British government.

Throughout the autumn of 2008 and in the months that followed, the demise of the financial system in Iceland was absolute and the ensuing economic catastrophe spilled over to other spheres of Icelandic society.

From the first day of the banking collapse the Icelandic state found itself under immense pressure from the British and Dutch governments, as well as almost the entire international community, to commit to guarantee deposit holders of the fallen Landsbanki's branches in the United Kingdom and the Netherlands and to comply with Iceland's alleged "international obligations", as it was phrased. The other Nordic countries, traditionally Iceland's closest international partners, lent the Icelandic state urgently required funds to build up foreign reserves at the country's Central Bank, and were also indispensable to provide the necessary funding to Iceland's programme with the International Monetary Fund (IMF). But they only did so on the condition that Iceland respected and complied with its "international obligations". Only the Faroe Islands and Poland lent Iceland funds without such strings attached.

The IMF did not impose the same conditions as the Nordic countries in respect to its lending to Iceland, but on the basis that the Nordic Countries were not willing to confirm that their financing of the IMF's programme would be accessible in the absence of the fulfilment of the alleged "international obligations", the revision of Iceland's programme with the IMF was repeatedly delayed. Due to this posture of the Nordic Countries – acting on the line given by the Hague and London - funding assurances for Iceland's programme with the IMF could not be provided. In consequence, as intended, Iceland's programme with the IMF was held hostage and the pressure was only relieved when the Icelandic authorities were forced to pledge that they would indeed negotiate and take on financial obligations and guarantees which amounted well over 50% of the country's GDP. At each review of the programme in the Board of the IMF, Iceland needed to convince it that it was making bona fide attempts to negotiate an agreement in respect of the alleged obligations. The consequences of a failure to ensure funding assurances would have brought the programme to a halt, with potentially devastating consequences for the already frail economy.

It is unclear if Iceland would have been able to make any progress in respect to securing the revision of the programme in the Board of the IMF had it not been for the bold decision of the United States – exercising its heavy share of the votes within the IMF's Board – and for the

intervention of the then managing director of the IMF, who decided to bring the programme's revision before the Board in spite of strong opposition from the Netherlands and the United Kingdom and their political allies. For months the international community, including the Nordic countries, continued to push Iceland to sign up to commitments which the country would probably never have been able to meet. Furthermore, these parties never accepted the Icelandic government's proposal that an international court would resolve the dispute. At the following revision of the programme, the IMF's Board approved the implementation of the "rescue package" and the IMF loan to Iceland was finally paid.

On 28 January 2013 the EFTA Court rendered judgment in respect of Iceland's alleged breach of its obligations under the EEA Agreement by not having paid the holders of Icesave deposit accounts in the Netherlands and the United Kingdom. The court's conclusions were clear: Iceland had not breached the EEA Agreement and Iceland was not obliged to repay these deposits nor to guarantee such repayment.

The background to the case and the EFTA Court's ruling raises three questions that need to be answered:

1. Does international law function as intended for small nations? By concerted action larger nations and international bodies almost forced a resolution of the matter which would have been contrary to international law and was also likely to cause significant economic hardship for Iceland in the future.
2. What is the responsibility of nations and international bodies or other entities which exert excessive pressure on small states to shoulder unlawful debts on terms which are likely to cause significant economic difficulties for that state?
3. What is the responsibility of the EU for giving the impression to its citizens and member states that a deposit guarantee system is in place which will cover all eventualities when it turns out that the system is substantially useless as the EFTA court's ruling suggests? It should be kept in mind that the directive in respect of the deposit guarantee system was not drafted by Iceland but the EU. What are the EU's obligations to those whom the system failed?

In light of the above issues it is clear that further discussion needs to take place in order to find solutions to the obvious limitations with the current system. It is unacceptable that one state can be coerced to take on burdensome obligations which have no legal basis. The recent changes to the deposit guarantee directive change nothing in this respect and it still is possible for a state to find itself in the same position that Iceland did. It is also necessary to examine the problems that this issue has brought up so clearly, namely that small nations seems to have difficulties protecting their rights under international law.

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The authors have written a number of articles since 2008 about Iceland's legal position in the Icesave matter, the first article being published on 15<sup>th</sup> October 2008, one week after the banking collapse. Some of these articles were published outside of Iceland. In the beginning of 2010 a summary of these articles was published in English, Danish and Icelandic and was delivered to the Dutch and British negotiating committees at the first negotiation meetings in 2010. The EFTA court's ruling is largely based on the same reasoning as set out in that summary. Lárus was a member of Iceland's team of Icesave negotiators in 2010.