

Q & A (Icesave)

1 What is the case about?

The case is about Iceland's obligation to ensure the payment of minimum compensation for Dutch and British depositors who lost their savings on "Icesave" accounts during the period of financial turmoil in Iceland.

When the Icelandic bank Landsbanki collapsed in October 2008, the Dutch and British depositors on the "Icesave" accounts of the local branches of the bank saw their deposits become unavailable and effectively disappear. In such a case, the Deposit Guarantee Directive requires that the State responsible for the bank (in this case Iceland) ensures that the deposits of each depositor are at least covered up to €20.000¹.

More than three years after the collapse of Landsbankinn, Iceland still has not complied with its obligations under the Directive and the Authority has therefore brought the case before the EFTA Court.

2 Why has ESA not waited since the likelihood is that everything will be paid by the bankruptcy estate?

Iceland's obligation was to ensure payment of the depositors who lost their deposits by 23 October 2009 at the latest. ESA's concern is that Iceland has still not complied with that obligation. According to projections provided by Iceland, the British and Dutch claims will not be fully paid out by the bankruptcy estate of Landsbanki until the end of 2013.

This only serves to underline the importance of compliance with the Deposit Guarantee Directive, which avoids depositors having to rely on bankruptcy proceedings.

3 What is the Authority's claim in its application to the EFTA Court?

The Authority claims that Iceland is in breach of its obligations under the EEA Agreement, by failing to ensure that depositors in Dutch and British branches of Landsbanki be paid out the minimum amount foreseen by the Deposit Guarantee Directive.

In addition to claiming that the Directive is breached, ESA also claims that Iceland infringed the principle of non-discrimination by not protecting depositors in branches abroad as the Directive requires, while at the same time granting depositors in Iceland protection above and beyond the Directive.

¹ Article 7 of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes. Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 lifts the minimum amount of payment to €100.000. That amendment has however not yet been made part of EEA law and thus does not yet apply in the EEA/EFTA States (Iceland, Liechtenstein and Norway).

4 What does the Deposit Guarantee Scheme Directive require?

It requires all states – including the three EEA/EFTA States (Iceland, Liechtenstein and Norway) – to set up a scheme to ensure that depositors receive a minimum payment in the event that they lose access to their deposits, if the bank goes bankrupt. In the context of this case, the relevant minimum amount of payment is €20.000 for each depositor.

The Deposit Guarantee Scheme Directive seeks to enhance consumer/depositor confidence in the banking system in the event of banks going bankrupt. The whole point is to avoid “runs” on banks, should depositors feel that they could lose their deposits.

The banking system depends on trust and consumer confidence and the Deposit Guarantee Scheme Directive is key in that respect.

5 But the depositors had accounts in the Netherlands and the UK. Why should Iceland be responsible for them?

Because that is what the Directive clearly requires.

It distinguishes between deposits with branches and deposits with subsidiaries.

If a bank from state A opens *subsidiaries* in state B, the deposits with subsidiaries are guaranteed by the system of state B, the *host state*. Then those subsidiaries are supervised by the host state financial regulators and have to abide by the banking laws of the host state.

If a bank opens *branches* in another state, the deposits in that state are guaranteed by the *home state* deposit guarantee scheme. It is also the home state’s financial regulators which are primarily responsible for supervising those branches.

In this case, Landsbanki opened *branches*, not subsidiaries, in the Netherlands and the United Kingdom. Thus, the Icelandic authorities were responsible for their supervision and also for ensuring payment under the Directive.

6 Why is the Authority involved?

The Authority has the task to ensure that the EEA Agreement is respected by Iceland, Liechtenstein and Norway. The Deposit Guarantee Scheme Directive has been part of that agreement since 19 October 1994.

7 Does the Directive apply in such exceptional circumstances?

Yes.

It has been argued by Iceland that the Directive does not apply in the exceptional circumstances prevalent in Iceland in October 2008 when the banks there failed.

However, all bank failures, by their very nature, are exceptional. The Directive is designed to protect depositors when banks fail. The purpose of it is to deal with exceptional situations.

Furthermore, there is case law of the Court of Justice to the effect that a directive such as the Deposit Guarantee Scheme Directive still applies in exceptional circumstances.

Finally, the Directive provides for mechanisms “*in wholly exceptional circumstances and in special cases*”, allowing the delaying of payment of the €20.000 by one year. Iceland has invoked this provision. But more than three years after the bank failures, Iceland has still not ensured payment to depositors.

8 Does ESA challenge Iceland’s transposition of the Directive?

The correct transposition of the Directive by Iceland is not the issue here.

Iceland’s transposition of the Directive by Act no 98/1999 was not necessarily faulty. But transposing a Directive into national law is only one part of complying with a Directive. A state must also make sure that *in practice*, the result sought by the Directive is attained. This is what this case is all about.

9 What has been the process leading up to the application to the EFTA Court?

According to the Directive, the Icelandic Fund should have made payments by 23 October 2009 at the latest.

In May 2010, ESA issued a “letter of formal notice” to Iceland, which was, formally speaking, the first stage in the proceedings. The purpose of that letter was to set out ESA’s position and give Iceland the opportunity to submit its observations.

After the letter of formal notice was issued, Iceland informed ESA that the Government was involved in negotiations with the Dutch and British Governments. However, in April 2011, once it became clear that these negotiations had not produced an agreement ratified by all parties, ESA requested that Iceland had to reply to the letter of formal notice by 2 May 2011.

After carefully examining the reply provided by Iceland, ESA still disagreed with the arguments presented and issued a reasoned opinion on 10 June 2011. The purpose of that reasoned opinion was to give Iceland a final possibility to comply with the Directive.

But the three month deadline to comply with the reasoned opinion has now elapsed and the arguments put forward in response to the reasoned opinion have not altered the view of the Authority that Iceland remains in breach. Hence the decision to refer the matter to the EFTA Court.

10 What's the next stage ?

By referring the case to the EFTA Court the Authority has launched the judicial process, through which Iceland will be given the opportunity to present its case to the Court.

The parties will exchange written pleadings and then present their arguments in an oral hearing. Once that judicial process is concluded, the EFTA Court will consider the arguments of both sides, and hand down its judgement, deciding whether Iceland has breached its obligations under the EEA Agreement, or not.

11 How long will the procedure before the EFTA Court take ?

It is very difficult to predict how long the procedure will take. Normally, the EFTA Court has dealt with direct actions such as this case within one year from the submission of an application.

12 What will be the consequences of the EFTA Court's judgement ?

If the EFTA Court accepts ESA's arguments and concludes that there is a breach of EEA law, Iceland has to take the necessary measures to comply with the judgment as rapidly as possible.