

THE ICESAVE SAGA: ICELAND WINS BATTLE BEFORE THE EFTA COURT

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INTRODUCTION

In Autumn 2008, during a worldwide financial crisis, 85% of Icelandic banking sector collapsed. There was no other choice but to adopt regulatory measures so that the State and highest Financial Supervision Authority (“FSA”) could take control of the situation. As a result, the Landsbanki bank was sent into reorganization, and depositors outside Iceland lost access to their deposits. This article discusses the rationale behind the 2013 Icesave judgment of EFTA Court. The court ruled that European Economic Area (“EEA”) States were not obliged to nationalize private debt created by the bankruptcy of the bank in the UK and the Netherlands, and the different treatment of domestic and non-domestic depositors was not in violation of Directive 94/19/EC, or of the EEA Agreement’s prohibition of discrimination.

I. THE EMERGENCY LAW OF 2008

A. Differentiation Between Owners/Bank Investors and Depositors

The main goal of Iceland’s Emergency Law of 2008 (“Emergency Law”) was to protect the nation from bankruptcy while preserving depositors.¹ This extreme regulatory response was also adopted to preserve the existence of a domestic financial sector in Iceland.² The Emergency Law respected European legislation on bank insolvencies with a cross-border dimension. Under this law, the home Member State would adopt reorganization measures or liquidate a financial institution (winding-up proceedings).³ This European approach is consistent with the “single

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1. ACT NO. 125/2008 ON THE AUTHORITY FOR TREASURY DISBURSEMENTS DUE TO UNUSUAL FINANCIAL MARKET CIRCUMSTANCES [ACT NO. 125/2008] art. 1 (Ice.). The Report of the Special Investigation Commission to the Icelandic Parliament published in April 2010 later confirmed this goal. ALTHNIGI, REPORT OF THE SPECIAL INVESTIGATION COMMISSION UNDER ACT 142/2008 (2010).

2. Eyvindur G. Gunnarsson, *The Icelandic regulatory responses to the financial crisis*, EUR. BUS. ORG. L. REV. 1-39 (2011).

3. *Directive 2001/24/EC of the European Parliament and of the Council on the*

passport” rule for offering banking services in all EEA countries.⁴

B. Differentiation Between Domestic and Non-domestic Depositors

Based on the Emergency Law, the FSA took control over the banks. As the financial crisis was systemic, the Depositors Guarantee Fund, which collects a small percentage of deposits, simply could not fulfil its mission and it never entered into play. A political announcement made by the Prime Minister promised that all deposits in domestic commercial and saving banks and their branch offices in the country were entirely safe (domestic recapitalisation.)⁵ The methodology employed to protect non-domestic depositors will be explained below.

The approach adopted to secure domestic deposits aimed to ensure that depositors in a particular jurisdiction (Iceland) actually received special protection, but not at the expense of other depositors located abroad. Preferential treatment for local and national depositors over foreign depositors was not the goal of the law. Rather, the goal was to preserve the existence and functioning of the domestic financial system while reimbursing depositors abroad through a different approach. Domestic deposits (saving accounts located within banks situated in Iceland) were transferred to new banks created *ex novo* with no limit. Thus a domestic deposit in old *Landsbanki* was transferred with the same face value to the “new *Landsbanki*.”⁶

Non-domestic deposits (saving accounts located in the branches which the banks had abroad)⁷ were given maximum priority in the insolvency proceedings. This measure meant that depositors (private individuals, legal entities such as charities) would receive full compensation in their own currencies with no limit for their savings. But this methodology meant that banks’ assets would be used to reimburse the debt. And, above all, this

reorganisation and winding up of credit institutions L 125/15 (Apr. 4, 2001). See also Case C-85/12, *Société Landsbanki Islands HF*, 2013 E.C.R. (considering that Directive 2001/24/EC does not preclude the adoption by law, as in Iceland, of measures to reorganize financial institutions provided that persons affected enjoy an effective remedy before the courts).

4. This rule allows a credit institution that is licensed in any EEA Member State to undertake business and establish branches throughout the EEA 27 without the need for any further authorization or licensing.

5. H.E. Geir H. Haarde, Address to the Nation by H.E. Geir H. Haarde, Prime Minister of Iceland (Oct. 6, 2008), available at eng.forsaetisraduneyti.is/news-and-articles/nr/3035.

6. *New Landsbanki Takes Over Domestic Operations of Landsbanki Islands hf.*, FJÁRMÁLAEFTIRLITID THE FINANCIAL SUPERVISORY AUTHORITY, ICELAND (Oct. 9, 2008), n.fme.is/published-material/news--announcements/news/nr/1400.

7. Due to previous financial difficulties, such as a mini crisis in Easter 2006, Landsbanki had collected deposits in the UK and the Netherlands through a branch called Icesave (on-line saving accounts) with almost no oversight from regulators in those countries. The outstanding logic of the passport system is that deposits in a UK/Netherlands branches were protected by the deposit-insurance scheme in the home country, that is to say Iceland’s Depositors’ and Investors’ Guarantee Fund.

meant more time.⁸

II. THE ICESAVE SAGA

A. Claims Against Iceland by the UK and the Netherlands

Due to these regulatory measures being adopted in a state of maximum emergency, the depositors of *Landsbanki* and its branch Icesave lost access to their savings in Autumn 2008. In order to avoid panic, the UK and Netherlands acted quickly and independently.⁹ The British and Dutch authorities stepped in to compensate depositors in their home countries from their own deposit-guarantee schemes. The UK set no limit, but the Netherlands limited refunds to deposits less than 100,000 EUR.¹⁰

The UK and Netherlands subsequently requested that Iceland reimburse the total amount of this refund plus interest. They argued that Iceland's Depositors' and Investors' Guarantee Fund should have been obliged to pay the minimum guarantee per depositor according to the rules and time limits as set out in the Icelandic law implementing Directive 94/19/EC on deposit-guarantee schemes ("the Directive").¹¹ At the time the amount was 20,887 EUR per person and per institution.¹² They argued, in a parallel way, that the regulatory actions adopted by Iceland constituted an indirect discrimination on the basis of nationality prohibited by the EU Treaties and the EEA Agreement.

In a nutshell, these are the issues that led to three different Icesave agreements between the UK, Netherlands and Iceland (the "Icesave saga"). Due to strong pressure from civil society, two of the parliamentary bills adopted were not sanctioned by the President,¹³ and were later rejected in

8. Eyvindur G. Gunnarsson, *The Icelandic regulatory responses to the financial crisis*, EUR. BUS. ORG. L. REV. 1, 6 (2011).

9. On October 8, 2008, the British government invoked the Anti-terrorism, Crime and Security Act of 2001 to freeze the assets of Landsbanki, the Central Bank of Iceland and the Government of Iceland in the UK, a move strongly criticised in Iceland by the organisation www.indefence.is which presented 83,000 signatures to the UK Parliament protesting this stigmatising measure.

10. Case E-16/11, EFTA Surveillance Authority v. Comm'n v. Iceland, 2013 EFTA Court ¶42.

11. Council Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, 1994 O.J. (L 135/5) (EC); 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 payout delay (Text with EEA relevance) 2009 O.J. (L 68/3) (EC); Decision of the European Economic Joint Area Committee No. 18/94 amending Annex IX (Financial Services) to the EEA Agreement (incorporating Council Directive 94/19/EC to the EEA legal order).

12. *Id.* art. 7. It is important to note in this regard that the beneficiaries of the rights are supposed to be private individuals, not legal persons nor the treasures of Member States.

13. Article 26 of the Icelandic Constitution foresees a national referendum if the President decides not to sanction a bill from the Parliament. CONSTITUTION OF THE REPUBLIC

two national referenda (in 2010 and 2011).¹⁴

*B. The EFTA Surveillance Authority, with the Support of the EU,
Initiates Action Under the EEA Agreement Before the EFTA Court*

After the failure of diplomacy and the two negative referendums, all three governments decided to accept the case as a legal infringement dispute for the EFTA Court to judge under the EEA Agreement.¹⁵ In fact, the EFTA Surveillance Authority (“ESA”) had previously lodged an application with the EFTA Court.¹⁶ ESA sought a determination that Iceland had failed to comply with its obligations resulting from the Directive 94/19/EC¹⁷ since it did not ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and the UK within the given time limits. The European Commission supported the application as an intervener.¹⁸ In short, the ESA claimed that Iceland was obligated to stand behind its national deposit-protection plan and not to discriminate against foreign depositors who had savings in overseas branches. Iceland responded that the methodology to reimburse depositors after a systemic crisis was not regulated. It could be done through recapitalization of new banks for domestic deposits and through priority of claims bankruptcy proceedings for foreign deposits rather than through the intervention of the Deposit Guarantee Scheme.¹⁹

C. The EFTA Court Acknowledges Iceland’s Claims

The final choice of litigation rather than diplomacy was a victory for

OF ICELAND Jun. 17 1944, § II, art. 26 (Ice.).

14 For information about the referenda, *see Referendum 6 March 2010 - Implementing voting here*, LAW INSTITUTE (Mar. 6, 2010) thjodaratkvaedi.is/2010/atkvaedagreidslan.html; *The Referendum on Saturday 9 April 2011*, LAW INSTITUTE (Apr. 9, 2011) thjodaratkvaedi.is/2011/en/thereferendum.html; Factsheet from the Ministry for Foreign Affairs of Iceland re: the Icesave Issue (Jun. 2010) *available at* http://www.mfa.is/media/MFA_pdf/Fact-Sheet---The-Icesave-Issue-June.pdf; *Statement from the Government of Iceland on the outcome of the referendum on the Icesave Agreements*, PRIME MINISTER’S OFFICE (Apr. 10, 2011) eng.forsaetisraduneyti.is/news-and-articles/nr/6724.

15. The EEA Agreement extends the internal market and several other important EU policies to the EFTA countries Iceland, Norway and Liechtenstein. *See* Agreement on the European Economic Area, 1993, OJ (L 1) (EC).

16. See parallel Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, 1994 OJ (L 344) (EFTA States).

17. In particular a breach was alleged against Articles 3, 4, 7 and 10 of the Directive (first plea) and/or Article 4 of the EEA Agreement (second and third pleas).

18. The Principality of Liechtenstein, the Kingdom of the Netherlands, the Kingdom of Norway and the United Kingdom also submitted written observations on the first plea.

19 Letter from Ámi Páll Árnason, Minister of Economic Affairs of Iceland to EFTA Surveillance Authority (May 2, 2011) *available at* <http://www.mfa.is/media/icesave-2011-12/Response-of-the-Government-of-Iceland-to-the-Authoritys-letter-of-formal-notice.pdf>.

Iceland. On 28 January 2013,²⁰ the EFTA Court cleared Iceland of all charges in the alleged infringement of EEA law. By dismissing the application from ESA,²¹ this meant in practice that the UK and the Netherlands lost their case for repayment of the total amount claimed (4 billion euros) with a guarantee from the Icelandic State. However, this was not an indication that the principal of the debt would not be honored. It was simply a question of methodology. As the Emergency Law stated, payment of foreign deposits was to be done with the liquidation of assets from Landsbanki, and the rights for recovery had no limit since individuals would recover all amounts and not only the minimum established by the Directive.²²

The judgment was celebrated in Iceland. The Court found that the obligations of an EEA State under Directive 94/19/EC were limited only to making sure that a proper deposit-insurance scheme existed but did not mean that the State inherited automatic liability if the scheme went bankrupt because of a systemic banking crisis. This was not a surprise in EU/EEA law since the Directive did not regulate to that extreme. What was surprising to some commentators was that the Court also found that Iceland had not breached the principle of non-discrimination of the EEA Agreement by treating domestic and non-domestic depositors differently.²³ In the following section, I will explain the legal arguments addressed by the EFTA Court.

II. THE EFTA COURT JUDGMENT

A. No EU/EEA Legal Obligation to Convert Private Debt into Sovereign Debt Under the Directive

In the first place, the Court noted that while the regulatory framework of the financial system had been updated and amended at the European level to increase financial stability after the crisis and to improve protection of depositors, the principle of legality suggested that the judgment be based on the Directive as it stood at the relevant time when the facts occurred.

Regarding the obligations of Iceland under EEA law, the Court clarified that the nature of the result to be achieved by Directive 94/19/EC was determined by its substantive provisions.²⁴ One important conclusion is that

20. See Icesave Judgment, *supra*, note 10.

21. All documents regarding Icesave litigation can be found at DOCUMENTS REGARDING THE ICESAVE CASE - IN CHRONOLOGICAL ORDER, <http://www.mfa.is/tasks/icesave/documents/> (last visited May 18, 2013).

22. At the time of the judgment, 50 percent of all the priority claims (guarantee for deposits) had been repaid. *Questions and Answers on Icesave: How much have the UK and Netherlands already recovered from the Landsbanki state?*, ICELAND MINISTRY OF FOREIGN AFFAIRS (2013), <http://www.mfa.is/tasks/icesave/q--a/>.

23. See Icesave Judgment, *supra* note 10, ¶¶ 216, 226, and 229.

24. *Id.*, ¶ 119.

the Directive placed no automatic obligation on the EEA States similar to State liability. There is simply no obligation for the State under the Directive to convert private debt of a failed bank into sovereign debt of the nation. The EEA States are not legally responsible to that extreme under the Directive in case of a systemic crisis.

On the basis of this strong legal argument, the EFTA Court thus concluded that Articles 7 and 10 of the Directive did not oblige Iceland to ensure payment to depositors in the Landsbanki branches in the Netherlands and the United Kingdom. The fact that the systemic crisis attained such a magnitude was also taken into account (as an extra economic and financial argument supporting the lack of general State liability).²⁵ Because the deposit guarantee scheme was unable to cope with its payment obligations, the methodology for the authorities to follow remained largely unanswered by the Directive and was beyond the scope of EEA law.²⁶

The ideal level of consumer/depositor protection nevertheless reaches its natural limits in the case of a systemic crisis.²⁷ The Court ruled that European law did not ‘exhaustively’ regulate the unavailability of deposits.²⁸ States certainly had to introduce a deposit-guarantee scheme and ensure its supervision, but they assumed no obligation of result concerning the payment of deposits ‘in all circumstances’.²⁹ While the EFTA Court did not deny directly the argument of the previous case of *Peter Paul* (adjudicated by the ECJ in 2004³⁰), it ruled that—at least in such a financial crash as the one that affected Iceland and under Directive 2004/19/EC³¹—the methodology to compensate for the deposits was up for Member States to decide. Thus a repayment of deposits made outside the Directive did not violate EEA law.

*B. No Violation of the Non-Discrimination Principle for Emergency
Action Outside the Scope of the Directive 94/19/EC*

The different methodology adopted for non-comparable situations

25. *Id.*, ¶¶ 117, 144, 148, 150, 153, 158, 166, 178 and 227.

26. The only operative provision that deals with non-payment is Article 7(6). This article gives depositors the possibility to bring an action against the responsible scheme but not an action against the State.

27. See Case C-233/94, *Fed. Republic of Ger. v. Parliament and Council*, 1997 E.C.R. I-2441, ¶ 48 (clarifying the objective of Directive 94/19/EC).

28. See *Icesave Judgment*, *supra* note 10, ¶ 134. See also Case C-222/02 *Peter Paul v. Bundesrepublik Deutschland*, 2004 E.C.R. I-09425 (opinion of Stix-Hackl, *Advoc. Gen.*).

29. See *Icesave Judgment*, *supra* note 10, ¶ 135, 144, and 147.

30. None of the EU directives on banking law confers individual rights against an EU/EEA State (i.e. for defective supervision) if they are ensured the compensation prescribed by the directive on deposit-guarantee schemes. Case C-222/02 *Peter Paul v. Bundesrepublik Deutschland*, 2004 E.C.R. I-09425.

31. The Court supported its reading of Article 7 by referring to the new Directive 2009/14 adopted in the EU context which provides a much more stringent wording of the obligations for Member States.

(domestic and non-domestic deposits) brings us to the second plea in the principle of non-discrimination. The question is the following: does the EEA law prohibiting discrimination on the basis of nationality require the same treatment for domestic and non-domestic depositors?

Here, the EFTA Court clarified an important issue. The principle of non-discrimination requires that there is no difference in the treatment of depositors by the guarantee scheme itself, and in the way it uses its funds. Thus, the Court found that discrimination under the Directive was prohibited to this extent.³² However, it noted that the regulatory and emergency response was achieved by a series of measures under the Icelandic Emergency law. Depositor protection in Iceland was not activated under the Directive. The deposit guarantee scheme never applied to depositors in the Icelandic branches of Landsbanki.

Since the Directive had not been activated for domestic depositors, this could not lead to an infringement of the provisions of the Directive read in light of Article 4 EEA, which prohibits discrimination. In short, there could be no discrimination under Directive 94/19/EC since it was not applied in Iceland. The decision of the FSA to restructure Icelandic banks was adopted well before the FSA made statements that triggered the obligation for the TIF.

The Court concluded that the transfer of domestic deposits thus did not fall within the scope of the Directive—“whether it leads in general to unequal treatment or not”.³³ While I agree with the conclusion, the legal reasoning and phrasing used by the EFTA Court exemplifies a narrow description of the problem and framework, falling on the side of formalism. It also sounds rather confusing for non-experts in European law. It would have been better to clarify the limits of the prohibition on the principle of non-discrimination on the basis of nationality inherent to EU/EEA law and the limits of its material scope regarding shared competencies over the internal market.

First, discrimination on grounds of nationality is prohibited for areas falling under the scope of EU/EEA Treaties.³⁴ It is important to remember that the primacy of EU law and quasi-primacy of EEA law over national law applies only in areas where the Union has powers (transferred competencies to legislate consented to by Member States), as powers not conferred upon the Union rest with the Member States.³⁵

32. See *Icesave Judgment*, *supra* note 10, ¶ 210.

33. See *Icesave Judgment*, *supra* note 10, ¶ 216 (“Consequently, the transfer of domestic deposits – whether it leads in general to unequal treatment or not – does not fall within the scope of the non-discrimination principle as set out in the Directive.”).

34. Article 4 EEA has similar wording to Article 18 TFEU as it provides: “Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”. Agreement on the European Economic Area art. 4, Dec. 13, 1993, O.J. No. L1, 3.1.1994.

35. Mendez-Pinedo, M. Elvira, “(De)(Re) constructing the primacy of Union law”, in Mendez-Pinedo and Hannesson, *The authority of European Law: Exploring primacy of EU law and effect of EEA law from European and Icelandic perspectives*, Codex, Reykjavík,

Second, discrimination on the basis of nationality is not equivalent to discrimination on the basis of residence/territory. European law does not prohibit all discrimination based on residence, which is accepted in the field of tax-law or social security law.³⁶ Icelandic emergency law did not discriminate on nationality but limited its scope and protection of depositors to those located within the territory and jurisdiction of the State. While this can be a case of indirect discrimination on the basis of nationality, it can be duly justified for reasons of public economic policy such as the limits of public budget resources after a systemic financial crisis.

Domestic depositors suffered through the different methodology although the EFTA Court did not mention how they were adversely affected. The subsequent devaluation of Icelandic króna against the euro (50 percent)³⁷ plus currency exchange restrictions and free movement of capital suspended with no end in sight meant that, in reality, non-domestic depositors may have preferred not to be subject to the domestic saving rescue exercise because their savings lost purchasing power (measured in purchasing power parity or “PPP”).

The EFTA Court preferred a safe and narrow interpretation of EEA law based on the black letter of the Directive. But if one follows the claim and pleas of the ESA to the extreme on the basis of the effectiveness of European law, the result is simply absurd. Is a country of 320,000 inhabitants supposed to rescue the debts of a financial system nine times its GDP, inherit the private losses from share- and bond-holders and reimburse the savings of 400,000 depositors with public funds? This extreme tax burden is nowhere to be found in the EU/EEA treaties. Assuming the effectiveness of EEA law required this kind of sovereign debt and fiscal solidarity at the time of the events, where would the limits be? It is clear that all States have limited territorial jurisdiction as well as tax powers and budgetary restraints. As EU/EEA law stood in 2008, States were not obliged to cover the losses of the private banking sector and attend to the financial needs of other States beyond the minimum required by the Directive.³⁸ This is a central budgetary issue outside EU/EEA law³⁹ and a “taboo area of

2012, 136.

36. Differences in taxation between residents and non-residents may not necessarily constitute discrimination as residents and non-residents are not generally in the same situation. See *Cross Border Workers*, TAXATION AND CUSTOMS UNION, http://ec.europa.eu/taxation_customs/taxation/personal_tax/crossborder_workers/ (last visited May 18, 2013).

37. Devaluation against other currencies reached 80 percent. See MINISTRY OF FOREIGN AFFAIRS OF ICELAND, THE ICESAVE ISSUE - KEY FIGURES, available at http://www.mfa.is/media/MFA_pdf/Fact-Sheet---The-Icesave-Issue---Key-Figures-June.pdf.

38. See Letter from Ámi Páll Árnason, Minister of Economic Affairs of Iceland to EFTA Surveillance Authority, *supra* note 19.

39. See, e.g., Bundesverfassungsgericht [BVerfG] [Fed. Const. Court] June 30, 2009, 2 BVE 2/08, ¶ 343. An English translation can be found at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html 43. As Chalmers put it, “this is the most extensive and most explicit list of national reserved

European legislation.”⁴⁰ None of this is mentioned by the EFTA Court, which avoids taking a direct stand on the issue.⁴¹

C. The Principle of Non-Discrimination was not Breached Because Domestic and Non-Domestic Depositors were not Comparable

As to the third plea presented (whether Iceland was under a specific obligation to ensure that payments were made to Icesave depositors in the Netherlands and the United Kingdom for the minimum amount required by the Directive⁴²) the EFTA Court followed the classic approach used in EU non-discrimination law.

It found that the Directive, even read in light of Article 4 EEA, imposes no such obligation of result to ensure payments from the state when all else fails. In a short paragraph, the Court concluded that this was not required under the principle of non-discrimination.⁴³ Article 4 EEA Agreement requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. The equal treatment between domestic depositors and those depositors in Landsbanki’s branches in other EEA States could not be thus derived from the principle of non-discrimination since the comparator fails. It is implicit in the reasoning that domestic and non-domestic depositors, residents and non-residents in Iceland were not in comparable situations.⁴⁴

But the Court added that, even if the ESA had formulated the plea in a different way without being limited to the Directive, the result would have been the same since:

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.

powers ever put forward”. Chalmers and others, *European Union Law*, Cambridge University Press, 2010 at 219–220.

40. Ingolf Pernice, *Motor or Brake for European Policies? Germany’s New Role in the EU after the Lisbon-Judgment of Its Federal Constitutional Court*, in *EUROPE’S CONSTITUTIONAL CHALLENGES IN THE LIGHT OF THE RECENT CASE LAW OF NATIONAL CONSTITUTIONAL COURTS* 355, 355 (José María Beneyto and Ingolf Pernice eds., 2011).

41. *But see* Icesave Judgment, *supra* note 10, ¶ 227 (hinting at this issue).

42. In this regard it is important to note that ESA had expressly limited the breach of the principle of non-discrimination to the minimum prescribed by the Directive. The compensation of domestic and foreign depositors above and beyond that minimum amount was not to be discussed in the context of these Icesave proceedings.

43. *See* Icesave Judgment, *supra* note 10, ¶ 226 (“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”).

44. An example is Art. 65(1)(a) TFEU which allows the right to different tax treatment of residents and non-residents who are not in the same situation (non-comparable situations). *See* Treaty on the Functioning of the European Union art. 65(1), Mar. 25, 1957, O.J. C 326, 26.10.2012.

This would have to be taken into consideration as a possible ground for justification.⁴⁵

Last but not least, the Court pointed to the concept of moral hazard and referred to Nobel laureate Professor Joseph Stiglitz where “less is more.”⁴⁶ In the field of financial services, individuals and companies must not be provided with automatic public insurance, which acts as an incentive to avoid bearing the full consequences of their actions.

III. SOME THOUGHTS ON THE LESSONS FROM THE ICESAVE SAGA

From a procedural point of view, it is highly relevant to note that this dispute was approached without success outside the European legal order and by way of diplomatic negotiations, an approach critical from the perspective of access to justice and legal effects *erga omnes*.⁴⁷ While a ruling from the ECJ or the EFTA Court is a source of European law, a diplomatic agreement between three countries outside the EU/EEA order does not produce legal effects.⁴⁸

Another aspect of the Icesave saga’s collateral damage is that it killed any interest in European integration process in Iceland. Together with the financial, euro and sovereign-debt crisis in Europe, Icesave thus became the perfect chronicle of a foretold political death (as citizens lost interest in acceding to the EU).⁴⁹

One question put forward by Martin Wolf, Financial Times editor, was the key to understanding the Icelandic victory before the EFTA Court.⁵⁰ Since the assets of the failed bank were sufficient to compensate depositors and cover 100 percent of the 4 billion euros in liabilities, why was a sovereign guarantee needed?

This question is even more relevant today in the midst of the euro and sovereign debt crisis that is affecting the periphery of Europe. There is simply no basis in the EU/EEA treaties to impose a sovereign liability

45. Icesave Judgment, *supra* note 10, ¶ 227. This was also done in Case E-3/111, Sigmarsson v. Seðlabanki Íslands, 2011 EFTA Court.

46. See Icesave Judgment, *supra* note 10, ¶ 167.

47. Maria Elvira Méndez-Pinedo, *The Icesave Dispute in the Aftermath of the Icelandic Financial Crisis: Revisiting the Principles of State Liability, Prohibition of State Aid and Non-discrimination in European Law*, 3 EUROPEAN J. RISK REG. 354 (2011).

48. For more information about sources of E.U. law, see SOURCES OF EUROPEAN LAW, http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114534_en.htm (last visited May 18, 2013); and EUROPEAN PARLIAMENT, SOURCES AND SCOPE OF EUROPEAN UNION LAW (2013) available at http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf.

49. See Maria Elvira Méndez-Pinedo, *Iceland and the EU: Bitter Lessons After the Bank Collapse and the Icesave Dispute*, 3 CONTEMP. LEGAL & ECON. ISSUES 9 (2011).

50. See Martin Wolf, *How the Icelandic Saga Should End*, FIN. TIMES, <http://www.ft.com/intl/cms/s/0/ca8f222e-0141-11df-8c54-00144feabdc0.html> (Jan. 14, 2010). See also *Icesave in the International Media*, INDEFENCE, <http://www.advice.is/?p=708>.

towards bank owners, investors and shareholders when private commercial banks go bankrupt. Regarding deposits, the obligation is to protect those up to 100,000 euros, but the methodology to comply with this obligation does not necessarily mean automatic State liability and/or sovereign debt.

Further scholarly thought is needed on how to bring sovereign debt into the equation of European law when a systemic crisis happens or a country is rescued as the different examples of Iceland, Ireland and Cyprus show different adopted approaches. This brings us to the fields of political philosophy and political economy and questions of the privatization of profit, the socialization of risks and losses, the theories of moral hazard and global economic justice where different theories are possible.⁵¹

CONCLUSION

The Icesave saga demonstrated a complex, unforeseen grey area created by the internal market of banking and financial services: the proper regulatory approach during and after a systemic financial crisis where a national deposit-guarantee scheme based on insurance laws of probabilities clearly fails to save every depositor. In fact, the real core of the dispute was the sovereign power of a country to re-organise its economy and financial system and that country's subsequent obligations towards depositors. The key issue was to determine whether European law obliged EU/EEA Member States at that time to nationalize private debt left by the collapse of the banks in the UK and The Netherlands without a connection to the Icelandic economy and territory. Did EU/EEA law impose an obligation of converting private bank debt into sovereign debt? The reply is that it did not. Since States kept their fiscal and budget sovereign powers intact, the regulatory actions fell out of the scope of European law. The principles of State liability and non-discrimination in EU/EEA law did not come into play. The limits of European law show the tension between the effectiveness of European law and the sovereign economic independence of a nation defined by its territorial limits and human and capital resources.

51. See, e.g. Ethan B. Kapstein, *Economic Justice in an Unfair World: Toward a Level Playing Field* 7 (2007).