JUDGMENT OF THE COURT
28 September 2012*

(Article 34 SCA – Appeal against a decision making a request for an Advisory Opinion – Reorganisation and winding up of credit institutions – Directive 2001/24/EC – Conform interpretation)

In Case E-18/11,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Héraðsdómur Reykjavíkur (Reykjavík District Court), in the case of

Irish Bank Resolution Corporation Ltd

and

Kaupthing Bank hf.

concerning the interpretation of Article 14 of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions,

THE COURT,

composed of: Carl Baudenbacher, President (Judge-Rapporteur), Per Christiansen, and Páll Hreinsson, Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

- Irish Bank Resolution Corporation Ltd ("the Plaintiff" or "IBRC"), represented by Eggert B. Ólafsson, District Court Attorney;
- Kaupthing Bank hf. ("the Defendant"), represented by Þröstur Ríkharðsson, District Court Attorney;

* Language of the request: Icelandic.

- the Icelandic Government, represented by Þóra M. Hjaltested, Director, Ministry of Economic Affairs, acting as Agent, and Áslaug Árnadóttir, District Court Attorney, acting as Counsel;
- the Estonian Government, represented by Marika Linntam, Director, European Union Litigation Division of the Legal Department, Ministry of Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Maria Moustakali, Temporary Officer, of the Department of Legal & Executive Affairs, acting as Agents;
- the European Commission ("the Commission"), represented by Albert Nijenhuis and Julie Samnadda, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Eggert B. Ólafsson; the Defendant, represented by Þröstur Ríkharðsson and Finnur Magnússon; the Icelandic Government, represented by Þóra M. Hjaltested, Áslaug Árnadóttir, Peter Dyrberg and Matthías Geir Pálsson; ESA, represented by Markus Schneider and Maria Moustakali; and the Commission, represented by Julie Samnadda, at the hearing on 26 June 2012,

gives the following

Judgment

I Legal background

EEA law

1 In the fourth recital in the preamble to the EEA Agreement, the Contracting Parties express their consideration for

> *... the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties;*

2 According to the eighth recital in the preamble to the EEA Agreement, the Contracting Parties are

> *CONVINCED of the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights;*

3 In the fifteenth recital in the preamble to the EEA Agreement, the Contracting Parties declare that

> *WHEREAS,... in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition;*

4 Article 2(a) EEA reads as follows:

> *For the purposes of this Agreement:*
>
> *the term "Agreement" means the main Agreement, its Protocols and Annexes as well as the acts referred to therein;*

5 Article 3 EEA reads as follows:

> *The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*
>
> *They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.*
>
> *Moreover, they shall facilitate cooperation within the framework of this Agreement.*

6 Article 119 EEA reads as follows:

> *The Annexes and the acts referred to therein as adapted for the purposes of this Agreement as well as the Protocols shall form an integral part of this Agreement.*

7 Article 129(1) EEA reads as follows:

> *1. This Agreement is drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Icelandic, Italian, Norwegian, Portuguese, Spanish and Swedish languages, each of these texts being equally authentic.*
>
> *Pursuant to the enlargements of the European Economic Area the versions of this Agreement in the Bulgarian, Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Romanian, Slovak and Slovenian languages shall be equally authentic.*

The texts of the acts referred to in the Annexes are equally authentic in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages as published in the Official Journal of the European Union and shall for the authentication thereof be drawn up in the Icelandic and Norwegian languages and published in the EEA Supplement to the Official Journal of the European Union.

8 EEA Joint Committee Decision 167/2002 of 6 December 2002 amended Annex IX (Financial services) to the EEA Agreement by adding Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions ("the Directive") at point 16c of that Annex (OJ 2003 L 38, p. 28). The Decision entered into force on 1 August 2003.

9 The twentieth recital in the preamble of the Directive reads as follows:

Provision of information to known creditors on an individual basis is as essential as publication to enable them, where necessary, to lodge their claims or submit observations relating to their claims within the prescribed time limits. This should take place without discrimination against creditors domiciled in a Member State other than the home Member State, based on their place of residence or the nature of their claims. Creditors must be kept regularly informed in an appropriate manner throughout winding-up proceedings.

10 The English language version of Article 14 of the Directive reads as follows:

Provision of information to known creditors

1. When winding-up proceedings are opened, the administrative or judicial authority of the home Member State or the liquidator shall without delay individually inform known creditors who have their domiciles, normal places of residence or head offices in other Member States, except in cases where the legislation of the home State does not require lodgement of the claim with a view to its recognition.

2. That information, provided by the dispatch of a notice, shall in particular deal with time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims or observations relating to claims and the other measures laid down. Such a notice shall also indicate whether creditors whose claims are preferential or secured in re need lodge their claims.

11 The Icelandic language version of Article 14 of the Directive reads as follows:

> *Tilhögun upplýsingamiðlunar til þekktra lánardrottna*
>
> *1. Þegar slitameðferð hefst skulu stjórnvöld eða dómsmálayfirvöld heimaðildarríkisins eða skiptastjórinn upplýsa án tafar alla lánardrottna, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu í öðrum aðildarríkjum, um það nema í tilvikum þegar í löggjöf heimaaðildarríkis þess er ekki krafist að kröfunni sé lýst til að hún fáist viðurkennd.*
>
> *2. Þessar upplýsingar skulu gefnar í formi auglýsingar þar sem fram koma tímamörk og viðurlög ef þau eru ekki virt, hvaða aðili hefur vald til að taka við kröfum sem lýst er eða athugasemdum sem eru lagðar fram varðandi kröfur og aðrar ráðstafanir sem mælt er fyrir um. Í auglýsingunni skal einnig koma fram hvort þeir sem eiga forgangskröfur eða kröfur sem eru tryggðar samkvæmt hlutarétti þurfi að lýsa þeim.*

12 Translated into English by the Plaintiff, the Icelandic language version of Article 14 of the Directive reads as follows:

> *Arrangements for the disclosure of information to known creditors*
>
> *When winding-up proceedings are opened, the administrative or judicial authorities of the home Member State or the liquidator shall without delay inform all creditors, which have their domicile, permanent residence or head offices in other Member States, thereof except in cases where the legislation of the home Member State does not require the lodgement of the claim with a view to its recognition.* [The Defendant agrees with this translation]
>
> *This information shall be provided in the form of an advertisement, which includes time limits and the penalty for non-observance of the time limits, the party empowered to take delivery of lodged claims or observations submitted regarding claims and other stipulated measures. The advertisement shall also indicate whether holders of preferential claims or claims secured under in re need to lodge such claims.*

13 Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority ("Surveillance and Court Agreement" or "SCA") reads as follows:

> *The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.*
>
> *Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.*

> *An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law.*

Icelandic law

14 Article 2(1) of Act No 2/1993 on the European Economic Area ("EEA Act") provides that the main text of the EEA Agreement shall have the force of statutory law. The same applies for the text of Protocol I to the Agreement, point 9 of Annex VIII and point 1 g) of Annex XII to the Agreement.

15 According to Article 3 of the same Act "[s]tatutes and regulations shall be interpreted, in so far as appropriate, to accord with the EEA Agreement and the rules based thereon".

16 Directive 2001/24/EC was implemented into Icelandic legislation by Icelandic Act No 130/2004 of 22 December 2004 on the Amendment of Act No 161/2002 on Financial Undertakings ("the Financial Undertakings Act") and Act No 60/1994 on Insurance Services.

17 Article 14 of the Directive was transposed by Article 11 of Act No 130/2004, which amended Article 104(4) of the Financial Undertakings Act and Article 4 of Icelandic Regulation 872/2006 on the notification and publication of decisions concerning the reorganisation and winding-up of credit institutions. The Financial Undertakings Act has subsequently been amended by Act No 44/2009.

18 Article 102(2) of the Financial Undertakings Act reads:

> *Once a Winding-up Committee has been appointed for a financial undertaking, the Committee must without delay issue and have published in the Legal Gazette an invitation to lodge claims in connection with the winding-up. The same rules shall apply concerning the substance of the invitation to lodge claims, the time limit for lodging claims and notifications or advertisements for foreign creditors as apply in insolvency proceedings.*

19 The rules referred to in Article 102(2) of the Financial Undertakings Act are found in Articles 85, 86(1) and 118 of Act No 21/1991 on bankruptcy (the "Bankruptcy Act").

20 Article 85 of the Bankruptcy Act provides:

> *The trustee in bankruptcy shall, immediately following his appointment, issue and have published a notice to creditors announcing the bankruptcy, and stating the following:*
>
> *1. the name of the bankrupt, his or her National Registry number, and, as the case may be, domicile, residence, place of stay, place of business operation, or registered venue;*

2. the name and National Registry number of a business enterprise or company, if the bankrupt has had unlimited liability for its obligations;

3. the date of the district court judge's order declaring the bankruptcy, and the bankruptcy reference date;

4. a call upon any creditors and others, who maintain that they have a claim against the bankruptcy estate, to declare their claims to the trustee in bankruptcy by sending or delivering their statements of claim to a certain place within the period determined for that purpose as provided for in the second paragraph;

5. the place and time of a meeting of the creditors held in the purpose of considering the declared claims, which shall be held not later than one month after the period for stating claims has expired;

The period for stating claims shall generally be two months, but in exceptional circumstances the trustee may decide on a period of three to six whole months. Irrespective of its duration, the period for stating claims shall start when the notice to creditors is published for the first time, and this shall be clearly stated in the notice.

In his notice to creditors, the trustee may provide that any creditors who have stated their claims during the bankrupt's preceding composition efforts need not state them anew, if they do not desire to submit a change to them.

If the trustee has, already when a notice to creditors is issued, decided to hold a meeting of the creditors to consider the interests of the bankruptcy estate, he may convene the meeting in the notice.

A notice to creditors shall be published twice in the Law and Ministerial Gazette.

21 Article 86 of the Bankruptcy Act reads:

As the trustee in bankruptcy issues a notice to creditors as provided for in Article 85, he may in particular seek information on whether any potential claimant against the bankruptcy estate resides abroad. If this proves to be the case, the trustee may notify the party in question as soon as possible of the bankruptcy, informing him of when the period for stating claims ends, and of the possible effects of a failure to state a claim within that period.

If the trustee considers that some creditors, whose identities are unknown and cannot be reached, may reside abroad, he may have a notice published abroad, of the same content as provided for in the first paragraph.

The trustee may have an advertisement of the same content as a notice issued as provided for in the first paragraph published in an Icelandic daily paper, or in some other manner of his choice, if he deems that there is a particular reason to do so.

22 Article 118(1) of the Bankruptcy Act, points 1 and 2, reads:

If a claim against a bankruptcy estate is not stated to the trustee in bankruptcy before the period provided for in Article 85, the second paragraph, is over, it shall, if it cannot be pursued as provided for in Article 116, be cancelled with respect to the estate, except if:

1. the claim is stated before a meeting of the creditors is convened for considering a proposal for distribution, and its acceptance is approved by three fourths of the creditors who would not be paid as a result, both by number of creditors and the amounts of their claims;

2. the claimant resides abroad and neither knew nor should have known of the bankruptcy, provided his claim is stated without undue delay and before a meeting of the creditors is convened for considering a proposal for distribution;

23 Article 1 of Act No 21/1994 on Advisory Opinions from the EFTA Court reads:

In district court proceedings where a question arises concerning the interpretation of the EEA Agreement, Protocols, Annexes to the Agreement or acts referred to therein, a judge may, in accordance with Article 34 of the Agreement of the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, rule that an Advisory Opinion may be sought in relation to that matter, prior to judgment in the case.

A party to the case shall always be heard prior to a ruling in accordance with the first paragraph of this article, regardless of whether an Advisory Opinion has been requested by the parties to the case or is sought the judge‘s own volition.

A ruling of a district court under the first paragraph of this article may be appealed to the Supreme Court pursuant to the applicable rules of civil or criminal procedure. The filing of an appeal suspends any further measures to be taken on account of the ruling.

II Facts and procedure

24 On 9 October 2008, the Icelandic Financial Supervisory Authority exercised its special powers due to unusual financial market circumstances and took over the power of the shareholders’ meeting of Kaupthing, dismissed its board of directors and appointed a resolution committee which immediately assumed control of the bank.

25 Anglo Irish Bank Corporation plc held two Kaupthing bonds. It was nationalised by the Irish State on 21 January 2009. Anglo Irish Bank Corporation Limited was renamed Irish Bank Resolution Corporation Limited on 14 October 2011.

26 On 25 May 2009, the Reykjavík District Court, upon a request from the resolution committee, appointed a winding-up committee for the estate.

27 On 30 June 2009, the Defendant issued and published an invitation for creditors to lodge claims according to the winding-up procedure in the Icelandic Legal Gazette (Lögbirtingablað). All those claiming debts of any sort, or other rights against Kaupthing, or assets controlled by it, were told to submit their claims in writing to the winding-up committee within six months of the publication of the notice.

28 The invitation stated that if a claim was not submitted within the specified time-limit, it would have the same legal effect as if it had not been properly submitted. Such a claim would therefore be deemed null and void against Kaupthing unless certain exceptions applied. At the same time, several invitations were published in daily newspapers in Iceland and in the countries Kaupthing had done business, including, *inter alia*, the United Kingdom, Germany, Spain, the Netherlands, Austria and Ireland. In Ireland, the invitation to lodge claims was published in the Irish Times on 21 July 2009.

29 On 22 July 2009 and 18 November 2009, as the holder of two bonds, the Plaintiff received two notifications through the Clearstream securities service of the invitation to lodge claims.

30 Additionally, the invitations were published in the Financial Times and the Official Journal of the European Union on 15 August 2009 and on Kaupthing's website.

31 The time-limit within which to lodge claims expired on 30 December 2009.

32 On 14 April 2010, IBRC filed claims with the winding-up committee concerning two bonds for a total amount of EUR 15 558 733. The Plaintiff demanded that the claims be recognised as having been received within the time-limit for lodging claims and be added to the list of claims in the bank's winding-up proceedings.

33 The Defendant rejected the Plaintiff's claim as out of time on the grounds that an email communication from the Plaintiff of 29 October 2008 could not be considered a claim lodged within the meaning of the relevant national provisions.

34 Following meetings between the parties the dispute was referred to the Reykjavík District Court by the winding-up committee on 24 September 2010.

35 At the oral hearing on 7 September 2011, the Plaintiff asked the District Court to seek an Advisory Opinion from the Court to establish whether the provision set

out in the first paragraph of Article 86 of Act No 21/1991 conformed to the substance of Directive 2001/24/EC. Kaupthing objected to the request.

36 Following oral submissions from both parties on 19 October 2011, the Reykjavík District Court decided, in a ruling of 8 November 2011, to make a request for an Advisory Opinion to the Court and posed the following questions:

1. *Does it accord with the provision of Article 14 of Directive 2001/24/EC of 4 April 2001, on the reorganisation and winding up of credit institutions, to publish an invitation to lodge claims for known creditors which have their domicile, permanent residence or head offices in other Member States in the manner practised by the Winding-up Board of Kaupthing Bank hf. which is described in this Ruling?*

2. *If the reply to the first question is that sufficient regard was not had for the rules of Article 14 of the Directive when issuing an invitation to lodge claims, an opinion is requested as to what impact this has on the winding-up proceedings of the credit institution.*

37 On 21 November 2011, Kaupthing appealed against the ruling of the Reykjavík District Court to the Supreme Court of Iceland, claiming that it should be set aside. On 16 December 2011, the Supreme Court upheld the decision to seek an Advisory Opinion but substantially amended the questions posed.

38 Following the Supreme Court of Iceland's judgment of 16 December 2011, the Reykjavík District Court referred to the Court, by a letter of 22 December 2011, the following amended questions:

1. *In the case of a discrepancy between the text of the EEA Agreement or rules based upon it, in different languages, so that the substance of individual provisions or rules is unclear, how should their substance be construed in order to apply them in resolving disputes?*

2. *Having regard to the answer to question 1, does it comply with paragraph 1 of Article 14 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions that the national legislation of a state, which is a member of the European Economic Area, vests the Winding-up Board or other competent authority or agency with competence to decide whether information should be disclosed on the aspects described in the provision, with an advertisement published abroad instead of individually notifying all known creditors?*

39 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Considerations on the admissibility of the questions referred

Preliminary remarks

40 In its letter of reference, the Reykjavik District Court set out the questions as amended by the Supreme Court in its judgment of 16 December 2011. The letter of reference does not itself contain a description of the factual and legal context of the main proceedings. However, the District Court referred to its own ruling of 8 November 2011, the judgment of the Supreme Court, and the case-file attached as regards the facts, pleas and legal arguments submitted by the parties to the national proceedings.

41 In the written observations submitted, the parties did not unanimously address those questions referred by the Reykjavík District Court, as amended by the Supreme Court of Iceland.

42 On 14 May 2012, the Court invited those participating in the proceedings to make written submissions on the admissibility of the first question of the reference of 22 December 2011 and of the other changes made to the reference of the District Court of 8 November 2011.

43 Substantive comments were received from the Plaintiff, the Defendant, the Icelandic Government and ESA.

Observations submitted to the Court

44 The Plaintiff submits that the questions posed by the Reykjavík District Court in the first reference of 8 November 2011 were not revoked and refers to the judgment of the Court of Justice of the European Union ("ECJ") in Case C-210/06 *Cartesio* [2008] ECR I-9641. Having regard to the fourth recital in the preamble to the EEA Agreement and the fact that Article 34 SCA and Article 267 TFEU have the same purpose, it argues that *Cartesio* constitutes a precedent for the purposes of EEA law. The Plaintiff also submits that the objective of achieving a balance in rights for individuals and economic operators means that they must have equal access to courts and judicial remedies irrespective of whether they find themselves in an EU or an EFTA State. This necessitates that an Icelandic District Court must have equivalent access to the referral mechanism provided for in the SCA and the EEA Agreement as its counterparts in EU Member States do in respect of the ECJ.

45 The Plaintiff notes that Iceland has not in its internal legislation limited the right to request an Advisory Opinion to courts and tribunals against whose decisions there is no judicial remedy under national law. It submits, therefore, that the Court is not bound in the present case by the appellate ruling of the Supreme Court of Iceland. Moreover, were the Court to answer only the amended questions referred on 22 December 2011, the decisive issues reflected in the second question of the Reykjavík District Court of 8 November 2011 would not be addressed.

46 The Defendant submits that the admissibility of the second set of questions referred on 22 December 2011 cannot be disputed. Article 34 SCA, when interpreted in the light of Protocol 35 to the EEA Agreement, differs considerably from Article 267 TFEU and, consequently, the principle of homogeneity should not apply.

47 The Defendant contends that the rationale of *Cartesio* does not prohibit an appellate court from amending questions referred by a lower court to the ECJ, if the lower court decides to adhere to the amended questions. It adds that the Reykjavík District Court appears to have agreed to the amended questions in its reference of 22 December 2011. Significantly, the Defendant submits, the Icelandic Supreme Court did not hinder the Reykjavík District Court from making its reference. Indeed, in its view, the questions posed in the first reference of 8 November 2011 do not respect the relationship between the Court and the national court, as the questions referred disregard the competences of the respective courts. The reformulation of the questions ensured that they adhered to the inherently different functions of the Court and the Reykjavík District Court.

48 The Icelandic Government contends that the Advisory Opinion must be rendered upon the second set of questions referred by the Reykjavík District Court on 22 December 2011 as those were the questions duly notified and introduced to the parties. The form and content of the questions is immaterial. In its view, if proper account is taken of the differences between Article 34 SCA and Article 267 TFEU, *Cartesio* need not be considered when interpreting Article 34 SCA.

49 ESA submits that Article 34 SCA is designed to promote judicial dialogue. It asserts that the Reykjavík District Court is the referring court and that the Court was seised by way of the admissible questions set out in the judgment of 8 November 2011. Iceland could have limited the right to refer questions to the Court to courts of last resort but did not do so. The letter of 22 December 2011 which the Reykjavík District Court addressed to the Court is, plainly, a letter and not a judgment or order. Consequently, in ESA's view, without a formal variation of the questions, the Court is properly seised by the questions of 8 November 2011. ESA states that its reasoning is not based on *Cartesio* as no parallel proceedings are in play in this case.

50 ESA also argues that the essence of the two questions drafted by the Reykjavík District Court in its ruling of 8 November 2011 can be found in both questions drafted by the Supreme Court. While it appears that the Supreme Court split the first question of the District Court into two parts, ESA submits that the first question as drafted by the Supreme Court covers the ground of the second question. Indeed, the first question of the Supreme Court asks "how should their substance [i.e. the substance of provisions of EEA law] be construed in order to apply them in resolving disputes?".

51 In ESA's view, that phrase can only usefully be understood as referring to the resolution of disputes between the parties as to what form of notification should have taken place. In other words, the Supreme Court is asking in its first question

what consequences must be drawn for the main proceedings of an interpretation of a provision of EEA law which appears unclear because of divergent language versions. If that phrase were taken to mean that the question only concerns how to resolve discrepancies between different language versions, it would be practically unnecessary to pose the second question. Moreover, given existing case-law such a question would be *acte clair*.

52 In addition, ESA argues that the questions drafted by the Reykjavík District Court are more pertinent and better suited to the resolution of the case than those framed by the Icelandic Supreme Court.

Findings of the Court

53 According to the Court's settled case-law, Article 34 SCA establishes a special means of judicial cooperation between the Court and national courts with the aim of providing the national courts with the necessary interpretation of elements of EEA law to decide the cases before them.

54 Under this system of cooperation, which is intended as a means of ensuring a homogenous interpretation of the EEA Agreement, a national court or tribunal is entitled to request the Court to give an Advisory Opinion on the interpretation of the Agreement (see Cases E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 25; E-1/95 *Samuelsson* [1994-1995] EFTA Ct. Rep. 145, paragraph 13; E-1/11 *Dr A* [2011] EFTA Ct. Rep. 484, paragraph 34).

55 It is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for an Advisory Opinion in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see Case E-13/11 *Granville*, judgment of 25 April 2012, not yet reported, paragraph 18). Even if in practice the decision to submit a reference will often be made on an application by one or both parties in the national proceedings, the cooperation between the Court and the national court is completely independent of any initiative by the parties.

56 In order to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law the Court may extract from all the factors provided by the national court and, in particular, from the statement of grounds in the order for reference, the elements of EEA law requiring an interpretation having regard to the subject-matter of the dispute and to restrict its analysis to the provisions of EEA law and provide an interpretation of them which will be of use to the national court, which has the task of interpreting the provisions of national law and determining their compatibility with EEA law (see *Granville*, cited above, paragraph 22, and case-law cited).

57 When drafting Article 34 SCA, the EFTA States were inspired by Article 267 TFEU. There are, however, differences. According to the wording of Article 34

SCA, there is, in particular, no obligation on national courts against whose decisions there is no judicial remedy under national law to make a reference to the Court. This reflects not only the fact that the depth of integration under the EEA Agreement is less far-reaching that under the EU treaties (see Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraph 59). It also means that the relationship between the Court and the national courts of last resort is, in this respect, more partner-like.

58 At the same time, courts against whose decisions there is no judicial remedy under national law will take due account of the fact that they are bound to fulfil their duty of loyalty under Article 3 EEA. The Court notes in this context that EFTA citizens and economic operators benefit from the obligation of courts of the EU Member States against whose decision there is no judicial remedy under national law to make a reference to the ECJ (see Case C-452/01 *Ospelt and Schlössle Weissenberg* [1993] ECR I-9743).

59 In the case at hand, the District Court seeks an interpretation of Directive 2001/24/EC. It is clear from the case-file accompanying the reference submitted by that court that the present dispute relates to the question how provisions of national law, including Article 102(2) of the Financial Undertakings Act, and Articles 85, 86 and 118 of the Bankruptcy Act, should be construed in order to be compatible with Article 14(1) of the Directive. In this regard, both the District Court and the Supreme Court agree that it needs to be determined whether Article 14 of the Directive establishes an obligation for a party such as the Defendant to individually notify known creditors, such as the Plaintiff, that winding-up proceedings have been opened, and thereby provide known creditors with the information set out in Article 14(2) of the Directive.

60 For those purposes, the Reykjavík District Court, in its ruling of 8 November 2011, specifically decided, by its first question, to seek an Advisory Opinion on whether the manner in which the winding-up board of the Defendant published an invitation to lodge claims for known creditors which had their offices, permanent residence or head offices in other EEA States complied with Article 14(1) of Directive 2001/24/EC. It clearly follows from the ruling of the District Court and the reasoning provided therein that this question is primarily related to the divergences between the Icelandic version of the Directive and versions in other EEA languages.

61 In their written observations and at the oral hearing, both the Plaintiff and ESA have argued that the Court should answer exactly the questions set out in the ruling of the District Court of 8 November 2011, and not as amended by the judgment of the Supreme Court of 16 December 2011, and stated in the District Court's letter of reference of 22 December 2011.

62 In relation to this argument, the Court notes that, in the case of a court or tribunal against whose decisions there is a judicial remedy under national law, Article 34 SCA does not preclude decisions of such a court by which questions are referred

to the Court for an Advisory Opinion from remaining subject to the remedies normally available under national law.

63 Furthermore, it must be recalled that the provisions of the EEA Agreement as well as procedural provisions of the Surveillance and Court Agreement are to be interpreted in the light of fundamental rights. The provisions of the ECHR and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights (see Cases E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185, paragraph 23; E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, paragraph 49; E-15/10 *Posten Norge*, judgment of 18 April 2012, not yet reported, paragraphs 84 ff.).

64 In this regard, it must be kept in mind that when a court or tribunal against whose decisions there is no judicial remedy under national law refuses a motion to refer a case to another court, it cannot be excluded that such a decision may fall foul of the standards of Article 6(1) ECHR, which provides that in "determination of his civil rights and obligations […], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". In particular this may be the case if the decision to refuse is not reasoned and must therefore be considered arbitrary (compare *Ullens de Schooten and Rezabek* v *Belgium*, Case Nos 3989/07 and 38353/07, judgment of the European Court of Human Rights of 20 September 2011, paragraphs 59 and 60, and case-law cited). These considerations may also apply when a court or tribunal against whose decisions there is no judicial remedy under national law overrules a decision of a lower court to refer the case, whether in civil or criminal proceedings, to another court, or upholds the decision to refer, but nevertheless decides to amend the questions asked by the lower court.

65 As regards the first question posed by the Reykjavík District Court in its ruling of 8 November 2011, the Court notes that the Supreme Court of Iceland does not appear to have altered the substance. Rather, the Supreme Court divides the question into two parts. First, it asks generally about the construction of EEA rules in case of discrepancies between different language versions. Second, it wants to know whether Article 14(1) of the Directive is satisfied where the winding-up board or another competent authority or agency is vested with the competence to decide whether information should be disclosed on the aspects described in the provision by publishing an advertisement abroad instead of individually notifying all known creditors.

66 In light of the fact that there is no substantive difference between the first question in the ruling of the Reykjavík District Court of 8 November 2011 and the two questions posed by the judgment of the Supreme Court of 16 December 2011, the Court will answer the question posed by the District Court in its letter of 22 December 2011, and thereby the questions as amended by the Supreme Court.

67 Therefore, the Court will consider the two questions as amended by the Supreme Court together with the original first question of the Reykjavík District Court,

namely, whether it follows from Article 14(1) of the Directive that known creditors must be individually notified about the opening of winding-up proceedings. In this context, the Court will also consider the divergences that exist between the Icelandic version of the Directive and versions in other EEA languages.

68 As regards the second question posed by the Reykjavík District Court in its original ruling of 8 November 2011, which concerns the consequences of the fact that sufficient regard was not had for the rules of Article 14 of the Directive when issuing an invitation to lodge claims, the Plaintiff has argued against the omission of that question, submitting that, otherwise, a decisive issue in the case before the District Court would not be addressed. In contrast, ESA contends that the essence of the second question is to be found in the first question of the Supreme Court.

69 In the view of the Court, it is not apparent from the first question of the Supreme Court that it covers the second question posed by the Reykjavík District Court in its ruling of 8 November 2011. On the other hand, the judgment of the Supreme Court shows no clear indication that it has taken a different view to that of the District Court on questions of national law or facts. Nor does the judgment set out any reasons why the second question originally put by the District Court was omitted.

70 In light of these circumstances and in order to give as complete and as useful a reply as possible to the referring court in the framework of the close cooperation under Article 34 SCA, the Court will also examine the problem raised by the second question of the District Court in its ruling of 8 November 2011.

IV The first question

71 As noted above, the questions referred by the Reykjavík District Court in its ruling of 8 November 2011 and its letter of 22 December 2011 essentially seek to establish whether it follows from Article 14(1) of Directive 2001/24/EC that known creditors must be individually notified about the opening of winding-up proceedings, in particular with regard to the apparent divergences between the Icelandic version of the Directive and versions in other EEA languages.

Observations submitted to the Court

72 The Plaintiff submits that the Icelandic version of Article 14 of the Directive is not consistent with the wording of the English version. Unlike all the other language versions of Article 14(1) of the Directive, the Icelandic version does not contain the word “individually”. Similarly, there are differences in meaning between the Icelandic and all the other language versions of Article 14(2) of the Directive.

73 This position is supported by ESA, which argues that there are two differences between the English, French, German, Spanish, Italian, Greek and Norwegian

versions of the Directive, on the one hand, and the Icelandic version, on the other. The first difference concerns the reference to "known" creditors and the implicit distinction between "known" and "unknown" creditors in Article 14 of the English version of the Directive. ESA indicates that the Icelandic version makes no reference to "known" or "unknown" creditors and so does not make this distinction.

74 The second difference is linked to the first and refers to the differential treatment of known and unknown creditors. Pursuant to the English version of the Directive, the competent authorities of the home EEA State or the liquidator have the legal obligation to notify individually each known creditor. In that connection, Article 14(2) of the Directive sets out the information that known creditors must receive. Conversely, the Icelandic version of the Directive does not provide for an obligation for individual notification to known creditors. The Commission agrees with ESA on this point.

75 The Plaintiff argues that case-law provides for three main methods of construction when the problem of divergence between EEA texts arises. These involve: (i) a comparison of the text in question in the various EEA languages; (ii) an analysis of the purpose and objective of the provision in question; and (iii) a consideration of the drafting language and the preparatory works. The Plaintiff contends that the first two methods of construction reveal unequivocally that the correct meaning of Article 14 of the Directive is that found in all its different language versions, bar Icelandic. While the third method is not available to the Plaintiff, there is no reason to assume that the result would be different.

76 The Plaintiff contends that the wording contained in the majority of the language versions should be accepted and refers to *Sveinbjörnsdóttir*, cited above. In any case, when there is a divergence between language versions concerning the meaning of a provision, that provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.

77 The Defendant argues that the Icelandic and English versions cannot be considered equally authentic if only one version is applied and not the other. The Defendant, the Icelandic Government and the Commission reject the view that a majority of language versions of a directive should override a particular language version in case of divergence. The Commission notes that under Article 129(1) EEA the texts of the acts referred to in the Annexes to the Agreement "are equally authentic" in all EU official languages. Those acts are then translated into Icelandic and Norwegian "for the authentication thereof".

78 The Plaintiff, the Defendant, the Estonian and Icelandic Governments, ESA and the Commission all agree that in case of divergence between different language versions, a provision of a directive must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part. In this regard, ESA and the Commission particularly emphasise the need for uniform interpretation of EEA law. Accordingly, preference should as far as possible be

given to the interpretation which renders the provision consistent with the general principles of EU law and, more specifically, with the principle of legal certainty.

79 The Defendant contends that, although Article 14(1) of the English version of the Directive prescribes that a liquidator shall without delay "individually inform known creditors", which is to be done, according to Article 14(2), by "the dispatch of a notice", the Directive does not prescribe where this notice is to be sent. Therefore, according to the Defendant, an EEA State has considerable discretion as to how this is done and it may be left to a liquidator to decide on a case-by-case basis how foreign creditors are to be individually notified.

80 The Plaintiff, the Estonian Government, ESA and the Commission, however, all argue that Article 14 of the Directive must be read in light of the purpose set out in recital 20 of the preamble to the Directive which is identical in all language versions, including Icelandic. Therefore, Article 14 of the Directive should be interpreted as a non-discretionary requirement on the administrative or judicial body of the home EEA State to send individual notices to all known creditors who have their domiciles, normal places of residence or head offices in EEA States other than the home EEA State.

81 In the view of the Estonian Government, ESA and the Commission, the intention of the European legislature to establish an obligation of individual information for known creditors is further illustrated by the separation and distinction made in Articles 13 and 14 of the Directive between the considerations and conditions governing the announcement of the decision to open winding-up proceedings, on the one hand, and the provision of information to known creditors, on the other. ESA and the Commission both submit that, in light of the above, the competent authorities or the liquidator of the home EEA State is required to provide the information listed in Article 14(2) of the Directive to known creditors on an individual basis and the Icelandic version of the Directive should be read in this light.

82 ESA emphasises that the email the Plaintiff sent to the Kaupthing winding-up board on 29 October 2008, intending to lodge claims over the estate, although apparently not a proper method of lodging a claim, clearly indicates that the Plaintiff was a known creditor. In that regard, ESA contends further that, as the Plaintiff is a credit institution established in the EEA, its domicile, place of residence, or head office could be identified even if it were not already known. As the Plaintiff was a known creditor, the Defendant should have individually informed it regarding the specific conditions for the lodging of its claims. That it did not do so means that the Plaintiff's rights to receive individual notification containing the requisite information as provided for under the Directive have not been respected.

83 The Commission submits further that, in light of the final sentence of recital 20 of the preamble to the Directive, there is an ongoing obligation, once proceedings are opened and known creditors have been individually informed, to keep all creditors "regularly informed in an appropriate manner throughout winding-up

proceedings". While the EEA States would appear to enjoy some discretion as to how creditors are regularly informed, there is no such discretion in relation to the primary obligation in Article 14 of the Directive.

Findings of the Court

84 Unlike the translation of an EU measure into the EU official languages by the European Commission, the preparation of the Icelandic version of the Directive was undertaken by the Icelandic Ministry for Foreign Affairs before being transmitted to the EFTA Secretariat for publication in the EEA Supplement to the Official Journal of the European Union. This was done in accordance with the Arrangement with Regard to Publication of EEA Relevant Information of the EEA Agreement Final Act, pages 19 to 22. Article 119 EEA, read in the light of Article 2(a) EEA, provides that the Annexes and the acts referred to therein as adopted for the purposes of the EEA Agreement shall form an integral part of the Agreement. Article 129(1) EEA must be understood as providing that those versions of acts referred to in the Annexes to the Agreement drawn up in the Icelandic and Norwegian languages, and published in the EEA Supplement to the Official Journal of the European Union, are equally authentic as those texts in an official language of the European Union.

85 The Icelandic version of Article 14 of the Directive differs materially from the other language versions of the provision including those in the English, Norwegian, German, French, Danish, Swedish, Italian and Spanish languages. The Estonian Government and ESA have furthermore noted that it also differs materially from the Estonian and Finnish language versions, and the Greek language version, respectively. First, Article 14(1) of the Icelandic version of the Directive does not make reference to "known" creditors and does not thereby make the implicit distinction between "known" and "unknown" creditors. Second, the Icelandic version of the Directive does not provide for an obligation for individual notification to known creditors. Given the difference in wording, and thus in the legal obligations imposed by Article 14 in the Icelandic and other language versions of the Directive, ESA is correct in its submission that legal certainty is jeopardised.

86 As the Court has previously held, in the case of differing authentic language versions, a preferred starting point for the interpretation will be to choose one that has the broadest basis in the various language versions. This would imply that the provision, to the largest possible extent, acquires the same content in all EEA States (see *Sveinbjörnsdóttir*, cited above, paragraph 28).

87 The purpose of Article 129(1) EEA, by providing for the translation and publication of the acts referred to in the Annexes to the EEA Agreement beyond the EU official languages and into the Norwegian and Icelandic languages, is to ensure the uniform interpretation of those rules across the EEA, in light of the versions existing in all EEA languages.

88 Therefore the wording used in one language version of an EEA provision cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the principle of homogeneity and the requirement of the uniform application of EEA law.

89 It follows from the principle of homogeneity and the general need for uniform application of EEA law and from the principle of equality that the terms of a provision of EEA law which makes no express reference to the law of the EEA States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EEA, having regard to the context of the provision and the objective pursued by the legislation in question.

90 Consequently, in the case of divergence between the language versions, the provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part so as to be consistent, as far as is possible, with the general principles of EEA law.

91 The text of Article 14(1) of the Directive in the other language versions states that when winding-up proceedings are opened, the administrative or judicial authority of the home EEA State or the liquidator shall, without delay, individually inform known creditors who have their domiciles, normal places of residence or head offices in other EEA States, except in cases where the legislation of the home State does not require lodgement of the claim with a view to its recognition. The individual character of the obligation to inform known EEA creditors is indicated by the use of the word "*individually*" in English, "*individuellement*" in French, "*einzeln*" in German, "*individualmente*" in Italian and Spanish, "*enkeltvis*" in Norwegian, "*individuelt*" in Danish and "*individuellt*" in Swedish. The necessary information, as set out in Article 14(2) of the Directive, must be provided to known creditors by the dispatch of a notice.

92 The purpose of Article 14 of the Directive may be understood from the third, fourth, fifteenth, sixteenth and twentieth recitals in the preamble thereto. These five recitals make clear that the Directive aims at ensuring the mutual recognition of reorganisation measures and winding-up proceedings in the EEA States as well as the co-operation necessary in that regard. Thus, the Directive forms a part of a framework of legislation whereby a credit institution and its branches form a single entity subject to the supervision of the competent authorities of the home EEA State (third recital). The important role played by the home EEA State authorities before winding-up proceedings are commenced may continue during the process of the winding-up in order to ensure that those proceedings can be properly carried out (15th recital), as in the present case.

93 The principles of unity and universality must be respected in the winding-up proceedings in order to ensure the equal treatment of creditors (16th recital). Crucially, according to the 20th recital, the provision of information to known creditors on an individual basis is as essential as publication to enable them,

where necessary, to lodge their claims or submit observations relating to their claims within the prescribed time limits. Creditors may neither be discriminated against on grounds of domicile or residence in another EEA State nor by the nature of their claims. Creditors must be kept regularly informed in an appropriate manner throughout winding-up proceedings.

94 Moreover, when Article 14 of the Directive is considered in the context and general scheme of the Directive as a whole, the individual nature of the notification requirement to known creditors becomes readily apparent. According to Article 13 of the Directive, the announcement of the decision to open winding-up proceedings by the liquidator or any administrative or judicial authority shall be published as an extract from the winding-up decision in the Official Journal of the European Union and at least two national newspapers in each of the host EEA States.

95 The intention of the European legislature underlying Article 13 of the Directive is evidently to bring the winding-up proceedings to the attention of the EEA publics at large. However, this advertisement to the public is entirely separate from, and not substitutable for, the requirements under Article 14 of the Directive on the liquidator, administrative or judicial authority of the home EEA State towards known creditors. Regard must also be had to the fact that pursuant to Article 18 of the Directive, liquidators must keep creditors regularly informed, in an appropriate manner, as to the progress of the winding-up.

96 Pursuant to Article 7(b) EEA, it is for national law to determine the choice of form and method of implementation of the Directive. Moreover, Article 10(2)(g) of the Directive provides that the law of the home EEA State shall determine the rules governing the lodging, verification and admission of claims.

97 However, in light of the purpose of the Directive, it is clear that the term known creditor in Article 14 of the Directive, as well as in Article 7 of the Directive, is an EEA law concept, which, in the absence of an express reference to the law of the EEA States, must be given an autonomous, uniform interpretation (see paragraph 89 above). Moreover, the principle of the equal treatment of creditors would be violated without an autonomous, uniform interpretation of the term. Article 14 of the Directive makes clear that the term known creditor describes a special category of creditor to whom greater obligations are owed.

98 Consequently, the term known creditor must be interpreted as encompassing those who are already known by the credit institution to be creditors, those creditors who may be discovered by a reasonably diligent responsible winding-up authority, such as by requesting information on the identity of creditors from a securities holding service, and those creditors who bring themselves to the attention of the credit institution at any stage prior to the final date imposed by national law for submission of claims to the responsible winding-up authority.

99 The answer to the first question must therefore be that in the case of discrepancy between different language versions, the version which reflects the purpose and

the general scheme of the rules provided for by the Directive as well as the general principles of EEA law must be deemed to express the meaning of an EEA law provision. Consequently, Article 14 of Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit institutions precludes a rule of national law which, following the publication of an invitation to lodge claims directed towards known creditors who have their domicile, permanent residence or head offices in other EEA States, allows for the cancellation of claims that have not been lodged even if these creditors have not been individually notified and the national legislation requires the lodgement of the claim with a view to its recognition.

V The second question of the first reference

100 By the second question of its ruling of 8 November 2011, the national court essentially seeks to establish what the consequences are for the winding-up proceedings of the credit institution if the first question is answered in the affirmative, that is, the invitation by the competent authority to lodge claims is deemed not to satisfy the requirements of Article 14 of the Directive.

Observations submitted to the Court

101 In the view of the Plaintiff, the second question referred by the Reykjavík District Court essentially seeks to establish what consequences, if any, there are for the winding-up proceedings of an EEA financial undertaking if the competent authority fails to dispatch a notification as prescribed in Article 14(2) of the Directive to each known creditor in other Member States under circumstances in which the lodgement of a claim is a requirement for its recognition under the national legislation governing the winding-up proceedings.

102 The Plaintiff submits that the freedom of establishment and the freedom to provide services within the EEA entitle financial undertakings to set up branches and to offer their services throughout the EEA. However, within the EEA, some rules applicable to the reorganisation and winding up of financial undertakings are country specific, divergent and remain non-harmonised. These include the rules on the handling of claims and the consequences of not filing a formal proof of a claim in winding-up proceedings. In the Plaintiff's view, this contradicts the objectives of the internal market by creating unequal conditions for creditors, depending on their location and contributes to the uncertainty of creditors when dealing with financial institutions from EEA States other than their own due to unfamiliarity with their legislation and thereby hampers the provision of cross-border services.

103 The Plaintiff contends that the purpose of Directive 2001/24/EC is to address, to the extent possible, the problems and risks which divergent national rules have, in this regard, on the internal market. Therefore, Article 16(1) establishes the principle that EEA creditors outside the home Member State of the credit institution shall have the right to lodge claims or to submit written observations relating to claims. To facilitate that right, Article 14 of the Directive sets out

mandatory rules on the provision of information to EEA creditors known to the institution being wound up.

104 Article 118(1), point 2, of the Icelandic Bankruptcy Act provides that a foreign creditor who has not filed a claim within the prescribed deadline has the possibility of having his claim accepted under certain conditions. However, these conditions are stringent and strictly applied.

105 The Plaintiff submits that the rejection of its claims by the Defendant entails an unlawful restriction of its right under Article 16(1) of the Directive, and, at the same time, a corresponding violation by the Defendant of that right. Iceland, as an EEA State, has an obligation to apply its national law in a manner which conforms to EEA law in the relevant field.

106 According to the Plaintiff, a provision of EEA law that is both unconditional and sufficiently precise is capable of conferring upon individuals and economic operators, rights and obligations which can be relied upon before national courts of EEA/EFTA States. While in EU law this principle is introduced through case-law, under the EEA Agreement, the same principle applies as a result of the objectives of the Agreement as set out, *inter alia*, in the fourth and fifteenth recitals of its preamble.

107 Article 14 of the Directive, the Plaintiff adds, contains a clear and precise substantive provision setting out the duties of an administrator of a failed bank in relation to known EEA creditors outside the home EEA State of the bank in question when winding-up proceedings commence. In its view, the wording of Article 14 of the Directive leaves no room for a choice of measures when it comes to informing known creditors of the opening of winding-up proceedings and the consequences of not lodging a claim within the deadline.

108 According to the Defendant, the Reykjavík District Court essentially seeks to ascertain whether, under EEA law, the provision included in Article 14 of the Directive, which provides that a liquidator "shall without delay individually inform known creditors", must prevail over Article 86 of the Icelandic Bankruptcy Act, which vests, *inter alia*, a liquidator with the power to determine how information should be disclosed to creditors.

109 The Defendant submits that directives incorporated into the EEA Agreement by the EEA Joint Committee are binding, as to the result to be achieved, upon an EEA State, but leave the choice of form and methods to the national authorities. The transposition of a directive does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation. In the Defendant's view, such discretion has been employed by Iceland. The 16th and 17th recitals in the preamble to the Directive emphasise the sole jurisdiction of the home State in the winding-up process.

110 The Defendant submits that, if the Court concludes that a provision of national law vesting power in a liquidator to decide how known creditors are notified is

incompatible with the Directive, the question arises whether the present case concerns the non-implementation or incorrect implementation of EEA law. In neither case, the Defendant submits, can Article 14(1) of the Directive override provisions of national law.

111 According to the Defendant, EEA law provides that the EFTA States are obliged to ensure that EEA rules that have been implemented prevail over national legal provisions. The EEA Agreement does not require any EEA State to transfer legal powers to any institution of the EEA and, moreover, the homogeneity of the EEA must be achieved through national procedures. However, if EEA rules have not been implemented into national law, they cannot take precedence over conflicting national law provisions. Therefore, if the Court concludes that Article 14(1) of the Directive has not been implemented into national law, it cannot take precedence over the relevant articles of the Icelandic Bankruptcy Act.

112 The Icelandic Government asserts that Article 14(1) of the English version of the Directive does not really prescribe how "known creditors" should be "individually informed". Although Article 14(2) of the English version of the Directive stipulates that the information should be provided "by the dispatch of a notice", the Directive is silent as to how, or where this notice should be dispatched. The Government concludes that the Directive gives EEA States considerable discretion in determining how such notices should be dispatched.

113 In the view of the Icelandic Government, Icelandic legislation conforms to the Directive. Article 104(4) of the Financial Undertakings Act provides that if a known creditor of the credit institution is resident in another EEA State, the administrator shall, without delay, "inform the creditor" of the commencement of the winding-up. Meanwhile, Article 86(1) and (2) of the Icelandic Bankruptcy Act, which applies to the winding up of financial undertakings in accordance with Article 102(1) of the Financial Undertakings Act, provides that the liquidator should investigate whether any party who potentially has a claim against the bankruptcy estate is domiciled abroad and, if that is the case, he should "notify the party in question". Equal treatment of creditors is ensured as the same rules apply to all creditors irrespective of the EEA State of residence.

114 ESA considers that the second question contains a certain ambiguity. It could either be read as asking whether the EEA Agreement requires Article 14 of Directive 2001/24 that has been made part of the EEA Agreement to be directly applicable and take precedence over the national rule that fails to transpose the relevant EEA rule correctly into national law or it could simply refer to the practical conclusions which the winding-up board should draw in the proceedings before it.

115 On the matter of direct applicability, ESA submits that, although it could be argued that Article 7 EEA and Protocol 35 to the EEA Agreement are relevant, neither provision provides an answer to the question posed.

116 ESA and the Commission both argue that national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law. The obligation of harmonious interpretation requires a national court to interpret national law in the light of an inadequately implemented or a non-implemented directive even in a case against an individual or between individuals, as in the case at hand. The national court must apply the methods of interpretation recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule. However, in ESA's view, this duty of harmonious interpretation cannot lead to a *contra legem* interpretation or lead to the judicial re-writing of legislation.

117 In the case at hand, the Commission asserts that an interpretation should be adopted that makes it feasible to inform known creditors and, so far as possible, to allow known creditors who would have been in a position to do so to lodge a claim. If it is no longer possible to lodge a claim under national law, taking into account all the circumstances, including the fact that the Plaintiff was precluded from exercising its rights, there should be a remedy available under national law for the known creditors. Any such remedy should take account of the time-limits specified in accordance with Article 14(2) of the Directive and the penalties for failing to adhere to such time-limits including any objective justification for imposing those time limits.

118 ESA submits further that, if the harmonious interpretation of the implementing measure with the text and purpose of the Directive is not possible, the second question referred becomes more complicated as the EEA Agreement does not entail a transfer of legislative powers or require that non-implemented EEA rules take precedence over conflicting national rules, including those which fail to transpose the relevant EEA rules correctly into national law. In that regard, EEA law does not require that individuals and economic operators be able to rely directly on non-implemented EEA rules before national courts. ESA contends that this must be interpreted to mean that EEA law does not have direct effect. Therefore, in its view, Article 14 of the Directive cannot take precedence over the conflicting Icelandic rules.

119 ESA observes that, according to case-law, in cases of conflict between national law and non-implemented EEA law, the EFTA States may decide whether, under their national legal order, national administrative and judicial organs are to apply the relevant EEA rule directly and thereby avoid the violation of EEA law. Alternatively, the EFTA State concerned is obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability, which is integral to the EEA Agreement. As a further alternative, ESA also notes that pursuant to Article 31 SCA it may commence proceedings against Iceland, even if this possibility may not be of great practical value to the parties to the main proceedings in the case at hand.

120 As regards the practical consequences for the winding-up board, ESA argues that, under the principle of effectiveness, the detailed procedural rules governing

actions for safeguarding an individual's rights under EEA law must not make it, in practice, impossible or excessively difficult to exercise the rights conferred by EEA law. Likewise, according to the principle of equivalence, the rights conferred on the Plaintiff by Article 14 of the Directive must be respected in a way which is no less favourable than the manner in which the national legal order protects similar rights under purely domestic legislation. Moreover, if Icelandic bankruptcy law permits a winding-up board to admit a claim that has been lodged late due to a procedural error committed by the board, ESA submits that such a solution should be extended to remedy the problem in the present case. However, in this regard, ESA considers that the order for reference contains insufficient information to offer further guidance.

Findings of the Court

121 In cases of conflict between national law and non-implemented EEA law, the EEA/EFTA States may, unless the principle of provisional applicability becomes operational, decide whether, under their national legal order, domestic administrative and judicial authorities have to apply the relevant EEA law rule directly, and thereby avoid violation of EEA law in a particular case (see Case E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 41).

122 The objective of establishing a dynamic and homogeneous European Economic Area can only be achieved if EFTA and EU citizens and economic operators enjoy, relying upon EEA law, the same rights in both the EU and EFTA pillars of the EEA.

123 The national court is bound to interpret domestic law, so far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result sought by the directive and consequently comply with Articles 3 EEA and 7 EEA and Protocol 35 to the EEA Agreement (*Criminal Proceedings against A*, cited above, paragraph 39).

124 The principle of conform interpretation requires the referring court to do whatever lies within its competence, having regard to the whole body of rules of national law, to ensure that an individual or economic operator who is a known creditor (see, paragraph 98 above) but who has not been individually notified through the dispatch of a notice pursuant to Article 14 of the Directive, such as the Plaintiff, may be able to lodge a claim with the responsible national winding-up authority within the applicable time-limits established under national law.

125 Where that is not possible, the Court notes that in cases of violation of EEA law by an EEA State, the EEA State is obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability which is an integral part of the EEA Agreement, if the conditions laid down in *Sveinbjörnsdóttir*, cited above, paragraph 62 et seq. and Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraphs 25 and 37 to 48, are fulfilled (see *Criminal Proceedings against A*, cited above, paragraph 42).

126 In light of the above, the answer to the second question of the first reference must be that while the EEA Agreement does not require that a provision of a directive that has been made part of the EEA Agreement is directly applicable and takes precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law, the national court is obliged, as far as possible, to ensure the result sought by the directive at issue through the conform interpretation of the national law with the EEA law provision.

VI Costs

127 The costs incurred by the Icelandic Government, the Estonian Government, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Héraðsdómur Reykjavíkur, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Héraðsdómur Reykjavíkur hereby gives the following Advisory Opinion:

1. **In the case of discrepancy between different language versions, the version which reflects the purpose and the general scheme of the rules provided for by the Directive, as well as the general principles of EEA law must be deemed to express the meaning of an EEA law provision.**

2. **Article 14 of Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit institutions precludes a rule of national law which, following the publication of an invitation to lodge claims directed towards known creditors who have their domicile, permanent residence or head offices in other EEA States, allows for the cancellation of claims that have not been lodged even if these creditors have not been individually notified and the national legislation requires the lodgement of the claim with a view to its recognition.**

3. **While the EEA Agreement does not require that a provision of a directive that has been made part of the EEA Agreement is directly applicable and takes precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law, the national court is obliged, as far as possible, to ensure the result sought by the directive at issue through the conform interpretation of the national law with the EEA law provision.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 28 September 2012.

Gunnar Selvik
Registrar

Carl Baudenbacher
President