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Case No: 71655
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Decision No: 212/17/COL

EFTA SURVEILLANCE AUTHORITY

Icelandic Ministry of Foreign Affairs
Rauðarárstígur25
105 Reykjavík
Iceland

Dear Sir or Madam,

Subject: Letter of formal notice to Iceland concerning Iceland's implementation of Protocol 35 to the EEA Agreement

1 Introduction

1. By letter of 11 April 2012,[1] the EFTA Surveillance Authority ("the Authority") asked the Icelandic Government to clarify how it fulfils its obligations under Protocol 35 to the EEA Agreement ("Protocol 35 EEA"). The Internal Market Affairs Directorate of the Authority referred to three Icelandic Supreme Court rulings that appeared to suggest that in the event of a conflict between an EEA rule, implemented into Icelandic law, and an Act of Parliament, the latter would be applied, irrespective of its (in)compatibility with the EEA Agreement. The judgments thus gave rise to doubts about whether Iceland's legislation was in accordance with the sole Article of Protocol 35 EEA, which states: *"For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases."*

2. Iceland did not reply to this letter.

3. Since then, the EFTA Court has further clarified its view on Protocol 35 EEA. Furthermore, the Icelandic Supreme Court has handed down several judgments, which hold that in the event of a conflict between an EEA rule, implemented into Icelandic law, and another Icelandic provision, the latter should be applied, irrespective of its (in)compatibility with the EEA Agreement.[2]

2 Relevant national law

4. Article 3 of Act No. 2/1993 on the European Economic Area ("the EEA Act") (*Lög nr. 2/1993 um Evrópska efnahagssvæðið*) was intended to implement Protocol 35 EEA. Article 3 of the EEA Act provides:

[1] Request for Information, Doc. No. 630826.
[2] See Section 4.3 below.

"[s]tatutes and regulations shall be interpreted, in so far as appropriate, in conformity with the EEA Agreement and the rules laid down therein."[3]

3 Relevant EEA law

5. Article 3 of the EEA Agreement ("EEA") provides:

> *"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. Protocol 35 EEA provides:

> *"Whereas this Agreement aims at achieving a homogeneous European Economic Area, based on common rules, without requiring any Contracting Party to transfer legislative powers to any institution of the European Economic Area; and*
>
> *Whereas this consequently will have to be achieved through national procedures;*
>
> Sole Article
>
> *For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases."*

7. 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.*

4 The Authority's Assessment

4.1 Protocol 35 EEA and the EFTA Court's interpretation and application of the protocol

8. The sole Article of Protocol 35 EEA obliges the EFTA States to secure the priority of *implemented* EEA rules within their own legal system.

9. The EFTA Court has repeatedly held that it follows from Protocol 35 EEA that implemented EEA law must prevail over conflicting internal provisions, provided that the former are unconditional and sufficiently precise.[4]

10. The first observations of the EFTA Court on Protocol 35 EEA arose in the Court's first case, *Restamark,* where the Court held it to be inherent in the nature of Protocol

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[3] Unofficial translation by the Authority [Original wording*: "Skýra skal lög og reglur, að svo miklu leyti sem við á, til samræmis við EES-samninginn og þær reglur sem á honum byggja."*]

[4] Case E-1/01 *Einarsson* [2002] EFTA Court Report 1, para. 50; Case E-2/12 *HOB-vín* [2012] EFTA Ct. Rep 1092, para. 122; Cases E-11/12 *Koch and Others* [2013] EFTA Ct. Rep 272, para. 119; Case E-6/12 *EFTA Surveillance Authority v Norway* [2013] EFTA Ct. Rep 618, para. 66; Case E-15/12 *Wahl* [2013] EFTA Ct. Rep. 534, para. 54 and Case E-12/13 *EFTA Surveillance Authority v Iceland* [2014], EFTA Ct. Rep. 58, para. 73.

35 EEA that, in cases of conflict, individuals and economic operators must be entitled to invoke and claim, at the national level, any rights that can be derived from the provisions of the EEA Agreement that have been made part of the national legal order, if they are unconditional and sufficiently precise.[5]

11. On 22 February 2002, the EFTA Court delivered its judgment in *Einarsson v The Icelandic State*,[6] concerning the content of the undertaking in Protocol 35 EEA. In that case, the Reykjavík District Court raised the question of whether the EEA Agreement contained any provisions dictating which rules should apply if the relevant Icelandic law was deemed incompatible with the EEA Agreement. The EFTA Court ruled that if a provision of national law is incompatible with implemented EEA law, *"... a situation has arisen which is governed by the undertaking assumed by the EFTA States under Protocol 35 to the EEA Agreement, the premise of which is that the implemented EEA rule shall prevail."*[7]

12. In *HOB-vín*, the EFTA Court held:

> *"It is inherent in the nature of the EEA Agreement that, in cases of conflict between implemented EEA rules and national statutory provisions, individuals and economic operators must be entitled to invoke and to claim at the national level any rights that can be derived from provisions of the EEA Agreement, as being or having been made part of the respective national legal order, if they are unconditional and sufficiently precise."*[8]

13. A similar approach can be seen in *Koch* and *ESA v Norway*, where the EFTA Court held that the EEA Agreement requires that incorporated EEA rules shall prevail in cases of possible conflict with other statutory provisions.[9]

14. In *Wahl* and *ESA v Iceland*, the EFTA Court ruled:

> *"Article 3 EEA requires the EEA States to take all measures necessary, regardless of the form and method of implementation, to ensure that a directive which has been implemented and satisfies the conditions set out above ["sufficiently precise and clear"] prevails over conflicting national law and to guarantee the application and effectiveness of the directive."*[10]

15. The Authority observes that the EFTA Court, in *HOB-vín*, *Koch* and *ESA v Norway*, confirms that the effectiveness and priority of implemented EEA rules over other national law has been confirmed as an inherent part of the EEA Agreement. In *Wahl* and *ESA v Iceland*, the Court then relied on the loyalty obligation in Article 3 of the EEA Agreement in order to require national courts to give effect to this principle of priority of implemented EEA law.

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[5] Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 15, para. 77.
[6] Case E-1/01 *Einarsson* [2002] EFTA Court Report 1. The case related to the higher VAT rate levied on books in languages other than Icelandic. The Court determined that this measure was incompatible with EEA provisions and could not be justified *"on grounds relating to the public interest of enhancing the position of the national language"*.
[7] Case E-1/01 *Einarsson*, cited above, para. 50.
[8] Case E-2/12 *HOB-vín*, ibid, para. 122.
[9] Cases E-11/12 *Koch and Others*, cited above, para. 119 and Case E-6/12 *EFTA Surveillance Authority v Norway*, cited above, para. 66.
[10] Case E-15/12 *Wahl*, cited above, para. 54 and Case E-12/13 *EFTA Surveillance Authority v Iceland*, cited above, para. 73.

16. The judgments of the EFTA Court on the interpretation of Protocol 35 EEA are clear. The Protocol requires the EFTA States to ensure that EEA rules, which have been implemented into national law and which are unconditional and sufficiently precise, take precedence over other national legislation that is not derived from EEA law.

4.2 Iceland's implementation of Protocol 35 EEA: Article 3 of Act No. 2/1993 on the European Economic Area

17. As mentioned above, Protocol 35 EEA was implemented in Icelandic law by Article 3 of the EEA Act, which states that "*statutes and regulations shall be interpreted, in so far as appropriate, in conformity with the EEA Agreement and the rules laid down therein.*"[11]

18. The preparatory works accompanying the EEA Act further state that the words *"statutes and regulations"* should be considered as meaning both the ordinary domestic legislation and regulations, as well as the statutes and regulations that incorporate EEA obligations into domestic law. The preparatory works then clarify that the words *"shall be interpreted, in so far as appropriate"* means that the ambit of this interpretation rule is limited in two ways. On the one hand, Article 3 applies only to national rules that may conflict with EEA rules, and, on the other hand, its ambit is limited by the provisions of the Icelandic Constitution, meaning that the Parliament may not be limited in its future legislative activities by this rule.[12]

19. The Authority notes that the actual wording of Article 3 of the EEA Act does not contain "*a statutory provision to the effect that EEA rules prevail"* in cases "*of possible conflicts between implemented EEA rules and other statutory provisions"*, as prescribed by Protocol 35 EEA. According to its wording, it is merely a rule of interpretation which provides that domestic law shall be interpreted in conformity with EEA law.

20. The requirement in Article 3 of the EEA Act thus seems to be the same as the court-created *principle of conform interpretation*.[13] The EFTA Court has recognised and emphasised this principle, stating that national courts "*must apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule*".[14] The EFTA Court has furthermore held that, "*when interpreting national law, national courts will consider any relevant element of EEA law, whether implemented or not.*"[15]

21. However, the Authority notes that the undertaking in Protocol 35 EEA is different from the *principle of conform interpretation*. Protocol 35 EEA addresses situations when national courts are faced with conflicts between implemented EEA law and other national provisions, which cannot be solved through interpretation.

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[11] Unofficial translation by the Authority [Original wording: *"Skýra skal lög og reglur, að svo miklu leyti sem við á, til samræmis við EES-samninginn og þær reglur sem á honum byggja."*]
[12] Parliamentary Report A [Alþingistíðindi A] of 1992-1993, p. 224.
[13] The principle of conform interpretation was first established by the CJEU in Case 14/83 *Von Colson* [1984] ECR 1891.
[14] Case E-1/07 *Criminal proceedings against A*, [2007] EFTA Ct. Rep. 246, para. 39.
[15] Case E-12/13 *EFTA Surveillance Authority v Iceland* [2014], cited above, para. 74.

22. In contrast with the wording of Article 3 of the EEA Act itself, the preparatory works to Article 3 do however address the question of conflicting legislation:

> *"Article 3 of the EEA Act entails, inter alia, that implemented EEA rules will be considered as special provisions in relation to incompatible subsequent legislation so that, in the event of possible conflict, the more recent law will be considered not to diverge from the specific [EEA] legislation, unless the legislator specifically states otherwise. This is necessary to ensure a uniform interpretation of the provisions of the EEA-agreement. Protocol 35 clearly states that this interpretation rule does not encompass a transfer of legislative power and Article 3 is based on this principle."*[16]

23. According to the preparatory works, implemented EEA law should thus be considered as "*special*" law in order for it to prevail over incompatible subsequent legislation, unless the legislature has specifically stated that it intended to deviate from the implemented EEA rule.

24. The Authority notes however that a *lex specialis* principle, based on the assumption that the Parliament does not intend to legislate contrary to EEA law, is not reflected in the text of Article 3 of the EEA Act, which text is limited to a rule requiring conform interpretation. Furthermore, the case law of the Icelandic Supreme Court shows that the *lex specialis* principle as set out in the preparatory works is not applied by the Supreme Court.

25. As the below cases illustrate, the Supreme Court is of the opinion that Article 3 of the EEA Act is a mere rule of interpretation and that an interpretation on the basis of Article 3 cannot secure the priority of implemented EEA legislation in cases of conflict with other national legislation.

26. It is settled case law that the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts.[17] The below cases of the Supreme Court must therefore be regarded as legal authority in Iceland on the interpretation and application of Article 3 of Act No. 2/1993.

4.3 The issue of conflict between implemented EEA rules and other statutory provisions in Iceland – the case law of the Icelandic Supreme Court since 2003

27. The Authority notes that the extent to which the undertaking in Protocol 35 EEA is fulfilled by an EFTA State depends on whether the practical effects of the national system produce the desired result, i.e. that in conflicts between implemented EEA rules and other statutory provisions, the EEA rules prevail.

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[16] Unofficial translation by the Authority [Original wording: *"Í 3. gr. felst m.a. að innlend lög sem eiga stoð í EES-samningnum verði jafnan túlkuð sem sérreglur laga gagnvart ósamræmanlegum yngri lögum, að því leyti að yngri lög víki þeim ekki ef þau stangast á, nema löggjafinn taki það sérstaklega fram. Þetta er nauðsynlegt til þess að tryggja samræmi í reglunum á Evrópska efnahagssvæðinu."*]. See Parliamentary Report A [Alþingistíðindi A] of 1992-1993, p. 224.

[17] Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577, para. 39; Case C-382/92 *Commission v United Kingdom* [1994] ECR I-2435, para. 36; Case C-300/95 *Commission v United Kingdom* [1997] ECR U-2649, para. 37; Case C-129/00 *Commission v Italy* [2003] ECR I-14637, para. 30; Case C-418/04 *Commission v Ireland*, [2007] ECR I-10947, para. 166 and Case C-490/04 *Commission v Germany* [2007] ECR I-6095, para. 49 and case law cited.

28. Since the EEA Agreement entered into force, Icelandic courts have, on a number of occasions, dealt with cases where there was at least a potential conflict between implemented EEA rules and other national rules.

29. It appears to the Authority that the Supreme Court has on only one occasion come to the conclusion that an implemented EEA rule should prevail over a national provision. This was in the **Supreme Court Case No. 477/2002** ***Hörður Einarsson v The Icelandic State*** of 15 May 2003. This case concerned the Icelandic VAT Act No. 50/1988, which provided for lower VAT rates for books in Icelandic than books in other languages. In its advisory opinion in the case, the EFTA Court came to the conclusion that such different tax rates were in breach of Article 14 EEA. The Supreme Court concluded, referring to Article 3 of the EEA Act, the preparatory works to that provision and Protocol 35 EEA, that Article 14 EEA was to prevail over the relevant provision in the previously enacted VAT Act No. 50/1988 since Article 14 EEA was a special rule. The Court, therefore, appears to have applied the *lex specialis* principle to reach this conclusion. However, the Court also took note of the fact that the VAT Act pre-dated Article 14 EEA.

30. The Authority notes that since the VAT Act predated Article 14 EEA and *the lex posterior* doctrine could also have been applied to reach the same conclusion, it cannot be deduced from this judgment with certainty that Article 3 of the EEA Act was understood by the Supreme Court as being more than a rule of interpretation. The Authority notes however that in subsequent case law, the Supreme Court has neither made a reference to the *lex specialis* principle found in the preparatory works nor any other rule of precedence.

31. In **Supreme Court Case No. 220/2005** of 6 April 2006, on the display of tobacco products, a claimant sought a declaration that a provision in the Tobacco Control Act (restricting the display of tobacco products in retail stores) was inoperative as it was contrary to Articles 11 and 36 EEA. In its ruling, the District Court of Reykjavík, without referring to Article 3 of the EEA Act or Protocol 35 EEA, stated:

> *"Even if the conclusion were reached that paragraph 6 of Article 7 of Act No. 6/2002 were in breach of Articles 11 and 36 of the EEA Agreement, that conclusion would not mean that the provision of paragraph 6 of Article 7 of Act No. 6/2002, which was adopted based on the constitutional processes, would not be applied. Such a conclusion might on the other hand form the basis of a claim for damages, cf. judgment of the Supreme Court of 16 December 1999. Already for that reason will the plaintiff's claims to the effect that the cited provision of Act No. 6/2002 infringes Articles 11 and 36 of the EEA Agreement, be rejected."*[18] (emphasis added)

32. On appeal, the Supreme Court upheld this position on the status of implemented EEA rules.

[18] Unofficial translation by the Authority. The original text reads as follows: ["*Stefnandi hefur krafist viðurkenningar á því að honum sé heimilt að sýna tóbaksvörur í verslun sinni þrátt fyrir fyrirmæli 6. mgr. 7. gr. laga nr. 6/2002 sem banna slíkt. Þó svo komist yrði að þeirri niðurstöðu að ákvæði 6. mgr. 7. gr. laga nr. 6/2002 færu gegn 11. gr. eða 36. gr. EES-samningsins, myndi sú niðurstaða ekki leiða til þess að stjórnskipulega settum ákvæðum 6. mgr. 7. gr. laga nr. 6/2002 yrði ekki beitt. Slík niðurstaða kynni hins vegar að mynda bótagrundvöll, sbr. m.a. dómur hæstaréttar frá 16. desember 1999. Þegar af þessari ástæðu verður kröfum stefnanda á þeim grunni að tilvitnuð ákvæði laga nr. 6/2002 fari gegn ákvæðum 11. gr. og 36. gr. EES-samningsins hafnað.*"]

33. In **Supreme Court Case No. 274/2006** of 24 May 2006, the defendant, in a criminal case concerning the advertisement of alcoholic products, claimed that Article 20 of Act No. 7/1998 on Alcoholic Beverages, which prohibited the advertisement of alcoholic products, was incompatible with Protocol 47 to the EEA Agreement on the abolition of technical barriers to trade in wine. The defendant requested an advisory opinion from the EFTA Court, but the Supreme Court confirmed the refusal of the request upon appeal, referring to the ruling of the District Court, which stated:

> *"Cases, similar in nature to the one being discussed here, have been brought before the courts. The question has been whether Article 20 of the Act on Alcoholic Beverages is in accordance with constitutional provisions on freedom of expression, property rights and equality and discrimination. The disputed issue in this case, as in the earlier cases, concerns the validity and interpretation of Article 20 of the Act on Alcoholic Beverages and whether it is compatible with constitutional provisions, since legislation adopted according to constitutional processes cannot be set aside on any other grounds. The EFTA Court will not deal with that type of legal interpretation. There is therefore no use in seeking an advisory opinion in this case."*[19] (emphasis added)

34. The Authority observes that this stance on the prohibition on the advertising of alcohol has been reaffirmed in **Supreme Court Cases No. 60/2008** of 25 February 2008, **No. 491/2007** of 23 October 2008, **No. 143/2008** of 6 November 2008 and **No. 649/2008** of 30 April 2009, by reference to previous case law.

35. The Authority notes that in the two above-mentioned judgments from 2006 (**Case No. 220/2005** and **Case No. 274/2006**), the Supreme Court simply declares, without making any reference to Article 3 of the EEA Act or Protocol 35 EEA, that it will not disregard national legislation which is incompatible with the EEA Agreement, i.e. implemented EEA legislation. The reasoning in these cases thus runs contrary to the principle in Protocol 35 EEA.

36. The issue of conflict again arose in the **Supreme Court Case No. 79/2010** ***Biðskýlið Njarðvík*** of 9 December 2010. In this case, the Supreme Court addressed the scope of Article 3 of the EEA Act, stating:

> *"Article 3 of Act No 2/1993 states that statutes and regulations shall be interpreted, in so far as appropriate, in conformity with the EEA Agreement and the rules laid down therein. Such an interpretation, by definition, entails that the wording of the Icelandic legislation shall be interpreted, to the extent possible, to contain a meaning that falls within its scope and corresponds most closely to the common rules that should apply in the EEA. However, the interpretation cannot lead to the wording of the Icelandic legislation being disregarded. The wording of Article 10, concerning the direct liability of the supplier for the damage of the injured party, is unambiguous and leaves no room for that responsibility to be set*

[19] Unofficial translation by the Authority. The original text reads as follows: [*"Mál af samkynja toga og hér er til meðferðar hafa áður komið til kasta dómstóla. Hefur þar verið tekist á um hvort 20. gr. áfengislaga standist ákvæði stjórnarskrár, m.a. um tjáningarfrelsi, eignarrétt og jafnræði. Úrlausnarefni í þessu máli snýst sem fyrr um gildi og skýringu á nefndri 20. gr. áfengislaga og hvort hún standist ákvæði stjórnarskrár, þar sem stjórnskipulega settum lögum verður ekki vikið til hliðar með öðrum hætti. EFTA dómstóllinn mun ekki fjalla um slíka lagaskýringu. Stoðar því ekki að leita ráðgefandi álits hans í þessu máli."*]

aside by means of interpretation on the basis of Article 3 of Act No. 2/1993."[20] (emphasis added)

37. In relation to this case, the Authority further refers to its reasoned opinion dated 22 May 2013 in case 69276.[21] In this, the Authority, *inter alia*, came to the conclusion that by giving effect to Article 10 of Act No. 25/1991 on product liability (*Lög nr. 25/1991 um skaðsemisábyrgð*) in the above Supreme Court case, Iceland had failed to fulfil its obligations under Protocol 35 EEA.

38. The Authority observes that the above case (*Biðskýlið Njarðvík*) has become a precedent to which the Supreme Court refers in order to define the scope of and limits to Article 3 of the EEA Act, as a mere rule of interpretation. In particular, the Supreme Court maintains that an interpretation on the basis of Article 3 "cannot lead to the wording of Icelandic legislation being disregarded"[22].

39. This approach was followed in **Supreme Court Case No. 10/2013 *Landsbankinn v Flugastraumur*** of 24 January 2013. The case concerned a motion for a request for an advisory opinion. Flugastraumur, a limited liability company, commenced litigation against Landsbankinn, maintaining that its lease should be regarded as a loan agreement indexed to foreign currency and recalculated as such. Landsbankinn argued, *inter alia*, that the Icelandic Act No. 38/2001 on Interest and Price Indexation, as applied by the Supreme Court, was in breach of the free movement of capital as provided for in Article 40 EEA, and requested an advisory opinion from the EFTA Court. In this regard Landsbankinn referred to the Authority's letter of formal notice to Iceland dated 19 April 2012, in which the Authority concluded that the ban on the granting of exchange rate indexed loans in ISK was in breach of Article 40 EEA, since it dissuaded Icelandic financial institutions from financing their loans in other currencies than the national currency.[23]

40. Landsbankinn also argued that if Act No. 38/2001 was considered incompatible with Article 40 EEA, it had to be decided which rules should prevail. It observed that Article 40 had acquired binding force in Icelandic law and therefore the Court would be obliged, under Protocol 35 EEA, to give Article 40 EEA precedence over the Act on Interest and Price Indexation. Landsbankinn observed that the wording of Article 3 of the EEA Act was vague and did not seem to prescribe an obligation to set aside other legislation on the basis of implemented EEA law. A ruling from the EFTA Court would therefore be necessary in order to determine whether Protocol 35 EEA had been correctly implemented in Icelandic law via Article 3 of the EEA Act.

41. The Supreme Court rejected the request. The Court referred to its case *Biðskýlið Njarðvík* (above) and noted that Article 3 of the EEA Act requires that the wording of

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[20] Unofficial translation by the Authority. The original text reads as follows: [*"Í 3. gr. laga nr. 2/1993 er mælt svo fyrir að skýra skuli lög og reglur, að svo miklu leyti sem við á, til samræmis við EES-samninginn og þær reglur, sem á honum byggja. Slík lögskýring tekur eðli máls samkvæmt til þess að orðum í íslenskum lögum verði svo sem framast er unnt gefin merking, sem rúmast innan þeirra og næst kemst því að svara til sameiginlegra reglna sem gilda eiga á Evrópska efnahagssvæðinu, en hún getur á hinn bóginn ekki leitt til þess að litið verði fram hjá orðum íslenskra laga. Orð 10. gr. laga nr. 25/1991 um beina ábyrgð dreifingaraðila á skaðsemistjóni gagnvart tjónþola hafa ótvíræða merkingu og gefa ekkert svigrúm til að hliðra þeirra ábyrgð með skýringu samkvæmt 3. gr. laga nr. 2/1993."*]

[21] Doc. No. 630035.

[22] The Authority's translation. The original text reads: ["…*getur á hinn bóginn ekki leitt til þess að litið verði fram hjá orðum íslenskra laga."]*

[23] Doc. No. 585210.

the Icelandic legislation shall be interpreted, to the extent possible, to coincide with the meaning of EEA rules. The Court then stated: *"This interpretation cannot, on the other hand, lead to the disregarding of Icelandic laws [...]."*

42. The Supreme Court continued to note that it had, in Case No. 92/2010, concluded that the granting of exchange rate indexed loans in Icelandic krona was incompatible with Act No. 38/2001 and therefore illegal.[24] The Court then held:

> *"Articles 13 and 14 of Act No. 38/2001 have not been amended since the aforementioned judgment of the Supreme Court in Case No. 92/2010 was passed on 16 June of that year. The unequivocal ban on the granting of exchange rate indexed loans in Icelandic krona is still unaffected. It is not possible to diverge from this unequivocal ban via an interpretation on the basis of Art. 3 of Act No. 2/1993"*

43. With regard to Protocol 35 EEA, the Supreme Court held that the dispute, which was between private parties, would "be resolved on the basis of Icelandic rules of law". Hence, any answer the EFTA Court might give with regard to Protocol 35 EEA would not be of relevance for the outcome of the case.

44. The Authority observes that the Supreme Court then went on to make a reference to Article 31 of the Surveillance and Court Agreement and stated that it was for the EFTA Surveillance Authority, in accordance with that provision, to initiate infringement proceedings against an EFTA State, if the Authority is of the opinion that an EFTA State has not fulfilled its obligations according to the EEA Agreement.

45. The issue of conflict of laws arose again in the **Supreme Court Case No. 552/2013** ***Commerzbank AG v Kaupthing***, of 28 October 2013[25] and **Supreme Court Case No. 120/2014** ***De Nederlandsche Bank N.V. v LBI***, of 8 May 2014. In relation to these cases, the Authority refers to its letter of formal notice dated 6 July 2016 in case 77038.[26] Here the Authority, *inter alia*, came to the conclusion *"that by not ensuring a derogation from the general principle that the law of the home EEA State shall apply, in order to secure that the creditors' rights of set-off and netting are not undermined in circumstances such as those described above, Iceland has failed to fulfil its obligations arising from … Protocol 35 to the EEA Agreement."*

46. The dispute in **Supreme Court Case No. 306/2013** ***Landesbank Baden-Württemberg v Glitnir***, judgment of 10 May 2013, concerned the question of whether the Icelandic legislature could provide for the *de facto* commencement of winding-up proceedings, without this being based on a ruling by a court or other competent judicial authority.

47. The background of the case was as follows: on 24 November 2008, the Reykjavík District Court granted Glitnir a moratorium, in accordance with the Act on Financial Undertakings No. 161/2002. On 22 April 2009, Act No. 44/2009 came into force, amending the Act on Financial Undertakings, and introducing transitional provisions which transformed the moratorium granted to Glitnir into winding-up proceedings, as if the bank had been made subject to winding-up proceedings by a court decision on

[24] See *e.g.* Supreme Court Rulings Nos. 92/2010, 153/2010, 603/2010, 604/2010 and 155/2011.
[25] See also the decisions during trial in Case No. 723/2012 and Case No. 166/2013.
[26] Doc. No. 789678.

the date that the Act took effect (i.e. 22 April 2009).[27] On 12 May 2009, the Reykjavík District Court appointed a Winding-up Board for Glitnir. The Winding-up Board issued an authorisation for the company's debt-collectors to call in debts on 26 May 2009, and the period allowed for filing claims ended on 26 November the same year. On 19 May 2010, the claimant filed claims with the Winding-up Board for a total amount of 5.89 billion krona. The defendant rejected the claimant's claim since the time limit within which to lodge claims had expired.

48. The claimant held that the winding-up of Glitnir could not be considered to have commenced on 22 April, by the enactment of Act 44/2009, since the measure was not adopted by "*an administrative or judicial authority*", within the meaning of Article 101 of the Act on Financial Undertakings,[28] which implemented Article 9 of Directive 2001/24/EC.[29] Thus, the winding up of Glitnir could not be considered to have commenced until 22 November 2010, when the winding-up proceedings in relation to Glitnir were confirmed by a ruling of the Reykjavík District Court. The claimant also argued that the court order could not be considered to have retrospective effect. The claimant requested an advisory opinion from the EFTA Court on these points.

49. The Reykjavík District Court (whose ruling was upheld by the Supreme Court) first recalled that Article 3 of the EEA Act could not lead to a situation where the clear wording of Icelandic legislation is disregarded. The judgments of the Icelandic Supreme Court in **Case No. 79/2010 (***Biðskýlið Njarðvík*) and **Case No. 10/2013** (*Landsbankinn*) made clear that if Icelandic law was unequivocally worded, the opinion of the EFTA Court could not be relevant for the outcome of the case. The Court then observed that under the general rule in Article 101 of the Act on Financial Undertakings, a court must rule on whether an undertaking is placed in winding-up proceedings. However, the transitional provisions included in point II of Act No. 44/2009 contained special rules, which made financial institutions under a moratorium subject to a specific winding-up scheme.

50. The District Court was unequivocal that Act No. 44/2009, which amended several provisions of the Act on Financial Undertakings, placed the bank in winding-up, commencing on 22 April 2009, when the Act came into force. The general rule in Article 101 of the Act on Financial Undertakings (implementing the relevant Article of Directive 2001/24/EC) could not change this fact.

51. The District Court then went on to state:

> *"The questions do not concern doubts as to the interpretation of the transitional provision but whether its introduction was compatible with EEA law. This case, however, does not concern a State liability claim against the Icelandic State, [...] but rather takes place between private parties [...] and the conclusion of the aforementioned dispute depends on Icelandic law."*[30]

[27] Point II of the transitional provisions of Act No. 44/2009 amended the legal effects of the moratorium, by making financial institutions under moratorium subject to a specific winding-up scheme.
[28] Article 101 of the Act on Financial Undertakings was introduced by Article 5 of Act No. 44/2009.
[29] Article 9(1) of that Directive states: *"The administrative or judicial authorities of the home Member State which are responsible for winding up shall alone be empowered to decide on the opening of winding-up proceedings concerning a credit institution, including branches established in other Member States."*
[30] Unofficial translation by the Authority. The original text reads as follows: ["*Spurningarnar í beiðni sóknaraðila snerta í reynd ekki vafa um túlkun á efni framangreinds ákvæðis til bráðabirgða, heldur hvort lögfesting þess hafi samræmst EES-rétti. Mál þetta lýtur hins vegar ekki að þeirri bótakröfu á hendur*

52. In light of the above, and of the nature of Article 3 of the EEA Act, the Court held that it could not see how an opinion from the EFTA Court could lead to the conclusion that a date, other than that stipulated in Act No. 44/2009, could serve as reference for determining the commencement of the winding-up proceedings. Thus, an advisory opinion was deemed irrelevant to the outcome of the case.

53. In the criminal **Case No. 429/2014** ***The Public Prosecutor v X, Y, Z and Þ***, of 15 July 2014, the accused had been charged under the Foreign Exchange Act No. 87/1992, which prohibits parties from acting as intermediaries in foreign exchange transactions in Iceland unless authorised to do so by, *inter alia*, the Central Bank. The accused requested that the case be referred to the EFTA Court, alleging the incompatibility of the Act with the free movement of capital (Art. 40 EEA).

54. The Supreme Court stated that the questions in the case "*do not concern the application of Article 8(1) of Act No. 87/1992 in light of an interpretation of the EEA Agreement, but whether the provision is compatible with it*."[31] The Court then refused to seek an opinion from the EFTA Court, since any answer the EFTA Court might give "*could not influence the resolution of the criminal case against the accused, since their criminal liability depends on Icelandic law*."[32]

55. In the criminal **Case No. 291/2015** ***The Public Prosecutor v X***, of 5 May 2015, the accused had been charged for breaching the Customs Act No. 88/2005, the Medicinal Products Act No. 93/1994 and the Medicinal Products Sales Act No. 30/1963, after having imported, without a marketing authorisation, 1 050 nicotine filters for e-cigarettes. Before the District Court, X requested that an advisory opinion be sought whether such a ban was in conformity with Articles 11 and 13 EEA on the free movement of goods. The accused reasoned that the e-cigarettes had been imported to Iceland from the United Kingdom, where they are lawfully sold and considered to be regular consumer products. By qualifying the product as a medicinal product, the Icelandic Medicines Agency had for all intents and purposes prohibited their sale in Iceland, and this constituted an unjustified restriction on the free movement of goods.

56. The District Court rejected the accused's request for an advisory opinion. The Supreme Court upheld that decision, stating that under Icelandic law it was unlawful and punishable to import medicinal products without a valid Icelandic marketing authorisation. The Icelandic Medicines Agency had classified e-cigarettes containing nicotine as a drug. The Court stated that *"it follows from Article 34 of the Surveillance and Court Agreement and Article 1(1) of Act No. 21/1994 that it is the role of the EFTA Court to interpret the EEA Agreement but the assessment of evidence and the factual circumstances of the case, as well as interpretation of domestic legislation and the application of the Agreement in Iceland falls upon the Icelandic courts."* The Court then held that on this basis, and on the facts of the case, that it was not relevant

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íslenska ríkinu […], heldur er um að ræða mál sem rekið er á milli tveggja lögaðila […], og niðurstaða málsins um framangreint ágreiningsefni aðila ræðst af íslenskum réttarreglum."]

[31] Unofficial translation by the Authority. The original text reads as follows: [*"Þær spurningar sem varnaraðilar krefjast ráðgefandi álits um varða ekki beitingu 1. mgr. 8. gr. laga nr. 87/1992 í ljósi túlkunar á EES-samningnum heldur hvort ákvæðið sé samrýmanlegt honum."*]

[32] Unofficial translation by the Authority. The original text reads as follows: [*"Svör EFTA-dómstólsins við þeim spurningum gætu því ekki haft áhrif við úrlausn sakamálsins á hendur varnaraðilum, enda fer um refsiábyrgð þeirra að íslenskum lögum."*]

for the outcome of the case to request an advisory opinion from the EFTA Court, since the defendant's criminal liability depended on Icelandic law.[33]

4.4 The Authority's conclusions

57. Protocol 35 EEA provides that the EFTA States are obliged, if necessary, to introduce a statutory provision to the effect that, in case of conflict between implemented EEA rules and other statutory provisions, the former will prevail. Furthermore, Article 3 EEA imposes upon the EFTA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement.[34]

58. As noted above, Article 3 of the EEA Act contains a rule requiring conform interpretation. It does not, by its wording, require that implemented EEA rules should prevail if and when in conflict with national rules, as prescribed by Protocol 35 EEA. Thus, notwithstanding the preparatory works to the provision, the wording of Article 3 alone does not seem to fulfil the obligations under Protocol 35 EEA.

59. This position is confirmed by the case law of the Icelandic Supreme Court. As the above cases illustrate, the Supreme Court has, in cases of conflict between implemented EEA law and other national legislation, either refrained from making a reference to Article 3 of the EEA Act[35] or held that Article 3 of the EEA Act is a mere rule of interpretation, which cannot secure the priority of implemented EEA legislation.[36]

60. One of the effects of this is that the fundamental provisions of the EEA Agreement on free movement of goods, persons, services and capital, cannot be applied in the circumstances of a (possible) conflict with other, later, national provisions, irrespective of the fact that the four freedoms are implemented in Iceland by Act No. 2/1993 and comply with the requirement of being unconditional and sufficiently precise.[37] The Authority observes that this deprives these main provisions of the EEA Agreement of its core purpose, that is to prevent unjustified restrictions on free movement.

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[33] Unofficial translation by the Authority. The original text reads as follows: [*„Af 1. mgr. 34. gr. samnings milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls, sbr. 1. mgr. 1. gr. laga nr. 21/1994, leiðir að það er hlutverk EFTA-dómstólsins að skýra EES-samninginn, en íslenskra dómstóla að fara með sönnunarfærslu um staðreyndir máls, skýringu innlends réttar og beitingu samningsins að íslenskum lögum. Þegar dómstóll beitir þeirri heimild að leita ráðgefandi álits tekur hann eingöngu afstöðu til þess hvort slíks sé þörf við þær aðstæður sem uppi eru í málinu, en tekur ekki afstöðu til efnisatriða þess. Samkvæmt þessu og eins og mál þetta liggur fyrir samkvæmt framansögðu verður ekki séð að álit EFTA-dómstólsins hafi sjálfstæða þýðingu til að héraðsdómur geti kveðið upp dóm í málinu, enda fer um refsiábyrgð varnaraðila samkvæmt íslenskum lögum.“*]

[34] See, *inter alia*, Case E-2/15 *ESA v Iceland* [2015] EFTA Ct. Rep. 340, para. 18, and case law cited.

[35] See, for example, cases No. 220/2005, No. 274/2006, No. 552/2013 and No. 120/2014.

[36] See, for example, Supreme Court Cases No. 79/2010, No. 10/2013 and No. 306/2013. See also Supreme Court Case No. 92/2013 of 14 October 2014, *the Icelandic State v Atli Gunnarsson*, where the Court made a reference to Article 3 of the EEA Act and cases No. 79/2010 and No. 10/2013, explaining the scope of this rule of interpretation – i.e. that it may not lead to situations where "explicitly worded provisions of Icelandic law are disregarded."

[37] See, for example, Supreme Court Cases No. 220/2005, No. 60/2008, No. 491/2007, No. 143/2008, No. 10/2013, No. 429/2014 and No. 291/2015.

61. As stated above, the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts.[38] The above cases of the Supreme Court must therefore be regarded as legal authority in Iceland on the interpretation and therefore application of Article 3 of the EEA Act.

62. Consequently, it is the Authority's view that Article 3 of Act No. 2/1993, as interpreted and applied by the Supreme Court of Iceland, does not adequately implement the sole Article of Protocol 35 EEA, as it does not ensure that unconditional and sufficiently precise implemented EEA law prevails over conflicting national provisions. The Authority considers that Iceland has therefore failed to take the appropriate measures to ensure fulfilment of the obligations arising out of the EEA Agreement.

5 Conclusion

63. Accordingly, as its information presently stands, the Authority must conclude that Iceland has failed to fulfil its obligations under Protocol 35 EEA, by failing to adopt the necessary measure to ensure that implemented EEA rules prevail over conflicting provisions of national law, and thus failing to ensure that individuals and economic operators can rely on their rights derived from the EEA Agreement.

64. Thereby, it appears that Iceland has also failed to comply with its obligations under Article 3 EEA.

65. In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Icelandic Government submits its observations on the content of this letter *within two months* of its receipt.

66. After the time limit has expired, the Authority will consider, in the light of any observations received from the Icelandic Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

Sven Erik Svedman
President

This document has been electronically signed by Sven Erik Svedman.

[38] Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577, para. 39; Case C-382/92 *Commission v United Kingdom* [1994] ECR I-2435, para. 36; Case C-300/95 *Commission v United Kingdom* [1997] ECR U-2649, para. 37; Case C-129/00 *Commission v Italy* [2003] ECR I-14637, para. 30; and Case C-418/04 *Commission v Ireland*, [2007] ECR I-10947, para. 166.