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Hagsmunasamtök Heimilanna

Erindi nr. HH16U145.0384
Dags. 20.8.2016

Efni: **Umsögn Hagsmunasamtaka heimilanna um 384. mál á 145. löggjafarþingi**
Vextir og verðtrygging o.fl. (erlend lán, EES-reglur)

Frumvarp það sem hér um ræðir snýr að tveimur mismunandi formum lánsfjár, annars vegar lánsfé í erlendum gjaldmiðlum, og hins vegar „lánsfé þar sem greiðslur breytast í samræmi við gengi erlendra gjaldmiðla“ eins og það er orðað í frumvarpinu eða öllu heldur lánsfé sem er verðtryggt miðað við gengi erlendra gjaldmiðla (gengistryggt). Svo virðist sem í frumvarpinu séu þessi tvö ólíku lánsform lögð að jöfnu og er lagt til að sömu reglur skuli gilda um þau bæði. Hagsmunasamtök heimilanna telja þá nálgun að málinu ekki aðeins vera ranga heldur beinlínis varasama og þau rök sem færð eru fyrir henni í greinargerð með frumvarpinu ekki standast nánari skoðun. Jafnframt leggjast samtökin alfarið gegn því að gengistryggð lán verði heimiluð. Hér á eftir verður nánar gerð grein fyrir þessum sjónarmiðum og öðrum athugasemdum við frumvarpið.

I. Aðgreining lánsforma

Lán sem tengjast á einhvern hátt erlendum gjaldmiðlum hafa verið talsvert til umræðu í þjóðfélaginu á undanförnum árum, ekki síst vegna þeirra stökkbreytinga sem urðu á slíkum lánum í kjölfar fjármálahrunsins árið 2008. Í þeirri umræðu hefur því miður oft gætt alvarlegs misskilnings og rangrar hugtakanotkunar, en frumvarp þetta virðist vera sama marki brennt. Í heiti frumvarpsins og inngangi greinargerðar með því er notað hugtakið „erlend lán“ sem er rangnefni, því eðli málsins samkvæmt geta íslensk lög ekki náð yfir lán sem eru veitt utan íslenskrar lögsögu.

Í athugasemdum við 1. gr. frumvarpsins segir jafnframt að ekki þyki ástæða til þess að greina á milli þessarra flokka lánsfjár með tilliti til áhættu fyrir lántaka, lánveitendur og þjóðarbúið, og í III. kafla greinargerðar með frumvarpinu er því haldið fram að áhætta af slíkum lántökum sé í meginatriðum sú sama. Slíkar fullyrðingar eiga þó ekki við rök að styðjast, því eins og dæmi frá undanförnum árum sýna getur verið vandkvæðum bundið að afla gjaldeyris meðan öðru máli kann að gegna um íslenskar krónur. Þá hafa þessar tvær tegundir lána hlotið mismunandi úrlausnir fyrir dómstólum, sem hafa skilað gjörólíkum niðurstöðum fyrir samsvarandi hópa lántakenda.

Í III. kafla greinargerðar með frumvarpinu segir jafnframt að það hafi reynst þrautin þyngri að greina á milli erlendra lána og gengistryggðra lána eins og dómaframkvæmd liðinna sé til vitnis um. Þetta eru að mati samtakanna ekki haldbær rök fyrir því að leggja þessi lánsform að jöfnu, heldur miklu frekar vitnisburður um þá miklu ágalla sem verið hafa á umræddri dómaframkvæmd, þar sem dómendur virðast í mörgum tilvikum hafa verið haldnir sama misskilningi og áður var nefndur sem stafar að stóru leyti af rangri hugtakanotkun og skorti á réttum upplýsingum.

Með 1. gr. frumvarpsins er lagt til að bæði lán í erlendum gjaldmiðlum og gengistryggð lán verði færð undan gildissviði verðtryggingarkafla laga um vexti og verðtryggingu nr. 38/2001. Hvað lán í erlendum gjaldmiðlum varðar er slíkur áskilnaður óþarfur þar sem í fyrstu setningu kaflans kemur fram að hann gildir aðeins um sparifé og lánsfé í íslenskum krónum. Gengistryggð lán væri aftur á móti óeðlilegt að fella undan þeim ákvæðum laga sem eiga við um verðtryggingu, þar sem þau eru einmitt verðtryggð og enginn munur er á þeim og öðrum verðtryggðum lánum nema sú vísitala sem verðtryggingin er miðuð við. Frá öndverðu hefur það verið meginregla íslenskra laga að verðtrygging sé almennt ekki heimil nema að því leyti sem hún er heimiluð sérstaklega með lögum, eins og hefur margítrekað verið staðfest í dómaframkvæmd. Þar af leiðandi er 1. gr. frumvarpsins í raun markleysa, sem myndi aðeins auka við þá réttaróvissu sem ríkt hefur um gengisbundin lán á undanförnum árum líkt og vísað er til í greinargerð með frumvarpinu. Vegna þessarra alvarlegu ágalla á 1. gr. frumvarpsins er hún beinlíns ótæk og verður því að fella hana brott.

II. Gjaldeyrislán

Lán sem veitt eru í erlendum gjaldmiðlum, þ.e.a.s. þannig að andvirði lánsins er raunverulega afgreitt til lántakanda í erlendum gjaldeyri, hafa fram til þessa verið lögleg. Með frumvarpinu er ekki lagt til að því verði breytt. Aftur á móti er lagt til að skýrari reglur verði settar um slíkar lánveitingar, þar á meðal takmarkanir, sem byggjast á sjónarmiðum um neytendavernd og fjármálastöðugleika. Samtökin leggjast ekki gegn því að settur verði lagarammi utan um slíkar lánveitingar. Hinsvegar er vert að geta þess að við meðferð efnahags- og viðskiptanefndar á fyrra frumvarpi svipaðs efnis á síðasta þingi, komu fram tillögur frá umsagnaraðilum sem tekið var undir í drögum að nefndaráliti, varðandi upplýsingaskyldu lánveitenda gagnvart neytendum og rétt neytenda til uppgreiðslu eða umbreytingar láns yfir í annan gjaldmiðil án aukakostnaðar fari svo að forsendur lánveitingar bresti. Þessar tillögur virðast því miður ekki hafa ratað inn í frumvarpið í þeirri mynd sem nú liggur fyrir. Ákvæði þar að lútandi eru reyndar til staðar í fyrirliggjandi frumvarpi til nýrra laga um fasteignalán til neytenda, en að mati samtakanna væri samt full ástæða til að kveða á um samskonar reglur í hinum almennu lögum um neytendalán nr. 33/2013.

III. Gengistryggð lán

Í greinargerð með frumvarpinu er talsvert fjallað um rökstutt álit Eftirlitsstofnunar EFTA frá 22. maí 2013 þar sem kemur fram að stofnunin telji bann íslenskra laga við gengistryggingu ekki samrýmast meginreglu EES-samningsins um frjálst fjármagnsflæði. Upphaf málsins má rekja til kvörtunar sem beint var til stofnunarinnar af hálfu formanns slitastjórnar eins þeirra föllnu fjármálafyrirtækja sem brutu gegn lögum með því að veita slík lán. Í bréfaskiptum við stofnunina vegna málsins kemur fram sú eindregna afstaða íslenskra stjórnvalda að bann við gengistryggingu feli ekki í sér neina takmörkun á frjálsu flæði fjármagns, enda séu lán í erlendum gjaldmiðlum fullkomlega lögleg. Jafnframt koma þar fram upplýsingar sem staðfesta flest það sem Hagsmunasamtök heimilanna hafa bent á varðandi eiginleika slíkra lána, þar á meðal að þau eru raunverulega fjármögnuð í íslenskum krónum en hinir erlendu gjaldmiðlar eru eingöngu notaðir sem viðmið. Jafnframt að með veitingu slíkra lána sé þeirri gríðarlegu gengisáhættu sem fylgi lántöku í erlendum gjaldmiðlum allri velt yfir á lántakendur, þrátt fyrir að þeir fái engan gjaldeyri í hendur heldur aðeins íslenskar krónur. Með því hverfi ekki áhættan úr bankakerfinu heldur umbreytist hún aðeins úr gengisáhættu yfir í skuldaráhættu sem raungerist ef skuldara þrýtur greiðslugetu vegna óvæntrar hækkunar á greiðslubyrði í kjölfar gengisbreytinga, og að mati Fjármálaeftirlitsins séu slík lán því afar áhættusöm, bæði fyrir lántakendur og lánveitendur.

Með hliðsjón af framangreindri og margítrekaðri afstöðu íslenskra stjórnvalda, sætir mikilli furðu sú fyrirætlan að heimila slík lán, burtséð frá framangreindum annmörkum á frumvarpinu. Að mati Hagsmunasamtaka heimilanna er afstaða eftirlitsstofnunar EFTA ekki á réttum rökum reist, og hefði því verið eðlilegra að halda afstöðu Íslands til streitu, og eftir atvikum að taka til varna ef til þess kæmi að stofnunin myndi bera málið undir EFTA-dómstólinn.

Í 40. gr. EES-samningsins er kveðið á um að engin höft skuli vera milli samningsaðila á flutningum fjármagns **í eigu** þeirra sem búsettir eru í aðildarríkjum né nokkur mismunun. Ákvæðið nær því ekki yfir lánsfé, en eina ákvæðið í 4. kafla EES-samningsins um fjármagnsflutninga þar sem minnst er á lánsfé er í 42. gr. þar sem segir ef beitt sé innlendum reglum um fjármagnsmarkað og lánsviðskipti í fjármagnsflutningum sem höftum hafi verið létt af samkvæmt ákvæðum samningsins, skuli það gert án mismununar. Ekki fæst séð að það myndi fela í sér neina mismunun þó banni við gengistryggingu yrði viðhaldið, þar sem það á jafnt við um alla, óháð ríkisfangi eða búsetu. Þessu til staðfestingar hefur Hæstiréttur Íslands ítrekað hafnað því að bann við gengistryggingu hafi neitt með EES-reglur að gera, í þeim tilvikum sem lánveitendur hafa reynt að bera slíkum röksemdum við, og hafnað því að leitað verði ráðgefandi álits EFTA-dómstólsins um slík álitaefni (sbr. Hrd. 282/2011, 652/2011 og 225/2001). Þar sem lán í erlendum gjaldeyri eru lögleg og undir venjulegum kringumstæðum hægt að skipta lánsfé úr einum gjaldmiðli í annan ef ætlunin er að flytja það milli landa, fæst ekki séð að reglur um hverskonar lánsform séu leyfileg geti falið í sér neina hindrun á slíkum fjármagnsflutningum. Enn fremur virðist ESA misskilja dómaframkvæmd Evrópudómstólsins þar sem því var slegið föstu að landsreglur þess efnis að veðtrygging fyrir skuldbindingu í erlendum gjaldmiðli skuli vera tilgreind í innlendum gjaldmiðli, stönguðust á við frjálst flæði fjármagns. Því skal tekið fram að samkvæmt 4. gr. laga um samningsveð nr. 75/1997 er fullkomlega heimilt að tilgreina veðréttindi í erlendri mynt eða með gengisviðmiði, og umrædd dómafordæmi geta því alls ekki átt við um íslenskar aðstæður.

Þá er full ástæða til að ítreka það sem komið hefur fram í umsögnum samtakanna við fyrra frumvarp svipaðs efnis, að gengistrygging lána felur í raun í sér blekkingarleik sem ber að stemma stigu við. Þrátt fyrir bann með lögum nr. 38/2001 fékk ólögleg gengislánastarfsemi að þrífast um árabil hér á landi, ekki aðeins án afskipta heldur beinlínis í skjóli eftirlitsaðila. Í gögnum frá Fjármálaeftirlitinu kemur skýrt fram að sum þeirra fyrirtækja sem veittu slík lán, höfðu jafnvel hvorki starfsleyfi til viðskipta með gjaldeyri, gengisbundin bréf, eða framvirka samninga sem sum þeirra fjármögnuðu sig með eins og kemur fram í ársreikningum þeirra sjálfra. Einnig má lesa í gögnum frá Seðlabanka Íslands fjálglega umfjöllun um gengisbundin útlán til íslenskra heimila og fyrirtækja frá því árabili sem þessi umræddu lögbrot áttu sér stað, án þess að þar væru gerðar neinar athugasemdir við þá lögleysu sem þannig viðgekkst. Þessu í ofanálag setti seðlabankinn reglur nr. 387/2002 um gjaldeyrisjöfnuð sem gerðu lánafyrirtækjum beinlínis kleift að bókfæra gengisbundin útlán í krónum til innlendra aðila, eins og um erlendar eignir í erlendum gjaldmiðlum væri að ræða. Svo virðist sem í skjóli þeirra reglna hafi átt sér stað fölsun á raunverulegri gjaldeyrisstöðu fjármálafyrirtækja sem nemur að minnsta kosti hundruðum milljarða, en sú staða gufaði upp í bankahruninu 2008 enda var aldrei raunveruleg innstæða fyrir henni. Þessar reglur hafa verið endurnýjaðar alls þrisvar án þess að bókfærslu gengisbundinna krónuliða hafi verið breytt svo neinu nemi, fyrst 2006, svo 2008, og síðast með reglum nr. 950 þann 6. desember 2010, tæpu hálfu ári eftir að Hæstiréttur Íslands hafði dæmt gengistryggingu lánsfjár ólöglega. Sú fyrirætlan að viðhalda þessum reglum og lögleiða jafnframt gengistryggð lán, ber ekki vott um að neinn lærdómur hafi verið dregin af óförum fortíðarinnar.

IV. Verðtrygging neytendalána

Í bréfaskiptum íslenskra stjórnvalda við Eftirlitsstofnun EFTA varðandi bann núgildandi íslenskra laga við gengistryggingu, kemur meðal annars fram það sjónarmið að bannið sé réttlætanlegt vegna þeirrar miklu áhættu sem fylgi slíkum lánum, ekki aðeins fyrir lántakendur heldur einnig þjóðfélagið í heild. Að mati Hagsmunasamtaka heimilanna geta þessi sömu rök reyndar átt með sama hætti við um verðtryggingu almennt, þar á meðal miðað við vísitölu neysluverðs, þar sem reynslan hefur sýnt að innlend verðlagsþróun er nátengd þróun á gengi erlendra gjaldmiðla sem hefur áhrif á verð innfluttra neysluvara, en lántakendur og sérstaklega einstaklingar eru almennt óvarðir fyrir þessari áhættu. Af hálfu ESA kemur einnig fram að þrátt fyrir afstöðu stofnunarinnar gegn banni við gengistryggingu, kunni ákveðnar takmarkanir að vera réttlætanlegar frá sjónarhóli neytendaverndar. Hagsmunasamtök heimilanna telja samkvæmt þessu að jafnvel þó farin yrði sú leið samkvæmt frumvarpinu að heimila gengistryggingu í einhverjum tilfellum, séu hinsvegar málefnaleg rök sem hníga að því að viðhalda banninu að minnsta kosti í neytendalánum.

Enn fremur er gagnrýnt af hálfu ESA að samkvæmt íslenskum lögum sé heimilt að verðtryggja lánmiðað við innlendar og erlendar hlutabréfavísitölur, en íslensk stjórnvöld hafi ekki fært nein rök fyrir því að sú tegund verðtryggingar feli í sér neitt minni áhættu en gengistrygging, og telur stofnunin að ósamræmis gæti í íslenskum lögum að þessu leyti. Svo virðist sem að í frumvarpinu sé brugðist við þessari gagnrýni með því að leggja til að verðtrygging neytendalána miðað við hlutabréfavísitölur verði bönnuð. Að mati Hagsmunasamtaka heimilanna myndi samþykkt frumvarpsins í óbreyttri mynd, alls ekki útrýma hinu umrædda ósamræmi, heldur þvert á móti búa til nýtt ósamræmi með því að leyfa eina áhættusama tegund verðtryggingar í neytendalánum, þ.e. gengistryggingu, en leggja bann við annari þ.e. tengingu við hlutabréfavísitölur. Þá telja samtökin jafnframt athyglisvert að sú tillaga sem fram kemur í 2. gr. um að banna verðtryggingu neytendalána miðað við hlutabréfavísitölur með einungis einni setningu í lagatexta (eða „pennastriki" eins og það er stundum orðað), sýnir rækilega fram á það hversu auðvelt væri í reynd að afnema á sama hátt verðtryggingu neytendalána miðað við vísitölu neysluverðs. Það eina sem til þyrfti væri samskonar ákvæði og lagt er til í 2. gr. frumvarpsins, nema að í stað þess að texti þess bætist við 2. mgr. 14. gr. laga nr. 38/2001 bætist hann þess í stað við 1. mgr. sömu lagagreinar. Telja samtökin þetta fela í sér afsönnun allra kenninga sem lúta að því að einhverjum sérstökum vandkvæðum sé bundið að afnema verðtryggingu neytendalána.

Fjölgun á tegundum verðtryggingar í lánaumhverfinu myndi fara þvert gegn fyrirheitum þeirra flokka sem saman mynda núverandi stjórnarmeirihluta, um að afnema verðtryggingu eða draga úr umfangi hennar. Afstaða Hagsmunasamtaka heimilanna er skýr, en samtökin leggjast alfarið gegn hverskonar verðtryggingu neytendalána, þar á meðal gengistryggingu.

V. Almennt um frumvarpið

Auk framangreindra athugasemda vilja Hagsmunasamtök heimilanna benda á að í frumvarpinu er ekki að finna neinar sérstakar reglur um ógildingu samningsákvæða sem brjóti í bága við ákvæði þess er varða skilyrði fyrir veitingu lána sem tengjast erlendum gjaldmiðlum. Með breytingum sem gerðar voru samkvæmt lögum nr. 151/2010 í tilefni af dómum Hæstaréttar um ólögmæti gengistryggingar, var réttindum neytenda samkvæmt reglum EES á sviði neytendaverndar beinlínis vikið til hliðar. Að mati samtakanna er brýn þörf á úrbótum að þessu leyti, ekki síst með hliðsjón af 5. tölulið ráðgefandi álits EFTA-dómstólsins í máli nr. E-25/13 (*Gunnar V. Engilbertsson*).

Í greinargerð með frumvarpinu kemur fram að það byggist að hluta á tillögum nefndar sem falið var að endurskoða bann íslenskra laga við gengistryggingu og að sú nefnd hafi verið skipuð fulltrúum frá fjármála- og efnahagsráðuneytinu, innanríkisráðuneytinu, Seðlabanka Íslands og Fjármálaeftirlitinu. Þar segir jafnframt að nefndin hafi haft samráð við ýmsa hagsmunaaðila, þar á meðal Samtök fjármálafyrirtækja, Samtök atvinnulífsins, Samband íslenskra sveitarfélaga, Neytendasamtökin o.fl. Hinsvegar var á engum stigum þeirrar vinnu haft neitt samráð við Hagsmunasamtök heimilanna. Að mati samtakanna eru slík vinnubrögð ekki einungis ámælisverð, heldur beinlínis ólögleg þar sem þau fela í sér ómálefnalega mismunun og brjóta þannig gegn jafnræðisreglu stjórnarskrár. Af því tilefni mælast samtökin eindregið til þess að framvegis verði þau höfð með í ráðum til jafns við aðra hagsmunaaðila við undirbúning lagasetningar á sviðum er varða hagsmuni heimilanna og stöðu þeirra sem neytenda á fjármálamarkaði.

Afstaða Hagsmunasamtaka heimilanna til frumvarpsins er skýr og afdráttalaus. Samtökin eru alfarið mótfallin hverskonar verðtryggingu neytendalána, hvort sem hún miðast við vísitölu neysluverðs eða gengi erlenda gjaldmiðla. Hagsmunasamtök Heimilanna geta með engu móti unað því að frumvarpið verði samþykkt óbreytt sem lög frá Alþingi, þar sem í núverandi mynd þess er gert ráð fyrir því að gengistryggð lán verði heimiluð. Jafnframt hafna samtökin því alfarið að slík breyting sé á nokkurn hátt nauðsynleg vegna skuldbindinga Íslands samkvæmt EES-samningnum og telja afstöðu Eftirlitsstofnunar EFTA þess efnis byggjast á misskilningi. Telji löggjafinn engu að síður nauðsynlegt að heimila gengistryggð lán að einhverju leyti til þess að þóknast stofnuninni, mælast samtökin eindregið til þess að þá verði samt sem áður kveðið á um að gengistrygging skuli áfram vera óheimil í neytendalánum. Loks mælast samtökin eindregið til þess að staðið verði við gefin fyrirheit um afnám verðtryggingar neytendalána miðað við vísitölu neysluverðs. Með umsögn þessari fylgir útfærsla á tillögu um þær breytingar sem samtökin telja að gera þurfi á frumvarpinu, til þess að koma til móts við þau sjónarmið sem hér hafa verið rakin.

- o -

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Fylgiskjöl:

1. Útfærð breytingartillaga Hagsmunasamtaka heimilanna við frumvarpið um gengisbundin lán.
2. Reglur Seðlabanka Íslands nr. 387/2002 um gjaldeyrisjöfnuð ásamt síðari reglum sama efnis.
3. Bréfasamskipti íslenskra stjórnvalda og Eftirlitsstofnunar EFTA um bann við gengistryggingu.

145. löggjafarþing 2015-2016.
skjal ____ — 384. mál.

Breytingartillaga

við frumvarp til laga um breytingu á lögum um vexti og verðtryggingu,
lögum um Seðlabanka Íslands og lögum um neytendalán (erlend lán, varúðarreglur).

Frá: Hagsmunasamtökum heimilanna

1. 1. gr. orðist svo: Við 1. mgr. 14. gr. laganna bætist nýr málsliður sem orðast svo: Það á þó ekki við um neytendalán.
2. Í stað orðsins „tengdum“ í 1. efnismálslið 3. gr. komi: í.
3. 4. gr. fallli brott.
4. Við 6. gr.
    a. Í stað orðsins „tengd“ í h-lið komi: í.
    b. Orðin „eða bundið“ í undirlið i. falli brott.
    c. Orðin „eða bundið“ í undirlið ii. falli brott.
5. Við 7. gr.
    a. Í stað orðsins „tengd“ í efnismálslið a-liðs komi: í.
    b. Í stað orðsins „tengd“ í 1. efnismálslið b-liðs komi: í.
    c. Í stað orðsins „tengd“ í 5. efnismálslið b-liðs komi: í.
    d. Í stað orðsins „tengd“ í 1. efnismálslið c-liðs komi: í.
6. Við 8. gr.
    a. Í stað orðanna „sem tengjast“ í fyrirsögn efnisgreinarinnar komi: í.
    b. Í stað orðsins „tengist“ í a-lið efnisgreinarinnar komi: er tilgreint í.
7. Í stað orðsins „tengd“ í efnislið 10. gr. komi: í.

Greinargerð.

Breytingartillaga þessi felur efnislega í sér að frumvarp það sem hún lýtur að skuli ekki ná til gengistryggðra lána heldur eingöngu til lána sem raunverulega eru veitt í erlendum gjaldmiðlum. Auk þess er lagt til að 1. gr. frumvarpsins verði breytt þannig að kveðið verði á um að neytendalán verði undanþegin verðtryggingu miðað við vísitölu neysluverðs.

REGLUR

um gjaldeyrisjöfnuð.

Með tilvísun til 13. gr. laga nr. 36/2001 um Seðlabanka Íslands, svo og 8. gr. laga nr. 87/1992 um gjaldeyrismál, hefur bankastjórn Seðlabankans sett eftirfarandi reglur um gjaldeyrisjöfnuð bindiskyldra lánastofnana og annarra sem leyfi hafa til milligöngu um gjaldeyrisviðskipti.

1. gr.
Gildissvið.

Reglur þessar taka til bindiskyldra lánastofnana, þ.e. viðskiptabanka og sparisjóða, sbr. lög nr. 113/1996 með síðari breytingum og annarra lánastofnana, sbr. lög nr. 123/1993 með síðari breytingum, sem starfa hér á landi. Einnig taka þær til aðila sem leyfi hafa til milligöngu um gjaldeyrisviðskipti frá Seðlabankanum þar sem áskilið er að leyfishafi hlíti reglum um gjaldeyrisjöfnuð.

2. gr.
Skilgreiningar.

Til gengisbundinna liða í reglum þessum skal telja eigna- og skuldaliði svo og liði utan efnahagsreiknings sem eru í erlendum gjaldmiðli og liði í íslenskum krónum ef þessir liðir eru með gengisviðmiðun.

Til nústöðu í gjaldmiðli skal telja gengisbundna eigna- og skuldaliði í viðkomandi gjaldmiðli þar með talin núviðskipti með uppgjöri innan þriggja viðskiptadaga.

Til framvirkrar stöðu í gjaldmiðli skal telja öll gengisbundin viðskipti með uppgjöri eftir þrjá eða fleiri viðskiptadaga.

Til opinnar gjaldeyrisstöðu stofnunar í einstökum gjaldmiðlum skal telja allar eignir og skuldir og liði utan efnahagsreiknings í viðkomandi gjaldmiðli þar sem stofnunin ber sjálf gjaldeyrisáhættuna.

Heildargjaldeyrisjöfnuður stofnunar er samtala þeirra gjaldmiðla þar sem opin gjaldeyrisstaða stofnunar er jákvæð (nettó gnóttstaða) að frádreginni samtölu þeirra gjaldmiðla þar sem opin gjaldeyrisstaða er neikvæð (nettó skortstaða).

Eigið fé í reglum þessum er eftir því sem við á skilgreint í eiginfjárákvæðum laga um viðskiptabanka og sparisjóði nr. 113/1996 með síðari breytingum, laga um aðrar lánastofnanir nr. 123/1993 með síðari breytingum eða ákvæðum laga nr. 144/1994, um ársreikninga með síðari breytingum. Þó skal telja með eigin fé hjá Sparisjóðabanka Íslands hf. samtölu ábyrgðayfirlýsinga þeirra sem einstakir sparisjóðir hafa gefið út vegna viðskiptaskuldbindinga Sparisjóðabanka Íslands hf. gagnvart erlendum lánastofnunum.

3. gr.
Útreikningur á opinni gjaldeyrisstöðu.

Eftirfarandi stöður skal taka með í útreikninginn:

1) Nettó nústöðu, þ.e. allar eignir að frádregnum skuldum að meðtöldum áföllnum ógjaldföllnum vöxtum. Afskriftareikningur útlána skal dreginn frá eignum í þessu sambandi.
2) Nettó framvirk staða, þ.e. staða stofnunar í framvirkum samningum, stöðluðum framvirkum samningum og gjaldmiðlaskiptasamningum að því marki sem þessir

samningar eru ekki með í nettó nústöðu stofnunar. Gjaldmiðlaskiptasamninga skal meðhöndla sem eign í einum gjaldmiðli og sem skuld í öðrum.

3) Óafturkallanlegar ábyrgðir og svipaðar skuldbindingar ef öruggt er talið að á þær reyni og ólíklegt að þær verði endurkrefjanlegar.
4) Samanlagt nettó deltavirði af valréttarsamningum um gjaldeyri. Stofnanir sem eiga í viðskiptum með valréttarsamninga skulu reikna deltavirði í samræmi við ákvæði reglna nr. 693/2001 um eiginfjárhlutfall lánastofnana og fyrirtækja í verðbréfaþjónustu.
5) Markaðsvirði annarra valréttarsamninga í erlendum gjaldmiðli.

Stofnanir sem fengið hafa sérstaka heimild Fjármálaeftirlitsins geta auk ofangreindra töluliða tekið tillit til eftirfarandi við mat á gjaldeyrisstöðu sinni:

1) Framtíðartekna og -gjalda sem enn eru ekki áfallin en eru þegar að fullu baktryggð.
2) Staða sem stofnunin hefur beinlínis tekið til að baktryggja sig gegn óhagstæðum áhrifum gengisbreytinga gjaldmiðils á eiginfjárhlutfall svo og eignarhlutdeild í dótturfélögum sem dregin hefur verið frá við útreikninga á eigin fé. Slíkar stöður má undanskilja við mat á gjaldeyrisstöðu enda séu þær ekki viðskiptalegs eðlis eða kerfisbundnar.

Við útreikning á opinni gjaldeyrisstöðu í einstökum gjaldmiðlum er skylt að skipta upp samsettum mynteiningum eftir vægi hverrar myntar í viðkomandi mynteiningu.

4. gr.

Gjaldeyrisjöfnuður.

Gjaldeyrisjöfnuður stofnunar skal ávallt vera innan eftirfarandi marka:

1) Opin gjaldeyrisstaða stofnunar í einstökum erlendum myntum skal hvorki vera jákvæð né neikvæð um meira en nemur 15% af eigin fé stofnunar samkvæmt síðasta birta uppgjöri. Þó er heimilt að jöfnuður í Bandaríkjadal og evru sé jákvæður eða neikvæður um 20%.
2) Heildargjaldeyrisjöfnuður stofnunar skal hvorki vera jákvæður né neikvæður umfram 30% af eigin fé stofnunar samkvæmt síðasta birta uppgjöri.

Fari gjaldeyrisjöfnuður umfram þau mörk sem hér eru tilgreind skulu stofnanir þegar grípa til aðgerða til að laga hann, og skal hann vera innan tilskilinna marka eigi síðar en innan þriggja viðskiptadaga. Takist aðila ekki með aðgerðum sínum að laga gjaldeyrisjöfnuð sinn innan greindra tímamarka er Seðlabankanum heimilt að reikna dagsektir skv. 1. mgr. 2. gr. gildandi reglna um beitingu viðurlaga í formi dagsekta á þá fjárhæð sem gjaldeyrisjöfnuður er umfram tilskilda fjárhæð. Um ákvörðun dagsekta, kæruheimild og innheimtu gilda eftir því sem við geta átt ákvæði 6., 7. og 8. gr. ofangreindra reglna um beitingu viðurlaga í formi dagsekta. Bankanum er heimilt að skuldfæra reiknaðar dagsektir á viðskiptareikning hlutaðeigandi lánastofnunnar eða fyrirtækis í bankanum að liðnum a.m.k. sjö dögum frá því að ákvörðun um dagsektir var kynnt aðila sbr. 3. mgr. 6. gr. nefndra reglna.

5. gr.

Skýrsluskil.

Aðilar þeir er reglur þessar ná til skulu skila Seðlabankanum mánaðarlega skýrslum um gjaldeyrisjöfnuð á því formi sem bankinn ákveður. Skal slíkum skýrslum skilað innan 10 viðskiptadaga frá lokum hvers mánaðar. Aðilar að millibankamarkaðnum með gjaldeyri skulu þó skila daglega skýrslum sbr. gildandi reglur þar að lútandi um gjaldeyrismarkað.

Seðlabankanum er heimilt að beita dagsektum við vanrækslu á skýrsluskilum skv. 1. mgr. á grundvelli 2. mgr. 2. gr. ofangreindra reglna um beitingu viðurlaga í formi dagsekta. Um ákvörðun dagsekta, kæruheimild og innheimtu gilda tilvitnuð ákvæði sömu reglna eftir því sem við getur átt, sbr. 2. mgr. 4. gr. hér að framan.

6. gr.
Gildistaka.

Reglur þessar taka gildi hinn 1. júlí 2002. Jafnframt falla úr gildi reglur um gjaldeyrisjöfnuð lánastofnana og þeirra er leyfi hafa til milligöngu um gjaldeyrisviðskipti nr. 421 frá 1. júlí 1997.

Reykjavík, 29. maí 2002.

Seðlabanki Íslands,

Birgir Ísl. Gunnarsson. **Eiríkur Guðnason.** **Finnur Ingólfsson.**

Nr. 318 25. apríl 2006

REGLUR

um gjaldeyrisjöfnuð.

Með tilvísun til 13. gr. laga nr. 36/2001 um Seðlabanka Íslands, svo og 8. gr. laga nr. 87/1992 um gjaldeyrismál, hefur bankastjórn Seðlabankans sett eftirfarandi reglur um gjaldeyrisjöfnuð bindiskyldra lánastofnana og annarra sem leyfi hafa til milligöngu um gjaldeyrisviðskipti.

1. gr.
Gildissvið.

Reglur þessar taka til bindiskyldra lánastofnana sbr. gildandi reglur um bindiskyldu, nú reglur nr. 879 frá 30. september 2005 og starfa hér á landi. Einnig taka þær til aðila sem leyfi hafa til milligöngu um gjaldeyrisviðskipti frá Seðlabankanum þar sem áskilið er að leyfishafi hlíti reglum um gjaldeyrisjöfnuð.

2. gr.
Skilgreiningar.

Til gengisbundinna liða í reglum þessum skal telja eigna- og skuldaliði svo og liði utan efnahagsreiknings sem eru í erlendum gjaldmiðli og liði í íslenskum krónum ef þessir liðir eru með gengisviðmiðun.

Til nústöðu í gjaldmiðli skal telja gengisbundna eigna- og skuldaliði í viðkomandi gjaldmiðli þar með talin núviðskipti með uppgjöri innan þriggja viðskiptadaga.

Til framvirkrar stöðu í gjaldmiðli skal telja öll gengisbundin viðskipti með uppgjöri eftir þrjá eða fleiri viðskiptadaga.

Til opinnar gjaldeyrisstöðu stofnunar í einstökum gjaldmiðlum skal telja allar eignir og skuldir og liði utan efnahagsreiknings í viðkomandi gjaldmiðli þar sem stofnunin ber sjálf gjaldeyrisáhættuna.

Heildargjaldeyrisjöfnuður stofnunar er samtala þeirra gjaldmiðla þar sem opin gjaldeyrisstaða stofnunar er jákvæð (nettó gnóttstaða) að frádreginni samtölu þeirra gjaldmiðla þar sem opin gjaldeyrisstaða er neikvæð (nettó skortstaða).

Eigið fé í reglum þessum er eftir því sem við á skilgreint í eiginfjárákvæðum laga nr. 161/2002 um fjármálafyrirtæki með síðari breytingum eða ákvæðum laga nr. 144/1994, um ársreikninga með síðari breytingum. Þó skal telja með eigin fé hjá Sparisjóðabanka Íslands hf. samtölu ábyrgðayfirlýsinga þeirra sem einstakir sparisjóðir hafa gefið út vegna viðskiptaskuldbindinga Sparisjóðabanka Íslands hf. gagnvart erlendum lánastofnunum.

3. gr.
Útreikningur á opinni gjaldeyrisstöðu.

Eftirfarandi stöður skal taka með í útreikninginn:

1) Nettó nústöðu, þ.e. allar eignir að frádregnum skuldum að meðtöldum áföllnum ógjaldföllnum vöxtum. Afskriftareikningur útlána skal dreginn frá eignum í þessu sambandi.
2) Nettó framvirk staða, þ.e. staða stofnunar í framvirkum samningum, stöðluðum framvirkum samningum og gjaldmiðlaskiptasamningum að því marki sem þessir samningar eru ekki með í nettó nústöðu stofnunar. Gjaldmiðlaskiptasamninga skal meðhöndla sem eign í einum gjaldmiðli og sem skuld í öðrum.

3) Óafturkallanlegar ábyrgðir og svipaðar skuldbindingar ef öruggt er talið að á þær reyni og ólíklegt að þær verði endurkrefjanlegar.
4) Samanlagt nettó deltavirði af valréttarsamningum um gjaldeyri. Stofnanir sem eiga í viðskiptum með valréttarsamninga skulu reikna deltavirði í samræmi við ákvæði reglna Fjármálaeftirlitsins nr. 530/2003 um eiginfjárhlutfall fjármálafyrirtækja og fyrirtækja í verðbréfaþjónustu, með síðari breytingum.
5) Markaðsvirði annarra valréttarsamninga í erlendum gjaldmiðli.

Stofnanir sem fengið hafa sérstaka heimild Fjármálaeftirlitsins geta auk ofangreindra töluliða tekið tillit til eftirfarandi við mat á gjaldeyrisstöðu sinni:
1) Framtíðartekna og -gjalda sem enn eru ekki áfallin en eru þegar að fullu baktryggð.
2) Staða sem stofnunin hefur beinlínis tekið til að baktryggja sig gegn óhagstæðum áhrifum gengisbreytinga gjaldmiðils á eiginfjárhlutfall svo og eignarhlutdeild í dótturfélögum sem dregin hefur verið frá við útreikninga á eigin fé. Slíkar stöður má undanskilja við mat á gjaldeyrisstöðu enda séu þær ótengdar veltubókarviðskiptum eða kerfisbundnar í eðli sínu.

Við útreikning á opinni gjaldeyrisstöðu í einstökum gjaldmiðlum er skylt að skipta upp samsettum mynteiningum eftir vægi hverrar myntar í viðkomandi mynteiningu.

4. gr.
Gjaldeyrisjöfnuður.

Gjaldeyrisjöfnuður stofnunar skal ávallt vera innan eftirfarandi marka:
1) Opin gjaldeyrisstaða stofnunar í einstökum erlendum myntum skal hvorki vera jákvæð né neikvæð um meira en nemur 20% af eigin fé stofnunar (móðurfélags) samkvæmt síðasta birta uppgjöri.
2) Heildargjaldeyrisjöfnuður stofnunar skal hvorki vera jákvæður né neikvæður umfram 30% af eigin fé stofnunar samkvæmt síðasta birta uppgjöri.
3) Seðlabankinn getur veitt stofnun, sem reglur þessar taka til, heimild til að hafa sérstakan jákvæðan gjaldeyrisjöfnuð utan við heildargjaldeyrisjöfnuð, sbr. 2) tl., til varnar gengisáhrifum á eiginfjárhlutfall, enda leggi hún fram greinargerð þar sem fram koma forsendur og útreikningar til ákvörðunar á stærð hans og sýni hann sérstaklega í skýrslum til Seðlabankans.

Fari gjaldeyrisjöfnuður umfram þau mörk sem hér eru tilgreind skulu stofnanir þegar grípa til aðgerða til að laga hann, og skal hann vera innan tilskilinna marka eigi síðar en innan þriggja viðskiptadaga. Takist aðila ekki með aðgerðum sínum að laga gjaldeyrisjöfnuð sinn innan greindra tímamarka er Seðlabankanum heimilt að reikna dagsektir skv. 1. mgr. 2. gr. reglna um beitingu viðurlaga í formi dagsekta, nú nr. 389 frá 29. maí 2002, á þá fjárhæð sem gjaldeyrisjöfnuður er umfram tilskilda fjárhæð. Um ákvörðun dagsekta, kæruheimild og innheimtu gilda eftir því sem við geta átt ákvæði 6., 7. og 8. gr. ofangreindra reglna um beitingu viðurlaga í formi dagsekta. Bankanum er heimilt að skuldfæra reiknaðar dagsektir á viðskiptareikning hlutaðeigandi lánastofnunnar eða fyrirtækis í bankanum að liðnum a.m.k. sjö dögum frá því að ákvörðun um dagsektir var kynnt aðila sbr. 3. mgr. 6. gr. nefndra reglna.

5. gr.
Skýrsluskil.

Aðilar þeir er reglur þessar ná til skulu skila Seðlabankanum mánaðarlega skýrslum um gjaldeyrisjöfnuð á því formi sem bankinn ákveður. Skal slíkum skýrslum skilað innan 10 viðskiptadaga frá lokum hvers mánaðar. Aðilar að millibankamarkaðnum með gjaldeyri skulu þó skila daglega skýrslum sbr. gildandi reglur þar að lútandi um gjaldeyrismarkað, nú 5. gr. reglna um gjaldeyrismarkað nr. 913/2002, með síðari breytingum.

Seðlabankanum er heimilt að beita dagsektum við vanrækslu á skýrsluskilum skv. 1. mgr. á grundvelli 2. mgr. 2. gr. ofangreindra reglna um beitingu viðurlaga í formi dagsekta. Um ákvörðun dagsekta, kæruheimild og innheimtu gilda tilvitnuð ákvæði sömu reglna eftir því sem við getur átt, sbr. 2. mgr. 4. gr. hér að framan.

6. gr.
Gildistaka.

Reglur þessar taka gildi hinn 1. maí 2006. Jafnframt falla úr gildi reglur um gjaldeyrisjöfnuð lánastofnana og þeirra er leyfi hafa til milligöngu um gjaldeyrisviðskipti nr. 387 frá 29. maí 2002.

Reykjavík, 25. apríl 2006.

Seðlabanki Íslands,

Eiríkur Guðnason
bankastjóri.

Jón Sigurðsson
bankastjóri.

B-deild – Útgáfud.: 26. apríl 2006

Nr. 577 4. júní 2008

REGLUR

um gjaldeyrisjöfnuð.

Með tilvísun til 13. gr. laga nr. 36/2001 um Seðlabanka Íslands, svo og 8. gr. laga nr. 87/1992 um gjaldeyrismál, hefur bankastjórn Seðlabankans sett eftirfarandi reglur um gjaldeyrisjöfnuð fjármálafyrirtækja og annarra sem leyfi hafa til milligöngu um gjaldeyrisviðskipti.

1. gr.
Gildissvið.

Reglur þessar taka til fjármálafyrirtækja (móðurfélaga) sem geta átt viðskipti við Seðlabanka Íslands, sbr. nú reglur nr. 35, 17. janúar 2008 um viðskipti fjármálafyrirtækja við Seðlabanka Íslands. Einnig taka þær til aðila sem hafa leyfi frá Seðlabankanum til milligöngu um gjaldeyrisviðskipti þar sem áskilið er að leyfishafi hlíti reglum um gjaldeyrisjöfnuð.

2. gr.
Skilgreiningar.

Til gengisbundinna liða í reglum þessum skal telja eignir og skuldir svo og liði utan efnahagsreiknings sem eru í erlendum gjaldmiðli og liði í íslenskum krónum séu þeir með gengisviðmiðun.

Til nústöðu í gjaldmiðli skal telja gengisbundnar eignir og skuldir í viðkomandi gjaldmiðli þar með talin núviðskipti með uppgjöri innan þriggja viðskiptadaga.

Til framvirkrar stöðu í gjaldmiðli skal telja öll gengisbundin viðskipti með uppgjöri eftir þrjá eða fleiri viðskiptadaga.

Til opinnar gjaldeyrisstöðu fjármálafyrirtækis í einstökum gjaldmiðlum skal telja allar eignir og skuldir og liði utan efnahagsreiknings í viðkomandi gjaldmiðli þar sem fyrirtækið ber sjálft gjaldeyrisáhættuna.

Heildargjaldeyrisjöfnuður fjármálafyrirtækis er samtala þeirra gjaldmiðla þar sem opin gjaldeyrisstaða þess er jákvæð (nettó gnóttstaða) að frádreginni samtölu þeirra gjaldmiðla þar sem opin gjaldeyrisstaða er neikvæð (nettó skortstaða).

Eiginfjárgrunnur skal reiknast samkvæmt 84. gr. laga nr. 161/2002 um fjármálafyrirtæki. Miða skal við eiginfjárgrunn skv. síðasta birta uppgjöri. Heimilt er að leiðrétta eiginfjárgrunninn um mánaðamót vegna breytinga á gengi gjaldmiðla, enda sé Seðlabankanum gerð grein fyrir slíkri breytingu sérstaklega. Hafi heimildin verið notuð skal samsvarandi leiðrétting gerð um hver mánaðamót til hækkunar eða lækkunar.

3. gr.
Útreikningur á opinni gjaldeyrisstöðu.

Eftirfarandi stöður skal taka með í útreikninginn:

1. Nettó nústöðu, þ.e. allar eignir að frádregnum skuldum að meðtöldum áföllnum ógjaldföllnum vöxtum. Afskriftareikningur útlána skal dreginn frá eignum í þessu sambandi.
2. Nettó framvirka stöðu, þ.e. stöðu fjármálafyrirtækis í framvirkum samningum, stöðluðum framvirkum samningum og gjaldmiðlaskiptasamningum að því marki sem þessir samningar eru ekki með í nettó nústöðu fyrirtækisins. Gjaldmiðlaskiptasamninga skal meðhöndla sem eign í einum gjaldmiðli og sem skuld í öðrum.

3. Óafturkallanlegar ábyrgðir og svipaðar skuldbindingar ef öruggt er talið að á þær reyni og ólíklegt að þær verði endurkrefjanlegar.
4. Samanlagt nettó deltavirði af valréttarsamningum um gjaldeyri. Fjármálafyrirtæki sem eiga í viðskiptum með valréttarsamninga skulu reikna deltavirði í samræmi við ákvæði reglna Fjármálaeftirlitsins nr. 215/2007, um eiginfjárkröfur og áhættugrunn fjármálafyrirtækja.
5. Markaðsvirði annarra afleiðusamninga í erlendum gjaldmiðli.

Við útreikning á opinni gjaldeyrisstöðu í einstökum gjaldmiðlum er skylt að skipta upp samsettum mynteiningum eftir vægi hverrar myntar í viðkomandi mynteiningu.

4. gr.
Gjaldeyrisjöfnuður.

Gjaldeyrisjöfnuður fyrirtækis, sem þessar reglur taka til, skal ávallt vera innan eftirfarandi marka:

1. Almennur gjaldeyrisjöfnuður skal hvorki vera jákvæður né neikvæður um meira en nemur 10% af eiginfjárgrunni.
2. Seðlabankinn getur veitt fyrirtæki heimild til að hafa sérstakan jákvæðan gjaldeyrisjöfnuð utan við almennan gjaldeyrisjöfnuð, sbr. 1. tl., til varnar áhrifum af breytingum á gengi krónunnar á eiginfjárhlutfall, enda leggi það fram greinargerð þar sem fram koma forsendur og útreikningar til ákvörðunar á stærð hans og greini sérstaklega frá honum í skýrslum til Seðlabankans.
3. Um önnur atriði áhættustýringar varðandi gengisbundna liði, þ.m.t. um opna gjaldeyrisstöðu í einstökum erlendum myntum, skal fyrirtækið hlíta eigin verklagsferlum sem það setur á grundvelli 17. gr. laga nr. 161/2002 um fjármálafyrirtæki.

Víki gjaldeyrisjöfnuður frá þeim mörkum sem hér eru tilgreind skal hlutaðeigandi fyrirtæki grípa til aðgerða til að eyða frávikinu eigi síðar en innan þriggja viðskiptadaga. Takist fyrirtækinu þetta ekki er Seðlabankanum heimilt að reikna dagsektir á þá fjárhæð sem frávikið hefur orðið hæst skv. 1. mgr. 2. gr. reglna um beitingu viðurlaga í formi dagsekta, nú nr. 389 frá 29. maí 2002.

5. gr.
Skýrsluskil.

Aðilar þeir er reglur þessar ná til skulu skila Seðlabankanum mánaðarlega skýrslum um gjaldeyrisjöfnuð, á því formi sem bankinn ákveður, innan 10 viðskiptadaga frá lokum hvers mánaðar. Við sérstakar aðstæður getur Seðlabankinn krafist tíðari skýrsluskila. Aðilar að millibankamarkaði með gjaldeyri skulu þó skila skýrslum daglega sbr. gildandi reglur þar að lútandi um gjaldeyrismarkað, nú 5. gr. reglna um gjaldeyrismarkað nr. 913/2002, með síðari breytingum.

Seðlabankanum er heimilt að beita dagsektum við vanrækslu á skýrsluskilum skv. reglum um beitingu viðurlaga í formi dagsekta, nú nr. 389 frá 29. maí 2002.

6. gr.
Gildistaka.

Reglur þessar taka gildi hinn 1. júlí 2008. Jafnframt falla úr gildi reglur um gjaldeyrisjöfnuð nr. 318 frá 25. apríl 2006.

Reykjavík, 4. júní 2008.

Seðlabanki Íslands,

Davíð Oddsson,
formaður bankastjórnar.

Eiríkur Guðnason
bankastjóri.

B-deild – Útgáfud.: 20. júní 2008

Nr. 950 6. desember 2010

REGLUR

um gjaldeyrisjöfnuð.

1. gr.

Gildissvið.

Reglur þessar taka til lánastofnana sem hlotið hafa starfsleyfi skv. 1.-4. tölul. 1. mgr. 4. gr. laga um fjármálafyrirtæki nr. 161/2002 með síðari breytingum, sbr. 2. mgr. 4. gr. sömu laga, í reglum þessum nefnd einu nafni fjármálafyrirtæki.

2. gr.

Skilgreiningar.

Eiginfjárgrunnur: Eiginfjárgrunnur er reiknaður samkvæmt 84. gr. laga nr. 161/2002 um fjármálafyrirtæki, með áorðnum breytingum. Miða skal við eiginfjárgrunn skv. síðasta uppgjöri. Fjármálafyrirtækjum er heimilt að leiðrétta eiginfjárgrunn um mánaðamót vegna breytinga á gengi gjaldmiðla, enda sé Seðlabankanum gerð grein fyrir slíkri breytingu sérstaklega. Hafi heimildin verið notuð skal samsvarandi leiðrétting gerð um hver mánaðamót til hækkunar eða lækkunar.

Eignir og skuldir í erlendum gjaldmiðlum: Eignir og skuldir, svo og liðir utan efnahagsreiknings, sem eru í erlendum gjaldmiðli og svo liðir í íslenskum krónum sem taka mið af gengi erlendra gjaldmiðla.

Framvirk staða: Öll viðskipti í erlendum gjaldmiðlum með uppgjöri eftir þrjá eða fleiri viðskiptadaga, að meðtöldum gjaldmiðlaskiptasamningum og öðrum skiptasamningum.

Heildargjaldeyrisjöfnuður: Samtala þeirra gjaldmiðla þar sem opin gjaldeyrisstaða er jákvæð (nettó gnóttstaða) að frádreginni samtölu þeirra gjaldmiðla þar sem opin gjaldeyrisstaða er neikvæð (nettó skortstaða).

Nústaða í gjaldmiðli: Eignir og skuldir í viðkomandi gjaldmiðli, þar með talin núviðskipti með uppgjöri innan þriggja viðskiptadaga.

Opin gjaldeyrisstaða í einstökum gjaldmiðlum: Allar eignir og skuldir, svo og liðir utan efnahagsreiknings í viðkomandi gjaldmiðli, þar sem fjármálafyrirtæki ber sjálft gjaldeyrisáhættu. Við skilgreiningu áhættu skal miða við lög nr. 161/2002 um fjármálafyrirtæki eftir því sem við á.

3. gr.

Sundurliðun eigna og skulda í erlendum gjaldmiðlum.

Fjármálafyrirtækjum ber að sundurliða nústöðu eigna með eftirfarandi hætti í mánaðarlegri skýrslu til Seðlabankans:

1. Innstæður í Seðlabanka Íslands.
2. Innstæðubréf Seðlabanka Íslands.
3. Nostro reikningar.
4. Önnur innlán og ávöxtunarsamningar.
5. Skráð skuldabréf og víxlar þar sem útgefandi er ríki, seðlabanki, alþjóðastofnun eða fjölþjóða þróunarbanki, eða bréf sem tryggð eru með ábyrgð þessara aðila, sbr. 11. gr. og 14. gr. reglna Fjármálaeftirlitsins nr. 215 frá 2. mars 2007, um eiginfjárkröfur og áhættugrunn fjármálafyrirtækja.
6. Önnur skráð skuldabréf og víxlar.
7. Skráð hlutabréf.
8. Óskráð hlutabréf.
9. Hlutdeildarskírteini verðbréfasjóða.
10. Skammtímaútlán, til skemmri tíma en eins árs.
11. Langtímaútlán, til lengri tíma en eins árs.
12. Núviðskipti með uppgjöri innan þriggja viðskiptadaga.
13. Aðrar eignir en ofantaldar.

Fjármálafyrirtækjum ber að sundurliða nústöðu skulda með eftirfarandi hætti í mánaðarlegri skýrslu til Seðlabankans:

1. Viðskipti við Seðlabanka Íslands samkvæmt gildandi reglum bankans um viðskipti fjármálafyrirtækja við bankann, að framvirkum viðskiptum undanskildum.
2. Aðrar skuldir við Seðlabanka Íslands en skv. 1. tölul.
3. Veðlán og endurhverf viðskipti við aðra en Seðlabanka Íslands.
4. Útgefnir víxlar.
5. Útgefin skuldabréf með gjalddaga innan eins árs.
6. Útgefin skuldabréf með gjalddaga eftir lengri tíma en eitt ár.
7. Sértryggð skuldabréf útgefin skv. lögum um sértryggð skuldabréf nr. 11/2008.
8. Sambankalán.
9. Tvíhliða lánasamningar við fjármálafyrirtæki.
10. Ávöxtunarsamningar og innlán frá fjármálafyrirtækjum.
11. Ávöxtunarsamningar og innlán frá lífeyris-, verðbréfa- og fjárfestingarsjóðum.
12. Almenn innlán.
13. Núviðskipti með uppgjöri innan þriggja viðskiptadaga.
14. Aðrar skuldir en ofantaldar.

Fjármálafyrirtækjum ber að sundurliða framvirka stöðu eigna með eftirfarandi hætti í mánaðarlegri skýrslu til Seðlabankans:

1. Framvirkir gjaldmiðlasamningar (e. FX forwards).
2. Gjaldmiðlaskiptasamningar (e. FX swaps).
3. Vaxta- og gjaldmiðlaskiptasamningar (e. Cross-Currency Interest Rate Swaps).
4. Valréttir.
5. Aðrar eignir sem mynda framvirka stöðu.

Fjármálafyrirtækjum ber að sundurliða framvirka stöðu skulda með eftirfarandi hætti í mánaðarlegri skýrslu til Seðlabankans:

1. Framvirkir gjaldmiðlasamningar (e. FX forwards).
2. Gjaldmiðlaskiptasamningar (e. FX swaps).
3. Vaxta- og gjaldmiðlaskiptasamningar (e. Cross-Currency Interest Rate Swaps).
4. Valréttir.
5. Aðrar skuldir sem mynda framvirka stöðu.

4. gr.

Útreikningur á opinni gjaldeyrisstöðu.

Útreikningur á opinni gjaldeyrisstöðu skal innihalda eftirfarandi liði:

1. Allar eignir í erlendum gjaldmiðlum, að frádregnum skuldum í erlendum gjaldmiðlum, en að meðtöldum áföllnum ógjaldföllnum vöxtum (nettó nústaða).
2. Stöður í framvirkum samningum, stöðluðum framvirkum samningum og gjaldmiðlaskiptasamningum, að því marki sem þessir samningar eru ekki taldir með nettó nústöðu (nettó framvirk staða). Gjaldmiðlaskiptasamninga og framvirka samninga skal meðhöndla sem eign í einum gjaldmiðli og skuld í öðrum.
3. Óafturkallanlegar ábyrgðir í erlendum gjaldmiðlum, og svipaðar skuldbindingar, ef öruggt er talið að á þær reyni og ólíklegt að þær verði endurkrefjanlegar.
4. Samanlagt nettó deltavirði af valréttarsamningum um gjaldeyri. Fjármálafyrirtæki sem eiga í viðskiptum með valréttarsamninga skulu reikna deltavirði í samræmi við ákvæði reglna Fjármálaeftirlitsins nr. 215/2007, um eiginfjárkröfur og áhættugrunn fjármálafyrirtækja.
5. Markaðsvirði annarra afleiðusamninga í erlendum gjaldmiðli en skv. 2. og 4. lið að ofan.

Við útreikning á opinni gjaldeyrisstöðu í einstökum gjaldmiðlum er skylt að skipta samsettum mynteiningum upp eftir vægi hverrar myntar í viðkomandi mynteiningu.

Við útreikning á opinni gjaldeyrisstöðu skal umreikna fjárhæðir miðað við miðgengi íslensku krónunnar eins og það er skráð á heimasíðu Seðlabanka Íslands í lok hvers mánaðar. Viðskipta-

vökum á gjaldeyrismarkaði er þó heimilt að miða við lokagengi viðkomandi fjármálastofnunar við hver mánaðamót.

5. gr.
Gjaldeyrisjöfnuður.

Gjaldeyrisjöfnuður sem þessar reglur taka til, skal ávallt vera innan eftirfarandi marka:

1. Opin gjaldeyrisstaða í einstökum erlendum gjaldmiðlum skal hvorki vera jákvæð né neikvæð um hærri fjárhæð en sem nemur 15% af eiginfjárgrunni fjármálafyrirtækis samkvæmt síðasta uppgjöri, sbr. þó 1. mgr. 2. gr.
2. Heildargjaldeyrisjöfnuður skal hvorki vera jákvæður né neikvæður um hærri fjárhæð en sem nemur 15% af eiginfjárgrunni fjármálafyrirtækis samkvæmt síðasta uppgjöri, sbr. þó 1. mgr. 2. gr.

Víki gjaldeyrisjöfnuður frá þeim mörkum sem hér eru tilgreind skal hlutaðeigandi fjármálafyrirtæki grípa til aðgerða til að eyða frávikinu eigi síðar en innan þriggja viðskiptadaga. Takist viðkomandi þetta ekki er Seðlabankanum heimilt að reikna dagsektir á þá fjárhæð sem gjaldeyrisjöfnuður er umfram tilskilda fjárhæð, sbr. 1. mgr. 2. gr. reglna um beitingu viðurlaga í formi dagsekta nr. 389 frá 29. maí 2002.

6. gr.
Undanþáguheimildir.

Seðlabankinn getur veitt fjármálafyrirtæki heimild til að hafa sérstakan jákvæðan gjaldeyrisjöfnuð utan við almennan gjaldeyrisjöfnuð skv. 5. gr., til varnar áhrifum af breytingum á gengi krónunnar á eiginfjárhlutfall, enda leggi viðkomandi fjármálafyrirtæki fram greinargerð þar sem fram koma forsendur og útreikningar til ákvörðunar á stærð hins sérstaka jákvæða gjaldeyrisjafnaðar, og greini sérstaklega frá honum í skýrslum til Seðlabankans.

7. gr.
Skýrsluskil.

Aðilar þeir er reglur þessar ná til, skulu skila Seðlabankanum skýrslu um gjaldeyrisjöfnuð mánaðarlega, eftir því sem greinir í 3. gr., sbr. 4. gr., innan 15 daga frá lokum hvers mánaðar.

Seðlabanki Íslands getur krafist tíðari skýrsluskila en hér er kveðið á um. Seðlabankinn getur einnig á hverjum tíma kallað eftir ítarlegri upplýsingum um sundurliðun eigna og skulda skv. 3. gr.

Viðskiptavakar á millibankamarkaði með gjaldeyri skulu að auki skila daglega skýrslu um gjaldeyrisjöfnuð. Í skýrslunni er eingöngu tilgreind heildarnústaða eigna og skulda annars vegar, og framvirk staða eigna og skulda hins vegar.

Vanræki fjármálafyrirtæki að veita Seðlabankanum upplýsingar á tilsettum tíma skv. þessum reglum, getur Seðlabankinn beitt viðkomandi fjármálafyrirtæki dagsektum skv. reglum um beitingu viðurlaga í formi dagsekta, nú nr. 389 frá 29. maí 2002.

8. gr.
Gildistaka.

Reglur þessar, sem settar eru samkvæmt heimild í 13. gr. laga nr. 36/2001, um Seðlabanka Íslands, svo og 8. gr. laga nr. 87/1992, taka gildi 1. janúar 2011. Jafnframt falla úr gildi reglur um gjaldeyrisjöfnuð nr. 707 frá 14. ágúst 2009.

Ákvæði til bráðabirgða

I.

Vegna þeirra aðstæðna sem skapast hafa í kjölfar falls íslenska bankakerfisins, getur Seðlabanki Íslands veitt fjármálafyrirtækjum tímabundna heimild til að hafa sérstakan jákvæðan eða neikvæðan gjaldeyrisjöfnuð, sé þess þörf. Fjármálafyrirtæki skal leggja til grundvallar umsókn sinni tímasetta áætlun um hvernig það hyggst ná gjaldeyrisjöfnuði sem uppfyllir þessar reglur, þar sem fram komi greinargóð lýsing á því til hvaða aðgerða það hyggst grípa. Undanþágur skv. þessu ákvæði verða ekki veittar til lengri tíma en 1. janúar 2013.

Bráðabirgðaákvæði þetta fellur úr gildi 1. janúar 2013.

Reykjavík, 6. desember 2010.

Seðlabanki Íslands,

Már Guðmundsson
seðlabankastjóri.

Tryggvi Pálsson
framkvæmdastjóri.

B-deild – Útgáfud.: 9. desember 2010

Brussels, 19 April 2012
Cases No: 68809 and 69278
Event No: 585210
Dec. No: 134/12/COL

EFTA SURVEILLANCE AUTHORITY

Icelandic Mission to the EU
Rond-Point Schuman 11
1040 Brussels

Dear Sirs,

Subject: **Letter of formal notice to Iceland for failing to comply with its obligation under Article 40 of the Agreement on the European Economic Area by maintaining in force a ban on the exchange rate indexation of loans in Icelandic króna**

1 Introduction

According to Icelandic law, the exchange rate indexation of loans in Icelandic króna ("ISK") is prohibited. Following two complaints relating to the ban on exchange rate indexation of loans in ISK, the EFTA Surveillance Authority ("the Authority") has assessed the compatibility of these rules with Article 40 (free movement of capital) of the Agreement on the European Economic Area ("EEA").

2 Correspondence

In a letter dated 15 November 2010, the Authority informed the Icelandic Government that it had received a complaint against Iceland regarding alleged breach of Article 40 of the EEA Agreement for maintaining in force a ban on exchange rate indexation of loans in ISK. In that letter, the Authority invited Iceland to provide further information regarding the case.

In an e-mail of 27 January 2011, the Icelandic Government asked for an extended time limit to reply to the above letter until 15 February 2011.

By a letter of 1 February 2011, the Authority informed the Icelandic Government that it had received a new complaint concerning the ban on exchange rate indexation of loans in ISK. In that letter, the Authority invited Iceland to provide additional information regarding the case.

In an e-mail of 14 February 2011, the Icelandic Government asked for an extended time limit to submit the requested information to 28 February 2011.

On 5 April 2011, the Icelandic Government stated that an answer would be forthcoming around mid May. The case was discussed at the package meeting in Reykjavík on 7 June 2011.

The Icelandic Government finally replied to the above-mentioned letters in a letter dated 21 June 2011.

3 Relevant national law

3.1 Act No 38/2001 on Interest and Price Indexation

Act No 38/2001 on Interest and Price Indexation (*lög nr. 38/2001 um vexti og verðtryggingu*) applies to any kind of reimbursement for loans and price indexation of loans in Iceland.

Chapter VI of the Act (Articles 13-16) is on the price indexation of savings and loans and applies to obligations concerning savings and loans in ISK according to Article 13 of the Act.

Article 13 of the Act on Interest and Price Indexation reads:

"The provisions of this Chapter shall apply to obligations concerning savings and loans in Icelandic krónur (ISK) where the debtor promises to pay money and it has been agreed or stipulated that the payments should be price-indexed. Price indexation as referred to in this Chapter shall mean changes in line with a domestic price index. Authorisation for price indexation shall be as provided for in Article 14 of this Act unless otherwise provided for by law.

Derivative agreements do not fall within the scope of this Chapter."[1]

According to Article 14 (1) of Act No 38/2001, savings and loans may be price indexed if the basis of the price indexation is the consumer price index as calculated by Statistics Iceland in accordance with the law applicable to the index and published monthly in the Legal Gazette.

Furthermore, it is stated in Article 14(2) of Act No 38/2001 that a loan agreement may be based on a share price index, domestic or foreign, or a collection of such indices which do not measure changes to general price levels.

Act No 38/2001 does not expressly refer to exchange rate indexation of loans in ISK. However, in the previous Act on Interest No 25/1987, the concept of "exchange rate indexation" was considered to be part of the concept of "price indexation". In the preparatory works to Act No 38/2001 it is stated that exchange rate indexation of loans shall not be permitted anymore.

In two rulings of 16 June 2010[2], the Supreme Court of Iceland confirmed that since Act No 38/2001 does not provide a legal basis for the granting of exchange rate indexed loans

[1] Translation taken from the website of the Ministry of Economic Affairs http://eng.efnahagsraduneyti.is/laws-and-regulations/nr/2963

[2] Supreme Court rulings No 92/2010 and No 153/2010.

in ISK, the granting of such loans is not legal. Those two rulings concerned the granting of exchange rate indexed loans to two individuals. In its ruling of 14 February 2011[3], the Supreme Court of Iceland ruled that the prohibition of the granting of exchange rate indexed loans in ISK also applies to legal persons.

On 29 December 2010, Act No 38/2001 on Interest and Price Indexation was amended by Act No 151/2010. The amendment addresses the question of how the interest of exchange rate indexed loans in ISK, that have already been granted, shall be re-calculated. The amendments do not change the provisions in the Act concerning the legality of the granting of exchange rate indexed loans in ISK and the granting of such loans is, therefore, still prohibited under Icelandic law.

3.2 Act No 87/1992 on Foreign Exchange

On 28 November 2008, Iceland introduced currency controls by Act No 134/2008 amending the Foreign Exchange Act No 87/1992 (*lög 134/2008 um breytingu á lögum nr. 87/1992 um gjaldeyrismál*). At the same time Rules No 1082/2008 on foreign exchange were issued. In conjunction with those amendments to the Foreign Exchange Act, the Icelandic Government sent notifications dated 28 November 2008 to the EEA Joint Committee and the Standing Committee of the EFTA States according to the procedure permitted under Article 45(3) EEA and Article 1(2) of Protocol 2 of the Agreement on a Standing Committee. The Foreign Exchange Act has been amended nine times since the currency controls were introduced by Act No 134/2008. Furthermore, the Rules on foreign exchange have been replaced three times by new Rules on foreign exchange, the rules currently in force are Rules No 370/2010 on foreign exchange.

According to Article 1(6) of the Foreign Exchange Act, cross-border movement of capital shall mean the transfer or transport of capital across national borders and transfer or transport of capital between residents and non-residents in certain instances.

Article 13b(2) of the Foreign Exchange Act state that all cross-border movement of foreign-denominated capital is prohibited unless it is for the purchase of goods or services or is particularly exempted according to the rules.

Furthermore, according to Article 13b(3) of the Foreign Exchange Act, all cross-border movement of capital denominated in domestic currency is prohibited unless specifically exempted.

Article 13g of the Foreign Exchange Act concerns the borrowing and lending. According to Article 13g(1) of the Act, the borrowing and lending between residents and non-residents for purposes other than cross-border trading in goods and services is prohibited unless such borrowing and lending takes place between undertakings in the same conglomerate.

According to Article 13n of the Foreign Exchange Act, several parties are exempted from some or all the provisions of the Act. According to Article 13n(6) of the rules, commercial banks, savings banks and credit institutions operating under the supervision of the Financial Supervisory Authority, are authorized to engage in spot, forward, and swap transactions with foreign currency. Furthermore, such institutions are exempt from the provisions of Articles 13g, 13h, 131 of the Act . Consequently, commercial banks, savings

[3] Supreme Court ruling No 603/2010.

banks and credit institutions operating under the supervision of the Icelandic Financial Supervisory Authority, are not subject to the general ban under Article 13g on the borrowing and lending between residents and non-residents.

4 Relevant EEA law

4.1 EEA fundamental freedoms

Article 40 EEA reads:

> *"Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article."*

Article 1 of the Capital Movements Directive[4] states that *"Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I."* That non-exhaustive Nomenclature has, according to case law, an indicative value for the purposes of defining the notion of capital movements.[5]

The opening words of the Nomenclature are as follows:

> *"In this Nomenclature, capital movements are classified according to the economic nature of the assets and liabilities they concern, denominated either in national currency or in foreign exchange."*
>
> *The capital movements listed in this Nomenclature are taken to cover:*
>
> *[...]*
>
> *- operations to repay credits or loans."*

Section VII of Annex I to the Nomenclature has the heading *"CREDITS RELATED TO COMMERCIAL TRANSACTIONS OR TO THE PROVISION OF SERVICES IN WHICH A RESIDENT IS PARTICIPATING"*. Under that heading are listed:

> *"1. Short-term (less than one year).*
> *2. Medium-term (from one to five years).*
> *3. Long-term (five years or more).*

[4] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty.
[5] Case E-2/06 *EFTA Surveillance Authority* v *Norway*, [2007] EFTA Court Report, p. 164, paragraph 67; Case C -222/97 *Manfred Trummer* [1999] ECR I-1661, paragraph 21; Case C-464/98 *Stefan* [2001] ECR I-173, paragraph 5; Joined Cases C-515/99, C-519/99 - C-524/99 and C-526/99 - C-540199 *Reisch* [2002] ECR I-2157, paragraph 30; Case C-386/04 *Centro di Musicologica Walter Stauffer* [2006] ECR I-8203, paragraph 22, and Case C-370/05 *Festersen*, [2007] ECR I-1135, paragraph 23.

A – Credits granted by non-residents to residents
B – Credits granted by residents to non-residents"

Section VIII of Annex I to the Nomenclature has the heading *"FINANCIAL LOANS AND CREDITS (not included under I, VII and XI)"*. Under that heading are listed:

"1. Short-term (less than one year).
2. Medium-term (from one to five years).
3. Long-term (five years or more).

A – Loans and credits granted by non-residents to residents
B – Loans and residents to non-residents"

According to the explanatory notes in Directive 88/361/EEC, financial loans and credits include *"Financing of every kind granted by financial institutions, including financing related to commercial transactions or to the provision of services in which no resident is participating."* Furthermore, the category also includes *"mortgage loans, consumer credit and financial leasing, as well as back-up facilities and other note-issuance facilities."*

5 The Authority's assessment

5.1 Existence of a restriction on the free movement of capital

As a preliminary remark, the Authority notes that although there is a general ban in Article 13g of the Foreign Exchange Act on the borrowing and lending between residents and non-residents, Icelandic financial institutions are not restricted in borrowing money from foreign undertakings since they are, according to Article 13n(6) of the Act, exempted from the ban in Article 13g. The currency controls do, therefore, not restrict Icelandic financial institutions in financing themselves in foreign currencies.

Turning to the issue of the existence of a restriction, the Court of Justice and the EFTA Court have repeatedly held that national rules which are liable to impede the free movement of capital and to dissuade investors in other Member States from exercising that freedom must be regarded as restrictions within the meaning of Article 63 TFEU/Article 40 EEA.[6]

In the complaints it is alleged that the ban on exchange rate indexation of loans in Iceland has the effect of making it less attractive for financial institutions to finance themselves in other currencies than ISK.

In *Trummer and Mayer*[7] the Court of Justice concluded that the free movement of capital precluded the application of national rules that required a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency. The Court of Justice emphasised that such rules would have the effect of weakening the link between the debt to be secured (payable in the currency of another Member State) and the mortgage. This rule would therefore reduce the attractiveness and effectiveness of such

[6] See *e.g.* Cases C-367/98 *Commission v. Portugal* [2002] ECR I-4731, paragraphs 44-46; C-483/99 *Commission* v. *France* [2002] ECR I-4781, paragraphs 40-42, Case C-98/01 *Commission* v. *United Kingdom*. [2003] ECR I-4641, paragraph 47, and Case C-463/00 *Commission* v. *Spain* [2003] ECR I-4581, paragraph 61.
[7] C-222/97 *Trummer and Mayer* [1999] ECR I-1661.

a security. As a consequence the rules are liable to dissuade parties from denominating a debt in the currency of another Member State and thus deprive them of a right which constitutes a component element of the free movement of capital.[8]

With reference to *Trummer and Mayer* the Court of Justice, in *Westdeutsche Landesbank Girozentrale,* again confirmed that the provision on free movement of capital "*was to be construed as precluding the application of national rules such as those at issue in the main proceedings, requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency*".[9]

As explained above, the granting of loans can fall under the scope of capital movements (see the nomenclature of Directive 88/361/EEC), regardless of whether the loan is denominated in the national currency or in a foreign currency. An exchange rate indexed loan is not a loan granted in foreign currency but a loan granted in ISK. Such a loan is, however, indexed to the value of certain other foreign currencies. It was common in Iceland to grant exchange rate indexed loans in so-called "currency baskets" *i.e.* the loans were indexed to the value of certain foreign currencies such as USD, EUR, CHF and JPY. It varied between loan agreements which currencies were involved and the percentage of each currency in the "currency basket" differed between agreements as well.

Although exchange rate indexed loans were granted in ISK, such loans were inevitably linked to the value of other currencies. In order to reflect the risk of granting such loans in ISK, Icelandic financial institutions would therefore probably seek to finance the loans in the currencies that the loans were indexed to.

A total ban on the granting of exchange rate indexed loans in ISK, such as laid down in Act no 38/2001, will dissuade Icelandic financial institutions from financing their loans in other currencies than the national currency and therefore constitutes a restriction on the free movement of capital as provided for under Article 40 EEA.

In its letter dated 21 June 2011, the Icelandic Government states that, to its knowledge, there have in practice been no providers of capital from other EEA States that have seen their capital movements hindered as a result of the ban of exchange rate indexation of loans in ISK. Lenders have been domestic and the Icelandic Government considers consequently that the cross border element that is necessary for the application of Article 40 EEA, in practice, is absent in the present case.

The Authority considers that this has no impact on the conclusion reached above. Under the fundamental freedoms there is no requirement to establish actual effects of a provision restrictive of the freedoms.[10] Moreover, the fact that many of the agreements coming within the scope of the ban might lack the cross-border element necessary to trigger the application of Article 40 EEA is not relevant for the purposes of these infringement proceedings. It follows from the above that the restriction of the free movement of capital identified by the Authority in the present letter of formal notice is concerned with Icelandic financial institutions being dissuaded from financing their loans in other currencies than the national currency. Such a restriction will primarily affect the

[8] C-222/97 *Trummer and Mayer,* cited above, paragraph 26-28.
[9] C-464/98 *Westdeutsche Landesbank Girozentrale* v *Friedrich Stefan and Republik Österreich* [2001] ECR I-173, paragraph 19.
[10] See, *e.g.*, in relation to the free movement of goods, Case C-184/96 *Commission v France* [1998] ECR I-6197, paragraph 17.

relationship between the Icelandic financial institutions and their (potential) lenders in other EEA States.

5.2 Justifications

In its letter dated 21 June 2011, the Icelandic Government argues that the objectives of protecting individual persons as well as the society in general against the risk presented by loans in ISK with indexation linked to foreign currency, are valid justifications for a restriction under Article 40 EEA. The prohibition of such loans is appropriate and necessary as there are no other measures that could effectively achieve the objectives sought. The Icelandic Government finally recalls the ruling of the Court of Justice in the *Alpine Investments* case[11] where it was held that a prohibition of cold calling in the financial sector was justified and proportionate. In the opinon of the Icelandic Government, cold calling is minor compared to the risks that loans with indexation linked to foreign currency pose to individual persons and society.

National measures liable to hinder or make less attractive the exercise of the four fundamental freedoms may be in conformity with EEA law if they fulfil the conditions of being applied in a non-discriminatory manner, justified by imperative requirements in the general interest, suitable to attain the objective which they pursue and not going beyond what is necessary in order to attain the objective.[12]

Contracts with exchange rate indexation of loans may involve risk for consumers, since consumers usually have their income in the national currency and are therefore not prepared to react to fluctuation in the value of other currencies. Furthermore, consumers might not have the ability to assess the risk involved in such contracts.

Therefore, the Authority does not contest that the aim of protecting consumers can serve as a justification ground when it comes to restrictions on offering certain high risk financial products to individuals. A total ban on the granting of such loans can, however, not be seen as a proportionate measure to protect that aim. Iceland could introduce other less restrictive measures to protect consumers from the risk that exchange rate indexed loans may involve. Such measures could include informing the consumers in an adequate and clear manner about the risks involved before contracting a loan with an exchange rate indexation, or possibly granting the consumers a right to retract, within a certain time period, from a signed loan contract.

In this context, the Authority wishes to point out that, in general, rules aiming at ensuring consumer protection relate to, *inter alia*, the advertising and marketing of credit products, adequate and transparent pre-contractual information about offers and related risks, as well as thorough creditworthiness assessments[13].

It should further be noticed that, Article 14(2) of Act 38/2001 provides that loan agreements may be indexed to both domestic and foreign stock price indices. The Court of Justice has held "*it must be recalled that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a*

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[11] Case 384/93, *Alpine Investment* vs *Minister van Financien*, [1995] ECR I-01141.

[12] See e.g. C-55/94 *Gebhard,* [1995] ECR I-4165, paragraph 37.

[13] For additional information, see the EC Commission's Staff Working Paper accompanying the European Parliament's and Council's proposal for a Directive on credit arrangements relating to residential property, SEC(2011) 355 final of 31.3.2011, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0355:FIN:EN:PDF

consistent and systematic manner".[14] The Icelandic Government has not presented the Authority with any information indicating that, given the possible flucations of such indices, allowing this type of indexation entails significantly less risks for consumers than exchange rates indexation. Therefore, the Authority considers that in any event the Icelandic legislation is inconsistent with regard to the pursuit of the objective of consumer protection.

The conclusion above, that the Icelandic legislation is not compatible with the principle of proportionality applies *a fortiori* with regard to its application to legal persons. Contrary to the situation relating to consumers, this group of persons has the necessary means and resources to be able to adequately assess any risks involved when considering contracting a loan with an exchange rate indexation.

5. Conclusions

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force a ban on the exchange rate indexation of loans in ISK, as laid down in Act No 38/2001 on Interest and Price Indexation (*lög nr. 38/2001 um vexti og verðtryggingu*), in particular Articles 13 and 14 of the Act, Iceland has failed to fulfil its obligation arising from Article 40 of the Agreement on the European Economic Area.

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 invites the Icelandic Government to submit its observations on the content of this letter *within two months* following receipt thereof.

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.

Done at Brussels, 19 April 2012

For the EFTA Surveillance Authority

Sabine Monauni-Tömördy
College Member

[14] Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 55. See also Case C-500/06 *Corporación Dermoestéticas* [2008] ECR I-5785, paragraph 39.

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Reykjavík August 17, 2012
Reference: EVR10110066/12.5.0

Subject: The Icelandic Government's response to the Authority's Letter of Formal Notice - Case No. 68809 and 69278.

In reference to the Letter of Formal Notice from the EFTA Surveillance Authority ("the Authority") dated 19 April 2012 (Case No: 68809 and 69278, Event No: 58210), the Icelandic Government ("the Government") welcomes the opportunity to submit its observations and comments on the factual statements and conclusions presented in the letter.

1. Introduction

1.1 Iceland's position

The Government does not share the Authority's findings in its Letter of Formal Notice. The Government has not failed to fulfil its obligations under Article 40 of the Agreement of the European Economic Area by limiting to a certain extent exchange rate indexation of loans in ISK, as laid down in Act No 38/2001 on Interests and Price Indexation *(lög nr. 38/2001 um vexti og verðtryggingu)*.

The Government strongly objects that the aforementioned limitations will dissuade Icelandic financial institutions from financing their loans in other currencies than the national currency thus constituting a restriction on the free movement of capital as provided for under Article 40 EEA.

1.2 Main legal issues

The Government disapproves of the premise of the Authority that an alledged total ban on the granting of exchange rate indexed loans in ISK will dissuade Icelandic financial institutions from financing their loans in other currencies than the national currency thus constituting a restriction on the free movement of capital as provided for under Article 40 EEA.

The Government's position is based on the fact that although the Supreme Court of Iceland has confirmed that Act No 38/2001 has laid down a ban on a certain form of exchange rate indexation of loans in ISK the Supreme Court has also confirmed that it is lawful to grant loans and conclude leases in foreign currencies. The Supreme Court has recently concluded that, even if the lent amounts are actually disbursed in ISK and repaid in ISK, but linked to foreign currency fluctuations in a certain way, a loan may be considered legal. Case law is still developing at this time. The Government is of the opinion that more clarity needs to be obtained before full analysis of the legal situation in this field can be presented. Hence, it is premature to determine whether a "ban on foreign currency indexation" exists or at least to what extent it does.

It is also an important fact that the majority of Icelandic firms' debt is in foreign currency (cf. the Central bank of Iceland's report from 29 June 2012). For that reasons it is clear that the ban on exchange rate indexation of loans in ISK will not dissuade financial institutions from financing their loans in other currencies than the national currency. The main assumption for the Authority's findings is therefore doubtful and needs further substantiation.

2. Facts

With a letter dated 4th June 2012 the Government of Iceland, requested a formal report from the Central Bank of Iceland concerning the Authority's Letter of Formal Notice. Two core questions were put forth.

- Firstly, the Government requested documents and/or information regarding whether the ban on granting exchange rate indexation of loans in ISK affects the banks funding methods.

- Secondly, the Government requested the Central Bank's opinion on whether the ban on granting exchange rate indexation will affect the commercial banks' funding methods. The formal report of the Central Bank of Iceland will be referred to as the "Central Bank's report" in this letter.

The Central Bank's report notes the necessity to monitor the development and provide more general information on lending in Iceland and the commercial banks' funding processes during the past decade to assess effectively whether the ban on granting exchange rate indexation has affected, or will affect, the banks' funding methods.

2.1 General lending

The Central Bank's report states that, between the years of 2003 and 2006, Icelandic financial undertakings radically changed their funding practices. Their balance sheets expanded rapidly and they issued a large number of bonds abroad. During the period from 2006 to 2008, they began accumulating deposits abroad. Easy access to relatively cheap foreign funding supported growth abroad and fuelled enormous lending growth in Iceland.

Subsequently, foreign and exchange rate-linked lending to firms grew. Foreign and exchange rate-linked lending to households was largely confined to motor vehicle loans at first, but towards the end of the period (primarily from mid-2007 onwards), mortgage loans were included as well. Foreign and exchange rate-linked household loans grew from 8.2 bn ISK (about 1% of total household debt) at year-end 2003 to 320 bn ISK (about 17% of total household debt) by the end of September 2008. In the wake of the banks' collapse, the Supreme Court judgments declaring exchange rate linkage illegal, and considerable debt restructuring, the share of foreign loans has fallen rapidly once again, to the current 2% of household debt. (As stated in the Central Bank's report, this is actually in line with the recommendations from the European Systemic Risk Board (ESRB) to increase borrowers' risk awareness and restrict foreign-denominated lending to borrowers whose income is not in same currency as the loan).

Exporters whose revenues are predominantly in foreign currency have long held foreign-denominated debts in order to limit their foreign exchange risk, as stated in the Central Bank's report. Foreign and exchange rate-linked lending to firms and households with an ISK-denominated income can be traced both to supply and to demand for the comparatively low interest rates on such loans. In part the loans were taken to fund investments, and in part they were carry trade transactions. Household and business demand grew in tandem with the interest rate differential, in spite of the increased risk of currency depreciation. The increased influx of foreign capital further strengthened the ISK, temporarily increasing purchasing power and fuelling a greater willingness to accumulate debt. Foreign and exchange rate-linked loans to firms accounted for an average of 50-60% of total

corporate debt in 2003-2006. This percentage first rose above 60% in 2007 and 2008, and by the end of 2008 it was 70%. Today it is about 55%.

The Central Bank's report notes that about ⅔ of the commercial banks' loans are to companies and the other ⅓ to households. An insignificant share of household debt and about 55% of corporate debt is in foreign currency. These percentages have remained relatively stable for the past decade, excluding the aforementioned spike prior to the collapse of the banks in 2008.

As a result, some 35% of the commercial banks' loans are in foreign currency. Furthermore, in recent years the commercial banks have lent money both to foreign subsidiaries of domestic firms and to foreign firms for investments abroad, often in relation to operations in which Icelandic firms have expert knowledge, such as the geothermal and fisheries sectors. These loans are in foreign currency.

2.2 The commercial banks' funding

As such a high percentage of loans is in foreign currency. A portion of the collateral backing for the Icelandic commercial banks' loans is therefore abroad. Additionally it must be noted that for years exporters have financed their investments in foreign currency in order to hedge against foreign exchange risk, as their revenue flows are also in foreign currency. Currency swap arrangements were also wide-spread in order to limit risk of export firms in this respect.

Today, Iceland's commercial banks are funded with equity, foreign- and domestic-denominated deposits, as well as borrowed funds, the majority of which are foreign-denominated debt instruments with the old banks. Indeed as the Central Bank of Iceland has pointed out recently in its *Financial Stability* report, the commercial banks must seek out foreign credit in order to increase and extend their foreign funding and thus reduce their refinancing risk.

Towards the end of 2011, around 30% of the commercial banks' assets were in foreign currency, even though they had not obtained funding through foreign credit markets since 2007 (jf. the Central banks' report).

3. The Government's arguments and remarks

In the Authority's Letter of Formal Notice the Authority alleges that by maintaining in force a ban on the exchange rate indexation of loans in ISK, Iceland has failed to fulfil its obligation arising from Article 40 of the Agreement of the European Economic Area. The Authority's assessment is mainly based on the grounds that a total ban on granting exchange rate indexation of loans in ISK will dissuade Icelandic financial institutions from financing their loans in other currencies than the national currency.

This section sets out the Government's arguments in regards to the Authority's conclusion in its Letter of Formal Notice.

3.1 Granting loans in foreign currencies is lawful in Iceland

As is noted in the aforementioned Letter of Formal Notice the Supreme Court of Iceland has confirmed in its rulings of 16 June 2010 (Supreme Court ruling No 92/2010 and No 153/2010) and 14 February 2011 (Supreme Court ruling No 603/2010) that since Act No 38/2001 does not provide a legal basis for the granting of exchange rate indexed loans in ISK, the granting of such loans is not legal.

In its Letter of Formal Notice the Authority appears to ignore the fact that it remains lawful to grant loans in foreign currencies in Iceland, cf. the rules of chapter VI. of Act no. 38/2001 which includes the ban of granting exchange rate indexation, but does not pertain to loans in foreign currency.

Article 40 EEA reads as follows:

> *Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.*

Article 1 of the Capital Movements Directive (88/361/EEC of 24 June 1988) states that:

> *Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of the Directive, capital movements shall be classified in accordance with the Nomenclature in Annex 1.*

Article 1 of the Capital Movements Directive refers to the Nomenclature in Annex 1. As is noted in the Letter of Formal Notice the Nomenclature has, according to case law, an indicative value for the purpose of defining the notion of capital movements. The opening words of the Nomenclature are as follows:

> *In this Nomenclature, capital movements are classified according to the economic nature of the assets and liabilities they concern, denominated either in national currency or in foreign exchange.*
> *The capital movements listed in this Nomenclature are taken to cover:*
> *[...]*
> *-operations to repay credits or loans.*

By allowing the granting of loans in foreign currencies the Government considers that it is fulfilling the obligations regarding capital movements as borrowers can both grant loans in foreign currencies and the national currency of Iceland, although the indexation of loans in ISK to exchange rate is forbidden.

As stated in the Authority's Letter of Formal Notice, exchange rate indexed loans in ISK were inevitably linked to the value of other currencies. The Authority assumes that the Icelandic institutions would seek to finance the exchange rate indexed loans in the currencies the loans were indexed to, in order to reflect the risk of granting such loans in ISK.

The Government would like to point out that this understanding is not completely correct. As noted in the Central Bank's report, in Iceland, as in Norway, Austria, Cyprus, and a number of other countries, financial supervisors have set rules governing the foreign exchange risk that financial undertakings are permitted to take on. These are referred to as foreign exchange balance rules. These rules place limits on the open position in foreign currencies; that is, they attempt to control the accumulation of foreign exchange risk on credit institutions' balance sheets. Icelandic financial undertakings sought out foreign credit and deposits abroad, primarily in pounds sterling, euros, and US dollars, and then lent that money to domestic borrowers via exchange rate-linked or foreign loans that were mainly in Japanese yen (JPY) and Swiss francs (CHF). To a large extent, the loans were not funded in the currencies in which they were disbursed. This however did not create an open foreign exchange position in the credit institutions' accounts (cf. Central banks' report).

3.2 The Authority's main presumption is strongly objected

As previously stated, it is strongly objected that the ban on exchange rate indexation of loans in ISK will dissuade financial institutions from financing their loans in other currencies than the national currency, as the Authority concludes in its Letter of Formal Notice. As stated in the Central Bank's report, a restriction on exchange rate-linked lending in itself will not affect the banks' funding, nor will it affect domestic demand for foreign credit. The Government agrees with that conclusion.

As has been highlighted in this letter it is lawful in Iceland to grant loans in foreign currency. Although an insignificant share of household debt is in foreign currency, the fact remains that about 55% of total loans to firms are in foreign currency, according to the Central Bank's report. As a result, the Central Bank assumes that some 35% of the commercial banks' loans are in foreign currency. This rate has remained relatively stable for the past decade, except for the spike prior to the collapse of the banks in 2008. Furthermore, in recent years the commercial banks have lent money in foreign currency to foreign subsidiaries of domestic firms and to foreign firms for investments abroad.

The Icelandic Government fails to see that a restriction on exchange rate-linked lending affects domestic demand for foreign-denominated credit, due to the fact that as before, it is permissible to conclude loan agreements in foreign currency.

Instead, attention should be drawn to the fact that domestic borrowers that do not enjoy foreign income – firms and households – have faced heavy losses on account of the foreign exchange risk that developed as a result of the collapse of the currency and the banking system in the autumn of 2008. The Central Bank of Iceland believes that, in the long run, the commercial banks' foreign lending activities – to households as well as domestic and foreign companies with foreign-denominated income – will continue and even grow.

As the Central Bank of Iceland has highlighted recently in its *Financial Stability* report, the commercial banks must seek out foreign credit in order to increase and lengthen their foreign funding and thereby reduce their refinancing risk. On the other hand, the banks remain cautious regarding carry trade, and the collateral requirement for such transactions (lending foreign currency to borrowers with domestic income) could become a limiting factor in the next few years. In order to curtail foreign exchange risk, it is considered desirable that credit institutions' assets and liabilities be maintained in the same currency. As is stated above, a number of countries have adopted rules on foreign exchange balance in an attempt to control this risk. With currency swaps, it is possible to convert assets and liabilities from one currency to another. A prohibition on exchange rate linkage should not adversely affect the interbank market since it is permissible to grant loans in foreign currency, and it is possible to fund loans in ISK with foreign capital if swap agreements are used to hedge against the foreign exchange risk (cf. Central banks' report).

In light of this, the Government finds it clear that a restriction on the granting of exchange rate indexed loans in ISK will *not* dissuade Icelandic financial institutions from financing their loans in other currencies than the national currency, since it is permissible to conclude loan agreements in foreign currency.

3.3 Courts are still defining the borders between exchange rate indexation of loans in ISK and loans in foreign currency

Background

Although the Icelandic courts have confirmed that granting loans in foreign currency is lawful in Iceland there still exists an uncertainty of how to define exchange rate indexation of loans in ISK vis-à-vis loans in foreign currencies generally.

As stated before, the Icelandic Supreme Court rulings of 16 June 2010 (Supreme Court ruling No 92/2010 and No 153/2010) determine that the certain loan agreements clearly indicated that they were exchange rate indexed loans in ISK rather than legitimate foreign currency loans. The Court came to that conclusion for several reasons: i) the loans were determined in ISK, ii) the loan amounts were connected to exchange rate of foreign currencies in specified proportions, iii) the underlying purchase (of motor vehicles) was determined in ISK, iv) monthly payments were determined in ISK, v) the instalment in ISK changed in relation to the exchange rate of said foreign currencies, vi) the

contracts stated that the loans were "100% exchange rate indexed".

These two rulings concerned the granting of exchange rate indexed loans to two individuals. For similar reasons, the Supreme Court came to the conclusion in its rulings from 14 February 2011 (Supreme Court rulings No 603/2010 and 604/2010) that real estate mortgages were exchange rate indexed loans. Those rulings concerned granting of exchange rate indexed loans to undertakings.

Recent rulings of the Supreme Court of Iceland
Since the Authority's Letter of Formal Notice was issued, new Supreme Court rulings have been handed down clarifying further how to differentiate exchange rate indexation of loans in ISK from loans in foreign currencies:

In its ruling of 7 June 2012 (Supreme Court ruling No 524/2011), the Icelandic Supreme Court came to the conclusion that disputed loan agreement was is in fact a loan in foreign currencies (and therefore legitimate). The loan was a household loan from Glitnir banki hf. Though its disbursement was in ISK as well as the instalments the Supreme Court concluded that the loan was in foreign currencies. The Court came to that conclusion for several reasons.

- First, the Supreme Court took note of the bond's name, i.e. *"Bonds in foreign currencies"* (*Skuldabréf í erlendum gjaldmiðlum*).
- Secondly, the loan amount was as stated, first specified in three different currencies, Swiss franc (CHF), Japanese Yen (JPY) and Euros (EUR) and then the equivalence in ISK.
- Thirdly, its interests were in accordance with a foreign loan, as the interests were Libor and Euribor interests.
- Finally, the heading of the subsequent change of terms is: *"Change of terms of bond agreement in foreign currencies"* (*Skilmálabreyting skuldabréfs í erlendum myntum/mynteiningum*) and the equivalent amount in ISK was not mentioned in the change of terms though the borrower was permitted to convert the loan amount to the equivalent amount in ISK after the entire debt was called, based on the sale price of the currencies which the debt was comprised of that particular day (entered by Glitnir banki hf.).

With the Supreme Court ruling from 9 June 2011 (Supreme Court ruling No 155/2011) the court came to that conclusion that loan agreement granted to a firm under the title "*multicurrency loan for 5 years, equivalent to 150.000.000 ISK" (fjölmyntalán til 5 ára að jafnvirði kr. 150.000.000*), was an exchange rate indexation of loan in ISK. The reasoning was *i.a.* based on the fact that the loan amount wasn't specified in other currency than ISK, the loan amount was paid out in ISK and the instalments were paid in ISK. Also the court showed regard to provisions on currency conversion.

Contrary to the aforementioned ruling from 9 June 2011 the Supreme Court came to the conclusion, with its ruling of 15 June 2012 (Supreme Court ruling No 3/2012), that a disputed loan agreement, granted to a firm, was actually a legal loan in foreign currencies. In its reasoning, the Supreme Court highlighted that the loan agreement was named *"Loan agreement in foreign currencies"* (*Lánssamningur í erlendum myntum)* . The Court pointed out that though the loan amount was only specified in ISK and the amount in foreign currencies was not mentioned, only the proportions of the foreign currency and its connection to ISK, the disbursements in the relevant amount in foreign currencies were deposited to the borrower's currency account in Kaupþing banki hf. Payments of instalments and interests were also charged from the borrower's currency account in the relevant amount in foreign currencies each time. This was repeated until restrictions were imposed on foreign exchange 15 November 2008 with the amendment to Act No 87/1992 on Foreign Exchange. When an instalment was transferred after the amendment a similar method was used, i.e. the borrower applied for purchasing foreign currency to be able to pay instalments and interests.

***

As previously stated, uncertainty remains on how to distinguish exchange rate indexation of loans in

ISK from loans in foreign currencies generally. It is expected that the courts will have to examine several cases in the coming months before it becomes possible for the legislature to consider revision of Act. 38/2001.

3.3.1 Proposed changes to the legislation

In late 2010 proposed changes to Art. 14 of Act No 38/2001 on Interests and Price Indexation (*lög nr. 38/2001 um vexti og* verðtryggingu) where introduced to the Parliament with the aim of allowing undertakings to grant an exchange rate indexation of loans in ISK. Althingi sought the opinion of several parties, including the Financial Supervisory Authority of Iceland (*Fjármálaeftirlitið*) and the Central Bank of Iceland (*Seðlabanki Íslands*).

The Financial Supervisory Authority found it unnecessary to allow granting of exchange rate indexation of loans in ISK when it is clear that it is lawful to grant loans in foreign currencies. The Central Bank pointed out various difficulties, i.e. the need to define what type of loans are exchange rate indexed and what kind of loans are in foreign currencies.

The Central Bank also mentioned that it would be wise to ban granting individuals loans in foreign currencies if the aim was to permanently ban the granting of exchange rate indexed loans. After reviewing the aforementioned opinions the proposal was withdrawn.

3.3.2 Uncertainty remains on how to recalculate interests

In addition, a lack of clarity remains on how to recalculate the interests of exchange rate indexed loans since the Supreme Court of Iceland, with its ruling of 16 September 2010 (Supreme Court ruling No 471/2010) found it inevitable that the ban on exchange rate indexation of loans in ISK led to putting aside the provision of a contract regarding interest rates.

The Parliament of Iceland, Althingi, reacted to the situation with Art. 18 of Act No 151/2010 amending Act No 38/2001 on Interests and Price Indexation. In short, Art 18 stated that if provisions of a contract regarding interests or other repayment would be considered invalid the interests of the amount shall be decided on the grounds of first paragraph of Art. 4 of Act No 38/2001 on Interests and Price Indexation.

With the Supreme Court's ruling of 15 February 2012 (Supreme Court ruling No 600/2011) the court came to the conclusion that the retroactivity of Art. 18 of Act No 151/2010, which determined new interests for banned exchange rate indexation loans, could not change previous results of the settlement of interests between the parties concerned in a retroactive way.

At the current time a few unresolved issues still remain as regards the "resetting" of illegitimate foreign currency linked loans. It is the opinion of the Government that the Courts of Iceland will have to address those before any intervention by the Government is possible.

3.4 The rulings of the Court of Justice and the EFTA Court

In its Letter of Formal Notice the Authority concludes that the Court of Justice and the EFTA Court have repeatedly held that national rules which are liable to impede the free movement of capital and to dissuade investors in other Member States from exercising that freedom must be regarded as restrictions within the meaning of Article 63 TFEU/Article 40 EEA with references to several cases.

The Authority refers to the Trummer and Mayer case (C-222/97 *Trummer and Mayer* [1999] ECR I-1661). As stated in the Authority's Letter of Formal Notice the Court of Justice concluded that the free movement of capital precluded the application of national rules that required a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency. The Court of Justice emphasised that such rules would have the effect of weakening the link between the debt to be secured (payable in the currency of another Member State) and the mortgage. This rule would therefore reduce the attractiveness and effectiveness of such a security. As

a consequence the rules are liable to dissuade parties from denominating a debt in the currency of another Member State and thus deprive them of a right which constitutes a component element of the free movement of capital.

The Government argues that the case does not apply in this matter due to the different and incomparable facts and circumstances of the two cases. As detailed before, it is lawful in Iceland to grant loans in foreign currencies and no enhanced expenses or efforts are implied for borrowers regarding exchange rate indexation of loans in ISK. Furthermore, it cannot be assumed that it will dissuade financial institution from financing their loans in foreign currencies.

3.5 Other issues

The Government reiterates the submissions made in its letter from 21 June 2011 regarding justifications on limiting exposure to currency fluctuations by restricting foreign currency indexation. This is further substantiated by remarks in the aforementioned Central Bank report:

> "Foreign exchange risk develops when funds are borrowed in one currency and the assets being financed or the revenues to be used to service the debt are in another. When the exchange rate of the ISK falls, the foreign loan principal as measured in Icelandic krónur rises, leading to higher instalments and interest payments and increasing the risk of default and loan losses. Balance sheets are eroded as well, as equity decreases commensurate with the rise in the underlying loans. A negative equity position can make it difficult for households and firms to sell assets, which also intensifies the risk of default and loan losses.
>
> Although the foreign exchange balance on financial institutions' balance sheets may be in equilibrium as regards foreign borrowing and lending activities, their credit risk may be underestimated if their borrowers' income is in domestic currency. Although the foreign exchange risk lies with the borrower, it can be shunted over to the financial undertaking if the borrower ends up in distress. Iceland's experience shows this clearly. The likelihood of loan losses and default are much greater among borrowers that take loans in foreign currency but have income in domestic currency. Financial undertakings are therefore merely swapping foreign exchange risk for credit risk when they extend foreign-denominated loans to borrowers with domestic-denominated income. For the economy as a whole, foreign exchange risk is unchanged; it is merely transferred from financial institutions to households and businesses.
>
> It should be borne in mind that the exchange rate of the ISK fluctuates more than that of a currency in a larger currency area. Exchange rate-linked loans in Icelandic krónur granted to borrowers whose income is solely in krónur are therefore extraordinarily risky for borrower and lender alike. They actually represent an unhedged and therefore risky foreign exchange position, as the borrower has no foreign-denominated income to offset instalments and interest on the loan. Exchange rate-linked lending therefore makes credit institutions' accounts more opaque and actually hides the risk associated with the loans."

4. Conclusions

The Government has in this letter explained the fact and stated the reasoning to why it has not breached Article. 40 of the Agreement of the European Economic Area by maintaining in force restriction on the exchange rate indexation of loans in ISK.

However, in the unlikely event that the Authority would come to the conclusion that restrictions on the free movement of capital, in the meaning of Article 40 EEA, are in place the Government maintains that it is justified and reserves the rights to support this with further evidence.

In any instance the Government finds it appropriate to await further clarifications from the Supreme Courts as regards the scope of restrictions on exchange-rate linked lending, before further actions will

be taken. The Government urges the Authority to take into account these practical aspects of the case and postpone further handling of the matter until more clarity has been obtained.

Final Remarks

In this reply to the Letter of Formal Notice the Government has set forth its objections to the conclusions of the Authority. The Government also refers in general to previous exchanges with the Authority on the matter.

The Government expresses its commitment to provide the Authority with further information

On behalf of the Minister

Valgerður Rún Ben.

Valgerður Rún Benediktsdóttir

Sigurbjörg Guðmundsd.

Sigurbjörg Stella Guðmundsdóttir

Case No: 68809 and 69278
Event No: 652739
Dec. No: 195/13/COL

EFTA SURVEILLANCE AUTHORITY

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Iceland's breach of Article 40 of the Agreement on the European Economic Area by maintaining in force a ban on the exchange rate indexation of loans in Icelandic króna

EFTA SURVEILLANCE AUTHORITY

1 Introduction

According to Icelandic law, the exchange rate indexation of loans in Icelandic króna ("ISK") is prohibited. Following two complaints relating to the ban on exchange rate indexation of loans in ISK, the EFTA Surveillance Authority ("the Authority") has assessed the compatibility of these rules with Article 40 (free movement of capital) of the Agreement on the European Economic Area ("EEA").

2 Correspondence

In a letter dated 15 November 2010 (event no. 577289), the Authority informed the Icelandic Government that it had received a complaint against Iceland regarding an alleged breach of Article 40 of the EEA Agreement for maintaining in force a ban on exchange rate indexation of loans in ISK. In that letter, the Authority invited Iceland to provide further information regarding the case.

In an e-mail of 27 January 2011, the Icelandic Government asked for an extended time limit to reply to the above letter until 15 February 2011.

By letter of 1 February 2011 (event no. 585026), the Authority informed the Icelandic Government that it had received a new complaint concerning the ban on exchange rate indexation of loans in ISK. In that letter, the Authority invited Iceland to provide additional information regarding the case.

In an e-mail of 14 February 2011, the Icelandic Government asked for an extended time limit to submit the requested information. The Authority granted the requested extension of the time limit in an e-mail of 15 February 2011 (event no. 587292).

On 5 April 2011, the Icelandic Government stated that an answer would be forthcoming around mid May 2011. The case was discussed at the package meeting in Reykjavík on 7 June 2011.

The Icelandic Government finally replied to the above-mentioned letters in a letter dated 21 June 2011.

On 19 April 2012, the Authority issued a letter of formal notice to Iceland (event no. 585210) for failing to comply with its obligation under Article 40 EEA by maintaining in force a ban on the exchange rate indexation of loans in ISK.

The case was discussed at the package meeting in Reykjavík on 7 June 2012. At that meeting the representatives of the Icelandic Government asked for an extension of the time limit to submit observations in the case until 19 August 2012. The Authority granted the requested extension in a follow-up letter to the meeting, dated 5 July 2012 (event no. 638743).

Iceland replied to the letter of formal notice by letter of 17 August 2012.

3 Relevant national law

3.1 Act No 38/2001 on Interest and Price Indexation

Act No 38/2001 on Interest and Price Indexation (*lög nr. 38/2001 um vexti og verðtryggingu* ("Act No 38/2001")) applies to any kind of reimbursement for loans and price indexation of loans in Iceland.

Chapter VI of the Act (Articles 13-16) concerns the price indexation of savings and loans and applies to obligations concerning savings and loans in ISK according to Article 13 of the Act.

Article 13 of Act No 38/2001 reads as follows:

"The provisions of this Chapter shall apply to obligations concerning savings and loans in Icelandic krónur (ISK) where the debtor promises to pay money and it has been agreed or stipulated that the payments should be price-indexed. Price indexation as referred to in this Chapter shall mean changes in line with a domestic price index. Authorisation for price indexation shall be as provided for in Article 14 of this Act unless otherwise provided for by law.

Derivative agreements do not fall within the scope of this Chapter."[1]

According to Article 14(1) of Act No 38/2001, savings and loans may be price indexed if the basis of the price indexation is the consumer price index as calculated by Statistics Iceland in accordance with the law applicable to the index and published monthly in the Legal Gazette.

Furthermore, it is stated in Article 14(2) of Act No 38/2001 that a loan agreement may be based on a share price index, domestic or foreign, or a collection of such indices which do not measure changes to general price levels.

Act No 38/2001 does not expressly refer to exchange rate indexation of loans in ISK. However, in the previous Act on Interest No 25/1987, the concept of "exchange rate indexation" was considered to be part of the concept of "price indexation". In the preparatory works to Act No 38/2001 it is stated that exchange rate indexation of loans shall not be permitted anymore.

In two rulings of 16 June 2010[2], the Supreme Court of Iceland confirmed that since Act No 38/2001 does not provide a legal basis for the granting of exchange rate indexed loans in ISK, the granting of such loans is not legal. Those two rulings concerned the granting of exchange rate indexed loans to two individuals. In its ruling of 14 February 2011[3], the Supreme Court of Iceland ruled that the prohibition of the granting of exchange rate indexed loans in ISK also applies to legal persons.

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[1] Translation taken from the website of the Ministry of Economic Affairs (now the Ministry of Finance and Economic Affairs).

[2] Supreme Court rulings No 92/2010 and No 153/2010.

[3] Supreme Court ruling No 603/2010.

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3.2 Act No 87/1992 on Foreign Exchange

On 28 November 2008, Iceland introduced currency controls by Act No 134/2008 amending the Foreign Exchange Act No 87/1992 (*lög 134/2008 um breytingu á lögum nr. 87/1992 um gjaldeyrismál* ("Act No 87/1992")). In conjunction with those amendments to Act No 87/1992, the Icelandic Government sent notifications dated 28 November 2008 to the EEA Joint Committee and the Standing Committee of the EFTA States according to the procedure permitted under Article 45(3) EEA and Article 1(2) of Protocol 2 of the Agreement on a Standing Committee. Act No 87/1992 has been amended several times since the currency controls were introduced by Act No 134/2008. The most recent notification of protective measures from Iceland to the Joint Committee is from 12 March 2013.

Article 13g of Act No 87/1992 concerns borrowing and lending. According to Article 13g(1) of the Act, the borrowing and lending between residents and non-residents for purposes other than cross-border trading in goods and services is, as a general rule, prohibited unless such borrowing and lending is between companies within the same group.

According to Article 13n of Act No 87/1992, several parties are exempted from some or all of the provisions of the Act. According to Article 13n(7) of the Act, commercial banks, savings banks and credit institutions operating under the supervision of the Financial Supervisory Authority, are authorized to engage in spot, forward, and swap transactions with foreign currency. Furthermore, such institutions are exempt from the provisions of Articles 13g, 13h and 13l of the Act. Consequently, commercial banks, savings banks and credit institutions operating under the supervision of the Icelandic Financial Supervisory Authority, are not subject to the general ban under Article 13g on the borrowing and lending between residents and non-residents.

4 Relevant EEA law

Article 40 EEA reads:

> *"Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article."*

Article 1 of the Capital Movements Directive[4] states that *"Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I."* That non-exhaustive Nomenclature has, according to case law, an indicative value for the purposes of defining the notion of capital movements.[5]

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[4] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty.

[5] Case E-2/06 *EFTA Surveillance Authority* v *Norway*, [2007] EFTA Court Report, p. 164, paragraph 67; Case C -222/97 *Manfred Trummer* [1999] ECR I-1661, paragraph 21; Case C-464/98 *Stefan* [2001] ECR I-173, paragraph 5; Joined Cases C-515/99, C-519/99 - C-524/99 and C-526/99 - C-540/99 *Reisch* [2002] ECR I-2157, paragraph 30; Case C-386/04 *Centro di Musicologica Walter Stauffer* [2006] ECR I-8203, paragraph 22; and Case C-370/05 *Festersen*, [2007] ECR I-1135, paragraph 23.

The opening words of the Nomenclature read as follows:

> *"In this Nomenclature, capital movements are classified according to the economic nature of the assets and liabilities they concern, denominated either in national currency or in foreign exchange."*
>
> *The capital movements listed in this Nomenclature are taken to cover:*
>
> *[...]*
>
> *- operations to repay credits or loans."*

According to the explanatory notes in Directive 88/361/EEC, financial loans and credits (listed in Sections VII and VIII of Annex I to the Nomenclature) include *"Financing of every kind granted by financial institutions, including financing related to commercial transactions or to the provision of services in which no resident is participating."* Furthermore, the category also includes *"mortgage loans, consumer credit and financial leasing, as well as back-up facilities and other note-issuance facilities."*

5 The Authority's Assessment

5.1 Existence of a restriction on the free movement of capital

As a preliminary remark, the Authority notes that although there is a general ban in Article 13g of Act No 87/1992 on borrowing and lending between residents and non-residents, Icelandic financial institutions are not restricted in being granted loans from foreign undertakings since they are, according to Article 13n(7) of the Act, exempted from the ban in Article 13g of the Foreign Exchange Act. The currency controls do, therefore, not restrict Icelandic financial institutions in financing themselves in foreign currencies.

Turning to the issue of the existence of a restriction, the Court of Justice of the European Union ("The Court of Justice") and the EFTA Court have repeatedly held that national rules which are liable to impede the free movement of capital and to dissuade investors in other EEA States from exercising that freedom must be regarded as restrictions within the meaning of Article 63 TFEU/Article 40 EEA.[6]

In the complaints it is alleged that the ban on exchange rate indexation of loans in Iceland has the effect of making it less attractive for Icelandic financial institutions to finance themselves in other currencies than ISK. Such a restriction will, in turn, affect potential foreign lenders.

In *Trummer and Mayer*[7] the Court of Justice concluded that the free movement of capital precluded the application of national rules that required a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency. The Court of Justice emphasised that such rules would have the effect of weakening the

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[6] See *e.g.* Cases C-367/98 *Commission v. Portugal* [2002] ECR I-4731, paragraphs 44-46; C-483/99 *Commission* v. *France* [2002] ECR I-4781, paragraphs 40-42; C-98/01 *Commission* v. *United Kingdom*, [2003] ECR I-4641, paragraph 47; and C-463/00 *Commission* v. *Spain* [2003] ECR I-4581, paragraph 61.

[7] C-222/97 *Trummer and Mayer* [1999] ECR I-1661.

link between the debt to be secured (payable in the currency of another Member State) and the mortgage. This rule would therefore reduce the attractiveness and effectiveness of such a security. As a consequence the rules are liable to dissuade parties from denominating a debt in the currency of another Member State and thus deprive them of a right which constitutes a component element of the free movement of capital.[8]

With reference to *Trummer and Mayer* the Court of Justice, in *Westdeutsche Landesbank Girozentrale,* again confirmed that the provision on free movement of capital "*was to be construed as precluding the application of national rules such as those at issue in the main proceedings, requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency*".[9]

The transaction of granting and taking loans can fall under the scope of capital movements, regardless of whether the loan is denominated in the national currency or in a foreign currency.[10] An exchange rate indexed loan is not a loan granted in foreign currency but a loan granted in ISK. Such a loan is, however, indexed to the value of certain other foreign currencies. It was common in Iceland to grant exchange rate indexed loans in so-called "currency baskets" *i.e.* the loans were indexed to the value of certain foreign currencies such as USD, EUR, CHF and JPY. It varied between loan agreements which currencies were involved and the percentage of each currency in the "currency baskets" differed between agreements as well.

Although exchange rate indexed loans were granted in ISK, such loans were inevitably linked to the value of other currencies. In order to reflect the risk of granting such loans in ISK, Icelandic financial institutions would therefore probably seek to finance the loans in foreign currencies.

In its letter of formal notice from 19 April 2012, the Authority came to the conclusion that a total ban on the granting of exchange rate indexed loans in ISK, such as laid down in Act No 38/2001, will dissuade Icelandic financial institutions from financing their loans in other currencies than the national currency and therefore constitutes a restriction to the free movement of capital as provided for under Article 40 EEA. This was the Authority's conclusion regardless of Iceland's allegation that it was not aware of any providers of capital from other EEA States that had seen their capital movements hindered as a result of the ban of exchange rate indexation of loans in ISK. The Authority considers that this has no impact on the restrictive nature of the ban on exchange rate indexation of loans in ISK. It is settled case-law that there is no requirement to establish actual effects of a provision which has a potential restrictive effect on the fundamental freedoms.[11] Moreover, the fact that many of the agreements coming within the scope of the ban might lack the cross-border element necessary to trigger the application of Article 40 EEA is not relevant for the purposes of these infringement proceedings. It follows from the above that the restriction of the free movement of capital identified by the Authority concerns Icelandic financial institutions that are being dissuaded from financing their loans in other currencies than the national currency. Such a restriction will primarily affect the

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[8] C-222/97 *Trummer and Mayer,* cited above, paragraphs 26-28.

[9] C-464/98 *Westdeutsche Landesbank Girozentrale* v *Friedrich Stefan and Republik Österreich* [2001] ECR I-173, paragraph 19.

[10] See *e.g.* the nomenclature of Directive 88/361/EEC and Cases E-1/00 *State Debt Management Agency v Íslandsbanki FBA* EFTA Court Report 2000-2001 p. 8, paragraph 28 and C-484/93 *Svenson Gustavsson* [1995] ECR I-3955.

[11] See, *e.g.*, in relation to the free movement of goods, Case C-184/96 *Commission v France* [1998] ECR I-6197, paragraph 17.

relationship between the Icelandic financial institutions and their (potential) lenders in other EEA States.

In its reply to the Authority's letter of formal notice from 17 August 2012, Iceland maintains its position that the ban on the granting of exchange rate indexed loans in ISK will not dissuade Icelandic financial institutions from financing their loans in other currencies than the national currency thus constituting a restriction to the free movement of capital as provided for under Article 40 EEA. Iceland's arguments in this regard can be divided into two: *First*, Iceland claims that the total ban on the granting of exchange rate indexed loans in ISK does not restrict the free movement of capital since there are no restrictions in force on the granting of loans in foreign currencies. *Second*, Iceland claims that there is not necessarily a direct link between the banks' lending in certain currencies and their financing in the same currencies.

5.1.1 Foreign exchange loans

Iceland has explained that even though it is prohibited to grant exchange rate indexed loans in Iceland there are no statutory restrictions on the granting of loans in foreign currency. Therefore, Icelandic banks can offer such loan agreements to individuals and companies.

In its letter of 17 August 2012, Iceland refers to *Trummer and Mayer*[12] and states that it disagrees with the Authority that this case is relevant for the assessment of the Icelandic ban due to the different facts and circumstances of the cases since foreign currency loans are lawful in Iceland while there was a total ban on the registration of mortgages in foreign currencies in *Trummer and Mayer.*

When preparing the reply to the letter of formal notice, the Icelandic Government requested information from the Central Bank of Iceland on whether the ban on granting exchange rate indexed loans in ISK affects the banks' funding methods.

In its letter of 29 June 2012, the Central Bank of Iceland gives an overview of the nature of the loans that the Icelandic banks have granted. According to the information from the Central Bank, around 2/3 of the commercial banks' loans in Iceland are to companies and 1/3 to private households. An insignificant share of household debt and about 55% of corporate debt is in foreign currency. As a result, some 35% of the commercial banks' total loans are in foreign currency. In addition, Icelandic banks have also granted loans in foreign currencies to foreign companies and foreign subsidiaries of domestic companies.

5.1.2 The financing of exchange rate indexed loans

Apart from basing its position in the case on the assumption that there is no restriction on the free movement of capital because Iceland allows the granting of loans in foreign currencies, Iceland objects to the Authority's conclusion that the Icelandic financial institutions would seek to finance the exchange rate indexed loans in the currencies that the loans were indexed to, in order to reflect the risk of granting such loans in ISK.

According to the explanations in Iceland's letter of 17 August 2012, loans granted in certain currencies or indexed to the value of certain currencies are not necessarily financed in the same currencies. However, according to the explanations in Iceland's letter, the risk

[12] C-222/97 *Trummer and Mayer,* cited above.

of such loans is mitigated by the financing in foreign currencies even though it is not the same currencies.

In its letter Iceland states that *"...in Iceland as in Norway, Austria, Cyprus and a number of other countries, financial supervisors have set rules governing the foreign exchange risk that financial undertakings are permitted to take on. These are referred to as foreign exchange balance rules. These rules place limits on the open position in foreign currencies; that is, they attempt to control the accumulation of foreign exchange risk on credit institutions' balance sheets. Icelandic financial undertakings sought out foreign credit and deposits abroad, primarily in pounds sterling, euros, and US dollars, and then lent that money to domestic borrowers via exchange rate-linked or foreign loans that were mainly in Japanese yen (JPY) and Swiss francs (CHF). To a large extent, the loans were not funded in the currencies in which they were disbursed. This however did not create an open foreign exchange position in the credit institutions' accounts..."*.

Iceland claims that the ban on granting exchange rate indexed loans does not dissuade Icelandic financial institutions from financing themselves in foreign currency since there exists no direct link between the granting of such loans and the financing in the relevant currencies. In this context Iceland explains that the exchange rate indexed loans were not necessarily funded in the same currencies as the loan agreements were indexed to. Most agreements concerned loans indexed to the value of JPY and CHF but the banks mainly financed themselves in GBP, EUR, and USD.

5.1.3 The Authority observations on Iceland's reply

The Authority is of the opinion, that the arguments presented by Iceland do not alter its conclusion that the exchange indexation ban is a restriction under Article 40 EEA. In that respect the Authority refers to the arguments set out in Section 5.1 above. Furthermore, the Authority would like to note the following.

The Authority recalls, that in order to be in breach of the free movement of capital it is sufficient that the national measure has a potential effect on the free movement of capital.[13] A ban on the granting of exchange rate indexed loans may have a potential effect on the banks when it comes to financing themselves in foreign currencies and the Authority fails to see that Iceland attempted to demonstrate that it was excluded that the index loan ban could have such a potential effect. The fact that the Icelandic banks might not necessarily have financed themselves in same currencies as the loans were indexed to does not detract from the finding that there exists at least a potential restrictive effect.

Moreover, in the view of the Authority a total ban such as the one at stake in this case can, in principle, not be regarded as having a too indirect or too uncertain effect on the free movement of capital to be classified as an obstacle to that freedom.[14]
The fact that it is allowed to grant loans in foreign currency is, as such, not crucial for the assessment of whether it can constitute a restriction. In the view of the Authority, the fact that it may be possible for contracting parties to draft their agreements differently in order to evade the scope of the ban cannot remove the ban from the ambit of Article 40 EEA. Moreover, even though the granting of foreign currency loans has been a common practice in Iceland it is still the Authority's position that it is not determinative for the assessment

[13] See *e.g.* E-1/00 *State Debt Management Agency v Íslandsbanki FBA*, cited above, paragraph 28.
[14] See *e.g.* C-577/10 *Commission* v *Belgium* [2012], not yet reported, paragraph 42.

of the restrictive nature of the ban on exchange rate indexation of loans.[15] In this context the Authority also recalls that any restrictions on the fundamental freedoms, however minor they might be are prohibited unless they are justified.[16]

In light of the above, the Authority maintains its conclusion that the ban on exchange rate indexation of loans in ISK constitutes a restriction to the free movement of capital as provided for in Article 40 EEA.

5.2 Justifications

In its letter dated 21 June 2011, the Icelandic Government argues that the objectives of protecting individual persons as well as the society in general against the risk presented by loans in ISK with indexation linked to foreign currency, are valid justifications for a restriction under Article 40 EEA. The prohibition of such loans is appropriate and necessary as there are no other measures that could effectively achieve the objectives sought. The Icelandic Government finally recalls the ruling of the Court of Justice in the *Alpine Investments* case[17] where it was held that a prohibition of cold calling in the financial sector was justified and proportionate. In the opinion of the Icelandic Government, cold calling is minor compared to the risks that loans with indexation linked to foreign currency pose to individual persons and society.

National measures liable to hinder or make less attractive the exercise of the four fundamental freedoms may be in conformity with EEA law if they fulfil the conditions of being applied in a non-discriminatory manner, justified by imperative requirements in the general interest, suitable to attain the objective which they pursue and not going beyond what is necessary in order to attain the objective.[18]

Contracts with exchange rate indexation of loans may involve risk for consumers, since consumers usually have their income in the national currency and are therefore not prepared to react to fluctuation in the value of other currencies. Furthermore, consumers might not have the ability to assess the risk involved in such contracts.

Therefore, the Authority does not contest that the aim of protecting consumers can serve as a justification ground when it comes to restrictions on offering certain high risk financial products to individuals. A total ban on the granting of such loans can, however, not be seen as a proportionate measure to protect that aim. Iceland could introduce other less restrictive measures to protect consumers from the risk that exchange rate indexed loans may involve. Such measures could include informing the consumers in an adequate and clear manner about the risks involved before contracting a loan with an exchange rate indexation, or possibly granting the consumers a right to retract, within a certain time period, from a signed loan contract.

In this context, the Authority wishes to point out that, in general, rules aiming at ensuring consumer protection relate to, *inter alia*, the advertising and marketing of credit products,

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[15] See *e.g.* C-112/05 *Commission* v *Germany* [2007] ECR I-8995, paragraph 53.
[16] See *e.g.* Cases E-1/03 *EFTA Surveillance Authority* v *Iceland* EFTA Court Report 2003 p. 143, paragraph 30; C-34/98 *Commission* v *France* [2000] ECR I-995, paragraph 49; C-169/98 *Commission* v *France* [2000] ECR I-1049, paragraph 46 and C-49/89 *Corsica Ferries France* [1989] ECR-4441, paragraph 8;
[17] Case C-384/93, *Alpine Investment* vs *Minister van Financien*, [1995] ECR I-01141.
[18] See *e.g.* C-55/94 *Gebhard,* [1995] ECR I-4165, paragraph 37.

adequate and transparent pre-contractual information about offers and related risks, as well as thorough creditworthiness assessments[19].

It should further be noticed that Article 14(2) of Act No 38/2001 provides that loan agreements may be indexed to both domestic and foreign stock price indices. The Court of Justice has held that "*it must be recalled that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner*".[20] The Icelandic Government has not presented the Authority with any information indicating that, given the possible fluctuations of such indices, allowing this type of indexation entails significantly less risks for consumers than exchange rate indexation. Therefore, the Authority considers that in any event the Icelandic legislation is inconsistent with regard to the pursuit of the objective of consumer protection.

The conclusion above, that the Icelandic legislation is not compatible with the principle of proportionality applies *a fortiori* with regard to its application to legal persons. Contrary to the situation relating to consumers, legal persons have the necessary means and resources to be able to adequately assess any risks involved when considering contracting a loan with an exchange rate indexation.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Iceland the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by maintaining in force a total ban on the granting of exchange rate indexed loans in ISK, Iceland has failed to fulfil its obligation arising from Article 40 of the Agreement on the European Economic Area.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Iceland to take the measures necessary to comply with this reasoned opinion within *two months* following notification thereof.

Done at Brussels, 22 May 2013
For the EFTA Surveillance Authority

Sabine Monauni-Tömördy
College Member

Xavier Lewis
Director

[19] For additional information, see the EC Commission's Staff Working Paper accompanying the European Parliament's and Council's proposal for a Directive on credit arrangements relating to residential property, SEC(2011) 355 final of 31.3.2011, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0355:FIN:EN:PDF

[20] Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 55. See also Case C-500/06 *Corporación Dermoestéticas* [2008] ECR I-5785, paragraph 39.

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Reykjavík July 15, 2013
Reference: FJR12090287/17.4.2

Subject: Response to the Authority's Reasoned Opinion No. 195/13/COL.

Reference is made to the Authority's Reasoned Opinion No. 195/13/COL of 22 May 2013.

Please find enclosed comments and information from the Icelandic authorities.

On behalf of the Minister

Eiríkur Áki Eggertsson

Hafdís Ólafsdóttir

In response to a reasoned opinion regarding a ban on the granting of exchange rate indexed loans in ISK.

Reference is made to the EFTA Surveillance Authority's (the Authority) reasoned opinion dated 22 May 2013 as well as previous exchanges with the Authority on the matter as described in the section on Correspondence.

1. Introduction

The Authority is of the opinion that a total ban on exchange rate-indexed ISK loans is not compatible with Article 40 of the EEA Agreement since it is liable to restrict trade within the meaning of the rules on free movement of capital. In the first place the Authority considers that the ban restricts trade as it potentially limits the ability of Icelandic financial institutions to finance themselves in other currencies than ISK. Secondly the Authority is of the view that the ban cannot be seen as justified although it recognizes the right of the Icelandic state to protect consumers up to a certain point.

Following conclusions can be drawn from the Authority's opinion:

- The total ban on exchange rate-indexed loans is a non-discriminatory measure, however liable to restrict trade. Furthermore the dispute appears to revolve around Icelandic financial institutions challenging the ban on the grounds of Article 40 EEA concerning the free movement of capital.
- The national measure in question can be considered compatible with the EEA Agreement if applied in a non-discriminatory manner in favor of public interests and if it satisfies the test of proportionality. With regard to national interests that could justify a restriction under Article 40 EEA, the Authority only makes reference to the protection of consumers.

2. The ban on exchange rate-indexed ISK loans and Article 40 of the EEA.

The Government maintains its earlier position and submits that the ban is not caught by Article 40 EEA.

The Authority points out in its reasoned opinion that an exchange rate-indexed loan is not a loan granted in foreign currency but a loan granted in ISK. The Authority is also aware that it remains lawful to grant loans in foreign currency but does not find that fact crucial for the assessment of whether the ban at stake constitutes a restriction. It concludes *"that any restriction on the fundamental freedoms, however minor they might be are prohibited unless they are justified".*

The Authority's understanding appears to be grounded on the assumption that the domestic currency is in itself liable to restrict trade and that exchange rate-indexation is intended to mitigate the transaction cost associated with international exchange. By transferring the exchange rate risk to borrowers the Icelandic experience however shows that financial institutions have been able to offer loans with interest rates significantly below the interest rates on domestic loans. Indexation may

therefore be perceived as an unquantifiable charge that relates to the pricing of the domestic currency.[1]

In line with the Authority's reasoning the Government finds that the difference between an exchange rate-indexed ISK loan and a loan granted in foreign currency is of significance. First, a loan in foreign currency would normally entail that the borrower would receive foreign currency which under normal circumstances would be used to invest in foreign nominated assets or as a part of a hedge strategy. These principles do not apply to exchange rate-indexed ISK loans. Thus, it may be argued that there is a principle distinction between the nature of the two financial instruments and the risks imposed. Second, Iceland enjoys a monetary autonomy and the primary object of the monetary policy is to maintain and preserve price stability. With regard to the target of keeping inflation down and a long experience of economic instability in Iceland and currency depreciation, it cannot in principle be considered irrational to prohibit exchange rate-indexation of loans nominated in the domestic currency but allowing such loans to be price indexed. It is also evident that the coordination of economic and monetary policy is not seen as an integral part of the EEA-agreement as within the EU which underlines the fact that the competences in these policy areas rest with the Icelandic state.

A recent judgment by the ECJ in *Volksbank România*[2] might indicate, contrary to what the Authority claims, that a national law that prohibits credit institutions from levying certain bank charges may be considered too uncertain and indirect to restrict trade. That judgment seems to be of more relevance than *Trummer and Mayer*[3], which the Authority bases its argument on, also keeping in mind that the former judgment was issued after the international financial crisis that has caused an increased awareness of the risks associated with lending in foreign currencies.[4]

The matter in *Volksbank România* concerned a provision of Romanian law that restricted the right of credit institutions to impose charges in consumer credit agreements only to those charges expressly permitted by the law. A foreign credit institution offering its service in Romania that had demanded a certain risk charge from its customers argued that the ban was contrary to the Treaty rules on free movement. The Court rejected the argument by pointing out *"that whilst the national legislation at issue in the main proceedings limits the number of bank charges that can be included in credit agreements, it does not impose requirements curbing the rate of charge, since no limit is laid down as regards the amount of the charges that are authorized by the national provision at issue in the main proceedings or as regards interest rates in general."* The Court also based its findings on the assumption that mere disparities between national laws of the Member States to providers of similar services were not enough to trigger a restriction to the fundamental freedoms.[5]

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[1] See on a related matter the Authority's response, dated 25th February 2013, to a letter from Prof. Mendez Pinedo concerning the legality of price-indexation of consumer loan agreements under EEA law on consumer protection, question 6.

[2] C-602/10 *SC Volksbank România*

[3] C-222/97 *Trummer and Mayer*

[4] European Systemic Risk Board *„Recommendation of the European Systemic Risk Board" of 21 September 2011 on lending in foreign currencies (ESRB/2011/1)"*

[5] See paragraph 74 of the judgment: *„As to determining the circumstances in which a measure that is applicable without distinction to all credit institutions supplying services in Romania, such as the prohibition on levying certain bank charges at issue here, may fall within that concept, it must be borne in mind that rules of a Member State do not constitute a restriction within the meaning of the Treaty solely by virtue of the fact that*

The Icelandic Government recalls that as a matter of principle it is not prohibited to grant loans in foreign currency in Iceland and that there are no limits in national legislation as regards interest rates in general apart from an interim provision in the Act on Consumer Loans, No. 121/1994, concerning the total cost of credit.[6] Accordingly it is not possible to concur with the Authority's arguments that a total ban on exchange rate-indexed ISK loans is caught by Article 40 EEA.[7] The Government recalls that before the onset of the financial crisis in 2008, Icelandic financial institutions encouraged foreign risk taking by Icelandic households and businesses that had no income or collateral in foreign currencies.[8]

3. Justifications for the ban on exchange rate-indexed ISK loans.

The Government maintains its earlier position and provides that if caught by Article 40 EEA, the ban is a justified restriction to the free movement of capital.

The Authority's reasoned opinion indicates that the only acceptable solution in order to limit access to exchange rate-indexed ISK loans is to confine such restrictions to consumers, preferably by informing them in an adequate and clear manner, that in many ways resembles the terms laid out in the Directive 2008/48/EB.

In its earlier replies to the Authority the Government has provided evidence on the risk posed by foreign lending, in particular for those Icelandic firms and households that do not enjoy income in the relevant foreign currencies.

The Authority, however, appears to consider that the justification for the ban is unconvincing, i.a. due to the fact that the Icelandic law do not prohibit stock price indices indexed loans, not to mention loans dominated in foreign currency. Consequently the Authority is of the opinion that the legislation is not consistent and rather unsuitable with regard to the objectives pursued. The Government notes that stock price indexing appears in the first place to be designed for specific type of financing, unrelated to normal loans to households and operating companies. Second, that type of indexing is relatively unheard of in Iceland and has not posed a problem on any scale compared with exchange rate-indexed ISK loans. Finally it does not seem to add any relevance to the Authority's

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other Member States apply less strict, or economically more favourable, rules to providers of similar services established in their territory (see, inter alia Commission v Italy, paragraph 49)."

[6] The provision entered into force in the middle of April 2013 and will be maintained in a new act on consumer loans, No. 35/2013, replacing the existing one in the beginning of November 2013.

[7] It should also be observed that there are doubts about whether the ban is *"total"*. According to the Supreme Court of Iceland it is a well-established principle in Iceland that it is forbidden to grant indexed ISK loans in Iceland unless expressly permitted by the law, at least and so long as the lender cannot provide extensive evidence that such loan was granted for the benefit of the debtor. See for instances judgements of the Supreme Court in cases Hrd. nr. 604/2010 from 14 February 2010 and Hrd. 155/2011 from 9. June 2011.

[8] With regard to households see for instance a Working Paper of the Central Bank of Iceland *"Households's position in the financial crisis in Iceland"* by Thorvardur Tjörvi Ólafsson and Karen Áslaug Vignisdóttir, June 2012. See the following text on page 10: *„Indexation to foreign currencies and direct foreign-denominated borrowing increased rapidly in the years leading up to the financial crisis, especially from early 2007, exposing those households' debt levels and debt service to fluctuations in the exchange rate. Consequently, households' currency risk increased rapidly, a feature encouraged by some of the banks themselves, whose implicit credit risk rose accordingly. This composition of debt proved extremely unfortunate, as Iceland experienced the largest currency depreciation of any advanced economy during the crisis."*

argument to point to other indexes that may or may not be exemplary as legislation. As regards the difference between loans in foreign currency and exchange rate-indexed ISK loans we have pointed above the different characteristics and the risks entailed.

The Authority's arguments in this regard have been discussed by the Court in other areas of the law, including those linked to the gambling industry.[9] Tendency of individual Contracting Parties to restrict such practices are well known and recognized because of the individual and social consequences resulting from them. Comparison with the gambling industry becomes clear when foreign lending is directed at firms and households that do not have income in foreign currency.

The Government is of the opinion that in spite of the arguments made by the Authority, and referred above, there are very important justifications for restricting lending and borrowing in domestic currency while the principal of the obligation is adjusted to currency fluctuations and economies of other countries. The arguments are macro-economical as well as related to consumer protection. Most importantly those arguments relate in particular to this type of lending, not to normal loans in foreign currency or loans that may be linked to stock price index.

At the annual package meeting in Reykjavík on 6 June 2013 the Government emphasized that in order to reduce currency risk within the financial system the focus is not limited to the protection of consumers but is also directed at firms and public entities. The attention of the Authority was drawn to the Recommendation of the European Systemic Risk Board of 21 September 2011 on lending in foreign currencies where national supervisory authorities are encouraged to *"allow foreign currency loans to be granted only to borrowers that demonstrate their creditworthiness, taking into account the repayment structure of the loan and the borrower's capacity to withstand adverse shocks in exchange rates and in the foreign interest rates;"*.

The Government does not contest that exchange rate-indexed ISK loans and loans in foreign currency carry some similarities as regards the currency risk involved. The Government is also aware that there might be compelling reasons for placing similar conditions for borrowing in both cases. However, one cannot ignore the fact that, as the Authority has put it, *"an exchange rate-indexed loan is not a loan granted in foreign currency but a loan granted in ISK."* According to the Supreme Court of Iceland it is a well-established principle in Iceland that it is forbidden to grant indexed ISK loans in Iceland unless expressly permitted by the law, at least and so long as the lender cannot provide extensive evidence that such loan was granted for the benefit of the debtor.[10]

The judgments of the Supreme Court since mid-2010 indicate that the distinction between exchange rate-indexed ISK loans on the one hand and loans granted in foreign currency on the other can in some cases be blurry and unfortunately it has taken some financial institution a tremendous amount of time to classify loans that were granted prior to the crash. According to the Court's classification

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[9] E-3/06 *Ladbrokes Ltd.* See paragraph 51: *„However, the national court must consider whether the State takes, facilitates or tolerates other measures which run counter to the objectives pursued by the legislation at issue, see Gaming Machines, at paragraph 43. Such inconsistencies may lead to the legislation at issue being unsuitable for achieving the intended objectives. It is for the State to demonstrate that its measures in the field of games of chance fulfil these requirements, see paragraph 42 above."*

[10] See for instances judgements of the Supreme Court in cases Hrd. nr. 604/2010 from 14 February 2010 and Hrd. 155/2011 from 9. June 2011.

criteria the distinguishing factor seems to be dependent on the terms of the agreement, in particular those that refer to the amount of the principal and interest rate.

4. A revision is underway.

The Cabinet approved on 28 June 2013 a memorandum of the Minister of Finance and Economic Affairs proposing a revision of the ban on exchange rate-indexed loans. For that purpose it has been decided to establish a working group led by the ministry as well as being composed of representatives of the Ministry of the Interior, the Central Bank and the Financial Supervisory Authority (the FSA). The committee is expected to begin its work next fall and will presumably consult various stakeholders during its term. A proposal for legal amendments might follow and be presented to the parliament before a general deadline to submit proposals expires in the beginning of April 2014.[11]

The committee is expected to examine under what conditions individuals, firms and public entities, including municipalities, shall be permitted to engage in foreign borrowing and whether and to what extent it is desirable to apply similar rules to the granting of loans dominated in foreign currency and exchange rate-indexed ISK loans. It is important to realize that the outcome is likely to restrict trade further than according to current state of affairs.

The revision is viewed as an integral part of a wider preparatory work that aims to strengthen the macro prudential framework in Iceland and provide for certain prudential rules that the Central Bank considers necessary for the successful removal of the currency controls. Based on this work a legislative bill has already been proposed by the Minister of Finance and Economic Affairs and passed through the parliament in order to strengthen the bank's authority to gather information and to adopt rules concerning the liquidity ratio and foreign exchange balance of financial institutions.[12]

Furthermore, the FSA has stated that it views exchange rate-indexed ISK loans and foreign currency loans to individuals or legal entities as high risk assets, as long as the debtor does not have income or collateral in foreign currencies.

Final remarks

The Government invites the Authority to take account of the information provided by this letter, in particular concerning the planned revision of the current limitations on exchange rate-indexed ISK loans, in the handling of the case.

The Government expresses its will to provide the Authority with further information as may be needed.

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[11] Article 37 of the Standing Orders of Alþingi, 55/1991.

[12] This act was adopted 5 July 2013: http://www.althingi.is/altext/142/s/0089.html