MINISTRY FOR FOREIGN
AFFAIRS OF ICELAND

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS ON THE APPLICATION FOR LEAVE TO INTERVENE, LODGED BY THE EUROPEAN COMMISSION

Submitted pursuant to Article 36 of the Statute and
Article 89 of the Rules of Procedure of the EFTA Court, by the

GOVERNMENT OF ICELAND

Represented by its Agent Kristján Andri Stefánsson

in

Case E-16/11

EFTA Surveillance Authority

v

Iceland

The Government of Iceland has the honour to submit the following written observations:

I. INTRODUCTION

1. By writ of 27 March 2012 the European Commission applied for leave to intervene in the present case – a direct action lodged by the EFTA Surveillance Authority ("the Authority"), under which the Authority seeks a declaration that Iceland has not fulfilled its obligations under Directive 94/19 on deposit-guarantee schemes and/or Article 4 of the EEA Agreement.

2. In recent orders handed down by the President of the European Court of Justice, the EFTA States and the Authority have been denied the right to intervene before the ECJ in similar circumstances.

3. Given those recent orders the Government finds it appropriate to deal with the request of the European Commission more extensively than it would otherwise do.

4. The Government shall below first recall the Final Act to the EEA Agreement which provides the common platform for the rules governing intervention before the EFTA Court and its sister courts in matters pertaining to the EEA Agreement. The Government shall then deal with the rules enacted by the Union to give effect to the Final Act and the practice developed by the ECJ. Next, the Government shall deal with the rules enacted on the EFTA side and the practice of the EFTA Court. Upon that follow the discussion and the conclusion. The crucial matter for the Government is to have the opportunity to react in writing to the position taken by the Commission in the case, no matter whether it takes the form of an intervention under Article 36 of the Statute or written observations under Article 20 of the Statute.

II. THE FINAL ACT TO THE EEA AGREEMENT

5. Opinion 1/91 of the ECJ made impossible a common institutional framework for the EEA Agreement. The solution of the Contracting Parties was the so called two pillar structure, with various mechanisms to ensure homogeneity.

6. One such mechanism was to ensure that bodies and States from one pillar can participate in court proceedings before the judicial organ in the other pillar.

7. Thus, in the Final Act to the EEA Agreement, the then European Community made the following declaration on the rights of the EFTA States before the ECJ:[1]

   1. In order to reinforce the legal homogeneity within the EEA through the opening of intervention possibilities for EFTA States and the EFTA Surveillance Authority before the EC Court of Justice, the Community will amend Articles 20 and 37 of the Statute of the Court of Justice and the Court of First Instance of the European Communities.

8. As can be seen from the text above, the objective of opening of intervention possibilities is to reinforce legal homogeneity. That objective pleads in favour of opening of the intervention possibilities to all cases where EU provisions similar to the provisions of the EEA Agreement are at issue; those are the cases where questions of homogeneity can arise.

III. EU PROVISIONS AND PRACTICE

9. Further to the conclusion of the EEA Agreement, the EU altered the provisions of the Statute of the ECJ mentioned above. Article 20 of the Statute was altered so as to allow EFTA States and the Authority to present observations in preliminary references as long as the subject matter falls within the scope of the EEA Agreement.

[1] Declaration 27 in the Final Act, OJ 1994 L 1/567.

10. As concerns the possibility of intervention in direct actions, the relevant provision - Article 37 at the time, now Article 40 of the Statute – was altered so that it now reads as follows, as far as material:

Member States and institutions of the Union may intervene in cases before the Court of Justice.

The same right shall be open to bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court. Natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union [institutional cases].

Without prejudice to the second paragraph, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority referred to in that Agreement, may intervene in cases before the Court where one of the fields of application of that Agreement is concerned.

11. On the basis of this provision, Norway was allowed to intervene twice in an *institutional case, i.e. a direct action between a Member State/institution and/or an institution/Member State.* Those cases were Case C-14/96 *Parliament* v *Commission*, in which Norway intervened in support of the Parliament, and Case C-377/98 *Netherlands* v *Parliament and Council,* in which Norway intervened in support of the Netherlands.[2] Having regard to the ulterior developments in the case law of the ECJ, it is worth remarking that in the latter case, the intervention of Norway was disputed, not because Norway is an EFTA State but because the aim of its intervention was allegedly not sufficiently clear.

12. However, in orders from mid 2010 the President of ECJ reversed this state of law.[3] The President held that Article 40(3) of the Statute, quoted above, could not be interpreted so as to allow EFTA States and the Authority to intervene in

[2] See respectively order of the President of the ECJ of 10 July 2006 in Case C-14/06 *Parliament* v *Commission,* not reported but available of the website of the ECJ, and judgment of 9 October 2001in Case C.377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7149.

[3] Respectively order of the President of the ECJ of 15 July 2010 in Case C-493/09 *Commission* v *Portugal,* not reported, and order of the President of the ECJ of 1 October 2010 in Case C-542/09 *Commission* v *Netherlands,* not reported.

institutional cases, from which they are thus excluded by virtue of Article 40(2) of the Statute. The President thus gave much importance to the opening words of Article 40(3) of the Statute: *'Without prejudice to the second paragraph...'*

13. Thus EFTA States and the Authority cannot intervene in institutional cases before the ECJ; that decreases the possibilities for ensuring homogeneity within the EEA/ EFTA States and the Authority cannot even intervene in an institutional case that concerns solely the EEA Agreement.

14. This is the current state of law before the ECJ.

IV. EFTA PROVISIONS AND PRACTICE

15. Before the EFTA Court the EU Member States and the Commission are allowed to lodge observations in procedures for advisory opinions, i.e. the parallel to the procedures before the ECJ concerning preliminary references. As concerns this type of procedure, there is thus procedural homogeneity between the situation before the ECJ and the EFTA Court.

16. In contrast to the situation before the ECJ, the rules applicable to direct actions before the EFTA Court, i.e. also institutional cases, allow for the lodging of observations, cf. Article 20 of the Statute. That means that States, the Commission and the Authority can be heard in an institutional case without having to formally intervene; before the ECJ they can only be heard by formally intervening. Thus, in this aspect there is no procedural homogeneity between the situation before the ECJ and the EFTA Court.

17. As concerns the intervention, Article 36 of the Statute of the EFTA Court is worded as follows, as far as material:

    Any EFTA State, the EFTA Surveillance Authority, the Community and the EC Commission may intervene in cases before the Court.

The same right shall be open to any person establishing an interest in the result of any case submitted to the Court, save in cases between EFTA States or between EFTA States and the EFTA Surveillance Authority.

18. The wording of this provision implies that the States, the Commission and the Authority have an unconditional right to intervene, no matter whether the case is institutional or not.

19. On the basis of that provision the EFTA Court has allowed for instance Denmark to intervene in an institutional case, namely a direct action brought by the Authority against Norway.[4]

20. Thus, under the current state of law an EU State or the European Commission can intervene before the EFTA Court in an institutional case, while before the ECJ an EFTA State and the Authority are barred from doing so. In other words, there is no procedural homogeneity between the situation before the ECJ and the situation before the EFTA Court.

21. The issue in this case is whether the EFTA Court should align its practice to the one that results from the orders of the President of the ECJ, from mid 2010, in order to ensure procedural homogeneity.

V. DISCUSSION AND CONCLUSION

22. In its case law, the EFTA Court has given great weight to procedural homogeneity although the applicable texts do not oblige the Court to do so. In Case E-13/10 the Court stated:

The Court has repeatedly held, for the sake of procedural homogeneity, that although it is not required by Article 3(1) SCA to follow the reasoning of the ECJ when interpreting the main part of that Agreement, the reasoning which led that Court to its interpretations of expressions in Union law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court (see, inter alia, Case E-2/02 Bellona [2003] EFTA Ct. Rep. 52, paragraph

[4] Case E-3/00 *EFTA Surveillance Authority* v *Norway* [2000 - 2001] EFTA Court Reports 73.

39, and Joined Cases E-5/04, E-6/04 and E-7/04 Fesil and Finnfjord and Others [2005] EFTA Ct. Rep. 117, paragraph 53). This principle also applies to the issue of locus standi to bring an action for annulment (see Case E-5/07 Private Barnehagers Landsforbund [2008] EFTA Ct. Rep. 62, paragraph 47, and the case-law cited). [5]

23. Thus, the principle of procedural homogeneity pleads in favour of treating the application of the Commission for leave to intervene in the same manner as an application of the Authority would be treated by the ECJ in a case like this, i.e. it should be dismissed.

24. Moreover, it must be recalled that the fourth recital of the Preamble to the EEA Agreement states (emphasis added):

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

25. Considerations as to the equality of the Contracting Parties and reciprocity in their rights and obligations appear also to plead in favour of dismissing the Commission's application.

26. On the other hand, a number of considerations plead in favour of accepting the Commission's application.

27. Firstly, the recent orders of the President of the ECJ appear attributable to an unclear wording of the relevant provision on the EU side, namely the opening words of Article 40(3) of the Statute of the ECJ: *'Without prejudice to the preceding paragraph..'*. That unclearness is not reproduced in the wording of the relevant provision on the EFTA side. Article 36 of the Statute of the EFTA Court appears unconditional: *'Any EFTA State...and the EC Commission may intervene in cases before the Court.'*

[5] Order of 31 January 2011 in Case E-13/10 *Aleris Ungplan* v *EFTA Surveillance Authority*, not yet reported, paragraph 24. See also order of the President of 29 February 2012 in Case E-14/11 *Schenker* v *EFTA Surveillance Authority,* not yet reported, paragraph 14.

28. Secondly, the orders of the President of the ECJ date from 2010. If the EFTA States wanted to alter the rules before the EFTA Court to be in line with the state of law resulting from those orders, the EFTA States are free to do so; it is recalled that the relevant provision forms part of the Surveillance and Court Agreement, concluded solely amongst the EFTA States.

29. Thirdly, it is not clear that those orders of the President of the ECJ are an example to follow. The Government observes that the orders are detrimental to the EEA legal order in as far as they decrease the possibilities for ensuring homogeneity, and they run against the intention of the Contracting Parties.

30. Fourthly, allowing the intervention may improve the procedural situation of the party in the proceedings, not supported by the intervention:

31. If the EFTA Court refuses the application to intervene in the present case, the consequence is *not* the same as the one that applies before the ECJ, where there is no other possibility to be heard for the would-have-been intervener. Before the EFTA Court the Commission will, presumably, still be allowed to lodge observations, while before the ECJ such a possibility does not exist. Thus, the parties before the EFTA Court will still presumably be confronted with the opinions of the would-have-been intervener, namely in the form of written observations.

32. The parties before the EFTA Court have the possibility to reply in writing to a statement of intervention. As the Court applies the rules on written observations, the parties have, however, presumably no possibility to comment in writing on those observations. The procedure before the Court is overwhelmingly written; the normal time allocated for a party's oral pleadings is 30 minutes. Thus, it is a drawback for a party not to be able to reply in writing to the observations of, e.g. the Commission. Consequently, it may enhance a party's procedural situation to allow the intervention.

33. If the Court were to apply the rules on observations differently so as to allow the parties to comment in writing on the observations, dismissing the application for intervention pose no such problems.

34. The Government invites the Court to re-consider the manner in which it applies those rules. The Government is unaware of any provision that dictates that the Court must exclude comments in writing on observations. The Government is equally unaware of any need of judicial nature that commands that the parties cannot comment in writing on the observations. On the contrary, such comments seem to improve the balance of proceedings before the Court. The mechanism of lodging written observations stems from the procedure for preliminary references before the ECJ and has from there found its way into the procedure for advisory opinions before the EFTA Court. The exclusion of comments in writing on observations in those procedures follows largely from the nature of those procedures, in particular the need to ensure expediency as the referral of questions to Luxembourg is an incident in an on-going national court procedure. The same need is not present in a direct action like the one at hand.

35. Moreover, in a direct action like the present one the parties should have the opportunity to comment in writing on observations, as the observations may include advocacy in favour or against one of the parties. The same considerations which allow a party to respond in writing to an intervention, should allow it to comment in writing on written observations in direct actions.

36. Thus, the manner in which the Court applies the rules on observations, i.e. excluding comments in writing from the parties on the observations, entails that as a matter of principle, the procedural situation of the EFTA States and the Authority may be better served by allowing an intervention which the principles of procedural homogeneity, equality and reciprocity oppose.

37. Dismissing the application of the Commission would thus be more appropriate *if* the Government would have the opportunity to comment in writing on the advocacy that the Commission will presumably lodge in the form of written observations once it has been denied intervention. If that is not the case, allowing the Commission's intervention would appear more appropriate.

38. The Government invites the EFTA Court to decide on the Commission's application on the basis of the above considerations. Furthermore, the Government

requests an opportunity to comment in writing to all written observations which may be submitted in the case under Article 20 of the Statute.

Reykjavík, 13 April 2012

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