ECJ Rules on Effect of Icelandic Legislative Moratorium on Payments in France

On 24 October 2013, the Court of Justice of the European Union delivered its judgment in LBI hf, formerly Landsbanki Islands hf v Kepler Capital Markets SA and Frédéric Giraux (case C-85/12).

The Court issued the following press release:

The moratorium on payments granted to the bank LBI by the Icelandic authorities produces in France the effects which the Icelandic legislation confers on it

The directive on the reorganisation and winding up of credit institutions does not preclude that the effects of that moratorium retroactively cover interim protective measures in France

The directive on the reorganisation and winding up of credit institutions provides that, in the event of insolvency of a credit institution that has branches in other Member States, the reorganisation measures and the winding-up proceedings are part of a single insolvency procedure in the Member State where the institution has its registered office (known as the home Member State). Therefore, in principle, such measures are subject to a single law on insolvency and they are applied according to the law of the home Member State and are effective in accordance with that law throughout the EU, without any further formalities. For that purpose, States party to the Agreement on the European Economic Area, like Iceland, are treated in the same way as Member States of the EU.

In the context of the collapse of the financial system in Iceland following the international financial crisis in 2008, the Icelandic legislature adopted a series of reorganisation measures for various financial institutions established in that country. In particular, a Law of 13 November 20082, first, prohibited proceedings from being brought against financial institutions under a moratorium on payments and, second, ordered the suspension of proceedings pending. By a Law of 15 April 20093, the Icelandic legislature placed financial institutions under a

moratorium subject to transitional rules seeking to apply a specific winding-up scheme to their situation, without them being actually wound-up before the expiry of that moratorium.

LBI hf (formerly Landsbanki Islands hf) is an Icelandic credit institution to which a moratorium on payments was granted on 5 December 2008 by the District Court, Reykjavik. Shortly beforehand, on 10 November 2008, LBI was the subject of two attachment orders in France at the request of a creditor residing in that Member State. LBI contested those two attachments orders before the French courts and claimed that the directive made the reorganisation measures adopted in Iceland directly enforceable against its French creditor. In addition, the District Court, Reykjavik declared, on 22 November 2010, the opening of winding-up proceedings against LBI.

Against that background, the Cour de cassation (Court of cassation) (France), which considered that case at last instance, referred to the Court of Justice the question whether the reorganisation or winding-up measures resulting from the transitional rules in the Law of 15 April 2009 are also covered by the directive, the aim of which is the mutual recognition of reorganisation measures and of winding-up proceedings taken by the administrative and judicial authorities. Moreover, the French court seeks to ascertain whether the directive precludes the retroactive application of the effects of a moratorium on interim protective measures adopted in another Member State before it was declared.

In today’s judgment, the Court notes, first, that the administrative and judicial authorities of the home Member State are alone empowered to decide on the implementation of reorganisation measures for a credit institution and on the opening of winding-up proceedings against it. Accordingly, only the measures decided by those authorities are the subject, under the directive, of recognition in the other Member States, with the effects which the law of the home Member State confers on them.

However, the legislation of the home Member State relating to the reorganisation and winding-up of credit institutions can, in principle, take effect in the other Member States only through specific measures taken by the administrative and judicial authorities of that Member State against a credit institution.

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As regards the transitional rules of the Law of 15 April 2009, the Court states that, by adopting those rules, the **Icelandic legislature did not order, as such, the winding-up of the credit institutions placed under a moratorium**, but conferred certain effects linked to winding-up proceedings on the moratoria which were in force on a specific date. Likewise, it follows from those transitional provisions that, unless a judicial decision has granted or extended a moratorium for the benefit of a credit institution before that date, they cannot produce any effects. Accordingly, **those rules take effect not directly but through a reorganisation measure granted by a judicial authority** for a credit institution. Therefore the moratorium granted to LBI is capable of producing, under the directive, the effects which the Icelandic legislation confers on it in the EU Member States.

As regards the question whether the transitional rules must be able to form the subject of an action in order to take effect in the EU Member States, the Court notes that the directive establishes a system of mutual recognition of national reorganisation and winding-up measures, without seeking to harmonise national legislation on that subject. It points out that the directive does not make the recognition of reorganisation and winding-up measures subject to a condition that it be possible to bring an action against them. Similarly, the law of a Member State may not make that recognition subject to a condition of that type for which its national rules may provide.

Next, as regards the question whether the directive precludes the retroactive application of the effects of a moratorium on interim protective measures adopted in another Member State, the Court observes that the effects of

reorganisation measures and winding-up proceedings are, in principle, governed by the law of the home Member State. That general rule does not, however, apply to ‘lawsuits pending’ which are governed by the law of the Member State in which the lawsuit is pending. As regards the scope of that exception, the Court states that **the words ‘lawsuits pending’ cover only proceedings on the substance and that individual enforcement actions arising from those lawsuits remain subject to the legislation of the home Member State**. In that respect, the Court states that the **interim protective measures taken in France** constitute individual enforcement actions and, therefore, the effects of the moratorium granted to LBI in Iceland on those interim protective measures **are governed by Icelandic law**.

Moreover, the fact that those measures were adopted before the moratorium at issue in the main proceedings had been granted to LBI cannot invalidate that conclusion as **it is Icelandic law which also governs**, under the directive, **its temporal effects**. The directive does not prevent a reorganisation measure, such as the moratorium, from having retroactive effect.