JUDGMENT OF THE COURT

22 November 2012[*]

(Directive 94/19/EC – Directive 2000/12/EC – Directive 2006/48/EC – Admissibility – National legislation adopting provisions of EEA law to regulate purely internal situations – Notion of deposit – Interbank loans – Mutual recognition of an authorisation for the taking up and pursuit of the business of credit institutions – Applicability of decisions of the EEA Joint Committee)

In Case E-17/11,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Hæstiréttur Íslands (Supreme Court of Iceland), in the case of

Aresbank SA

and

Landsbankinn hf., Fjármálaeftirlitið (the Financial Supervisory Authority)

and the Icelandic State

concerning the interpretation of the term deposit in Article 1(1) of Council Directive 94/19/EC on deposit-guarantee schemes,

THE COURT,

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

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

[*] Language of the request: Icelandic.

- Aresbank SA ("Aresbank" or "the appellant"), represented by Bjarki H. Diego, Supreme Court Attorney;
- Landsbankinn h.f. ("Landsbankinn"), represented by Borgar Þór Einarsson, Attorney at Law, Counsel, and Grímur Sigurðarson, Attorney at Law, Co-Counsel;
- the Icelandic Financial Supervisory Authority ("FME") and the Icelandic State, represented by Jóhannes Karl Sveinsson, Supreme Court Attorney;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Florence Simonetti, Deputy Director, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Enrico Traversa, legal advisor, and Albert Nijenhuis, member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Aresbank, represented by Baldvin Björn Haraldsson, Attorney at Law; Landsbankinn, represented by Borgar Þór Einarsson and Grímur Sigurðarson; FME, represented by Jóhannes Karl Sveinsson, Þóra Margrét Hjaltested and Arnar Þór Sæþórsson; ESA, represented by Xavier Lewis and Florence Simonetti; and the Commission, represented by Enrico Traversa and Albert Nijenhuis, at the hearing on 20 June 2012,

gives the following

Judgment

I Legal context

EEA law

Directive 94/19/EC

1 Council Directive 94/19/EC on deposit-guarantee schemes ("the Directive" or "Directive 94/19") (OJ 1994 L 135, p. 5) was incorporated into the EEA Agreement by Decision No 18/94 of the EEA Joint Committee of 28 October 1994, amending Annex IX to the EEA Agreement. It entered into force on 1 July 1995.

2 Article 1 of Directive 94/19/EC provides as follows:

> *For the purposes of this Directive:*
>
> *1. "deposit" shall mean any credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution must repay under the legal and*

contractual conditions applicable, and any debt evidenced by a certificate issued by a credit institution.

…

For the purpose of calculating a credit balance, Member States shall apply the rules and regulations relating to set-off and counterclaims according to the legal and contractual conditions applicable to a deposit.

…

4. "credit institution" shall mean an undertaking the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account.

3 Article 2 of Directive 94/19/EC provides as follows:

The following shall be excluded from any repayment by guarantee schemes:

- subject to Article 8(3), deposits made by other credit institutions on their own behalf and for their own account,

...

4 Article 7(2) of Directive 94/19/EC provides as follows:

Member States may provide that certain depositors or deposits shall be excluded from guarantee or shall be granted a lower level of guarantee. Those exclusions are listed in Annex I.

5 Annex I to Directive 94/19/EC provides as follows:

List of exclusions referred to in Article 7(2)

1. Deposits by financial institutions as defined in Article 1(6) of Directive 89/646/EEC.

…

Directives 2000/12/EC and 2006/48/EC

6 By Decision No 15/2001 of 28 February 2001 of the EEA Joint Committee (OJ 2001 L 117, p. 13) ("Decision 15/2001"), Directive 89/646/EEC was replaced by Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1) ("Directive 2000/12"). No constitutional requirements were indicated and Decision 15/2001 entered into force on 1 March 2001.

7 Directive 2000/12 was repealed in the European Community by Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ 2006 L 177, p. 1) ("Directive 2006/48"). Directive 2006/48 entered into force twenty days after its publication in the *Official Journal of the European Union* on 30 June 2006.

8 By Decision No 65/2008 of 6 June 2008 of the EEA Joint Committee (OJ 2008 L 257, p. 27) ("Decision 65/2008"), Directive 2000/12 was replaced by Directive 2006/48. Constitutional requirements were indicated and Decision 65/2008 entered into force on 1 November 2010. According to information available on the EFTA Secretariat website, on 17 February 2009 the Icelandic Government notified a delay having regard to the six-month period specified in Article 103(2) EEA.

9 According to Article 1(1) of Directive 2000/12 and Article 4(1)(a) of Directive 2006/48 a credit institution is:

> *an undertaking the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account.*

10 Article 1(5) of Directive 2000/12 and Article 4(5) of Directive 2006/48 define a financial institution as:

> *an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points 2 to 12 of Annex I.*

11 According to Article 3 of Directive 2000/12 and Article 5 of Directive 2006/48, Member States shall prohibit persons or undertakings that are not credit institutions from carrying on the business of taking deposits or other repayable funds from the public. According to Article 4 of Directive 2000/12 and Article 6 of Directive 2006/48, Member States shall require credit institutions to obtain authorisation before commencing their activities. According to Article 8 of Directive 2000/12 and Article 7 of Directive 2006/48, Member States shall require applications for authorisation to be accompanied by a programme of operations setting out, inter alia, the types of business envisaged and the structural organisation of the institution.

12 Article 14(1) of Directive 2000/12 and Article 17(1) of Directive 2006/48 provide as follows:

> *The competent authorities may withdraw the authorisation granted to a credit institution only where such an institution:*
>
> *(a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased to engage in business for more*

than six months, if the Member State concerned has made no provision for the authorisation to lapse in such cases;

(b) has obtained the authorisation through false statements or any other irregular means;

(c) no longer fulfils the conditions under which authorisation was granted;

(d) no longer possesses sufficient own funds or can no longer be relied on to fulfil its obligations towards its creditors, and in particular no longer provides security for the assets entrusted to it; or

(e) falls within one of the other cases where national law provides for withdrawal of authorisation.

13 Both Annex I to Directive 2000/12 and Annex I to Directive 2006/48 list the activities of credit institutions to which an authorisation has been granted which are subject to mutual recognition. The lists are identical in both directives. Points 2 to 12 are equally applicable to financial institutions.

National law

Act No 98/1999 on Deposit Guarantees and Investor-Compensation Scheme

14 Directive 94/19 was implemented into the Icelandic legal order by Act No 98/1999 on Deposit Guarantees and Investor-Compensation Scheme ("Act 98/1999").

15 According to Article 2 of Act 98/1999, guarantees under the Act are entrusted to a special institute named the Depositors' and Investors' Guarantee Fund (the "Fund"). This is a private foundation which operates in two independent departments, the Deposit Department and the Securities Department, and which have separate finances and accounting.

16 Article 3 of Act 98/1999 lays down which companies must be members of the Fund. According to that article, commercial banks, savings banks, companies providing investment services, and other parties engaging in securities trading pursuant to law and established in Iceland must be members of the Fund. The same applies to any branches of such parties within the EEA.

17 The first paragraph of Article 9 of Act 98/1999 provides as follows:

If, in the opinion of the Financial Supervisory Authority, a Member Company is unable to render payment of the amount of deposits, securities or cash upon a customer's demand for refunding or return thereof in accordance with applicable terms, the Fund shall pay to the customer of the Member Company the amount of his deposit from the Deposit Department and the value of his securities and cash in connection with

securities trading from the Securities Department. The obligation of the Fund to render payment also takes effect if the estate of a Member Company is subjected to bankruptcy proceedings in accordance with the Act on Commercial Banks and Savings Banks and the Act on Securities Trading.

18 The third paragraph of Article 9 of Act 98/1999 provides as follows:

"a deposit" within the meaning of paragraph 1 constitutes credit balance resulting from financial deposits or transfers in normal banking transactions, which a commercial or savings bank is under obligation to refund under existing legal or contractual terms.

19 The sixth paragraph of Article 9 of Act 98/1999 provides as follows:

Deposits, securities and cash of Member Companies [to the Fund] are not covered by the deposit guarantee in the first paragraph of Article 9(1) ….

Act No 161/2002 on Financial Undertakings

20 Article 100a of Act No 161/2002 on Financial Undertakings ("Act 161/2002"), as inserted by Act No 125/2008 on the Authority for Treasury Disbursements due to Unusual Financial Market Circumstances ("Act 125/2008"), authorises FME to assume the powers of the shareholders' meeting of a financial undertaking in order to take decisions on necessary measures, including the authority to restrict the Board's power of decision, to dismiss the Board in part or in its entirety, to take over the financial undertaking's assets, rights and obligations in their entirety or in part, or to dispose of such an undertaking, in its entirety or in part, including the decision to merge it with another undertaking. This provision also allows FME to assign all rights to the extent necessary in such instances.

21 According to Article 103(1) of Act 161/2002, as amended by Act 125/2008, claims for deposits according to the Act on Deposit Guarantees and Investor-Compensation Scheme shall be accorded priority status in the winding up of financial undertakings.

II Facts and procedure

22 In 2008, Aresbank, a Spanish credit institution, transferred a total of EUR 30 000 000 and GBP 7 000 000 to the bank Landsbanki Íslands hf. ("Landsbanki"). The two banks agreed that Landsbanki would repay those funds, plus predetermined interest, on due dates that were fixed in advance.

23 The loans in question were agreed via the SWIFT system. The first loan was agreed on 6 June 2008 and was to run from 10 June 2008, the date on which the funds were transferred to Landsbanki, until 10 December 2008. The second loan was agreed on 7 August 2008 and was to run from 11 August 2008, the date on which the funds were transferred to Landsbanki, to 12 November 2008. The third

loan was agreed on 16 September 2008 and was to run from 18 September 2008, with the funds being transferred on that date, to 18 March 2009.

24 According to the request for an Advisory Opinion, the funds which Aresbank transferred to Landsbanki were not placed in a special account in Aresbank's name. Nor did Landsbanki issue any special documentation to Aresbank for the receipt of the funds. No insurance premiums in relation to those funds were paid to the Depositors' and Investors' Guarantee Fund. The funds in question were entered in the books of Landsbanki as loans.

25 In the proceedings before the national court, Aresbank is seeking repayment of the loans agreed on 6 June 2008 and 7 August 2008.

26 In September and October 2008, great upheaval took place on the global financial markets, which had a profound effect on the operations of Icelandic financial institutions. In those circumstances, the country's three largest commercial banks, Landsbanki, Glitnir banki hf. and Kaupthing banki hf., found themselves incapable of resolving the problems which threatened them.

27 On 7 October 2008, FME assumed the powers of the shareholders' meeting of Landsbanki under Article 100a of Act 161/2002. At the same time, the board of the bank was dismissed and a resolution committee was appointed. A new bank was established on the basis of the one that had collapsed: New Landsbanki Íslands. The new bank later changed its name to Landsbankinn hf. It is one of the respondents in the case before the national court. The financial basis of the new bank was formed predominantly by the transfer of assets from the previous bank. This was supplemented by funding from the Icelandic Treasury.

28 On the same day, FME decided that the New Landsbanki Íslands should take over obligations "of the branches of Landsbanki in Iceland due to deposits from financial undertakings, the Icelandic Central Bank and other customers". In its decision, FME did not define what was meant by the term deposits.

29 In a letter of 11 November 2008 to Landsbanki, FME stated that its board had discussed what effect decisions regarding the disposal of assets and liabilities of Landsbanki, Glitnir Bank hf. and Kaupthing Bank hf. would have on a specific aspect of each bank's funding, namely as regards money market loans/deposits from financial undertakings. According to the letter, various materials had been obtained from the banks and their auditors as regards the effect this funding had on the operations of the banks. The letter went on to state that, at a meeting of FME's board that same day, it had been "decided to reiterate that obligations in respect of such loans from financial undertakings were not transferred to the New Glitnir Bank hf., New Landsbanki Íslands hf. [which, as mentioned, later became Landsbankinn] and New Kaupthing Bank hf. by the decisions referred to". The letter finally stated that "ordinary deposits from financial undertakings in current and saving accounts in the bank's systems" would be transferred to the new banks, in the same way as other deposits.

30 On 19 November 2008, Aresbank wrote a letter to FME requesting to be informed of the reasons why its board had proposed that money market deposits should not be transferred to the three new banks.

31 In its reply of 21 November 2008, FME stated that it had been decided to classify money market deposits as deposits, except in cases where the bank's counterparty was a financial undertaking. In those cases, such sums transferred were regarded as loans from the financial undertakings, which were left behind in the old banks. The letter gave an account of the arguments on which the decision was based and traced the factors that were seen as being of particular importance in this connection.

32 Aresbank subsequently sued Landsbankinn, FME and the Icelandic State for repayment of the euro funds it had transferred in 2008. Aresbank based its principal claim on the fact that, in its view, the money market deposits of EUR 30 000 000 which it placed with Landsbanki in two stages in 2008 were transferred, or should have been transferred, to Landsbankinn after the collapse of the Icelandic banks in October 2008. Thus, the money, which Aresbank maintained constituted deposits and not loans, should have been available for disbursement on 12 November 2008 and 10 December 2008.

33 Aresbank based this part of its claims on FME's decision of 7 October 2008 on the disposal of the assets and liabilities of Landsbanki Íslands hf., pursuant to Article 100a of Act 161/2002, which provided that New Landsbanki Íslands was to take over obligations in the branches of Landsbanki Íslands hf. in Iceland due to deposits from financial undertakings, the Icelandic Central Bank and other customers. Aresbank argued that, pursuant to item 8 of the decision, its deposit was transferred to New Landsbanki Íslands hf., now Landsbankinn hf., as of 9.00 a.m. on 9 October 2008.

34 In a judgment of 22 December 2010, Reykjavík District Court concluded that the transfer of money from Aresbank to Landsbanki was to be regarded as a short-term interbank loan, not a deposit transaction. Consequently, the District Court dismissed Aresbank's claims.

35 Aresbank appealed against that judgment to the Icelandic Supreme Court and asked it to request an advisory opinion from the Court regarding the term deposit in the Directive. The appellant later withdrew that request.

36 On 15 December 2011, the Supreme Court on its own motion referred the following questions to the Court:

> *1. Can funds which bank A delivers to bank B, and which B must repay A on a predetermined date, together with interest which has been specially negotiated, be regarded as a deposit in the sense of Article 1(1) of Directive 94/19/EC on deposit-guarantee schemes, even though the funds, when they reach B, are not placed in a special account in A's name, B has not issued any special documents to A recording the receipt of the funds*

and has not paid premiums in respect of the funds to the Depositors' and Investors' Guarantee Fund and the funds have not been entered as a deposit in B's books? It is assumed in this question that banks A and B each hold operating licences as commercial banks in different states in the European Economic Area.

2. When the first question is answered, is it of any significance whether bank B's state of domicile has availed itself of the authorisation of Article 7(2) of Directive 94/19/EC, on deposit-guarantee schemes (cf. item 1 of Annex I) to exclude deposits by financial institutions from deposit guarantee?

3. When the first question is answered, is it of any significance whether bank A, which holds a licence to operate as a commercial bank according to the laws of the contracting party in whose territory it operates does not exercise the authorisation it has, under its operating licence, to accept deposits from the general public, but finances its operations by means of contributions from its owner and through the issue of financial instruments, subsequently re-loaning that money on the so-called interbank market?

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

III Admissibility

Observations submitted to the Court

38 At the oral hearing, FME and the Icelandic Government questioned whether the Court has jurisdiction to rule on the questions submitted. They argued that the essence of the legal dispute, namely the administrative decision of FME, was not based on legislation on deposit insurance, but on Article 100a of Icelandic Act 161/2002. That provision is not connected with EEA law. In the view of FME and the Icelandic Government, an advisory opinion in this case will have no bearing on the homogenous application of EEA law.

39 ESA observes that the litigation in the main proceedings did not arise because of the application of EEA law. The question to be determined before the Icelandic Supreme Court is whether the loan granted by Aresbank to Landsbanki is a deposit under Icelandic law. The Icelandic Supreme Court has referred the questions at hand to the Court since the general definition of deposit under Icelandic law is similar to the definition given in the Directive. In that regard, ESA observes that, according to settled case law, preliminary references may be made in circumstances in which a provision of national law is based on or makes some reference to EEA or EU law.

40 The Commission contends that it is settled case law that where domestic legislation, in regulating purely internal situations, adopts the same solutions as those adopted in EU law in order to avoid any distortion of competition, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.

41 The Commission considers that this logic also applies to the present case where national law refers to a concept of EEA/Union law in order to regulate a matter which is not directly governed by EEA/Union law. The EEA and the European Union have an interest in ensuring that these concepts are interpreted uniformly.

Findings of the Court

42 The dispute before the Supreme Court of Iceland concerns whether the loans granted by Aresbank to Landsbanki are covered by FME's decision of 8 October 2008 and thus should have been included in the transfer of assets and liabilities to Landsbankinn. Essentially, the Supreme Court of Iceland seeks to determine whether the loans in question constitute deposits from financial undertakings within the meaning of FME's decision and in the context of Act 98/1999 which implements Directive 94/19.

43 In that regard, it must be borne in mind, first, that under the system of judicial cooperation established by Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), it is the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for an Advisory Opinion in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Cases E-13/11 *Granville Establishment*, judgment of 25 April 2012, not yet reported, paragraph 18, and E-18/11 *Irish Bank*, judgment of 28 September 2012, not yet reported, paragraph 55).

44 It follows that questions concerning EEA law enjoy a presumption of relevance. Consequently, where the questions submitted concern the interpretation of EEA law, the Court is in principle bound to give a ruling, unless it is quite obvious that the interpretation of EEA law that is sought is unrelated to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*Granville Establishment*, cited above, paragraphs 19 to 20).

45 It must also be recalled that where domestic legislation, in regulating purely internal situations, adopts the same or similar solutions as those adopted in EEA law in order to avoid any distortion of competition, it is in the interest of the EEA to forestall future differences of interpretation. Provisions or concepts taken from EEA law should thus be interpreted uniformly, irrespective of the circumstances in which they are to apply. However, as the jurisdiction of the Court is confined

to considering and interpreting provisions of EEA law only, it is for the national court alone to assess the precise scope of that reference to EEA law in national law (see, for comparison, *mutatis mutandis*, Case C-126/10 *Foggia*, judgment of 10 November 2011, not yet reported, paragraphs 21 and 22, and case law cited).

46 It follows from the foregoing that the questions referred by the Supreme Court of Iceland relating to the interpretation of Directive 94/19 are admissible.

IV The questions referred to the Court

47 By its first question, the national court asks, in essence, whether loans made by one credit institution, in the words of the national court, a commercial bank, to another are to be considered deposits within the meaning of Article 1(1) of Directive 94/19, even though (i) the funds were not entered as deposits in the borrower bank's books; (ii) nor were they placed in a special account in the lender bank's name; (iii) no special documents recording the receipt of the funds were issued, and (iv) no premiums to the Depositors' and Investors' Guarantee Fund were paid in respect of the funds.

48 By its second and third questions, the national court asks, in essence, if it is of any significance in qualifying a loan between credit institutions as a deposit (i) whether the home State of the borrower bank has availed itself of the power established in Article 7(2) of Directive 94/19 to exclude deposits by financial institutions from deposit guarantee, and (ii) that the lender bank does not accept deposits from the general public, even though it is authorised to do so.

The first question

49 Aresbank, ESA and the Commission propose that the first question should be answered in the affirmative, namely, that the transaction should be considered a deposit. In their view, a credit institution can hold a deposit from another credit institution. The Commission adds that even if the transaction is considered technically to be a deposit within the meaning of Directive 94/19, such a deposit is not covered by the guarantee scheme of that directive. In its view, a functional definition of the term for the purpose of the application of Directive 94/19 must be distinguished from the mere technical definition.

50 Landsbankinn, FME and the Icelandic Government suggest that the question should be answered in the negative. According to Landsbankinn, the transaction does not fulfil the criteria established in Article 1(1) of Directive 94/19 which it argues are cumulative. FME and the Icelandic Government maintain that the transaction in question cannot be seen as a deposit since it is not a normal banking transaction for the purposes of that provision.

51 It is clear from the Supreme Court's request that both Aresbank and Landsbankinn have authorisations to operate as credit institutions within the EEA.

52 The dual objective of the Directive is expressed in its first recital as the promotion, in accordance with the objectives of the EEA Agreement, of the harmonious development of the activities of credit institutions throughout the EEA through the elimination of all restrictions on the right of establishment and the freedom to provide services, and, at the same time, to increase the stability of the banking system and protection for savers.

53 The notion of deposit is defined in Article 1(1) of the Directive. A deposit can be either (i) any credit balance which results from funds left in an account or (ii) any credit balance which results from temporary situations deriving from normal banking transactions and which a credit institution must repay under the legal and contractual conditions applicable, or (iii) any debt evidenced by a certificate issued by a credit institution.

54 It follows from the wording of Article 1(1) of the Directive that, contrary to the submission of Landsbankinn, it does not establish three cumulative requirements for funds to be treated as a deposit. Rather, a deposit within the meaning of the Directive can take the form of three distinct categories.

55 According to the request from the Supreme Court, no special documents recording the receipt of the funds were issued. Furthermore, the funds transferred were not placed in a special account in the lender bank's name. Consequently, the funds have not been left in an account. What needs to be assessed, therefore, is whether funds such as those described in the request are to be regarded as credit balances resulting from temporary situations deriving from normal banking transactions.

56 The concept of credit balance is not explained in the Directive. However, the wording of Article 1(1) of the Directive suggests that the term includes funds received by way of loans. In this regard, it can be of no relevance that the funds have not been entered as a deposit in the borrowing bank's books. It would be contrary to the purpose of the Directive if protection were to be dependent on the characterisation given by the credit institution receiving the funds. This is supported by the drafting history of the Directive. In the explanatory memorandum to the Commission's original proposal for the Directive (COM(92) 188 final), the notion of a deposit specified in Article 1(1) was stated to be envisaged from the depositor's point of view. The depositor has a credit balance or claim, whereas in the receiving bank's accounts, the deposit appears, conversely, in the form of a debt or loan.

57 Moreover, the Directive does not define what is meant by temporary situations deriving from normal banking transactions. However, the raising of capital through ordinary short-term loans, such as those at issue in the present case, must be considered both a measure of a temporary nature and a normal banking transaction, within the ordinary meaning of that term.

58 The question from the Supreme Court concerns an interbank loan between credit institutions. Credit institutions are defined in Article 1(4) of the Directive as

undertakings “the business of which is to receive funds from the public and to grant credits for [their] own account”.

59 Landsbankinn, FME and the Icelandic Government have argued that interbank loans cannot be regarded as deposits within the meaning of Article 1(1) of the Directive. However, the wording of the Directive does not suggest that the fact that the depositor is a credit institution has any bearing on whether funds are to be considered a deposit within the meaning of that provision.

60 However, the nature of the depositor may have an impact on whether a deposit is eligible for repayment. Article 2 of the Directive explicitly provides, as a main rule, that deposits made by other credit institutions on their own behalf and for their own account are automatically and generally excluded from repayment by deposit-guarantee schemes.

61 Consequently, as the Directive provides for an express exclusion from the principle of repayment in relation to deposits and, thus, also loans between credit institutions, such transactions as described in the first question from the national court must be understood to fall within the definition of deposit established in Article 1(1) of the Directive.

62 Finally, there is no requirement that premiums to the Depositors’ and Investors’ Guarantee Fund must be paid for funds to be considered a deposit within the meaning of the Directive.

63 It follows from all of the above that funds transferred by one credit institution to another pursuant to a loan agreement such as those at issue in the main proceedings are to be considered deposits within the meaning of Article 1(1) of the Directive even though (i) the funds were not entered as deposits in the borrower’s books; (ii) nor were these funds placed in a special account in the lender’s name; (iii) no special documents recording the receipt of the funds were issued, and (iv) no premiums to the Depositors’ and Investors’ Guarantee Fund were paid in respect of the funds.

64 However, pursuant to Article 2 of the Directive, funds transferred from one credit institution to another under a loan agreement such as those at issue in the main proceedings, although in principle technically covered by the notion of deposit, do not constitute, as was noted in paragraph 60 above, deposits eligible for repayment under the Directive. As a consequence, a distinction can be made between a functional definition of eligible deposits under the Directive, which is based on Article 1(1) read in light of Article 2, and a technical definition, which also includes deposits not covered by the guarantee schemes provided for in the Directive and, thus, not eligible for repayment.

65 As noted in paragraph 45 above, where national law, in regulating purely internal situations, adopts the same or similar solutions as those adopted in EEA law, it is for the national court to assess the precise scope of that reference to EEA law in the domestic legislation. Accordingly, it is a matter for the national court to

ascertain whether a technical or a functional definition of deposit is to be applied in relation to such national legislation for the purposes of the present case.

66 The reply to the first question must therefore be as follows:

- Article 1(1) of Directive 94/19 is to be interpreted as meaning that funds which a lending credit institution delivers to a borrowing credit institution, and which must be repaid on a predetermined date, together with interest which has been specially negotiated, are to be regarded as a deposit within the meaning of that provision. This applies even though the funds are not placed in a special account in the name of the lending credit institution, the borrowing credit institution has not issued any special documents recording the receipt of the funds, has not paid premiums in respect of the funds to the Depositors' and Investors' Guarantee Fund, and the funds have not been entered as a deposit in the books of the borrowing credit institution.

- However, such funds transferred from one credit institution to another pursuant to a loan agreement constitute deposits not covered by the guarantee schemes provided for in Directive 94/19. Such funds are thus not eligible for repayment under that Directive. Therefore, a distinction can be made between a functional definition of eligible deposits under the Directive, which is based on Article 1(1) read in light of Article 2, and a technical definition, which also includes deposits not covered by the guarantee schemes provided for in Directive 94/19 and, thus, not eligible for repayment. It is for the national court to ascertain whether a technical or a functional definition of deposit is to be applied under national law for the purposes of the present case.

The second question

67 By its second question, the Supreme Court asks whether it is of significance for the purpose of determining whether a loan between two credit institutions in the EEA is a deposit within the meaning of Article 1(1) of Directive 94/19 that the home State of the borrowing bank has availed itself of the possibility provided for in Article 7(2) of Directive 94/19 to exclude deposits by financial institutions from the relevant deposit-guarantee scheme.

68 All those who have submitted written observations in the present proceedings agree that this question should be answered in the negative. They have based their answers on Directive 2006/48. In essence, they argue that both the status and the activities of the depositor do not impact on the qualification of a transfer of funds as a deposit within the meaning of Article 1(1) of Directive 94/19 but are relevant simply as regards eligibility for compensation.

69 In order to provide a useful answer to the national court, the Court will assess the applicability of Directive 2006/48 in the present proceedings.

70 Directive 2006/48, which replaced Directive 2000/12, was adopted on 14 June 2006 and entered into force twenty days after its publication on 30 June 2006 in the *Official Journal of the European Union*.

71 Directive 2006/48 was incorporated into the EEA Agreement by Joint Committee Decision 65/2008 of 6 June 2008. By that decision, Directive 2000/12 was replaced by Directive 2006/48.

72 In the decision, the Joint Committee noted that constitutional requirements were indicated. The six-month period for notification prescribed in Article 103 EEA expired on 6 December 2008.

73 On 17 February 2009, the Icelandic Government notified delay.

74 The last notification was received on 8 September 2010 and the Decision of the Joint Committee entered into force on 1 November 2010.

75 As a consequence, Directive 2000/12 continued to apply in the EEA until 6 December 2008.

76 From 7 December 2008, Directive 2006/48 became provisionally applicable. The notification of delay by the Icelandic Government cannot alter this finding. It is clear from the wording of Article 103(2) EEA that a decision of the EEA Joint Committee shall be provisionally applicable upon the expiry of the six-month period if notification has not taken place. Since the notification was registered on 17 February 2009, it arrived well after the latest date permitted under Article 103 EEA.

77 In that regard, the Court notes that a notification under Article 103(2) EEA arriving after the expiry of the six-month period cannot reverse the provisional applicability of the decision of the EEA Joint Committee. Were a Contracting Party to be permitted at any point after the expiry of the six-month period to revoke unilaterally the provisional applicability of a decision of the EEA Joint Committee, this would be contrary to the express wording of Article 103 EEA and, thus, incompatible with the general principle of legal certainty.

78 In the proceedings before the national court, the first contract was entered into on 6 June 2008 and the final reimbursement should have taken place on 18 March 2009. Nevertheless, as those proceedings concern the classification of the transactions as deposits, the relevant moment in time must be the date on which the funds were transferred to Landsbanki pursuant to the loan agreements.

79 The three contracts at issue in the main proceedings were entered into on 6 June 2008, 7 August 2008, and 16 September 2008. The funds were transferred on 10 June 2008, 11 August 2008, and 18 September 2008, respectively. Since the funds were transferred before the entry into force of the decision of the EEA Joint Committee, the second question must be answered in the light of Directive 2000/12.

80 Pursuant to Article 7(2) and point 1 of Annex I to Directive 94/19, EEA States may provide that deposits by financial institutions as defined in Article 1(6) of Directive 89/646/EEC – at the relevant time replaced by Article 1(5) of Directive 2000/12 – shall be excluded from being guaranteed or shall be granted a lower level of guarantee.

81 It follows from Article 1(5) of Directive 2000/12 that a financial institution means an undertaking other than a credit institution. However, according to the case-file, the transactions in the present case concern credit institutions. Thus, it is irrelevant for the qualification of such a transaction as a deposit within the meaning of Directive 94/19 whether the home State of the borrower bank has availed itself of the possibility under Article 7(2) of Directive 94/19 to exclude deposits by financial institutions from the deposit-guarantee scheme.

82 Consequently, the answer to the second question must be that, for the purpose of determining whether a loan between two credit institutions in the EEA is a deposit within the meaning of Article 1(1) of Directive 94/19, it is of no significance that the home State of the borrowing bank has availed itself of the authority established in Article 7(2) of Directive 94/19 to exclude deposits by financial institutions from deposit guarantee.

The third question

83 By its third question, the national court asks, in essence, whether the fact that a credit institution does not exercise the authorisation it has, under its operating licence, to accept deposits from the general public, but finances its operations by means of contributions from its owner and through the issue of financial instruments, means that it is not to be regarded as a credit institution within the meaning of Article 1(4) of the Directive.

84 In this regard, the Court notes that if the national court chooses to apply a functional definition of a deposit, it may need to assess whether Aresbank is to be regarded as a credit institution within the meaning of Article 1(4) of the Directive.

85 All those who have submitted written observations in the present proceedings agree that this question should be answered in the negative. They have based their answers on Directive 2006/48. Adopting a similar reasoning to their observations on the second question, they all argue, in essence, that both the status and the activities of the depositor do not impact on the qualification of a transfer of funds as a deposit within the meaning of Article 1(1) of Directive 94/19, but are relevant simply as regards eligibility for compensation. ESA and the Commission add that, in any event, an undertaking which holds an authorisation allowing it to receive funds from the public but which does not receive such funds and only grants loans to other banks remains a credit institution.

86 The definition of a credit institution in Article 1(4) of Directive 94/19 is identical to the definition in Article 1 of Directive 2000/12 and Article 4 of Directive 2006/48. Moreover, in the preamble to Directive 94/19, reference is made to the system of single authorisation for each credit institution and its supervision by the authorities of the home Member State.

87 This system of single authorisation is maintained by Directive 2000/12 which, as the Court has already found (see paragraph 75 of this judgment), was part of EEA law *ratione temporis* in the home State of Landsbankinn when the funds were transferred pursuant to the loan agreements.

88 In light of the express reference made in Directive 94/19 to the system of single authorisation, which has since been maintained by Directive 2000/12, and the fact that the definition of "credit institution" found in Article 1 of Directive 2000/12 is identical to the definition provided for in Article 1(4) of Directive 94/19, it is appropriate to interpret the latter provision in light of the objective and general scheme of Directive 2000/12.

89 Article 3 of Directive 2000/12 provides that EEA States shall prohibit persons or undertakings that are not credit institutions from carrying on the business of taking deposits or other repayable funds from the public. Moreover, pursuant to Article 4 of the Directive, EEA States shall require credit institutions to obtain authorisation before commencing their activities.

90 Pursuant to Article 18 of Directive 2000/12, EEA States shall provide that the activities listed in Annex I may be carried on within their territories, in accordance with Articles 20(1) to (6), 21(1) and (2), and 22, either by the establishment of a branch or by way of the provision of services, by any credit institution authorised and supervised by the competent authorities of another EEA State, provided that such activities are covered by the authorisation.

91 This is further clarified by recitals 5, 6, 7 and 14 in the preamble.

92 According to recital 5 in the preamble to Directive 2000/12, the measures the Directive introduces are intended to coordinate credit institutions and must apply to all such institutions, in order to protect savings and to create equal conditions of competition. According to recital 6 in the preamble, the scope of these measures should therefore be as broad as possible, covering all institutions whose business is to receive repayable funds from the public, whether in the form of deposits or in other forms such as the continuing issue of bonds and other comparable securities and to grant credits for their own account.

93 According to recital 7 in the preamble to Directive 2000/12, the approach adopted in this regard seeks to achieve only the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the EEA and the application of the principle of home EEA State prudential supervision. Recital 14 then states that, by virtue of mutual

recognition, the approach chosen permits credit institutions authorised in their home Member State to carry on, throughout the EEA, any or all of the activities listed in Annex I by establishing branches or by providing services.

94 It follows from Articles 3, 4 and 18 of Directive 2000/12 that the authorisation and prudential supervision requirements for the taking up and pursuit of the business of a credit institution seek to ensure that a credit institution authorised and supervised by the competent authorities of one EEA State to carry on the activities listed in Annex I of Directive 2000/12 may provide those services in another EEA State, provided that such activities are covered by the authorisation.

95 Pursuant to points 1 and 2 of Annex I, both acceptance of deposits and other repayable funds and lending are activities subject to mutual recognition under Directive 2000/12, when covered by an authorisation.

96 In cases where a credit institution does not make use of an authorisation granted, Article 14 of Directive 2000/12 expressly provides that the competent authorities may withdraw the authorisation issued. However, according to this provision, the competent authorities may do so only where such an institution does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased to engage in business for more than six months, if the EEA State concerned has made no provision for the authorisation to lapse in such circumstances.

97 Thus, Article 1(4) of Directive 94/19 cannot be interpreted to exclude a credit institution duly authorised by the competent authorities to pursue activities such as accepting deposits and other repayable funds and lending from the scope of the Directive on the sole basis that the credit institution in question does not exercise its authorisation in practice. Such an interpretation would be contrary to the objective and general scheme of Directive 2000/12.

98 It is for the national court to determine whether the authorisation of Aresbank covers activities listed in Annex I of Directive 2000/12. If this is the case, the authorisation of Aresbank to take up and pursue the business of a credit institution must be recognised in Iceland pursuant to Directive 2000/12 unless it had been withdrawn by the competent authority at the relevant time.

99 Consequently, the third question must be answered as follows:

Where a credit institution which lends funds on the interbank market is authorised to accept deposits from the general public, it is of no significance for the qualification of an interbank loan by this institution to another credit institution as a deposit within the meaning of Article 1(1) of Directive 94/19 that it does not accept such deposits, but finances its operations by means of contributions from its owner and through the issue of financial instruments, subsequently re-lending that money on the interbank market, unless the authorisation of the institution to take up and pursue the business of a credit institution has been withdrawn by the competent authority.

V Costs

100 The costs incurred by ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Supreme Court of Iceland, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Supreme Court of Iceland hereby gives the following Advisory Opinion:

1. **Article 1(1) of Council Directive 94/19/EC on deposit-guarantee schemes is to be interpreted as meaning that funds which a lending credit institution delivers to a borrowing credit institution, and which must be repaid on a predetermined date, together with interest which has been specially negotiated, are to be regarded as a deposit within the meaning of that provision. This applies even though the funds are not placed in a special account in the name of the lending credit institution, the borrowing credit institution has not issued any special documents recording the receipt of the funds, has not paid premiums in respect of the funds to the Depositors' and Investors' Guarantee Fund, and the funds have not been entered as a deposit in the books of the borrowing credit institution.**

   However, such funds transferred from one credit institution to another, pursuant to a loan agreement, constitute deposits not covered by the guarantee schemes provided for in Directive 94/19. Such funds are thus not eligible for repayment under that Directive. Therefore, a distinction can be made between a functional definition of eligible deposits under Directive 94/19, which is based on Article 1(1) read in light of Article 2, and a technical definition, which also includes deposits not covered by the guarantee schemes provided for in Directive 94/19 and, thus, not eligible for repayment. It is for the national court to ascertain whether a technical or a functional definition of deposit is to be applied under national law for the purposes of the present case.

2. **For the purpose of determining whether a loan between two credit institutions in the EEA is a deposit within the meaning of Article 1(1) of Directive 94/19, it is of no significance that the home State of the borrowing bank has availed itself of the authority established in Article 7(2) of Directive 94/19 to exclude deposits by financial institutions from deposit guarantee.**

3. **Where a credit institution lending funds on the interbank market is authorised to accept deposits from the general public, it is of no significance for the qualification of an interbank loan by this institution to another credit institution as a deposit within the meaning of Article 1(1) of Directive 94/19 that it does not accept such deposits but finances its operations by means of contributions from its owner and through the issue of financial instruments, subsequently re-lending that money on the interbank market, unless the authorisation of the institution to take up and pursue the business of a credit institution has been withdrawn by the competent authority.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 22 November 2012.

Gunnar Selvik
Registrar

Carl Baudenbacher
President