REPORT FOR THE HEARING

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 Directive").[1]

I Introduction

1. By a letter of 15 December 2011, registered at the EFTA Court on 16 December 2011, the Supreme Court of Iceland made a request for an Advisory Opinion in a case pending before it between Aresbank SA, a company registered in Spain, the appellant before the court ("Aresbank" or "the Appellant"), and Landsbankinn hf. ("Landsbankinn"), a company registered in Iceland, the Icelandic Financial Supervisory Authority ("FME") and the Icelandic State, the respondents before the court.

[1] OJ 1994 L 135, p. 5.

II Legal background

EEA law

2. The Directive was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 18/94 of 28 October 1994, amending Annex IX to the EEA Agreement.[2]

3. Article 1 of the Directive 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.*
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> …
>
> *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.*
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> …
>
> *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.*

4. Article 2 of the Directive 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,*
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> …

5. Article 7(2) of the Directive 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.*

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[2] OJ 1994 L 325, p. 70.

6. Annex I to the Directive 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.*
>
> …

National law[3]

7. Article 9(3) of Act No 98/1999 (the Act which implements the Directive into the Icelandic legal order) provides as follows:

> *A "deposit" … 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.*

8. Moreover, the explanatory notes to the draft of that act state that "securities are not counted as deposits for the purposes of [Article 9]; this is in accordance with the Directive on deposit-guarantee schemes, which authorises the Member States to exclude from the guarantee various types of deposit and also issued securities".

9. Article 100a of Act No 161/2002 on Financial Undertakings, as inserted by Act No 125/2008 on the Authority for Treasury Disbursements due to Unusual Financial Market Circumstances, authorises FME to assume the powers of the shareholders' meeting in 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.

10. Article 103 of Act No 161/2002 provides that claims for deposits shall have priority when dividing a bank's estate.

III Facts and procedure

11. The Appellant is a Spanish commercial bank 99.86% owned by Libyan Foreign Bank, which, in turn, is 100% owned by the Central Bank of Libya. It operates under Spanish law. It does not accept deposits from the general public,

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[3] Translations of national provisions are unofficial and based on those contained in the documents of the case.

but raises capital from contributions from its owner and through the issue of financial instruments.

12. In 2008, Aresbank 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.

13. 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, and 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.

14. 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. The outcome was that the country's three largest commercial banks, Landsbanki, Glitnir banki hf. and Kaupthing banki hf., proved to be incapable of tackling the problems threatening them.

15. On 7 October 2008, FME assumed the powers of a shareholders' meeting in Landsbanki Íslands hf. 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, which 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.

16. On the same day, FME took the decision 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".

17. In essence, FME decided that money market deposits should not be transferred to New Landsbanki Íslands. As a result, the funds which Aresbank originally transferred to Landsbanki were not transferred to the new bank following the collapse. However, it appears to Aresbank that money market deposits were in fact transferred.

18. Aresbank sued Landsbankinn, FME and the Icelandic State for repayment of the funds which it had transferred in 2008.

19. The 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.

20. Aresbank appealed against that judgment to the Icelandic Supreme Court. In its appeal, the Appellant asked the Supreme Court to request an advisory opinion from the EFTA Court regarding the term "deposit" in the Directive. The Appellant later withdrew that request.

21. However, on 15 December 2011, the Supreme Court decided of its own motion to refer 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?**

IV Written observations

22. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- Aresbank, represented by Bjarki H. Diego, Supreme Court Attorney;

- Landsbankinn, represented by Erlendur Þór Gunnarsson, Supreme Court Attorney;
- 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.

V Summary of the pleas and arguments submitted

Aresbank

Potential inaccuracies in the premises on which the questions are based

23. Aresbank submits that, contrary to what is stated in the request, it is disputed whether in respect of money market deposits from financial undertakings Landsbanki (i) paid premiums to the Depositors' and Investors' Guarantee Fund, and (ii) entered the claims in question in its books as loans and not deposits. Consequently, it asserts that the Advisory Opinion should consider the possibility that the relevant deposits were covered by premiums of that kind and were entered as "deposits" in the books of bank B.

24. Moreover, the Appellant considers that the Advisory Opinion should address the possibility that the Appellant does not fall within the definition of a commercial bank. In that regard, the Appellant observes that according to a decision by the Bank of Spain, and its own articles of association, it is prohibited from receiving deposits from the general public. In addition, it notes that the third question refers to bank A "re-lending" money. The Appellant asserts that its money market deposit transactions constitute "deposits" and, consequently, requests the EFTA Court to disregard any predetermination by the Supreme Court of the characteristics of those transactions.

25. In addition, Aresbank notes that the request includes a description of the transaction between itself and Landsbanki on 6 June 2008, which states that it offered to "lend" Landsbanki a certain amount. The Appellant submits, however, that the relevant SWIFT documents clearly indicate that the transaction in question was a deposit, as can be seen from the heading "EURO DEPO". According to Aresbank, it is usual for brokers in dealing rooms to refer to "loans" and "lending" in relation to the taking and acceptance of deposits.

26. Finally, Aresbank notes that, in its request, the Supreme Court states that, according to evidence submitted in the case, Landsbanki did not issue any special

documentation to the Appellant for receipt of the funds. In the Appellant's view, however, the SWIFT confirmations clearly prove the acceptance of the funds by Landsbanki and indicate that Landsbanki acknowledged the transactions as constituting deposits.

The first question

27. At the outset, the Appellant notes that the question does not address whether the deposits in question enjoy a guarantee. It simply addresses whether or not they constitute deposits within the definition of Article 1(1) of the Directive, regardless of any guarantee. The Appellant submits that the first question should be answered in the affirmative.

28. According to the Appellant, the term "deposit" within the meaning of Article 1(1) of the Directive and the Icelandic Act No 98/1999 refers to any credit balance resulting from (a) financial deposits or (b) transfers in normal banking transactions which a commercial bank or savings bank is under obligation to refund under existing (i) legal or (ii) contractual terms.

29. Aresbank asserts that it is evident that Article 1(1) of the Directive and the Icelandic Act No 98/1999 offer one comprehensive and exhaustive definition for the term deposit, where no distinction is made between wholesale deposits (including money market deposits) and retail deposits.[4]

30. According to the Appellant, the fact that the term "deposit" as used in the Directive must be interpreted broadly can be seen also from the explanatory memorandum to the Commission's proposal for the Directive, in which it is stated:

> *The depositor has a "credit balance" or "claim" whereas in the Directives relating to annual accounts, this naturally appears in the credit institution's accounts in the form of "debt" or "loan". ... The idea of "credit balance" is relatively clear: in particular it is used for current accounts but it is supplemented by the idea of "funds left in accounts", which is intended to indicate savings books or accounts or any other instrument in which funds generally remain for longer than in current accounts.*[5]

31. It is common knowledge that accepting deposits is an important operation of credit institutions. Therefore, Aresbank submits, deposits and related transactions fall within the term of "normal banking transactions". Thus, the deposit and transaction described in the first question must be considered to fall within

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[4] According to the Appellant, deposits are considered "retail deposits" where they consist of relatively small amounts usually placed by individuals. In contrast, "wholesale deposits" consist of large individual amounts placed by banks, companies and other institutions, often through the money market.

[5] COM(92) 188 final, p. 9.

"normal banking transactions". In the Appellant's view, the deposits in question also fulfil the latter part of the definition, as it is undisputed that the receiving bank is obliged, both as a matter of law and contract, to repay the deposits including accrued interest.

32. The Appellant observes that the definition of the term "deposit" in Article 1(1) of the Directive is so broad that the Commission found it necessary to state explicitly that bonds were not included in the definition. According to Aresbank, one can conclude from this that in the absence of such explicit wording bonds would have fallen within the definition.

33. In Aresbank's view, this interpretation is supported by the fact that Article 2 of the Directive excludes from repayment "deposits made by other credit institutions on their own behalf and for their own account". Moreover, Article 7(2) of the Directive allows Member States to exclude certain types of deposits and/or depositors, listed in Annex I to the Directive, from guarantee protection. According to that annex, exclusion is permitted as regards "[d]eposits by financial institutions as defined in Article 1(6) of Directive 89/646/EEC". In the view of Aresbank, Articles 2 and 7(2) of the Directive are based on an assumption that banks can hold deposits with another bank within the meaning of Article 1(1).

34. According to Aresbank, when implementing the Directive by means of Act No 98/1999, the Icelandic legislature chose not to exercise the possibility provided for by Article 7(2) of the Directive in conjunction with Annex I to exclude deposits from financial institutions from the guarantee. In any event, the Appellant emphasises that excluding some types of deposits or depositors from guarantee protection under guarantee schemes does not result in such deposits ceasing to be deposits. On the contrary, such deposits still fall within the definition of the term deposit although they do not enjoy the guarantee.

35. According to the Appellant, once it is established that the transaction in question must be considered a "normal banking transaction", it is of no importance whether the funds have been placed in a separate account or how the funds have been treated in the bank's balance sheets. Were it otherwise, it would grant the bank's accountant the authority to decide which transactions are deposits and which are not. In any case, it appears that, in fact, Landsbanki entered money market deposits under the heading "deposits from financial institutions" in the bank's financial statements. Aresbank submits that it is not significant that a certificate of deposit has not been issued by a credit institution. However, the Appellant continues, the existence of such a certificate clearly indicates that the transaction is a deposit. In this regard, the Appellant asserts that SWIFT confirmations must be considered sufficient, as they clearly state the acknowledgement of acceptance of funds by a credit institution and, accordingly, the obligation to repay.

36. Further to this, the Appellant is surprised to note that the questions raised by the Supreme Court include the issue of whether premiums were paid to the Depositors' and Investors' Guarantee Fund. In its view, the legal nature of a deposit will determine whether or not a premium should be paid into a deposit guarantee scheme. Whether, in fact, payments have been made into the scheme does not define the legal nature of the transaction.

37. Aresbank notes that, in answering the first question, it is to be assumed that both banks hold operating licences as commercial banks in different States within the EEA. It observes, however, that, as it is not permitted to accept deposits of funds from the general public, it cannot be considered a commercial bank under Icelandic law. In any event, according to Aresbank, the nature of a depositor only has relevance when considering the guarantee status of a deposit. The questions at hand simply concern whether or not the transaction, that is, the Appellant's money market deposits, constitutes a deposit.

38. Although the guarantee status of a deposit is not addressed by the questions to the Court, Aresbank notes that the Icelandic legislature implemented very few exemptions to the guarantee protection, none of which applies – in its view – to the Appellant or its deposits. Accordingly, it submits that, not only do its money market deposits fall within the definition of deposits provided for in the Directive, they also enjoy guarantee protection.

The second and third questions

39. Aresbank submits that the second and third questions should be answered in the negative. Aresbank reiterates that the first question simply concerns whether funds delivered by one bank to another can be considered deposits if certain conditions are fulfilled. The question does not address whether the deposit can be considered a guaranteed deposit. Assuming an affirmative answer to the first question, i.e. that such a transaction is, in fact, a deposit, it is clearly irrelevant whether bank B's State of domicile has availed itself of the power under the Directive to exclude deposits by financial institutions from deposit guarantee (the second question), or whether the depositor is an entity which holds a licence to accepts deposits from the general public but does not do so (the third question). Such facts do not change the legal nature of the deposit in question, although they might, in certain jurisdictions, have an influence on whether the deposit is guaranteed. Therefore, according to Aresbank, after the first question has been answered, the second and third questions are irrelevant.

Landsbankinn

The first question

40. Landsbankinn submits that the first question should be answered in the negative.

41. Landsbankinn notes that a deposit is defined in Article 1(1) of the Directive as a 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.

42. According to Landsbankinn, this definition establishes three preconditions: First, the credit balance must result from funds left in an account; second, it must derive from a normal banking transaction; and, third, a deposit certificate must be issued. Landsbankinn submits that, in light of the questions raised by the Supreme Court, none of those preconditions are fulfilled. Thus, the transaction described does not constitute a deposit within the meaning of Article 1(1) of the Directive.

43. In this context, Landsbankinn notes that the fact that money market loans or money market deposits are not recorded in deposit accounts is consistent with the view that these are loans, and not deposits. In addition, it notes that the District Court established that none of the three major Icelandic banks paid insurance premiums on money market deposits in cases where the lenders were financial institutions.

44. According to Landsbankinn, it is evident, furthermore, that the precondition of "normal banking transaction" is not fulfilled. A transaction between two financial institutions on the interbank market for the purpose of short-term lending on the basis of SWIFT correspondence, where interest rates are negotiated according to the length of the term, does not constitute a normal banking transaction within the meaning of the Directive.

45. Landsbankinn submits that this interpretation of Article 1(1) is clear not simply from its wording but also its context and the objectives the Directive pursues.[6] Namely, the Directive's purpose is to increase the protection for private individuals who have insufficient financial knowledge to discriminate between sound and unsound credit institutions, not the protection of other financial institutions.[7]

46. In this regard, Landsbankinn submits that the exclusion of interbank deposits from repayment by guarantee schemes established in Article 2 of the Directive can be justified on the grounds that credit institutions are better placed than other depositors to evaluate the position of a crisis bank. Moreover, Landsbankinn continues, the fact that the deposit-guarantee schemes must ensure that the deposits of each depositor are covered to a minimum of ECU 20 000 in the event of deposits being unavailable, as provided for in Article 7(1) of the

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6 Reference is made to Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 50.

7 Reference is made to the first recital in the preamble to the Directive, and to Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2505, paragraph 48.

Directive, shows that the objective of the Directive is not to protect financial institutions, as ECU 20 000 is unlikely to suffice for that particular purpose.

47. According to Landsbankinn, these arguments are supported by remarks in a recent review by the Commission of the Directive, where the following is stated: "... banks are ineligible anyway. Not only can they be considered professional depositors who unlike non-professionals have to assess the risk of their actions and therefore have other liquid assets than deposits, the covered amount would only seem to represent an insignificant fraction of their overall deposits."[8]

The second and third questions

48. Landsbankinn submits that the second and third questions should be answered in the negative. According to Landsbankinn, it is of no significance whether bank B's State of domicile has availed itself of the power under the Directive to exclude deposits by financial institutions from deposit guarantee, if it has already been established that the transaction does not constitute a deposit. Whether or not a certain financial institution is excluded from deposit guarantee only becomes relevant if that financial institution has, in fact, made a deposit within the definition of Article 1(1) of the Directive.

The Icelandic Financial Supervisory Authority, supported by the Icelandic Government

The first question

49. FME and the Icelandic Government submit that the first question must be answered in the negative. In their view, the funds placed by Aresbank with Landsbanki (and all similar transactions) cannot be deemed "deposits" within the general definition of the term, nor within the definition provided for in the Directive.

50. According to FME and the Icelandic Government, the Aresbank loans to Landsbanki were simply short-term loans with a fixed maturity date, bearing specially negotiated interest rates. These are common transactions in the short-term interbank market, often defined as the "money market". FME and the Icelandic Government consider it incomprehensible to categorise the main occupation of a bank as depositing funds with other banks. In their view, banks are, by definition, mainly lending institutions and accept deposits from the public. According to FME and the Icelandic Government, Aresbank was making investments in the money market based on the ratings of other banks and their interest rates, which was, in fact, the bank's main commercial activity.

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[8] Reference is made to the Commission's Consultation Document of 29 May 2009: Review of Directive 94/19/EC on Deposit-Guarantee Schemes (DGS), p. 8.

51. In the view of FME and the Icelandic Government, activity in the interbank money market appears very remote from the placing of deposits within the traditional sense, let alone having anything to do with consumer protection, which is, in fact, what the Directive in broad terms seeks to ensure.

52. FME and the Icelandic Government observe that Aresbank and Landsbanki entered into their transaction after Aresbank took the initiative to offer to lend money; that both banks classified their transactions as loans rather than deposits from customers in their accounts; and that no contributions were made to the Icelandic Deposit Guarantee Fund on the basis of such claims. According to FME and the Icelandic Government, this shows that the parties did not regard the transactions as deposits.

53. FME and the Icelandic Government note that one of the principal objectives of the Directive is to afford protection to the general public, i.e. to common savers.[9] In their view, the position taken by the legislature in relation to deposits of credit undertakings with one another is completely different from the position taken in relation to the deposits of private customers. In this context, they refer to Article 2 of the Directive, which provides for nothing less than the exclusion of deposits made by other credit institutions on their own behalf and for their own account from repayment under guarantee schemes. FME and the Icelandic Government observe that the justification for excluding interbank deposits is that banks are supposed to know the crisis bank's situation better than other persons in a business relationship with it.[10]

54. FME and the Icelandic Government submit that, if Article 1(1) of the Directive, which defines the term "deposit", is read in isolation, one could easily come to the wrong conclusion, as most liabilities result in a "credit balance" from "temporary situations" and have to be repaid under legal and contractual conditions. Moreover, read in isolation, one could even argue that all debts are in some way evidenced by a certificate, as provided for in the final sentence of Article 1.

55. However, according to FME and the Icelandic Government, this is not the correct interpretation. In their view, the term "deriving from normal banking transactions" refers to normal banking practices, that is, the taking of deposits from the public and companies (in any shape or form) and lending money. Conversely, they continue, the global short-term interbank money market is a completely different playing field. That market, they argue, is based on interests and a commercial reality entirely different from those of the normal deposit-taking functions of a bank.

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[9] Reference is made to the first recital in the preamble to the Directive.

[10] Reference is made to the explanatory memorandum to the Commission's proposal for the Directive, COM(92) 188 final, p. 11.

56. Moreover, FME and the Icelandic Government refer to the explanatory memorandum to the Commission's proposal for the Directive, from which it appears obvious that the definition of scope set out in Article 1 is primarily aimed at current accounts and savings accounts, not lending activities or investment by other banks. According to FME and the Icelandic Government, that is entirely coherent with the objectives of the Directive. Namely, banks cannot be considered regular consumers vis-à-vis other banks, and they do not need the protection provided for in the Directive.

The second and third questions

57. FME and the Icelandic Government assert that the second and third questions should be answered in the negative. In their view, only if the first question is answered in the affirmative will it be necessary to determine whether an exclusion from the insurance scheme applies. However, in any event, the exclusion from the insurance scheme does not relate to the definition of a deposit.

The EFTA Surveillance Authority

Preliminary remarks

58. At the outset, ESA observes that the litigation in the main proceedings did not arise because of the operation 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. It notes that 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 connection, ESA observes that, according to settled case-law, preliminary references or requests for advisory opinions may be made in circumstances in which a provision of national law is based on or makes some reference to EEA law or EU law.[11]

The first question

59. ESA observes that, by its first question, the national court seeks in essence to establish whether the funds which Aresbank transferred to Landsbanki are to be considered a "deposit" within the meaning of Article 1(1) of the Directive.

60. ESA notes that, pursuant to Article 1 of the Directive, "deposit" means 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.

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[11] Reference is made to Joined Cases C-297/88 and C-197/89 *Dzodzi* v *Belgium* [1990] ECR I-3763, Case C-28/95 *Leur Bloem* [1997] ECR I-4161, paragraphs 32 to 34, and Case C-43/00 *Andersen og Jensen* [2002] ECR I-394, paragraphs 18 to 19.

61. According to the request, Landsbanki did not place the amounts transferred to it by Aresbank in a separate account in the latter's name. Thus, according to ESA, the funds have not been "left in an account". Nor did Landsbanki issue any document or certificate to Aresbank recording the receipt of the transferred funds.

62. Nevertheless, ESA submits that the transfer of funds from Aresbank to Landsbanki represents a deposit because it constitutes a credit balance in favour of Aresbank that results from a temporary situation and that Landsbanki was required to repay in accordance with contractual conditions. Any failure or negligence by Landsbanki in the handling of the funds received by it from Aresbank cannot alter the objective characteristics of those funds and in particular whether or not they constitute "deposits" within the meaning of Article 1(1) of the Directive.

63. ESA asserts that, having regard to the wording of Article 1(1) of the Directive and to the explanatory memorandum to the Commission's proposal,[12] the term "deposit" encompasses monies received by way of loans. It notes that, according to the explanatory memorandum, the notion of deposit specified in Article 1(1) was envisaged from the depositor's point of view. The depositor has a "credit balance" or "claim", whereas in the directives relating to annual accounts, this naturally appears in the bank's accounts in the form of a "debt" or "loan".

64. The fact that the transfer consists of an interbank loan does not, ESA submits, mean that it does not constitute a deposit. In fact, Article 2 of the Directive makes express provision to exclude interbank deposits from the compensation scheme established by the Directive. According to ESA, this shows that interbank deposits (including interbank loans) fall within the definition of "deposit" specified in Article 1(1).

65. Furthermore, ESA refers to Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of bank and other financial institutions,[13] which in Article 4 on the layout of the balance sheet distinguishes between "assets" and "liabilities". That provision lays down that "liabilities" include "[a]mounts owed to credit institutions", which are "repayable on demand" and/or "with agreed maturity dates or periods of notice".

66. According to ESA, it is clear from the facts that Landsbanki was obliged to repay the funds it had received from Aresbank. Consequently, Landsbanki should have entered them into the balance sheet as a liability. Those amounts clearly do not constitute an "asset" of Landsbanki. According to ESA, the fact that the

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[12] COM(92) 188 final.

[13] Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of bank and other financial institutions, OJ 1986 L 372, p. 1.

amounts in question are liabilities and not assets is indicative further of their status as "deposits".

67. Against that background, ESA submits that the loans granted by Aresbank to Landsbanki in the case at hand constitute a deposit within the meaning of Article 1(1) of the Directive.

The second and third questions

68. ESA observes that, by its second and third questions, the referring court seeks to establish whether it is of any significance for the qualification of the funds as deposits (i) whether the home State of bank B has availed itself of the power established in Article 7(2) of the Directive to exclude deposits by financial institutions from the deposit guarantee, and (ii) that Aresbank does not accept deposits from the general public, even though it is authorised to do so.

69. According to ESA, although the Directive establishes a broad definition of the concept of deposit, it excludes, or allows an EEA State to exclude, certain deposits from the compensation scheme. These deposits are excluded because of the status or the activities of the depositor. Thus, ESA continues, neither the status nor the activities of the depositor impacts on the qualification of a transfer of funds as a "deposit", but these factors may have an impact on eligibility for compensation.

70. In this context, ESA notes, first, that Article 2 of the Directive excludes the repayment by deposit guarantee schemes of deposits made by credit institutions.

71. Pursuant to Article 1(4) of the Directive, credit institutions are undertakings "the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account". ESA asserts that, in view of the use of the conjunction "and" and not "or", it appears that those two criteria are cumulative.

72. ESA notes that, according to the request for an Advisory Opinion, Aresbank holds a licence to operate as a commercial bank under Spanish law but, in accordance with its articles of association, does not accept deposits from the general public and, instead, operates exclusively on the interbank market and raises capital for this purpose from contributions from its owner and through the issue of financial instruments.

73. The definition of credit institutions in the Directive is, ESA continues, identical to the definition established in Directive 2006/48/EC.[14] Pursuant to Article 6 of Directive 2006/48, Member States shall require credit institutions to

[14] 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, as amended, incorporated at point 14 of Annex IX to the EEA Agreement by Decision of the EEA Joint Committee No 65/2008, OJ 2008 L 257, p. 27, and EEA Supplement No 58, 25.9.2008, p. 9.

obtain an authorisation before commencing their activities. According to Article 17 of Directive 2006/48, the competent authorities "may", but are not obliged to, withdraw the authorisation if an institution does not make use of the authorisation within 12 months.

74. In those circumstances, ESA submits that an undertaking that 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 constitutes, nonetheless, a credit institution within the meaning of Directives 94/19 and 2006/48.

75. According to ESA, this position finds support in the explanatory memorandum to the Commission's proposal for the Directive, which on page 11 reads as follows: "Some deposits are excluded from the guarantee. First of all, interbank deposits: the main justification for this is that banks are supposed to know the crisis bank's situation better than other persons in a business relationship with it."

76. In light of that statement, ESA submits that the exclusion laid down in Article 2 of the Directive must be interpreted as encompassing the interbank loan between Aresbank and Landsbanki even though Aresbank's business does not consist in receiving funds from the public. This means that this deposit is excluded from repayment under the deposit guarantee scheme.

77. However, if the Court decides that this undertaking is not a credit institution, ESA submits that it should be considered a financial institution.

78. In that regard, ESA notes that, according to Article 7(2) and Annex I to the Directive, EEA States may provide that deposits by financial institutions as defined in Directive 89/646/EEC[15] shall be excluded from guarantee. Pursuant to Article 1 of Directive 89/646, "financial institution" means 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 in the Annex to the Directive. Point 2 of the Annex to Directive 89/646 reads as follows: "lending including, inter alia: consumer credit, mortgage credit, factoring, with or without recourse, financing of commercial transactions (including forfeiting)."

79. ESA asserts that, in view of that definition, any undertaking other than a credit institution that lends money must be considered a financial institution. Thus, ESA continues, in the case at hand, the funds transferred still qualify as deposits but the compensation scheme does not apply to those funds.

80. ESA proposes that the questions should be answered as follows:

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[15] Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, OJ 1989 L 386, p. 1. This Directive has now been repealed and replaced by Directive 2006/48.

1. The definition of "deposit" set out in Article 1(1) of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit guarantee schemes comprises funds which bank A delivers to bank B, and which B must repay A on a predetermined date, together with interest which had been pre-negotiated, 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.

2. The fact that 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 has no impact on the answer to the first question. Nevertheless, deposits made by financial institutions are excluded from the compensation.

3. The fact that 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 has no impact on the answer to the first question. Nevertheless, deposits made by credit institutions are excluded from the compensation.

The European Commission

The first question

81. The Commission submits that the first question should be answered in the affirmative.

82. The Commission asserts that, under Article 1(1) of the Directive, deposits are credit balances (i) resulting from funds left in an account or (ii) from temporary situations deriving from normal banking transactions, which in both cases must be repaid by the bank under the legal and contractual conditions applicable; or (iii) any debt evidenced by a certificate issued by a bank.

83. According to the Commission, it is clear from the facts that the relevant funds were not as such placed in an account held by Aresbank at Landsbanki. It is equally clear that Landsbanki did not issue any specific document to Aresbank recording the receipt of funds. The question, therefore, is whether the loans can be considered credit balances resulting from temporary situations deriving from

normal banking transactions and which a bank must repay under the relevant conditions.

84. The Commission submits that the notion of credit balance, which is not defined in the Directive, should be interpreted as a balance on the credit side of the depositor's accounting books and records, and not of the institution that has received the funds. The Commission refers in this respect to its original proposal where the idea of a deposit was envisaged from the depositor's point of view.[16] The depositor has a "credit balance" or "claim" whereas in the directives relating to annual accounts, this naturally appears in the bank's accounts in the form of a "debt" or "loan". In its view, naturally, there has to be sufficient factual evidence to prove the existence of any credit balance or claim, but the fact that the institution that received the funds does not account for such funds as deposits is irrelevant. It suffices that the existence of a credit balance or claim is demonstrated.

85. According to the Commission, this wide interpretation of the notion of "deposit" is supported by the objective of the Directive, namely, of "increasing the stability of the banking system and the protection of savers".[17] Accordingly, it makes sense to have a wide concept of "deposit" in order to provide a safety net that is as broad as possible. Otherwise, it would be too easy for banks to escape any possible liability to finance deposit-guarantee funds by qualifying claims as non-deposits.

86. In the view of the Commission, what is clear from the definition of deposits in the Directive is that such credit balance must result from temporary situations deriving from normal banking transactions. In that respect, the Commission makes the following observations. First, the word "temporary" is not further specified or explained in the Directive but appears to mean that only short-term balances are covered. The precise meaning of the word "temporary" will have to be determined in the light of the conditions in the relevant markets concerned. Second, the notion of "normal banking transactions" also is not further specified or explained in the Directive. In the Commission's view, ordinary loans such as those at issue in the present case can generally be considered "normal banking transactions".

87. In addition, the Commission considers that the fact that no premium was paid in respect of the funds to the Depositors' and Investors' Guarantee Fund does not of itself constitute evidence that the funds were not deposits. The collection of contributions from the banking sector is not mentioned in the definition of "deposits" established in Article 1 of the Directive and is, therefore, not constitutive of that notion. While the fact that premiums are paid on certain funds may offer an indication that a bank or a scheme considered, at the time,

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[16] Reference is made to the Commission's Opinion on the European Parliament's amendments to the Council's common position: COM(94) 99, p. 9.

[17] Reference is made to the first recital in the preamble to the Directive.

that those funds might give rise to a right to compensation in case of default, it does not, the Commission argues, prejudge the legal assessment to be made under the rules transposing the Directive when the default actually occurs. According to the Commission, this applies all the more as the funding arrangements are currently not harmonised and may depend simply on ex post contributions.[18]

88. The Commission underlines the fact that the definition of deposit does not establish that the deposit holder cannot be a bank. The definition of deposit does not refer to the status or characteristics of the depositor. Thus, according to the Commission, whether or not the funds at issue are deposits is not affected by the fact that A is a bank.

89. However, in contrast, in the Commission's view, the characteristics of the depositor are relevant with regard to the eligibility of the deposits for compensation. In that regard, the Commission notes that while the notion of "deposits" established in Article 1 is very broad, the concept of deposits eligible for compensation is narrower and, in particular, is subject to restrictions laid down in Article 2 and Article 7(2) of the Directive. As a result, funds may very well qualify as "deposits" for the purposes of Article 1(1) of the Directive and, at the same time, be excluded from compensation pursuant to the eligibility criteria laid down in those provisions.

90. More specifically, the Commission notes that Article 2 of the Directive provides that, subject to Article 8(3), deposits made by other credit institutions on their own behalf and for their own account, are excluded from repayment by deposit guarantee schemes. Credit institutions are defined under Article 1(4) as undertakings "the business of which is to receive funds from the public and to grant credits for [their] own account". The Commission observes that this definition is identical to the definition provided in the directives on the taking up and pursuit of the business of credit institutions in force at the time of the adoption of the Directive,[19] and also to the definition laid down in Article 4(1) of Directive 2006/48 which replaced those directives.

91. According to the Commission, the exclusion of deposits by credit institutions on their own behalf and for their own account reflects the retail focus of the Directive and the fact that credit institutions are better placed than other depositors to assess the likelihood of a default of a bank (the asymmetry of information is deemed to be less acute). This means that interbank loans, although in principle technically covered by the notion of "deposit", do not

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[18] Reference is made to recital 23 in the preamble to the Directive. In addition, the Commission observes that, in contrast, the recast of the Directive it proposed on 12 July 2010 (COM(2010) 368 final) refers to compulsory prefunding.

[19] Reference is made to Article 1 of the First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, OJ 1977 L 322, p. 30, and Article 1 of Directive 89/646, cited above.

constitute deposits eligible for repayment. Such loans are, subject to Article 8(3), excluded from repayment. It appears to the Commission that, if the definition of deposit in Article 1(1) of the Directive is read in conjunction with the exclusion of interbank deposits in Article 2, a functional definition is established of the notion of "eligible deposit". The Commission is inclined to consider that such a functional definition is more in line with the aim of the Directive, which follows from Article 7 that provides for repayment. In the view of the Commission, it is, however, for the national court to decide whether the technical or the functional definition of "deposit" is to be applied for the purposes of the present case.

92. The Commission adds that while deposits by "credit institutions" on their own behalf and for their own account are automatically and generally excluded from compensation under Article 2 of the Directive, the exclusion of deposits made by financial institutions is left to the discretion of EEA States. Under Article 7(2), read in conjunction with Annex I of the Directive, EEA States are free to decide whether to exclude "deposits by financial institutions as defined in Article 1(6) of Directive 89/646/EEC", now replaced by Article 4(5) of Directive 2006/48. Given that this is an optional exclusion placed in a different part of the Directive, the Commission considers that, unlike the automatic and general exclusion of banks in Article 2, it is reasonable not to read this exclusion in conjunction with the definition of "deposit" in Article 1(1).

93. The Commission considers that it is, ultimately, for the national court to decide, in the light of the above considerations and on the basis of the available evidence, whether the loans in question can be considered credit balances resulting from a temporary situation deriving from normal banking transactions and which a bank must repay under the legal and contractual conditions applicable, and thus a "deposit" within the meaning of Article 1(1) of the Directive. It notes that the Directive does not lay down any conditions for the factual establishment of the existence of deposits. What is clear, however, the Commission continues, is that the Directive does not preclude the possibility that a deposit is evidenced by electronic notifications. The Commission submits that it is for the national court to determine whether for the purposes of the present case the technical definition (based simply on Article 1(1) of the Directive) or the functional definition (based on Article 1(1) read in conjunction with Article 2 of the Directive) of "deposits" applies.

The second and third questions

94. The Commission submits that the second and third questions should be answered in the negative. According to the Commission, it is of no relevance for the qualification of funds as deposits within the meaning of Article 1(1) whether (i) bank B's State of domicile has availed itself of the power established in Article 7(2) of the Directive to exclude deposits by financial institutions or (ii) bank A does not exercise its authorisation to accept deposits from the general public. According to the Commission, the definition of deposits does not exclude

the possibility that also banks, as providers of funds, can hold deposits whether or not they use their authorisation to accept deposits from the general public.

95. The Commission proposes that the questions should be answered as follows:

1. The definition of "deposit" in Article 1(1) of Directive 94/19/EC on deposit-guarantee schemes must be interpreted in such a way to include funds which bank A delivers to a bank B, and which B must repay A on a predetermined date, together with interest which had been pre-negotiated, even though they are not placed in a special account in the name of A and B has not issued any special documents to A recording the receipt of the funds, provided that such funds constitute credit balances resulting from temporary situations deriving from normal banking transactions. In this respect, it is irrelevant that B has not paid premiums in respect of the funds to the Depositors' and Investors' Guarantee Fund, or that the funds have not been entered as a deposit in B's books.

It is for the national court, according to national law, to assess the evidence brought in support of such a credit balance or claim. Directive 1994/19/EC does not preclude that a deposit be evidenced by electronic notifications.

However, even though these funds may qualify as "deposits" in the meaning of Article 1(1) of the Directive, they are pursuant to Article 2 of the Directive, subject to Article 8(3), automatically and generally excluded from repayment under the Directive if it is ascertained that both bank A and bank B are authorised in their home EEA States as a "credit institution" in the meaning of Article 4(1) of Directive 2006/48/EC

2. The fact that bank B's State of domicile has availed itself of the authorisation of Article 7(2) of the Directive to exclude deposits by financial institutions from deposit guarantee, bears no consequence on the qualification of the funds as "deposits" in the meaning of Article 1(1) of the Directive.

3. The fact that bank A does not exercise the authorisation it has, under its operating licence, to accept deposits from the general public, does not affect the qualification of the funds as "deposits" in the meaning of Article 1 of the Directive.

Per Christiansen
Judge-Rapporteur