Reports of Cases

OPINION OF ADVOCATE GENERAL CAMPOS SÁNCHEZ-BORDONA
delivered on 15 June 2017

Joined Cases C-688/15 and C-109/16

Agnieška Anisimovičienė and Others
v
BAB bankas Snoras,
Indėlių ir investicijų draudimas VĮ
(C-688/15)
and
Indėlių ir investicijų draudimas VĮ
v
Alvydas Raišelis
(C-109/16)

(Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania))

(Preliminary ruling — Deposit-guarantee and investor-compensation schemes — Directive 94/19/EC — Directive 97/9/EC — Definition of ‘deposit’ — Definition of ‘normal banking transaction’ — Direct effect of Directive 94/19 and Directive 97/9 — Money transferred from personal bank accounts to an account opened in the name of a credit institution and to be used as payment for financial instruments issued by that institution)

1. The Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania) again seeks a preliminary ruling from the Court of Justice in two disputes of which it is seised, resulting from the insolvency of a Lithuanian credit institution.

2. As in the case which led to the judgment of the Court of 25 June 2015, Indėlių ir investicijų draudimas and Nemaniūnas, the referring court requests an interpretation of Directives 94/19/EC and 97/9/EC in order to identify the extent of the protection which each provides to savers and investors, respectively.

3. In particular, the referring court asks whether those directives may be applied to sums transferred to a credit institution by its customers to pay for the purchase of shares or for subscription to that credit institution’s bonds. Both transactions were ultimately frustrated as a result of the bank’s subsequent insolvency.

1 Original language: Spanish.
2 Case C-671/13, EU:C:2015:418.
I. Legislative framework

A. EU law

1. Directive 94/19

4. The 1st, 18th and 20th recitals of the directive state:

‘[1] … in accordance with the objectives of the Treaty, the harmonious development of the activities of credit institutions throughout the Community should be promoted through the elimination of all restrictions on the right of establishment and the freedom to provide services, while increasing the stability of the banking system and protection for savers’.

‘[18] … a Member State must be able to exclude certain categories of specifically listed deposits or depositors, if it does not consider that they need special protection, from the guarantee afforded by deposit-guarantee schemes’.

‘[20] … the principle of a harmonised minimum limit per depositor rather than per deposit has been retained; whereas it is therefore appropriate to take into consideration the deposits made by depositors who either are not mentioned as holders of an account or are not the sole holders; whereas the limit must therefore be applied to each identifiable depositor; whereas that should not apply to collective investment undertakings subject to special protection rules which do not apply to the aforementioned deposits’.

5. According to Article 1:

‘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.

…

(3) “unavailable deposit” shall mean a deposit that is due and payable but has not been paid by a credit institution under the legal and contractual conditions applicable thereto, where either:

(i) the relevant competent authorities have determined that in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and to have no current prospect of being able to do so.

…; or

(ii) a judicial authority has made a ruling for reasons which are directly related to the credit institution’s financial circumstances which has the effect of suspending depositors’ ability to make claims against it, should that occur before the aforementioned determination has been made;

(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;
6. Article 2 provides:

‘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,

– all instruments which would fall within the definition of “own funds” in Article 2 of Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions,

’

7. Article 3(1) is worded as follows

‘Each Member State shall ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognised. Except in the circumstances envisaged in the second subparagraph and in paragraph 4, no credit institution authorised in that Member State pursuant to Article 3 of Directive 77/780/EEC may take deposits unless it is a member of such a scheme.

’

8. Article 7 states

‘1. Member States shall ensure that the coverage for the aggregate deposits of each depositor shall be at least EUR 50 000 in the event of deposits being unavailable.

1a. By 31 December 2010, Member States shall ensure that the coverage for the aggregate deposits of each depositor shall be set at EUR 100 000 in the event of deposits being unavailable.

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2. 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.’

9. Article 8(3) provides

‘Where the depositor is not absolutely entitled to the sums held in an account, the person who is absolutely entitled shall be covered by the guarantee, provided that that person has been identified or is identifiable before the date on which the competent authorities make the determination described in Article 1(3)(i) or the judicial authority makes the ruling described in Article 1(3)(ii). If there are several persons who are absolutely entitled, the share of each under the arrangements subject to which the sums are managed shall be taken into account when the limits provided for in Article 7(1), (3) and (4) are calculated.’

10. Point 12 of Annex I (‘List of exclusions referred to in Article 7(2)’) refers to ‘Debt securities issued by the same institution and liabilities arising out of own acceptances and promissory notes.’
2. **Directive 97/9**

11. Recitals 4, 8 and 9 state:

‘(4) ... the protection of investors and the maintenance of confidence in the financial system are an important aspect of the completion and proper functioning of the internal market in this area; ... to that end it is therefore essential that each Member State should have an investor-compensation scheme that guarantees a harmonised minimum level of protection at least for the small investor in the event of an investment firm being unable to meet its obligations to its investor clients’.

‘(8) ... therefore, every Member State should be required to have an investor-compensation scheme or schemes to which every such investment firm would belong; ... each scheme must cover money and instruments held by an investment firm in connection with an investor’s investment operations which, where an investment firm is unable to meet its obligations to its investor clients, cannot be returned to the investor; ... this is entirely without prejudice to the rules and procedures applicable in each Member State as regards the decisions to be taken in the event of the insolvency or winding-up of an investment firm’.

‘(9) ... the definition of investment firm includes credit institutions which are authorised to provide investment services; ... every such credit institution must also be required to belong to an investor-compensation scheme to cover its investment business; ..., however, it is not necessary to require such a credit institution to belong to two separate schemes where a single scheme meets the requirements both of this Directive and of Directive 94/19 ...; however, in the case of investment firms which are credit institutions it may in certain cases be difficult to distinguish between deposits covered by Directive [94/19] and money held in connection with investment business; ... Member States should be allowed to determine which Directive shall apply to such claims’.

12. According to Article 1of the directive

‘For the purposes of this Directive:

(1) “investment firm” shall mean an investment firm as defined in Article 1(2) of Directive 93/22/EEC, [5]

- authorised in accordance with Article 3 of Directive [93/22], or

- authorised as a credit institution in accordance with Council Directive 77/780/EEC and Council Directive 89/646/EEC, the authorisation of which covers one or more of the investment services listed in Section A of the Annex to Directive [93/22];

(2) “investment business” shall mean any investment service as defined in Article 1(1) of Directive [93/22] and the service referred to in point 1 of Section C of the Annex to that Directive;

(3) “instruments” shall mean the instruments listed in Section B of the Annex to Directive [93/22];

(4) “investor” shall mean any person who has entrusted money or instruments to an investment firm in connection with investment business;

...

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13. Article 2 of the directive provides

‘1. Each Member State shall ensure that within its territory one or more investor-compensation schemes are introduced and officially recognised. Except in the circumstances envisaged in the second subparagraph and in Article 5(3), no investment firm authorised in that Member State may carry on investment business unless it belongs to such a scheme.

...’

2. A scheme shall provide cover for investors in accordance with Article 4 where either:

– the competent authorities have determined that in their view an instrument firm appears, for the time being, for reasons directly related to its financial circumstances, to be unable to meet its obligations arising out of investors’ claims and has no early prospect of being able to do so,

or

– a judicial authority has made a ruling, for reasons directly related to an investment firm’s financial circumstances, which has the effect of suspending investors’ ability to make claims against it

 whichever is the earlier. Cover shall be provided for claims arising out of an investment firm’s inability to:

– repay money owed to or belonging to investors and held on their behalf in connection with investment business,

or

– return to investors any instruments belonging to them and held, administered or managed on their behalf in connection with investment business,

in accordance with the legal and contractual conditions applicable.

3. Any claim under paragraph 2 on a credit institution which, in a given Member State, would be subject both to this Directive and to Directive [94/19] shall be directed by that Member State to a scheme under one or other of those Directives as that Member State shall consider appropriate. No claim shall be eligible for compensation more than once under those Directives.

‘...’


14. Recitals 2, 26 and 31 state:

‘(2) In recent years more investors have become active in the financial markets and are offered an even more complex wide-ranging set of services and instruments. In view of these developments the legal framework of the Community should encompass the full range of investor-oriented activities. To this end, it is necessary to provide for the degree of harmonisation needed to offer

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investors a high level of protection and to allow investment firms to provide services throughout the Community, being a Single Market, on the basis of home country supervision. In view of the preceding, Directive [93/22] should be replaced by a new Directive.’

‘(26) In order to protect an investor’s ownership and other similar rights in respect of securities and his rights in respect of funds entrusted to a firm those rights should in particular be kept distinct from those of the firm. This principle should not, however, prevent a firm from doing business in its name but on behalf of the investor, where that is required by the very nature of the transaction and the investor is in agreement, for example stock lending.’

‘(31) One of the objectives of this Directive is to protect investors. ...

15. Article 4(1) contains the following definitions:

‘(1) “Investment firm” means any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis;

...

(2) “Investment services and activities” means any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I;

...

(17) “Financial instrument” means those instruments specified in Section C of Annex I;

(18) “Transferable securities” means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:

(a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;

(b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;

...

16. Annex I (‘List of services and activities and financial instruments’) includes Section A (‘Investment services and activities’) which contains the following points:‘(1) Reception and transmission of orders in relation to one or more financial instruments.

(2) Execution of orders on behalf of clients.

(3) Dealing on own account.

(4) Portfolio management.

(5) Investment advice.

(6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis.

(7) Placing of financial instruments without a firm commitment basis.
(8) Operation of Multilateral Trading Facilities.’

17. Section C of that annex (‘Financial Instruments’) includes ‘Transferable securities’ in point (1).


18. Recitals 5 and 6 state:

‘(5) Measures to coordinate credit institutions should, both in order to protect savings and to create equal conditions of competition between these institutions, apply to all of them. Due regard should however be had to the objective differences in their statutes and their proper aims as laid down by national laws.

(6) The scope of those 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. Exceptions should be provided for in the case of certain credit institutions to which this Directive cannot apply. The provisions of this Directive should not prejudice the application of national laws which provide for special supplementary authorisations permitting credit institutions to carry on specific activities or undertake specific kinds of operations.’

19. Article 5 is worded as follows:

‘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.

The first paragraph shall not apply to the taking of deposits or other funds repayable by a Member State or by a Member State’s regional or local authorities or by public international bodies of which one or more Member States are members or to cases expressly covered by national or Community legislation, provided that the activities are subject to regulations and controls intended to protect depositors and investors and applicable to those cases.’

B. Lithuanian law

20. Article 2 of Law No IX-975 of 20 June 2002 on the guarantee of deposits and of liabilities to investors includes the following definitions:*

‘3. “Depositor”: a natural or legal person, holding a deposit with a bank, a bank branch or a credit union, with the exception of the persons whose deposits cannot be covered by insurance under this law. Where a natural or legal person (with the exception of management companies which manage common funds or pension funds) holds the deposit as a trustee, the trustee shall be treated as a depositor. Where a group of persons holds a claim on the funds under a contract, each of those persons shall be treated as a depositor and the funds shall be divided between them in equal shares, unless stipulated otherwise in the contracts from which their claims are derived or in a court judgment.

...’

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8 Zin., 2002, n.t. 65-2635. Law on deposit insurance which transpose Directives 94/19 and 97/9 into Lithuanian law (‘LDI’).
4. “Deposit”: the total amount of a depositor’s money (including interest) held in a bank, a bank branch or a credit union under a deposit and/or bank account contract, in addition to other money on which the depositor has a claim arising from the credit institution’s undertaking to carry out transactions using the depositor’s money or to provide investment services.

... 

11. "Investor": a natural or legal person who has transferred money or transferrable securities to the policyholder in order to benefit from the investment services provided by the latter. Where a group of persons holds a claim on the money under a contract, each of those persons shall be treated as an investor and the transferrable securities or money shall be divided between them in equal shares, unless stipulated otherwise in the contract from which their claims are derived or in a court judgment. Where the person who has transferred the money or transferrable securities (with the exception of management companies which manage common funds or pension funds) acts as a trustee, the creator of the trust shall be treated as the investor.

12. "Obligations in relation to the investor": obligation of a policyholder who provides an investor with investment services to return that investor’s money or transferrable securities to him.'

21. According to Article 3(1), the insurance is to cover deposits in national currency and in foreign currency. Article 3(4) provides that, inter alia, debt securities issued by the insured entity itself cannot be covered by the insurance.

22. In accordance with the second sentence of Article 9(1) LDI, an investor becomes entitled to insurance compensation from the day of an insured event only where the entity with insurance has transferred or used the investor’s securities and/or funds without the investor’s consent.

II. The facts

A. Case C-688/15

23. On 21 December 2010, the general meeting of shareholders of BBA bankas Snoras ('Snoras') decided to increase Snoras’s share capital by a public offering of new shares for purchase and subscription.

24. On 3 February 2011, the Vertybinių popierių komisija (Securities Commission) approved the securities prospectus.

25. On 1 March 2011, an account was opened in the name of Snoras with AB bankas Finasta ('Finasta') to be used for depositing clients’ money intended for the purchase of the shares issued.

26. From 9 March 2011 to 16 May 2011, Ms Agnieška Anisimovienė and 256 other customers of Snoras concluded a number of share subscription agreements with that bank. In accordance with those agreements, Snoras acquired the right to debit the amount payable for the shares from the accounts which Ms Anisimovienė and the other customers held with Snoras and to transfer that amount to an account held by Snoras with Finasta. Ms Anisimovienė and the other customers were also able to pay money into that account directly.

27. On 5 May 2011, Snoras applied to Lietuvos Bankas (Bank of Lithuania) for authorisation to register amendments to its articles of association as a result of the decision to increase the share capital.
28. On 16 November 2011, the Bank of Lithuania adopted a decision to impose a moratorium on the operations of Snoras until 16 January 2012, and to expropriate shares in Snoras on grounds of public interest.

29. On 22 November 2011, the Bank of Lithuania refused registration of the amendments to the articles of association referred to above and, by decision of 24 November 2011, it revoked Snoras’s banking licence.

30. On 7 December 2011, insolvency proceedings were instituted with respect to Snoras, with effect from 20 December 2011.

31. Ms Anisimovičienė and the other persons affected brought an action before the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania), seeking recognition as depositors with that bank. Their claim was dismissed by judgment of 29 September 2014 in which the court held that they were to be regarded as investors and that the amounts paid by them for the purchase of the shares had not become deposits.

32. An appeal lodged was dismissed by the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania) by judgment of 12 March 2015; that judgment is the subject of an appeal on a point of law to the Lietuvos Aukščiausiasis Teismas (Supreme Court).

B. Case C-109/16

33. By decisions of 16 June and 14 July 2011, the Lithuanian Securities Commission approved a prospectus for the issue of new bonds by Snoras.

34. In accordance with that prospectus, Snoras was entitled to make a number of medium-term marketable bond issues, on condition of prior publication of the definitive conditions applicable to each issue.

35. The prospectus stated that: (1) individuals could purchase bonds at branches, agencies and other services of Snoras; (2) the price of the bonds had to be paid on the date of conclusion of the subscription agreement, to which end the purchaser needed to have the appropriate amount available in an account opened with Snoras and to authorise the bank to debit that amount from the account; (3) the date of performance indicated in the definitive conditions applicable to the bond issue would be the date of issue of the bonds; and (4) the bonds were to be registered in a securities account opened with Snoras in the purchaser’s name.

36. On 2 November 2011, Snoras published the definitive conditions applicable to the 11th medium-term fixed rate bond issue.

37. On 10 and 11 November 2011, Mr Alvydas Raišelis concluded with Snoras agreements for the subscription of bonds corresponding to that issue, the total price of which he paid into his personal bank account with Snoras. The agreements contained a clause allowing the Bank to debit the amount credited, without the need for a new agreement, in order to pay for the bonds purchased.

38. In accordance with the agreements concluded, Snoras transferred the sums paid by Mr Raišelis to an account in its own name.

39. As a result of Snoras’s failure, referred to above, the bonds to which Mr Raišelis subscribed were not issued.
40. Mr Rašelis brought an action before the Vilniaus miesto 2-asis apylinkės teismas (District Court Number 2, Vilnius, Lithuania) seeking recognition of his right to insurance compensation from the Indėlių ir investicijų draudimas VĮ (public undertaking whose business is to guarantee the protection of deposits and investments in the event of insolvency of financial institutions; ‘IID’).

41. The District Court dismissed the applicant’s claim by judgment of 7 September 2012. That court held that, although the bond issue had not taken place, Mr Rašelis would be entitled to receive insurance compensation only if Snoras had transferred or used the investor’s securities and/or money without the investor’s consent, which had not occurred. The District Court also observed that the debt securities issued by Snoras could not be covered by a guarantee.

42. On 17 October 2013, the first-instance judgment was set aside by the Vilniaus apygardos teismas (Regional Court, Vilnius), which recognised the appellant’s right to the compensation sought.

43. The appeal court held that, although the bonds would have been issued and accounted for in Mr Rašelis’s personal securities account only on the specified effective date of the securities (1 December 2011), the issue had not taken place and had not become effective due to the decision of the Bank of Lithuania which permanently revoked Snoras’s banking licence. The court ruled that the applicant should be treated as an investor and the applicant’s funds that were in Snoras’s account on the day of the insured event should be treated as a guaranteed deposit, from which it followed that Mr Rašelis was entitled to the compensation he sought.

44. IID appealed against the second-instance judgment to the Lietuvos Aukščiausiasis Teismas (Supreme Court).

III. The questions referred for a preliminary ruling

45. The Lietuvos Aukščiausiasis Teismas (Supreme Court) made two requests for a preliminary ruling, received at the Registry of the Court on 21 December 2015 (C-688/15) and 25 February 2016 (C-109/16); the questions are worded as follows:

A. Case C-688/15

‘(1) Is the Deposit Directive to be interpreted as meaning that funds debited with the persons’ consent or transferred or paid by those persons themselves into an account opened in the name of a credit institution held at another credit institution may be regarded as a deposit under that directive?

(2) Are Articles 7(1) and 8(3) of the Deposit Directive, taken together, to be understood as meaning that a deposit insurance payment up to the amount specified in Article 7(1) must be made to every person whose claim can be established before the date on which the determination or ruling referred to in Article 1(3)(i) and (ii) of the Deposit Directive is adopted?

(3) For the purposes of the Deposit Directive, is the definition of a “normal banking transaction” relevant for the interpretation of the concept of a deposit as a credit balance deriving from banking transactions? Is that definition also to be taken into account when interpreting the concept of a deposit in national legal measures which have implemented the Deposit Directive?

(4) If the third question is answered in the affirmative, how is the concept of a normal banking transaction used in Article 1(1) of the Deposit Directive to be understood and interpreted:

(a) what banking transactions should be regarded as normal or what criteria should be the basis for determining whether a specific banking transaction is a normal one?
(b) is the concept of a normal banking transaction to be assessed having regard to the objective of the banking transactions performed or to the parties between whom such banking transactions are carried out?

c) is the concept, used in the Deposit Directive, of a deposit as a credit balance deriving from normal banking transactions to be interpreted as covering only cases where all the transactions resulting in the creation of such a balance are regarded as normal?

(5) Where funds fall outside the definition of a deposit under the Deposit Directive but the Member State has chosen to implement the Deposit Directive and the Investor Directive in national law in such a way that funds to which the depositor has claims arising from a credit institution’s obligation to provide investment services are also regarded as a deposit, can the cover for deposits be applied only after it has been determined that in a specific case the credit institution acted as an investment firm and funds were transferred to it to carry out investment business/activities, within the meaning of the Investor Directive and [Directive 2004/39]?’

**B. Case C-109/16**

‘(1) In cases where a credit institution operates as an investment firm to which funds have been transferred for the acquisition of debt securities issued by the same credit institution, but the securities issue does not become effective and the securities are not transferred to the ownership of the person who has paid the funds, while the funds have already been debited from that person’s bank account and transferred to an account opened in the name of the credit institution and are not repayable, and the national legislative intent in such a case is not clear with regard to the application of a specific protection scheme, can Article 1(1) of the Deposit Directive and Article 1(4) of the Investor Directive be applied directly in order to determine the applicable coverage scheme, and is the intended use of the funds the decisive criterion for that purpose? Do those provisions of the directives display the necessary clarity, detail and unconditionality and confer rights on individuals, with the result that they may be relied on by individuals before national courts to found their claims for payment of compensation brought against the State body providing insurance cover?

(2) Should Article 2(2) of the Investor Directive, which specifies the types of claims that are covered by the investor compensation scheme, be understood and interpreted as also covering claims for repayment of funds that an investment firm owes to investors and that are not held in the name of the investors?

(3) If the answer to the second question is in the affirmative, does Article 2(2) of the Investor Directive, which specifies the types of claims that are covered by the compensation scheme, display the necessary clarity, detail and unconditionality and confer rights on individuals, with the result that that provision may be relied on by individuals before national courts to found their claims for payment of compensation brought against the State body providing insurance cover?

(4) Should Article 1(1) of the Deposit Directive be understood and interpreted as meaning that the definition of “deposit” under that directive also includes funds transferred from a personal account, with the person’s consent, to an account opened in the name of a credit institution which is held at the same credit institution and is intended to pay for the future debt securities issue of that institution?

(5) Are Articles 7(1) and 8(3) of the Deposit Directive, taken together, to be understood as meaning that a deposit insurance payment up to the amount specified in Article 7(1) must be made to every person whose claim can be established before the date on which the determination or ruling referred to in Article 1(3)(i) and (ii) of the Deposit Directive has been made?’
IV. Procedure before the Court of Justice

46. IID, the Lithuanian Government and the Commission lodged written observations in Cases C-688/15 and C-109/16. Ms Anisimovičiūnė and the other 256 persons lodged written observations in Case C-688/15.

47. At the joint hearing in both cases, held on 30 March 2017, oral argument was presented by Ms Anisimovičiūnė and others, IID, the Lithuanian Government and the Commission.

V. Analysis

48. The issue in this reference for a preliminary ruling is how the sums transferred by customers to a credit institution (Snoras) for the purpose of acquiring shares in that bank (Case C-688/15) or bonds issued by that bank (Case C-109/16) are to be classified with regard to their possible inclusion within the scope of Directives 94/19 and 97/9.

49. In the former case, customers’ money was paid into an account opened by Snoras at another credit institution (Finasta), either directly by the customers themselves or, with their consent, by transfers made by Snoras from accounts held at its branches by those individuals.

50. In the latter case, the funds were transferred, also with the customer’s consent, from his account with Snoras to another account opened with Snoras in that bank’s name.

51. The intended transaction could not be completed in either case because Snoras lost its banking licence in 2011 and was the subject of insolvency proceedings.

52. The question here is, first, whether the funds intended for the purchase of shares in Snoras (Case C-688/15) and for the subscription to bonds in that credit institution (Case C-109/16) can be classified as a ‘deposit’ within the meaning of Directive 94/19.

53. Next (and only with regard to Case C-109/16), it will be necessary to decide whether the sums transferred for subscription to the bonds are eligible for the protection that Directive 97/9 offers to investors.

54. Both questions have arisen in connection with national legislation which transposed the Deposit Directive (94/19) and the Investor Directive (97/9) into a single piece of legislation.

55. In my view, the questions referred by the Lietuvos Aukščiausiasis Teismas (Supreme Court) can be grouped together and reformulated as three questions.

56. First, it will be necessary to examine: (a) whether the funds in Case C-688/15 constitute a ‘deposit’ for the purposes of Directive 94/19, the issue dealt with in questions 1, 3, 4 and 5 of the national court and also, tangentially, in question 2; and (b) whether the funds in Case C-109/16 can also be classified as a ‘deposit’ within the meaning of Directive 94/19 (question 4 in Case C-109/16). Only in the event that the funds in both cases are caught by the scope of Directive 94/19, will it be necessary to determine who the beneficiaries of the guarantee are (question 2 in Case C-688/15 and question 5 in Case C-109/16).

57. Second, it will be necessary to examine whether the sums in Case C-109/16 are protected by Directive 97/9, since the referring court asks whether Article 2(2) of that directive applies to money owed to investors by an investment firm.
58. Lastly, questions 1 and 3 in Case C-109/16 ask whether it is possible for Directives 94/19 and 97/9 to have direct effect.

A. The term ‘deposit’ within the meaning of Directive 94/19, and the beneficiary of the deposit guarantee (questions 1 to 5 in Case C-688/15 and questions 4 and 5 in Case C-109/16)

1. Arguments of the parties

59. Ms Anisimovienė and the other applicants contend that Directive 94/19 covers the money they paid to Snoras under the share subscription agreements. In their submission, the amounts they paid should have been refunded to them as soon as those agreements became devoid of purpose because the Bank of Lithuania had refused to register the increase in Snoras's capital.

60. The applicants argue that a 'temporary situation' was created as a result of which the money that Snoras owed them was not repaid to them because of that bank's financial difficulties. In other words, Snoras's situation prevented the performance of a 'normal banking transaction' involving the transfer to Ms Anisimovienė and the other applicants of the amounts which had been deposited in Snoras's account but which could not be used for the acquisition of shares.

61. In the applicants' submission, a strict interpretation of the applicable legislation would deprive them not only of compensation as investors but also of compensation as depositors. It is their contention that, where a depositor who wishes to become an investor does not succeed in doing so (as in their case), he or she is eligible for protection under Directive 94/19.

62. Moreover, the applicants maintain that the holder of a claim for the recovery of funds should be considered to be a depositor on the date of the decisions referred to in Article 1(3)(i) and (ii) of Directive 94/19.

63. IID, the Lithuanian Government and the Commission submit that the funds at issue in the two proceedings do not constitute deposits within the meaning of Directive 94/19.

64. IID contends, in the same vein as the Commission, that the funds in Case C-688/15 are actually a deposit by Snoras with Finasta (and not a deposit by Ms Anisimovienė and the other applicants), since, in line with judicial findings in other proceedings, the sums concerned were transferred to Snoras, which became the proprietor of those sums, with the result that they do not fall within the scope of Directive 94/19.

65. IID, the Lithuanian Government and the Commission submit that those funds were not covered by the guarantee laid down in Directive 94/19 because they were not deposited in the accounts of Ms Anisimovienė and the other applicants and nor were they represented by debt securities issued by Snoras. All that needs to be determined, therefore, is whether those funds can be attributed to 'temporary situations deriving from normal banking transactions'. That is not the case because the term 'normal banking transaction' does not include the receipt by a bank of funds for use in the acquisition of its shares.

66. IID rejects the view that Directive 94/19 is applicable to the funds in Case C-688/15 because Snoras was acting as an investment firm and received the funds to carry out investment business. IID submits that the two guarantee schemes at issue are different in nature. Although overlapping is possible, it does not occur in this case, for the applicants transferred the money to carry out an investment that ultimately fell through. The transfer of that money was not a deposit protected by Directive 94/19 and nor was the risk inherent in the investment covered by Directive 97/9.
67. As regards Case C-688/15, the Lithuanian Government argues that the national legislature decided to apply the deposit guarantee laid down in Directive 94/19 where a credit institution undertakes to provide investment services. Therefore, the Lithuanian Government submits, the question concerning the intended use of the funds in the possession of Snoras is hypothetical. At all events, and in the alternative, money entrusted to a credit institution for the acquisition of financial instruments, or for other purposes, could, if that institution becomes insolvent, result in compensation under Directive 94/19 if that money can be deemed to fall within the scope of that directive.

68. In relation to Case C-688/15, the Commission submits that Directives 94/19 and 97/9 do not completely harmonise their subject matter. Member States may provide for greater protection provided that doing so does not weaken the practical effect of the directives or affect areas harmonised by other EU provisions.

69. The Commission contends that Member States may extend protection under the deposit-guarantee scheme to funds which do not fall within the scope of either directive. If that protection includes claims deriving from a bank’s undertaking to provide investment services to its customers, it will not be necessary for that bank to have acted, in this case, as an investment firm within the meaning of Directive 97/9.

70. In the event that the funds at issue may be classified as deposits, the Lithuanian Government maintains that compensation should not be granted to the account holder but to the owner of those funds, whose identity must be confirmed before the date on which the credit institution becomes insolvent.

71. IID observes, in that respect, that Snoras’s banking licence was revoked on 24 November 2011, a date on which neither that bank nor Finasta had an obligation to repay the funds, because the decision adopted to increase the share capital was valid until 20 December 2011, the date on which Snoras was required to repay the funds to Ms Anisimovienė and the other applicants.

72. Specifically with regard to the funds in Case C-109/16, IID, the Lithuanian Government and the Commission all contend, essentially, that these cannot be classified as deposits. Those parties submit that the funds in question are money transferred with the consent of the person concerned to an account held by Snoras for the purposes of accessing a future issue of bonds by that credit institution, a situation which is not caught by the term ‘deposit’ in Directive 94/19.

2. Analysis of the question

(a) The definition of deposit in Directive 94/19: General considerations

73. In accordance with Article 1(1) of Directive 94/19, the concept of a ‘deposit’ includes, on the one hand, ‘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, on the other, ‘any debt evidenced by a certificate issued by a credit institution’.
74. As Advocate General Cruz Villalón argued in the Opinion in *Indėlė ir investicijų draudimas and Nemaniiunės* (the first case involving IID), 9 ‘[i]n both cases, the debts concerned are ones which the credit institution is required to repay, either, in one case, to the holder of an account in which funds have been left which have given rise to a credit balance or in which normal banking transactions have been carried out which have given rise to temporary situations which have also led to a credit balance, or, in the other case, to the holder of a certificate of deposit.’ 10

75. The repayment obligation is, therefore, essential to the definition of the concept of ‘deposit’. 11 That is confirmed by Article 1(4) of Directive 94/19, in accordance with which the credit institutions referred to in Article 1(1) are ‘undertaking[s] the business of which is to receive deposits or other repayable funds from the public’. 12

76. The second key element of the definition of ‘deposit’ within the meaning of Directive 94/19 is, specifically, the fact the depositor must be a credit institution.

77. Finally, the third element of that definition concerns the nature of the depositor. Without prejudice to the exclusions laid down in Directive 94/19 13 or permitted by that directive, 14 depositors are essentially ‘savers’, whose protection, according to its first recital, is one of the aims of that directive. 15

78. It is common ground that two of those three elements are present in the proceedings giving rise to these references for a preliminary ruling: the sums were paid to a *credit institution* by individuals (*savers*, broadly speaking) who are not excluded, in principle, from the scope of the protection laid down in Directive 94/19. It remains to be seen whether the third element, which is more difficult to identify, is also present.

79. The credit balances referred to in Article 1(1) of Directive 94/19 include those entrusted to a credit institution under a contract governing deposits in a current or savings account, concepts which are not unduly complex. It is also, to my mind, not particularly difficult to determine — subject to the language-related difficulties to which I shall refer below — what is meant by ‘certificate’ in the final phrase of the first subparagraph of Article 1(1). 16 Neither of those two categories is present in Case C-688/15, as I shall argue below.

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9 Case C-671/13, EU:C:2015:129, point 36.
10 Advocate General Cruz Villalón went on to state: ‘While the debts concerned have that feature in common, they differ in that only certificates of deposit are concerned with debts which can be transferred or, as the case may be, negotiated.’
11 However, the question of whether they are transferrable or non-transferrable instruments is not decisive. Whilst, in principle, the ‘repayment obligation excludes the possibility that the debt may be transferred or negotiated since, strictly speaking, it is a deposit entrusted to the institution’ (Opinion of Advocate General Cruz Villalón in *Indėlė ir investicijų draudimas and Nemaniiunės*, C-671/13, EU:C:2015:129, point 37), Article 1(1) of Directive 94/19 also concerns certificates of deposit, that is, a type of ‘deposit’ characterised by the fact that it may be transferred (Opinion of Advocate General Cruz Villalón in *Indėlė ir investicijų draudimas and Nemaniiunės*, C-671/13, EU:C:2015:129, point 39), which, in the words of the judgment of 25 June 2015, given in that case (C-671/13, EU:C:2015:418), at paragraph 36, means that ‘the claim to the debt which that certificate entails may be traded’. The point relating to negotiability was, moreover, important in enabling the Court to hold that Article 7(2) of Directive 94/19 in conjunction with point 12 of Annex I to that directive do not preclude a rule of national law which excludes from the deposit guarantee certificates of deposit issued by the insured itself, ‘provided that such securities are negotiable’ (judgment of 25 June 2015, *Indėlė ir investicijų draudimas and Nemaniiunės*, C-671/13, EU:C:2015:418, paragraph 38).
12 Similarly, Article 5 of Directive 2006/48 relating to the taking up and pursuit of the business of credit institutions reserves to ‘credit institutions … [the] carrying on [of] the business of taking deposits or other repayable funds from the public’. My emphasis.
13 As occurs, in certain circumstances, with credit institutions themselves, according to Article 2 of the directive.
14 Those listed in Annex I, as referred to in Article 7(2) of the directive.
15 The 16th recital of Directive 94/19 also refers to ‘consumer protection’.
16 Financial instruments which Cortés, L.J., ‘Contratos bancarios [Il]’, in Uría, R. and Menéndez, A., *Curso de Derecho Mercantil*, vol. II, Civitas, Madrid, 2001, p. 541, defines as ‘títulos valores, a la orden, transmisibles por endoso de modo que el titular pueda enajenarlos recuperando los fondos invertidos o depositados a plazo sin que se cancele o ponga fin al contrato con la entidad de crédito’ (securities, payable to order and transferable by endorsement, meaning that the holder can transfer them and recover funds invested or deposited on a fixed-term basis without cancellation or termination of the agreement with the credit institution).
80. It is more difficult to characterise balances resulting from ‘temporary situations deriving from normal banking transactions’, in other words, the balances in the second case referred to in Article 1(1) of Directive 94/19.

81. In principle, it is possible to agree that ‘normal banking transactions’ are those carried out by credit institutions in the performance of their usual business, which is essentially ‘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.’

82. Admittedly, as the representative of Ms Anisimoviené and the other applicants in Case C-688/15 pointed out at the hearing, recital 6 of Directive 2006/48 advocates the ‘broad[est] ... possible’ approach to the scope of measures to coordinate credit institutions. However, it does so in the sense that ‘all institutions whose business is to receive repayable funds from the public’ must be included in the scope of those measures, and after referring explicitly in recital 5 to the protection of savings. Accordingly, irrespective of how varied the operations of credit institutions now are, the relevant activity for the purposes of Directive 94/19 can only be typical banking business, in other words, business related to the receipt of repayable funds and the grant of credits.

83. As regards the ‘temporary situations’ resulting from those types of normal transaction, it can be assumed that these are situations which occur during the period when those ‘transactions’ are being carried out. They are, therefore, situations of transition between two accounting statements, which differ as a result of the banking transaction separating them but which are in a relationship of complete continuity.

84. Thus, on initial consideration, the ‘deposits’ guaranteed by Directive 94/19 are, in addition to any credit balances arising in those situations of transition, credit balances resulting from every specific normal or typical banking transaction (carried out with or using ‘funds left in an account’) and debts evidenced by a certificate issued by a credit institution.

85. Nonetheless, I must stress that, when defining the concept of ‘deposit’ as used in Directive 94/19, the key lies in the repayment obligation. It is inherent in a deposit contract that someone receives another’s property with the obligation to keep and return that property. It must also be borne in mind that Directive 94/19 essentially seeks to protect investors against the closure of an insolvent credit institution. The aim is thus, first and foremost, to guarantee to savers that that insolvency will not prevent the recovery (at least up to a specified limit) of their money, which the credit institution was legally bound to repay.

86. From the point of view of the protection of savers, I believe, therefore, that the deposits guaranteed under Directive 94/19 are those transferred (by customers) to a credit institution in the confidence and certainty that it will be possible to recover the amounts concerned at any time, without being subject to any conditions other than those inherent in an ordinary repayment operation.

87. Such deposits are, in short, funds which the owner leaves in an account, to use the expression in Article 1(1) of Directive 94/19, with the intention that those funds should remain in that account until he decides to recover them. Naturally, the owner may also use those funds, for as long as they are left in that account, for any payments (direct debits and similar transactions) which, in agreement with the bank, he wishes to debit from the account.

18 My emphasis.
19 First and second recitals of Directive 94/19.
88. The aim of Directive 94/19 is to give due recognition to the confidence of savers that funds left in an account with a credit institution may be recovered, even where that institution becomes insolvent. The EU legislature attempts in that way to avoid the cost ‘that would result from a massive withdrawal of bank deposits not only from a credit institution in difficulties but also from healthy institutions following a loss of depositor confidence in the soundness of the banking system’.  

89. It is that specific confidence, and not the confidence generally warranted by any legal transaction, which Directive 94/19 seeks to ensure. That directive does not guarantee the repayment of money paid as consideration for any contractual obligation but rather, strictly, the repayment of money entrusted by savers to a credit institution in the certainty that they will be able to recover that money at any time.

90. Obviously, funds used to meet an obligation entered into in the context of any other contractual relationship will benefit from the general protection which the law affords to lawfully concluded contracts. However, that (general) protection must take effect using the procedures stipulated in each case for establishing liability on the part of a person who breaches his contractual obligations, which do not include those provided for in Directive 94/19.

(b) Whether it is possible to classify the funds at issue in Case C-688/15 as a ‘deposit’

91. The Court clearly stated in the judgment of 21 December 2016 that the acquisition of shares in companies is not guaranteed by Directive 94/19. In that judgment, it was a matter of determining whether Directive 94/19 included the protection of shares in recognised cooperatives operating in the financial sector. The Court held that ‘[t]he acquisition of such shares is ... more comparable to the acquisition of shares in companies, with respect to which no guarantees are provided by Directive 94/19, than to a payment made into a bank account’.

92. Since in that case it was a matter of determining only whether the acquisition of those particular shares could be included in the definition of ‘deposit’ in Directive 94/19, the Court did not need to examine in detail the concept of share subscription, merely stating that it was excluded from Directive 94/19. However, the question now arises directly, and it is therefore necessary to refer to the reasons specifically underpinning that categorical statement by the Court.

93. With regard to the facts of Case C-688/15, as set out in the order for reference, I believe that the funds at issue in that case cannot be classified as a ‘deposit’ within the meaning of Article 1(1) of Directive 94/19.

94. It should be recalled that those funds were sums paid into an account opened with a credit institution (Finasta) in the name of another credit institution (Snoras) and were to be used for the acquisition of new shares issued by Snoras. The sums were either paid directly (by the individuals concerned) into the account opened by Snoras with Finasta, or through transfers by Snoras to that account from the accounts which its customers (who had given their consent to this) held with Snoras. Before the acquisition of the shares could be formally completed, the Lithuanian Government decided to expropriate Snoras on public interest grounds.

95. In my opinion, the sums involved in those transactions are not ‘funds left in an account ... and which a credit institution must repay’. Indeed, the funds were not even left in the accounts of the individuals concerned but rather in the account held by Snoras with Finasta, so that, as IID and the Commission observe, if there was any deposit, it was only that made by Snoras with Finasta.

20 Fourth recital of Directive 94/19.
22 Loc. cit.
96. It could be argued, nevertheless, that the sums ‘deposited’ by Snoras with Finasta continued in reality to belong to the individuals who had paid them. The guarantee laid down in Article 8(3) of Directive 94/19 should, therefore, protect the applicants. However, there are two reasons which preclude that approach.

97. First, the money paid into Finasta would only be eligible, where appropriate, for the guarantee under Directive 94/19 if Finasta itself, as the depositary, was insolvent and could not, therefore, repay it, which was not the case.

98. Second (and irrespective of the fact that there appears to have been a judicial finding that the funds concerned are the property of Snoras), the repayment obligation which may be incumbent on Snoras is derived from the non-performance of the share purchase agreement concluded between that bank and its customers. That obligation cannot be confused with the obligation to repay the funds entrusted to a credit institution in the certainty that it will be possible to recover those funds at any time, which is a distinctive feature of the funds protected by Directive 94/19.

99. In other words, Ms Anisimovičienė and the other applicants who paid money to Snoras did not do so with the confidence that Snoras was obliged to repay those funds to them at any time in the future, at their request, but rather under the condition that they were paying that money as consideration (payment of the price) for the acquisition of a specified number of shares in Snoras. The fact that ultimately it was not possible to complete that acquisition may constitute a breach of contract, compensation for which must be sought by using the procedures laid down in Lithuanian civil or company law but not by relying on the protection provided by Directive 94/19 to bank deposits.

100. The situation resulting from non-fulfilment of the obligations assumed by Snoras under the share subscription agreements does not, in my view, come within the ‘temporary situations’ referred to in Article 1(1) of Directive 94/19 either.

101. The applicants contend that Snoras was obliged to repay the money they had entrusted to it since the transfer of that money constituted a ‘normal banking transaction’, even though it could not be completed because, between the payment of the money and its repayment (a ‘temporary situation’), there was, first, the moratorium on Snoras’s operations and, second, the opening of the insolvency proceedings.

102. I believe, however, that, if Snoras was required to repay money received as consideration for a share issue, which subsequently fell through, it would not be on the grounds that it had carried out a ‘normal banking transaction’ within the meaning of Article 1(1) of Directive 94/19. As I have observed, the adjective ‘normal’ is applied to transactions carried out by credit institutions in the performance of their usual business (the receipt of repayable funds and the grant of credits for their own account) but not to subscription to shares.

103. In the instant case, the money was not received as repayable funds but as sums of money which Snoras received to increase its share capital, that increase being reflected in the new shares which customers acquired. The amounts paid by Ms Anisimovičienė and the other applicants therefore constituted the payment of consideration, which differs from the safekeeping, holding and, as the case may be, repayment of a deposit.

23 The word ‘may’ makes this assertion at point 70 of its written observations in Case C-688/15, citing the judgment given by the Lietuvos auškščiausiasis teismas (Supreme Court) on 2 October 2013 (civil case No 3K 3 470/2013). The Commission also referred to that case at the hearing.
104. The 'temporary situation' referred to in Article 1(1) of Directive 94/19 is, I repeat, a situation which occurs between 'normal' banking transactions and not a situation which arises between the creation of an obligation as a result of non-performance of a contract for the acquisition of shares, on the one hand, and actual fulfilment of that obligation, on the other. In those circumstances, there are not two 'normal banking transactions' with a 'temporary situation' occurring between them, but rather the reflection of the relationship in time between a breach of contract and the emergence of the relevant legal consequence of that breach.

105. Lastly, to my mind, there is little doubt that it is not possible either to classify the funds at issue in the proceedings as a 'debts evidenced by a certificate issued by a credit institution', meaning that those funds do not satisfy the third criterion referred to in Article 1(1) of Directive 94/19.

106. In short, it is my view that the funds at issue in Case C-688/15 do not constitute a deposit under Directive 94/19.

107. In the light of the fact that the national legislation transposed Directives 94/19 and 97/9 in a single piece of legislation, the referring court also asks whether the national legislature may include, in the definition of 'deposit', 'money in respect of which the depositor has a claim arising from the credit institution’s undertaking to carry out transactions using the depositors’ money or to provide investment services'. The referring court states that this is the wording of Article 2(4) of the LDI.

108. According to the referring court, the Lithuanian legislature intended through that provision to extend the deposit-guarantee scheme to all money held in bank accounts, irrespective of the purpose of the money deposited in each account. It therefore also includes funds connected to investment services provided by banks to their customers.

109. I agree with the Commission that, since Directive 94/19 provides only for minimum harmonisation, the Member States are free to increase the scope of the protection afforded, provided that it does not 'undermine the practical effectiveness of the deposit-guarantee scheme that that directive requires them to establish'.

110. Subject to that specific qualification, if a national legislature decides to classify funds linked to the provision of investment services as 'deposits', Directive 94/19 does not prohibit it from doing so. To the same extent, for the purposes of applying national legislation, it will not be essential to interpret the meaning of investment activity in the precise terms of Directive 97/9.

111. Therefore, if the referring court believes that, irrespective of Directive 97/9, Snoras acted as an investment firm and that the funds at issue were paid to Snoras so that they could be invested, it must decide whether, under national law, that is sufficient to afford those funds protection which, while not that guaranteed by Directive 94/19, must not undermine the scheme laid down in that directive.

24 An approach which is not prohibited by EU law, although the Court has held that 'the scheme established by that measure must, as is made clear in recital 9 of Directive 97/9, meet the requirements of both directives' (judgment of 25 June 2015, Indėlij ir investicijų draudimas and Nemaniunas, C-671/13, EU:C:2015:418, paragraph 45).

25 See, to that effect, judgment of 21 December 2016, Vervloet and Others (C-76/15, EU:C:2016:975, paragraph 83).
(c) Whether it is possible to classify the funds at issue in Case C-109/16 as a 'deposit'

112. In Case C-109/16, Mr Raišelis wished to subscribe to medium-term fixed-rate bonds issued by Snoras, to which end he consented to the transfer of a specified sum of money from an account held by him (at Snoras) to another account belonging to that credit institution. The referring court asks whether, in those circumstances, those funds may be classified as a 'deposit' under Article 1(1) of Directive 94/19.

113. In my opinion, the reasons for concluding that the funds in Case C-688/15 cannot be classified as a deposit are equally applicable to the funds in Case C-109/16.

114. Case C-109/16 is again not concerned with money left in an account belonging to Mr Raišelis, since, at the time when Snoras's licence was revoked and the insolvency proceedings were opened, the money had already been paid into an account in the name of that credit institution. Accordingly, I must repeat here the considerations I set out above regarding the nature of the repayment obligation which may be incumbent on Snoras.

115. Similarly, the arguments set out above in relation to the concept of 'temporary situation' which must occur between the creation of that obligation under the contract and its actual fulfilment are also applicable.

116. The funds in this reference for a preliminary ruling cannot be classified as a 'debt evidenced by a certificate' either, although that assertion calls for further explanation since, unlike the situation at issue in Case C-688/15, Mr Raišelis did not attempt to purchase shares in Snoras but rather to subscribe to bonds issued by that bank.

117. The aim was to use the funds in question to create a kind of 'securitised debt', an expression which Article 4(1)(18) of Directive 2004/39 uses in relation to a certain class of securities which are negotiable on the capital market ('bonds or other forms of securitised debt, including depositary receipts in respect of such securities').

118. That fact may be relevant for the purposes of Directive 94/19, since the debts referred to in Article 1(1) thereof, in connection with the definition of 'deposit', are debts evidenced by 'certificates'.

119. In material terms, the debt clearly existed from the time when Mr Raišelis and Snoras concluded the subscription agreements and the former paid the total price of the bonds into the credit institution's account.

120. However, in strictly formal terms, the debt was not 'securitised', even though that was the intention. Accordingly, in my view, the factual situation referred to in Article 1(1) of Directive 94/19 does not arise in this case.

121. Nevertheless, I accept that, in theory, it is possible to imagine a more flexible interpretation of the provision in order to argue that, through the requirement that the debt must be 'evidenced' by a certificate, Directive 94/19 ultimately seeks to guarantee (up to a limit) debts the existence of which has been sufficiently established.

122. Regard being had to the aim of protecting investors to which I referred above, a broad interpretation of the term 'evidenced' would, perhaps, enable the inclusion of any 'sufficient confirmation' of the existence of a debt that the credit institution is obliged to repay.

26 A bond is a financial instrument which, essentially, records a loan of capital, consisting of funds which must be repaid to the lender within the period and in accordance with the conditions stipulated at the appropriate time.
123. Even from that point of view, it is for the national court to assess whether, as a result of the conclusion of the bond subscription agreement between Mr Rašelis and Snoras and the fact that the former complied with his contractual obligation to pay the latter the funds stipulated, a debt may be deemed to have been established in the same way as if the payment of the funds to Snoras by Mr Rašelis had been evidenced by a certificate.

124. Moreover, if that interpretation of Article 1(1) of Directive 94/19 is accepted, it must be borne in mind that Lithuanian law, relying on the option provided for in Article 7(2) of Directive 94/19, does not include a guarantee of certificates of deposit issued by a credit institution. 27

125. The functional interpretation to which I have just referred is likely to go beyond the limits within which the EU legislature defined the factual situation provided for in Article 1(1) of Directive 94/19. That provision refers to ‘debt evidenced by a certificate’, that is, debt which not only exists substantively as such but which can also be evidenced formally by means of a specific instrument.

126. The Spanish version of the provision is perhaps particularly rigorous in its definition of that instrument, which must be a ‘certificado de depósito’ [certificate of deposit]. Other language versions appear to be less strict: for example, the French version refers to ‘toute créance représentée par un titre de créance’. 28 However, it still refers to an ‘instrument’, in other words, a document which must ‘represent’ a debt, that is, formally record it.

127. In short, it is not sufficient that the existence of the debt may be evidenced in a way other than by drawing up a document. By argument a contrario, merely establishing the intention to complete the formalities relating to the debt or, as in the present case, to fulfil the payment obligation on the part of the subscriber to the bonds issued by the credit institution is precluded. 29

128. In summary, I believe that the funds in Case C-109/16 cannot be classified as a ‘deposit’ within the meaning of Article 1(1) of Directive 94/19 either, without prejudice to the fact that that directive does not preclude national law from treating these funds and those at issue in Case C-688/15 as deposits, provided that the effectiveness of the guarantee scheme laid down therein is respected.

B. Cover under the investor-compensation scheme laid down in Directive 97/9 (question 2 in Case C-109/16)

129. Recital 9 of Directive 97/9 recognises that, in certain circumstances, ‘it may ... be difficult to distinguish between deposits covered by Directive 94/19/EC and money held in connection with investment business’. Furthermore, some debts will be eligible for protection under Directive 94/19 and under Directive 97/9. Article 2(3) of Directive 97/9 prohibits double compensation in those cases.

130. The referring court asks whether the funds at issue in Case C-109/16 — which, as I have already observed, do not constitute a deposit under Directive 94/19 — fall within the scope of Directive 97/9.

27 As stated in the judgment of 25 June 2015, Indėlių ir investicijų draudimas ir Nemaniūnas (C-67/13, EU:C:2015:418, paragraph 38), Article 3(4) of the LDI excludes from the deposit guarantee ‘debt securities (certificates of deposit) issued by the insured itself’. The Court held that that exclusion was compatible with Directive 94/19, in so far as ‘such securities are negotiable’. At the hearing, the Lithuanian Government confirmed that Lithuanian law has not been amended in that regard. It is, therefore, for the referring court to examine whether or not the bonds at issue satisfy that condition, for the purposes of their possible exclusion from the deposit guarantee.

28 On the same lines, the Italian and Portuguese versions use the expressions ‘debiti rappresentati da titoli’ and ‘dívidas representadas por títulos’, respectively.

29 Other language versions confirm the importance of the form of evidence of the debt. Thus, the English version states ‘any debt evidenced by a certificate’ while the German states ‘Forderungen, die das Kreditinstitut durch Ausstellung einer Urkunde verbrieft hat’.
1. Arguments of the parties

131. IID maintains that those funds are not covered by Directive 97/9. Snoras did not act as an investment firm but rather as a firm issuing bonds, so that the harm suffered by the customers flows from the materialisation of the investment risk, which as such is excluded from the scope of the directive.

132. In the same vein, the Lithuanian Government submits that Snoras cannot be regarded as a firm providing investment services, because it does not match the definition laid down in Directive 2004/39 in that it acted as a bond issuer and not an investment firm. The harm suffered by Mr Raišelis is inherent in the risk involved in any investment.

133. The Commission argues that, regardless of the wording of the Lithuanian version, Article 2(2) of Directive 97/9 must be interpreted as meaning that the cover is to apply to debts arising as a result of the inability of an investment firm to repay to investors money owed to or belonging to them, which that firm holds on its own account in relation to investment business. It is immaterial whether the money is deposited in an account in the name of the investment firm or the investor.

2. Analysis of the question

134. As is clear from its title, Directive 97/9 is not aimed at the protection of investments, that is, it does not seek to cover or remove the financial risk inherent in all securities investments. Its aim is to protect investors. More specifically, or in particular, its aim is to protect ‘the small investor’, as recital 4 of that directive states.

135. This entails insuring the risk ‘of an investment firm being unable to meet its obligations to its investor clients’, in other words, to protect those clients against non-fulfilment of the obligations relating to ‘the provision of ... investment services’ and ‘the performance of ... investment activities’. That amounts to protecting an investor against the possibility that the firm whose professional assistance the investor has sought for the purpose of making an investment may become insolvent or, in general, be ‘... unable to meet its obligations to its investor clients’.

136. In short, the directive guarantees that savers (or at least some of them) are able to invest with the confidence that there is a guarantee scheme which protects them, up to certain limits, and which covers ‘money and instruments held by an investment firm’ where that firm is unable to meet its obligations.

137. Accordingly, it is, once again, a guarantee overlaying the use of the usual mechanisms available to the parties to a contract under civil or company law. Irrespective of the contractual or non-contractual liability of investment firms which do not treat their clients with the honesty, impartiality and professionalism required, or which provide their clients with ambiguous or misleading information about the risks those clients are assuming, the guarantee scheme in Directive 97/9 is applied objectively. However, that does not avoid the risk that the investment, once made, will suffer the rigours of the logic of the market.

30 Directive ‘on investor-compensation schemes’.
33 In accordance with Article 4(2) of Directive 97/9, Member States ‘may provide that certain investors shall be excluded from cover by schemes or shall be granted a lower level of cover. Those exclusions shall be as listed in Annex I.’
34 Recital 8 of Directive 97/9.
138. The Lietuvos Aukščiausiasis Teismas (Supreme Court) appears to conclude, as an established fact, that in the circumstances of Case C-109/16, Snoras acted as an investment firm. That court’s uncertainties relate specifically to the classification of Mr Raišelis as an investor and, accordingly, to his possible right to protection under Directive 97/9.

139. The Court must assume, therefore, for the purposes of answering the question submitted to it by the referring court, that in this case Snoras satisfied the necessary conditions for classification as an investment firm.

140. On that basis, it must be observed that the financial transaction that Mr Raišelis attempted to carry out could not be completed because of the insolvency of an entity (Snoras) which was both the issuer of the bonds to which its customer wished to subscribe and the investment firm to which the customer had entrusted that transaction.

141. In those circumstances, it is difficult to identify whether the financial loss suffered by Mr Raišelis was due to one or other of the roles Snoras played in relation to him. It is for the referring court to determine into which of those categories the facts of the main proceedings fit. If the national court concludes, first, that Snoras acted as an investment firm and, second, that the bond subscription came under the financial services contract concluded with Mr Raišelis, it will have to examine the extent to which the ‘inability’ of Snoras creates the obligation to pay compensation, for which purpose the referring court requests an interpretation of Article 2(2) of Directive 97/9.

142. That question must be viewed in the context of a significant difference between the Lithuanian wording of the provision and the rest of the language versions. The latter state that cover is to be provided ‘for claims arising out of an investment firm’s inability to repay money owed to or belonging to investors and held on their behalf in connection with investment business’. However, the Lithuanian version refers only to money belonging to investors but does not mention money which the investment firm owes to investors.

143. As I shall set out below, the wording of the applicable provision includes a reference to money owed to investors, which is what specifically interests the referring court. Since that court did not find those words in the Lithuanian version of the provision, it asks the Court of Justice if they can be inferred by interpretation.

144. The Lietuvos Aukščiausiasis Teismas (Supreme Court) seeks to ascertain whether Article 2(2) of Directive 97/9 must be interpreted ‘as also covering claims for repayment of funds that an investment firm owed to investors and that are not held in the name of the investors’.

35 According to point 22 of the order for reference, in addition to the bond subscription agreement, Mr Raišelis concluded with Snoras a contract for financial services to a non-professional client.

36 The premiss in question does not arise in Case C-688/15, in which all the indications are that Snoras did not provide investment services. Perhaps that is why the referring court has focused in its questions in that case on the scope of Directive 94/19 and whether the funds at issue may be classified as a ‘deposit’.

37 See, in that connection, the Spanish version and other versions, like the English (‘repay money owed to or belonging to investors and held on their behalf in connection with investment business’); the French (‘rembourser aux investisseurs les fonds leur étant dus ou leur appartenant et détenus pour leur compte en relation avec des opérations d’investissement’); the German (‘Gelder zurückzuzahlen, die Anlegern geschuldet werden oder gehörend und für deren Rechnung im Zusammenhang mit Wertpapiergeschäften gehalten werden’); the Italian (‘rimborsare i fondi dovuti o appartenenti agli investitori e detenuti per loro conto in relazione ad operazioni d’investimento’); and the Portuguese (‘reembolsar os investidores dos fundos que lhes sejam devidos ou que lhes pertencem e que sejam detidos por sua conta no âmbito de operações de investimento’).

38 ‘[G]ažinti pinigus, priklausančius investuotojams ir laikomus jų vardu ryšium su investicine veikla’. Article 2(12) of the LDI is also worded in those terms.

39 As the judgment of the Court of 7 July 2016, Ambispig (C-46/15, EU:C:2016:530, paragraph 48), observes, ‘the wording used in one language versions of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. The provisions of EU law must be interpreted and applied in a uniform manner, in the light of the versions established in all the languages of the European Union. Where there is a divergence between the various language versions of a provision of EU law, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part’.

40 Wording of the second question in Case C-109/16; my emphasis.
145. The answer must be yes, first, because the majority of the language versions (except the Lithuanian version) of the provision are worded in the same way. In such cases, there is no need to infer, by interpretation, a requirement which, unequivocally and unconditionally, must be considered to be part of the very wording of the provision. Second, it is the approach which best meets the aim of the provision of protecting investors.

146. Moreover, the article in question is sufficiently clear, precise and unconditional for it to be relied on by individuals, as will be explained below.

C. The direct effect of Directives 94/19 and 97/9 (questions 1 and 3 of Case C-109/16)

147. The referring court also asks whether Article 2(2) of Directive 97/9 can be relied on directly by individuals before the courts.

148. The Commission submits that it can, for the reference in that article to ‘the legal and contractual conditions applicable’ does not preclude the section of the provision relating to the repayment obligation from being sufficiently clear, precise and unconditional and from creating individual rights, because those ‘conditions’ relate only to the methods of payment of compensation.

149. The uncertainty was resolved by the judgment of 25 June 2015, Indėlių ir investicijų draudimas and Nemaniiunas, in which the Court held that ‘Directive 97/9 is, in so far it concerns the delimitation of the cases protected, sufficiently clear, precise and unconditional to be relied on directly by individuals.’

150. The same is true of Article 1(1) of Directive 94/19 and of the definition of ‘deposit’ laid down therein, about the direct effect of which the referring court also asks.

151. At all events, and as was also the case in Indėlių ir investicijų draudimas and Nemaniiunas, the referring court must ‘determine whether ... IID which, it is common ground, has responsibility for guaranteeing the protection of deposits and of investments vis-à-vis investors in the event of the insolvency of investment firms’ meets the conditions to be satisfied by ‘entities against which the provisions of a directive that are capable of having direct effect may be relied upon’. Inter alia, it must be ‘a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals’.

41 Case C-671/13, EU:C:2015:418, paragraph 58.
43 Loc. cit.
VI. Conclusion

152. In the light of the foregoing considerations, I propose that the Court reply as follows to the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania):

(1) Article 1(1) of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, as amended by Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009, must be interpreted as meaning that the definition of ‘deposit’ does not include:

- funds transferred from a personal bank account, with the account holder’s consent, to another bank account opened in the name of a credit institution for the purpose of subscribing to a future issue of bonds by that institution;

- funds transferred, under the same conditions, for the purpose of acquiring shares in a bank which have been the subject of a public offer for sale.

(2) Directive 94/19 does not preclude the legislation of a Member State from protecting such funds as guaranteed deposits, provided that this does not undermine the effectiveness of the protection scheme laid down by that directive.

(3) Article 2(2) of Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes applies where an investment firm is unable to repay the money it owes to its customers.

(4) Article 1(1) of Directive 94/19 and Article 2(2) of Directive 97/9 are sufficiently clear, precise and unconditional to be relied on directly before the courts by individuals against bodies which, whatever their legal form, have been charged with providing a public service and which have, for that purpose, special powers beyond those which result from the normal rules applicable in relations between individuals, a matter which it is for the national court to determine.