Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 7 June 2018 [1]

Case C-571/16

Nikolay Kantarev

(Request for a preliminary ruling from the Administrativen sad — Varna (Administrative Court, Varna, Bulgaria))

(Directive 94/19/EC on deposit-guarantee schemes — Determination that a deposit is unavailable — Liability of a Member State for damage caused as a result of a breach of EU law — Legal remedies)

I. Introduction

1. It was only in the banking and financial crisis that developed globally from 2007 that many depositors learnt that their deposits with credit institutions authorised in the EU Member States are guaranteed up to EUR 100 000. Yet Directive 94/19/EC on deposit-guarantee schemes [2] introduced this deposit-guarantee scheme at European level back in 1994:[3] with a view to the completion of the single market for banking services on 1 January 1993, the European legislature harmonised the conditions of competition and inter alia ensured '*a harmonised minimum level of deposit protection wherever deposits are located in the Community*'.[4]

2. From 1994 the directive had a twofold objective, pursuing both the protection of depositors and the stability of the banking system, the two being closely connected. It poses a high risk to the banking system if depositors — whether on the basis of speculation or on the basis of reliable information — all withdraw their deposits at the same time, as '*no bank … holds enough liquid funds to redeem all or a significant share of its deposits on the spot*'.[5] Such 'bank runs' must therefore be prevented by ensuring that depositors believe that their deposits are safe by virtue of a guarantee.

3. In the present case, the amount guaranteed by Directive 94/19 was paid in full to the applicant in the main proceedings by the deposit-guarantee scheme after a Bulgarian bank experienced liquidity problems. However, the applicant considers that the payment was late, as he was unable to access his deposits for a period of around six months. He is therefore claiming a breach of EU law before the referring court.

1 Original language: German.

2 Directive of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ 1994 L 135, p. 5).

3 The amount guaranteed was originally lower, however. From 2009 it has been gradually increased from ECU 20 000 to EUR 100 000 (Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay, OJ 2009 L 68, p. 3).

4 See the second recital of Directive 94/19.

5 Proposal of 12 July 2010 for a Directive of the European Parliament and of the Council on deposit-guarantee schemes [recast], COM(2010) 368 final.

4. According to the applicant, the Directive on deposit-guarantee schemes has been transposed and applied incorrectly in Bulgaria. The determination that the deposit is unavailable, which is a condition for the activation of the deposit-guarantee scheme, was made contingent on the withdrawal of the banking licence, even though the directive lays down a fixed time limit for that determination which is independent of that occurrence.

5. Even though both the relevant national legislation — which no longer makes the determination that deposits are unavailable contingent on the withdrawal of the banking licence — and EU law — which no longer prescribes a fixed time limit for the determination that deposits are unavailable — have now been amended, the questions referred for a preliminary ruling retain their relevance because effective compensation for depositors within a reasonable period of time is still today required by EU law and is no less important.

II. Legal framework

A. EU law

6. The framework for the case in EU law is provided by the principle of sincere cooperation under Article 4(3) TEU and Directive 94/19.[6]

7. Reference should be made, first of all, to recitals 1, 4, 8, 9 and 24 of Directive 94/19:[7]

'[1] Whereas, 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.

…

[4] Whereas the cost to credit institutions of participating in a guarantee scheme bears no relation to 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.

…

[8] Whereas harmonisation must be confined to the main elements of deposit-guarantee schemes and, within a very short period, ensure payments under a guarantee calculated on the basis of a harmonised minimum level.

[9] Whereas deposit-guarantee schemes must intervene as soon as deposits become unavailable.

…

6 As amended by Directive 2009/14. Directive 94/19 has since been repealed and replaced by a recast version, but only with effect from 4 July 2019 (see Article 21 of Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit-guarantee schemes, OJ 2014 L 173, p. 149), although a number of provisions of the recast version had to be transposed by 3 July 2015 (see Article 20 of Directive 2014/49). At the material time, Directive 94/19 alone (as amended by Directive 2009/14) was applicable in the present case.

7 Numbering added.

[24] Whereas this Directive may not result in the Member States' or their competent authorities' being made liable in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognised.'

8. Directive 2009/14 amending Directive 94/19 includes the following recitals:

'(1) The Council agreed on 7 October 2008 that it is a priority to restore confidence and proper functioning of the financial sector. It undertook to take all necessary measures to protect the deposits of individual savers …

…

(3) … In order to maintain depositor confidence and attain greater stability on the financial markets, the minimum coverage level should therefore be increased to EUR 50 000. By 31 December 2010, coverage for the aggregate deposits of each depositor should be set at EUR 100 000 …

…

(12) Deposits may be considered unavailable once early intervention or reorganisation measures have been unsuccessful. This should not prevent competent authorities from making further restructuring efforts during the payout delay.'

9. Article 1(1) of Directive 94/19 defines the term 'deposit':

'"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. …'

10. Article 1(3) defines the term 'unavailable deposit' for the purposes of Directive 94/19:

'"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.

The competent authorities shall make that determination as soon as possible and in any event no later than five working days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable; 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.'

11. Article 7(1) and the first subparagraph of Article 7(1a) of Directive 94/19 contain rules on ensuring coverage of depositors:

'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.

…’

12. Article 10 of Directive 94/19 regulates arrangements for compensation payments under the deposit-guarantee scheme:

‘1. Deposit-guarantee schemes shall be in a position to pay duly verified claims by depositors in respect of unavailable deposits within 20 working days of the date on which the competent authorities make a determination as referred to in Article 1(3)(i) or a judicial authority makes a ruling as referred to in Article 1(3)(ii).

That time limit includes the collection and transmission of the accurate data on depositors and deposits, which are necessary for the verification of claims. In wholly exceptional circumstances, a deposit-guarantee scheme may apply to the competent authorities for an extension of the time limit. Such extension shall not exceed 10 working days.

…

3. The time limit laid down in paragraphs 1 and 2 may not be invoked by a guarantee scheme in order to deny the benefit of guarantee to any depositor who has been unable to assert his claim to payment under a guarantee in time.

…’

B. National law

13. In this request for a preliminary ruling, the Bulgarian rules which may form a possible basis for a claim for damages are relevant. Consideration must also be given to the rules adopted to transpose Directive 94/19 and other rules governing the Balgarska Narodna Banka (Bulgarian Central Bank, BNB).

1. Rules on liability

14. The Zakon za zadalzheniata i dogovorite (Law on obligations and contracts, ZZD) lays down, in Article 45 thereof, a general claim for damages. Under that provision, any person who, through his own fault, has caused damage to another person is obliged to make reparation for that damage. Article 49 of the ZZD regulates the liability of contracting entities for damage caused by agents in the performance of the contract. The Grazhdanski protsesualen kodeks (Code of Civil Procedure) is applicable to the assertion of claims for damages under the ZZD. That Code provides, inter alia, for an advance payment of legal costs, under the State tax table, of 4% of the amount in dispute, but at least 50 leva (BGN), and confers jurisdiction on the place of residence of the defendant or the place of the tort.

15. Article 1 of the Zakon za otgovornostta na darzhavata i obshtinite za vredi (Law on liability of the State and of municipalities for damage, ZODOV) lays down, in paragraph 1 thereof, the conditions governing a claim for damages against the State. Under that provision, the State and municipalities are liable for damage sustained by natural and legal persons as a result of unlawful legal measures and

unlawful action or failure to act on the part of their bodies or employees in the performance of their administrative activity. In making a claim in this regard, the Administrativnoprotsesualen kodeks (Code of Administrative Procedure) may be applied, pursuant to Article 1(2) and Article 8 of the ZODOV, as an alternative to the general procedure under the Code of Civil Procedure.

16. With regard to administrative decisions, Article 204(1) of the Code of Administrative Procedure links the possibility of making a claim for damages to the prior annulment of the legal measure under the relevant procedure. However, the court hearing the claim for damages rules on unlawfulness itself where the administrative decision was null and void or has been revoked (paragraph 3) and in principle where the claim for damages is based on (simple) action or failure to act on the part of the administrative authorities (paragraph 4).

17. In addition, the Code of Administrative Procedure provides for an advance payment of legal costs, under the State tax table, of BGN 10 or 25 and the Law on liability of the State and of municipalities for damage provides for the possibility of conferring jurisdiction on the place of residence of the injured party.

2. Deposit guarantee

18. The Zakon za Balgarskata Narodna Banka (Law on the Bulgarian Central Bank) regulates, in Article 16 thereof, in particular the responsibility of the Central Bank for granting licences to banks, the withdrawal of those licences and special supervisory measures. Under Article 2(6) of that Law, the Central Bank must exercise its competences with a view to safeguarding the stability of the banking system and protecting the interests of depositors.

19. The Zakon za garantirane na vlogovete v bankite (Law on guarantees for bank deposits)[8] transposes Directive 94/19 into Bulgarian law. Article 23 of that Law provides, in paragraph 1, that the Fond za garantirane na vlogovete v bankite (Bank Deposit Guarantee Fund, FGVB) must meet the obligations of the bank concerned up to the guaranteed amount if the BNB has withdrawn the banking licence. Under Article 23(5), the Fund must begin disbursement no later than 20 working days from the date of withdrawal of the licence.

20. The Zakon za kreditnite institutsii (Law on credit institutions, ZKI)[9] provides, in Article 36(2)(1) thereof, that the BNB must withdraw a licence on grounds of insolvency where a bank fails to meet its due obligations for more than seven working days, if this is directly related to the financial circumstances of that bank and the BNB considers it unlikely that the obligations due will be met within a reasonable period of time. Under Article 36(2)(2), the licence is also to be withdrawn if the bank's equity capital has a negative value. Article 36(3) of the ZKI provides that the banking licence is to be withdrawn within five working days from the date of the determination of a state of insolvency. Under Article 36(7), after the licence has been withdrawn, compulsory liquidation is to take place. Article 79(8) of the ZKI provides that the liability of the BNB is limited to intentional conduct. Article 115 of the ZKI governs the conditions under which the BNB may place a bank under special supervision. Under Article 115(3), special supervision may not be for a period longer than six months. Article 116(2) of the ZKI authorises the BNB, in such a case, to reduce interest rates for deposits placed with the bank concerned to the average market rate and to suspend payment of all or some of the bank's obligations.

8 As in force at the material time of the case in the main proceedings.

9 As in force at the material time of the case in the main proceedings.

III. Main proceedings and procedure before the Court

21. On 4 March 2014, Nikolay Kantarev opened a bank account with the Korporativna Targovska Banka (KTB). Interest was to be paid on deposits at a fixed rate once each year or on termination and the funds deposited were to be guaranteed by the FGVB.

22. On 20 June 2014, representatives of the KTB made a request to the BNB for the KTB to be placed under special supervision. By letter of the same date, the KTB notified the BNB that it had suspended all banking transactions. By decision of the BNB of the same date, the KTB was placed under special supervision, initially for a period of three months, on grounds of imminent insolvency pursuant to Articles 115 and 116 of the ZKI and the fulfilment of all the KTB's obligations was suspended. By decision of 30 June 2014, the BNB reduced interest rates for deposits with the KTB to the average market rate in the banking system. On 16 September 2014, those measures were extended to 20 November 2014.

23. On 4 November 2014, the BNB ascertained, on the basis of an external audit, the annual accounts and the supervision reports for the KTB, that the KTB's equity capital had a negative value of minus BGN 3 745 313.

24. By decision of 6 November 2014, the BNB withdrew the KTB's licence and undertook to apply for the institution of insolvency proceedings and to notify the Bank Deposit Guarantee Fund. On the same date, Mr Kantarev's deposit account was terminated *ex officio*.

25. On 4 December 2014, one of the banks liable under the Bank Deposit Guarantee Fund paid out BGN 86 973,81 to Mr Kantarev, BGN 84 300 of which represented the principal claim and BGN 2 673,81 interest. The interest rate was based on the agreed conditions for the period from 5 March to 1 July 2014 and on the decision of the BNB of 30 June 2014 for the period from 1 July to 6 November 2014.

26. By Decision No 664 of the Sofiyski gradski sad (Sofia City Court, Bulgaria) of 22 April 2015, the KTB was declared insolvent with effect from 6 November 2014. On 3 July 2015, the Sofiyski apelativen sad (Court of Appeal, Sofia, Bulgaria) annulled that decision and determined 20 June 2014 as the date of commencement of insolvency because the condition of insufficient equity capital had existed at that time.

27. In the main proceedings, Mr Kantarev has brought an action against the BNB seeking payment of compensation of BGN 3 710,91 (approximately EUR 2 000) for late payment of his deposits for the period from 30 June to 4 December 2014. The BNB infringed EU law because it did not correctly apply Article 1(3)(i) of Directive 94/19, which has not been correctly transposed into national law in this regard but has direct effect.

28. Against this background, the Administrativen sad — Varna (Administrative Court, Varna, Bulgaria) made reference to the Court pursuant to Article 267 TFEU for a preliminary ruling on the following questions:

'(1) Are Article 4(3) TEU and the principles of equivalence and effectiveness to be interpreted as permitting, in the absence of national rules, the courts having jurisdiction and the procedure for hearing actions for damages based on an infringement of EU law to be determined by reference to the authority which committed the infringement and by reference to the nature of the act/failure to act through which the infringement was committed if, as a result of the application of those criteria, the actions are heard by different courts, general and administrative courts, on the basis of different codes of procedure, the Code of Civil Procedure and the Code of Administrative Procedure, which require payment of different fees, namely proportionate and flat-rate, and proof of satisfaction of different conditions, including fault?

(2) Are Article 4(3) TEU and the requirements laid down by the Court in *Frankovich and Others* (C-6/90 and C-9/90, EU:C:1991:428) to be interpreted as precluding [the possibility of] actions for damages based on an infringement of EU law being heard in a procedure such as that under Article 45 and Article 49 of the Law on obligations and contracts, which requires payment of a proportionate fee and proof of fault, and also in a procedure such as that under Article 1 of the Law on liability of the State and of municipalities for damage, which provides for objective liability and includes special rules to facilitate access to the courts, but which is nevertheless applicable only to damage arising from annulled unlawful legal acts and unlawful acts/failures to act by the administration and does not cover infringements of EU law committed by other public authorities through legal acts/failures to act not annulled under the procedure in question?

(3) Are Article 1(3)(i) and Article 10(1) of Directive 94/19 (1) to be interpreted as permitting a legislative approach such as that taken in Article 36(3) of the Law on credit institutions and Article 23(5) of the Law on guarantees for bank deposits, under which "the condition that 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" is synonymous with the declaration of the insolvency of the institution and the withdrawal of its authorisation and the deposit-guarantee scheme takes action from the time of withdrawal of the banking licence?

(4) Is Article 1(3) of Directive 94/19 to be interpreted as meaning that in order for a deposit to be classified as "unavailable", its unavailability must be expressly determined by the "relevant competent authorities" after completing the assessment pursuant to point i of that provision or does it permit, where there is a gap in national law, the assessment and the intention of the "relevant competent authority" to be inferred by way of an interpretation of other legal acts of that authority — in the present case, for example, Decision No 73 of 20 June 2014 of the Management Board (upravitelen savet, US) of the BNB, by which the KTB was placed under special supervision — or to be presumed in the light of circumstances like those in the main proceedings?

(5) Under circumstances like those in the main proceedings, where, by Decision No 73 of 20 June 2014 of the Management Board of the BNB, all payments and transactions were suspended and in the period from 20 June 2014 to 6 November 2014 depositors were neither able to make requests for payment nor had access to their deposits, are all secured indefinite deposits (which may be disposed of without prior notice and which are to be paid out immediately upon request) to be considered as unavailable within the meaning of Article 1(3)(i) of Directive 94/19 or does the condition that a deposit "is due and payable but has not been paid by a credit institution" mean that depositors with the credit institution must have made a claim for payment (by application or request) which was not granted?

(6) Are Article 1(3)(i), Article 10(1) of Directive 94/19 and recital 8 of Directive 2009/14 (2) to be interpreted as meaning that the discretion enjoyed by the "relevant competent authorities" in respect of the assessment under Article 1(3)(i) is in any case limited by the time limit laid down in the second sentence of point i or do they permit, for the purposes of special supervision, as under Article 115 of the ZKI, deposits to remain unavailable for longer periods than provided for in the directive?

(7) Do Article 1(3)(i) and Article 10(1) of Directive 94/19 have direct effect and do they confer on holders of deposits in a bank which is a member of a deposit-guarantee scheme, in addition to their right to compensation under that scheme up to the amount specified in Article 7(1) of Directive 94/19, the right to hold the State liable for an infringement of EU law by bringing an action against the authority required to determine the unavailability of deposits, seeking compensation for the damage which has arisen as a result of the late payment of the guaranteed deposit, if the decision under Article 1(3)(i) was taken after the expiry of the time limit of five

days laid down in the directive and that lateness is due to the effect of a reorganisation measure which was intended to protect the bank from insolvency and was adopted by that authority, or, in circumstances like those in the main proceedings, do they permit a national provision such as Article 79(8) of the ZKI, under which the BNB, its organs and persons authorised by them are liable for damage arising in the performance of their supervisory activity only if it was caused intentionally?

(8) Does an infringement of EU law where "the relevant competent authority" has not taken a decision pursuant to Article 1(3)(i) of Directive 94/19 constitute a "sufficiently serious breach" which can trigger the liability of a Member State for damage by way of an action brought against the supervisory authority, under what conditions is this the case and, in this connection, are the following circumstances relevant: (a) that the FGBV did not have sufficient funds to cover all the guaranteed deposits; (b) that in the period in which payments were suspended the credit institution was placed under special supervision in order to protect it against insolvency; (c) that the applicant's deposit was paid out after the BNB had established that the reorganisation measures had been unsuccessful; [(d)] that the applicant's deposit was paid out together with income from interest, calculated for the period from 20 June 2014 to 6 November 2014 inclusive?'

29. In the proceedings before the Court, Mr Kantarev, the BNB and the European Commission submitted written observations.

IV. Assessment

30. The present request for a preliminary ruling concerns the interpretation of 'unavailable deposit', as defined in Article 1(3)(i) of Directive 94/19, and the possibility for individuals to make claims for damages for failure to comply with that provision.

31. By the first two questions, the referring court would like to know, in essence, whether it is contrary to EU law that two different procedures with different substantive conditions, fees and jurisdictions are applicable in Bulgaria to claims for damages made against the State for a breach of EU law.

32. The third to sixth questions concern the conditions under which an unavailable deposit exists. It must be clarified whether unavailability commences only with the determination of insolvency and the withdrawal of the credit institution's licence, whether an express determination that deposits are unavailable is necessary, whether the depositor must have requested payment from the bank and, lastly, whether the competent authorities enjoy discretion with regard to the time limit for the determination of unavailability.

33. Finally, the seventh and eighth questions revolve around whether the relevant provisions of Directive 94/19 have direct effect and to what extent a failure to take a decision on the unavailability of deposits or a failure to do so in good time constitutes a sufficiently serious breach of EU law which gives rise to the liability of the State.

A. Admissibility of the request for a preliminary ruling

34. Before I turn to the substantive assessment of the questions referred, it is necessary to make a few remarks regarding the admissibility of the request for a preliminary ruling, as the BNB contests whether the questions asked are relevant to the decision in the main proceedings.

35. First of all, the BNB asserts that the Court has already ruled in *Paul*[10] that individuals are not entitled to make a claim for damages for defective banking supervision if the compensation of depositors prescribed by Directive 94/19 is ensured. It argues that, as the subject matter of the present dispute is a claim for damages for defective banking supervision on the part of the BNB and the guaranteed deposit was disbursed to Mr Kantarev, in the light of the judgment in *Paul* there is (now) no need to answer the questions.

36. However, it cannot be inferred from the fact that the Court has already answered a question referred for a preliminary ruling that this question has become irrelevant and therefore inadmissible. Article 267 TFEU allows a national court, if it considers it desirable, to refer questions of interpretation to the Court again.[11] The significance of the judgment in *Paul* must therefore be examined as part of the substantive assessment and has no bearing on the admissibility of the reference.

37. In the view of the BNB, the request for a preliminary ruling is also inadmissible because it remains to be decided in the main proceedings whether Mr Kantarev actually sustained damage. It is for the national court and not the Court of Justice to make such a finding and the questions referred are immaterial in this regard.

38. This objection also cannot be accepted as, first, the interpretation of EU law that is sought is without prejudice to the specific assessment of damage by the national court as the judge of the facts and, second, questions relating to EU law enjoy a presumption of relevance.[12] Furthermore, the referring court has explained in detail why it considers answers to its questions to be necessary in order to be able to rule on Mr Kantarev's claim for damages.

39. Lastly, the BNB objects that the questions referred are also irrelevant to the decision in the main proceedings because the Bulgarian legislature, and not it, is responsible for transposing the directive into Bulgarian law.

40. This claim must also be rejected, however, because the action for damages before the referring court has been brought against the BNB, which, in the applicant's view, failed to apply the directive correctly as a national authority.

41. Under these circumstances, it is not obvious that the interpretation of EU law that is sought by the referring court bears no relation to the purpose of the main action. The request for a preliminary ruling is therefore admissible.

B. Substantive assessment of the questions referred for a preliminary ruling

42. I think it reasonable first to answer the questions concerning the substance of the obligation imposed by Directive 94/19 to determine that deposits are unavailable, before I turn to the possible consequences of failure to comply with that obligation.

10 Judgment of 12 October 2004, *Paul and Others* (C-222/02, EU:C:2004:606).

11 Judgment of 12 October 2010, *Rosenbladt* (C-45/09, EU:C:2010:601, paragraph 31 and the case-law cited).

12 Judgment of 21 December 2016, *Vervloet and Others* (C-76/15, EU:C:2016:975, paragraph 57 and the case-law cited).

1. Third to sixth questions

43. The concept of '*unavailable deposit*', which is the focus of the third to sixth questions, is of central importance to Directive 94/19 as, in the event of deposits being unavailable, Member States must ensure, under Article 10(1) of that directive, that in the place of the defaulting credit institutions the deposit-guarantee schemes established by the Member States pay claims by depositors within 20 working days.[13] Under Article 7(1a) of that directive, the coverage for the aggregate deposits of each depositor is set at EUR 100 000.

(a) The answer to the third and sixth questions

44. By the third question, the referring court would like to know, in essence, whether Article 1(3)(i) of Directive 94/19 is to be interpreted as precluding a national rule such as the Bulgarian provision at the material time, under which an '*unavailable deposit*' only exists once the insolvency of the credit institution has been established and its licence has been withdrawn.

45. The third question is closely connected with the sixth question, which relates to the discretion enjoyed by the competent authority in respect of the time limit for the determination that deposits are unavailable. In particular, the referring court is seeking to ascertain whether the authority may derogate from the time limit for making the determination under the second sentence of Article 1(3)(i) of Directive 94/19 in order to place the financial institution in question under special supervision. The two questions should be answered together.

46. According to the wording of the first sentence of Article 1(3)(i), a deposit that is due but has not been paid is unavailable for the purposes of Directive 94/19 where the competent authorities have determined that 'in their view' the credit institution 'appears to be unable for the time being to repay the deposit and to have no current prospect of being able to do so'. The use of the terms 'view', 'for the time being' and 'current' suggests that, first, the competent authority enjoys a certain discretion in assessing the situation and, second, the repayment of the deposit does not have to be definitively excluded in order to trigger the determination of unavailability. Rather, the competent authority must make a forecast-based decision as to whether, in the present circumstances, there is a prospect that the deposits will be repaid in the future.[14] That forecast-based decision is both a requirement and a sufficient condition for deposits being unavailable for the purposes of Directive 94/19.

47. The determination of the insolvency of the credit institution or the withdrawal of the banking licence, on the other hand, are not circumstances referred to by the wording of the first sentence of Article 1(3)(i) of Directive 94/19. The two concepts represent criteria which do not necessarily correspond to the conditions laid down by that provision. Thus, the withdrawal of the banking licence in the case at issue was not based directly on an assessment whether there was no current prospect of repayment by the KTB, but on an adverse balance.

48. In any event, the second sentence of Article 1(3)(i) of Directive 94/19 sets the competent authority a clear time limit for its forecast-based decision. That provision requires the authority in question to make the determination of unavailability as soon as possible and at the latest five working days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable.

13 Directive 2014/49 provides for this time limit to be reduced to seven working days, which Member States may implement gradually until 31 December 2023 (Article 8(1) and (2)).

14 Some language versions of this provision refer more specifically to the *near* future (French: 'pas de perspective *rapprochée*'; Italian: 'non ha, *a breve*, la prospettiva'; Dutch: 'op *afzienbare* termijn').

49. This wording makes clear that a Member State may not moderate the competent authority's duty in respect of the immediate determination of unavailability or extend the envisaged time limit by making that determination subject to the condition that the insolvency of the credit institution has been established and its banking licence has been withdrawn. If, as a result, more time [15] passes than the authority is allowed by the second sentence of Article 1(3)(i) of Directive 94/19, this would run counter to the clear wording of the provision.

50. This interpretation is supported by the objectives pursued by Directive 94/19.

51. Directive 94/19 serves both the stability of the banking system and protection for savers. [16] These two objectives are closely interlinked. Protection for depositors increases their confidence in the banking system and the stability of the banking system in turn depends on depositor confidence. The protection of depositors under the deposit-guarantee scheme is intended to instil sufficient confidence to avoid a massive withdrawal of deposits, as a sudden, massive withdrawal of liquidity can have serious consequences not only for a credit institution in difficulties, but also for a healthy credit institution. [17]

52. In order to avoid this ripple effect, depositors are intended to have certainty that, in the event of failure of their credit institutions that is likely to be permanent, they will be repaid their deposits in the guaranteed amount within a very short and predictable period of time, irrespective of the determination of the insolvency of a credit institution and the withdrawal of its licence. Depositor confidence in such quick repayment also must not be shaken by possible delays as a result of supervisory measures. In particular, measures that suspend for a long period repayment by the financial institution of deposits may not therefore delay the repayment of deposits by the deposit-guarantee scheme, as in that case the conditions for the determination that the deposits are unavailable are met.

53. Furthermore, the Explanatory Memorandum for the Commission proposal for a directive shows that the definition of 'unavailable deposit' was deliberately not linked with the uncertainties of the procedures of reorganising and liquidating the credit institution. [18] In addition, recital 12 of Directive 2009/14 mentions the possibility that repayment by the deposit-guarantee scheme may be made alongside reorganisation measures.

54. The importance to the European legislature of a very quick disbursement is also made clear by the fact that the time limits for the determination of unavailability (Article 1(3)(i) of Directive 94/19) and for paying out the guaranteed amount (Article 10(1) of Directive 94/19) were reduced, following the amendment of Directive 94/19 by Directive 2009/14, from 21 to 5 days and from three months to 20 days. In addition, the eighth and ninth recitals of Directive 94/19 emphasise that deposit-guarantee schemes must intervene as soon as deposits become unavailable and that payments under a guarantee must be ensured within a very short period.

55. It follows that Article 1(3)(i) of Directive 94/19 is to be interpreted as meaning that the determination that deposits are unavailable must be made within five working days after the competent authority has first become satisfied that a credit institution has not repaid deposits which are due and payable, irrespective of the decision on the insolvency of the credit institution and the withdrawal of its licence. Special supervisory measures must also not have suspensory effect on the determination that deposits are unavailable.

15 Responsibility for withdrawing the authorisation of credit institutions was conferred on the European Central Bank from 4 November 2014 (Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ 2013 L 287, p. 63). It is clear from the measures provided for in Article 14(5) and (6) of that regulation that a long time can pass until the banking licence is withdrawn.

16 See the first recital of Directive 94/19 and the first and third recitals of Directive 2009/14.

17 See the fourth recital of Directive 94/19.

18 Proposal for a Council Directive on deposit-guarantee schemes, COM(92) 188 final, p. 11.

(b) The answer to the fourth question

56. By the fourth question, the referring court is asking the Court, in essence, whether Article 1(3)(i) of Directive 94/19 is to be interpreted as meaning that the unavailability of deposits must be *expressly* determined by the competent authority or whether such unavailability may be inferred from other circumstances, such as, in the present case, the decision of the BNB to place the KTB under special supervision.

57. Directive 94/19 does not lay down any formal requirements for the determination by the competent authority that deposits are unavailable. Nevertheless, that determination is of considerable importance to the deposit-guarantee schemes introduced by the directive, as the determination of unavailability is not only a condition for the activation of the deposit-guarantee scheme [19] but also marks the point at which the time limit for the compensation of depositors begins to run.

58. Indeed, under Article 10(1) of Directive 94/19, deposit-guarantee schemes are required to settle relevant claims by depositors within 20 working days of the date of the determination of unavailability of their deposit. Only 'in wholly exceptional circumstances' may that time limit be extended on an application by the deposit-guarantee scheme, although no such extension may exceed ten working days.

59. On account of the mandatory time limit with which the deposit-guarantee scheme is required to comply in compensating depositors, it must be able to determine clearly and quickly when the time limit begins to run. This means that the determination pursuant to Article 1(3)(i) of Directive 94/19 must clearly refer to that provision and be notified to the deposit-guarantee scheme immediately. A determination which the deposit-guarantee scheme would have to infer implicitly from other circumstances does not meet these conditions.

60. It follows that Article 1(3)(i) of Directive 94/19 is to be interpreted as meaning that the determination that deposits are unavailable must be made in a manner that indicates unequivocally to the deposit-guarantee scheme that the time limit under Article 10(1) of Directive 94/19 has begun to run.

(c) The answer to the fifth question

61. By its fifth question, the referring court is seeking to ascertain whether, under circumstances like those in the main proceedings, the unavailability of a deposit under Article 1(3)(i) of Directive 94/19 can be determined only when the depositor has made an unsuccessful application for disbursement to the credit institution. [20]

62. This view is taken in the present case by the BNB, which asserts that, according to the wording of the directive, the answer to the question of when a deposit is due and payable depends on the relevant legal and contractual conditions and thus on national law. In the case at issue, both national law and the contract concluded between Mr Kantarev and the KTB provide that before deposits are paid out an application must be made to that effect. Furthermore, it maintains that, as it depends on national law whether a deposit is due and payable, the answer to the fifth question falls outside the competence of the Court.

19 See above, point 46 of this Opinion.

20 It is apparent from the referring court's question that the application the need for which it is seeking to ascertain is an application to the credit institution concerned and not an application to the competent deposit-guarantee scheme. See below, point 73.

63. This objection must be rejected as, notwithstanding the reference to the 'legal and contractual provisions' applicable to a deposit, Article 1(3) of Directive 94/19 contains an autonomous definition of 'unavailable deposit' which applies in EU law. This is also made clear by the fact that Article 1 begins with the words '[f]or the purposes of this Directive'. It is for the Court, as part of the interpretation of the EU-law definition, to determine the implications of the reference to 'legal and contractual conditions' for the question whether a deposit is due and payable.

64. In this regard, the substance of the view taken by the BNB also cannot be accepted, as it fails to recognise that the definition of 'unavailable deposit' in Article 1(3) of Directive 94/19 has two functions. First, it provides that the competent authority or a judicial authority must be satisfied that there is a case of liability triggering intervention by the deposit-guarantee scheme. Second, it defines the deposits which are to be paid to depositors by the deposit-guarantee scheme on grounds of liability being incurred.

65. These two functions of the definition of 'unavailable deposit' are apparent from a combined reading of Article 1(3), Article 7(1) and (1a) and Article 10(1) of Directive 94/19. Under Article 7(1) and (1a), Member States must guarantee the deposits of each depositor in the amount specified by the directive in the event of deposits being unavailable (first function). In addition, under Article 10(1), deposit-guarantee schemes must, in the event of unavailability, be in a position to pay claims by depositors in respect of unavailable deposits within the time limit specified by the directive (second function).

66. The fact that the definition of 'unavailable deposit' in its first function serves the determination of liability by the competent authority or a judicial authority is confirmed both by the wording of Article 1(3)(i) and (ii) of Directive 94/19 and by the spirit and purpose of that provision. It is clear that unavailability occurs if deposits which are *due and payable* are not repaid *for reasons related to a credit institution's financial circumstances*. At that time, there is a case of insolvency for which the deposit-guarantee schemes are created and deposits are guaranteed up to the specified amount.

67. The legal and contractual conditions applicable to a deposit are relevant in the determination of unavailability only in establishing whether a credit institution is insolvent. Thus, only the fact that a credit institution has failed to repay deposits which are due and payable under the relevant contractual provisions can actually indicate that it is no longer solvent. It is perfectly natural that deposits which are not due and payable under the applicable provisions are not repaid, as it is, conversely, that, in the normal operation of a bank, deposits which due and payable are not repaid without a request to that effect.

68. Once unavailability is determined, however, all a depositor's deposits which are still left in his accounts and come under the definition of Directive 94/19[21] up to the amount guaranteed by that directive are regarded as due, payable, not paid and thus unavailable, such that they are to be repaid by the deposit-guarantee scheme pursuant to Article 1(3) in conjunction with Article 10(1).

69. If the deposits payable by the deposit-guarantee scheme thus consist simply in the funds left in the depositor's account at the time when unavailability is determined, the question whether a deposit is 'due and payable but has not been paid by a credit institution' under the legal and contractual conditions applicable thereto is no longer relevant at this stage. It is therefore likely that at the time

21 Under Article 7(2) of Directive 94/19, only the deposits listed in Annex I to that directive may be excluded from the guarantee. If a deposit is not guaranteed, the credit institution must inform the depositor accordingly (see Article 9(1)).

of unavailability not only demand deposits like those at issue, but also fixed-term deposits, which are invested for a certain period and are available only subject to a period of notice, are 'due and payable … by a credit institution' within the meaning of Directive 94/19.[22] That is not the subject of the present question, however, and does not have to be definitively clarified here.

70. It follows from the above, in any case, that no kind of duty to make an application which normally exists for the repayment of deposits may be invoked against the depositor at the time when deposits become unavailable. In a situation of insolvency, depositors are deemed by the directive to wish to have their deposits returned and the deposits still left in the bank must therefore be regarded as having 'not been paid' within the meaning of the directive.

71. Furthermore, in circumstances like those in the main proceedings where the bank concerned was evidently effectively closed and had suspended its business relationships, it would not be feasible to expect depositors to make an application for disbursement of their deposits. It is also questionable how the making of such an application — which, in the case of deposits due on demand, often takes the form of an attempt to withdraw money at a cash machine or to make an internet transfer — could be proven. It would therefore also be problematic for the deposit-guarantee scheme if it were required to satisfy itself that depositors had made an application for disbursement of their deposits.[23] This would also raise other practical problems. If the depositor had merely tried to withdraw EUR 500, would he nevertheless receive compensation of EUR 100 000, the sum provided for by the directive?

72. Lastly, a duty to make an application is also not compatible with the declared objective of Directive 94/19, which is to avoid 'bank runs' and thus a rush of depositors to a stricken or even a healthy credit institution. It would run counter to that objective if depositors were expected to have first applied to their bank in order to receive compensation from the deposit-guarantee scheme.

73. The only application provided for by Directive 94/19 is the application for compensation to be made to the deposit-guarantee scheme itself[24] and even this duty to make an application is no longer provided for by Directive 2014/49, as a duty to intervene cannot establish depositor confidence in immediate repayment.[25]

74. It follows that Article 1(3)(i) of Directive 94/19 is to be interpreted as meaning that the determination that a deposit is unavailable may not be made contingent on a duty of the depositor to request repayment from the credit institution.

(d) Interim conclusion

75. Article 1(3)(i) of Directive 94/19 is to be interpreted as meaning that the determination that deposits are unavailable must be made within five working days after the competent authority has first become satisfied that a credit institution has not repaid deposits which are due and payable, irrespective of the decision on the insolvency of the credit institution and the withdrawal of its licence. Special supervisory measures must also not have suspensory effect on the determination that

22 This is suggested by the fact that Directive 2014/49, which does replace Directive 94/19, but retains its definition of 'unavailable deposit', expressly includes fixed-term deposits within the definition of 'deposit'. It also provides that interest on deposits which has accrued until, but has not been credited at, the date of the determination of unavailability must be reimbursed by the deposit-guarantee system; see Article 2(1)(3) and (8) and Article 7(7) of Directive 2014/49 (see above, footnote 6).

23 Especially since compensation must be paid quickly: within 20 working days under Article 10(1) of Directive 94/19 and even within seven days under Article 8(1) of Directive 2014/49.

24 See the second subparagraph of Article 9(1) and Article 10(3) of Directive 94/19.

25 See Article 8(6) of Directive 2014/49: 'The repayable amount shall be made available without a request to a DGS being necessary'.

deposits are unavailable. That determination must, furthermore, be made in a manner that indicates unequivocally to the deposit-guarantee scheme that the time limit under Article 10(1) of Directive 94/19 has begun to run. Lastly, the determination that a deposit is unavailable may not be made contingent on a duty of the depositor to request repayment from the credit institution.

2. Seventh and eighth questions

76. By its last two questions, the referring court wishes to know, in essence, whether Article 1(3)(i) of Directive 94/19 is to be interpreted as meaning that failure to comply with the time limit provided for therein for the determination that deposits are unavailable triggers the liability of a Member State for a breach of EU law. In particular, the referring court asks whether this constitutes a 'sufficiently serious breach' and whether the liability of the State in this regard may be limited to damage caused intentionally.

77. The BNB objects that the judgment in *Paul*[26] has already ruled out the possibility of individuals making the Member State concerned liable on the basis of Directive 94/19 beyond the compensation provided for.[27]

(a) Distinction with the judgment in Paul

78. This objection is not convincing for the following reasons. In *Paul* the Member State concerned had transposed Directive 94/19 belatedly. The depositors injured by the bankruptcy of their bank were *not* compensated by a deposit-guarantee scheme. Consequently, the Member State was ordered *by a national court*, on grounds of a serious breach of Community law, to compensate the depositors in the amount guaranteed in Article 7(1) of Directive 94/19.

79. However, the financial losses sustained by the depositors were in excess of the amount guaranteed by the directive. The Court was therefore asked whether Directive 94/19 confers on depositors, *in addition to* the right to reimbursement of the amount guaranteed under Article 7(1), the more far-reaching right to require the competent authority to take certain supervisory measures pursuant to Article 3(2) to (5) (such as the withdrawal of the licence). In this connection the question arose whether damage that would not have arisen if such a supervisory measure had been taken should be compensated in excess of the guaranteed amount.

80. The injured depositors in *Paul* thus considered the banking authority to be jointly responsible for the fact that losses of their deposits had occurred at all. The Court nevertheless ruled out a right for depositors to have supervisory measures taken in their interest by the competent authorities and rejected a claim for compensation for damage resulting from defective supervision.

81. Accordingly, the proceedings before the Court in *Paul* did 'not concern whether the incorrect transposition or incorrect application of Article 7 of Directive 94/19',[28] that is to say, a defective functioning of the compensation mechanism, could give rise to claims based on State liability. Instead, they related to claims seeking to establish State liability which had their origin in a failure to take certain supervisory measures provided for in Article 3 of Directive 94/19.

26 Judgment of 12 October 2004, *Paul and Others* (C-222/02, EU:C:2004:606).

27 See above, points 35 and 36 of this Opinion.

28 Opinion of Advocate General Stix-Hackl in *Paul and Others* (C-222/02, EU:C:2003:637, point 87).

82. The point at issue here, on the other hand, is whether the incorrect transposition and application of the compensation mechanism can give rise to claims based on State liability. Mr Kantarev does not consider the supervisory authorities responsible for the loss of his deposit, but for failure to comply with the compensation arrangements provided for in Directive 94/19.

83. The 24th recital of Directive 94/19 rules out the liability of the Member States only where they have provided for schemes ensuring the compensation or protection of depositors *under the conditions prescribed in the directive*. Mr Kantarev considers that the guaranteed amount was not paid out to him under the conditions prescribed in Article 1(3) of the directive, but belatedly.

84. As has already been explained, however, quick compensation is the purpose of Directive 94/19. The liability of the State for incorrect transposition or incorrect application of Article 1(3)(i), on which compensation under Article 10(1) of Directive 94/19 depends, is not therefore precluded in principle either by the judgment in *Paul* or by the 24th recital of the directive.

85. Nevertheless, a right exists only if the conditions for the liability of the State are met.

(b) The conditions for State liability

86. It is the Court's settled case-law that individuals have a right to reparation for damage caused to them as a result of breaches of EU law for which the State can be held responsible where three conditions are met: the rule of EU law infringed must be intended to confer rights on individuals; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals.[29] It is in principle a matter for the national courts to determine whether those conditions are satisfied and the State is liable to make reparation for damage.[30] Accordingly, in the case at issue the parties in the main proceedings are in dispute as to whether the three cumulative conditions for liability of the State based on a breach of EU law are met.

87. It should be stated, as a preliminary point, that these three conditions are sufficient to give rise to a right to reparation for individuals.[31] It follows that EU law does not rule out the possibility of a State being liable for a breach of EU law in less restrictive conditions on the basis of national law. It precludes, by contrast, additional conditions from being imposed under national law in that regard.[32] The Court has ruled that reparation of loss or damage pursuant to national legislation cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State, going beyond that of a sufficiently serious breach of EU law, although certain objective and subjective factors connected with the concept of fault under a national legal system may be relevant.[33]

88. It should also be stated, as a preliminary point, that — as the Commission rightly asserts — the direct effect of a rule is not a condition for the liability of the State.[34]

89. Rather, with regard to the liability of the State it must be examined whether the provision which is alleged to be infringed confers rights on individuals.

29 Judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 51); of 24 March 2009, *Danske Slagterier* (C-445/06, EU:C:2009:178, paragraph 20); of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 30); and of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 47).

30 See judgments of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 62), and of 9 September 2015, *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565, paragraph 50).

31 See judgment of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 65 and the case-law cited).

32 See judgment of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 66 and the case-law cited).

33 See judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraphs 78 to 80); of 4 July 2000, *Haim* (C-424/97, EU:C:2000:357, paragraph 39); and of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 67).

34 See judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraphs 21 and 22).

90. In the present case, Article 1(3)(i) of Directive 94/19 does not confer on individuals any right to the effect that the competent authority must automatically determine that his deposits are unavailable where such unavailability actually extends over a certain period.[35] As was seen above, the competent authority enjoys a certain discretion in that determination, since it is above all a forecast-based decision.[36]

91. However, under Article 1(3)(i) of Directive 94/19, *if*, in the view of the competent authority, the credit institution appears to be unable for the time being, because of its financial circumstances, to repay the deposit and to have no current prospect of being able to do so, the authority *must* make the determination to that effect within five days after first becoming aware that a credit institution has failed to repay the deposit.

92. This means that while the provision does not confer on individuals a right to the determination that their deposits are unavailable, it does confer a right to the effect that *if* the authority determines unavailability, it must do so within five days.

93. The rule is clear and precise as regards the time limit.[37]

94. By reason of the supervisory measures taken by the BNB in this case, that authority can be considered to have taken the view that the credit institution appeared to be unable for the time being, because of its financial circumstances, to repay the deposit. On the same date on which it learned from the KTB that the KTB had suspended payments, the BNB placed the KTB under special supervision on grounds of imminent insolvency. It was even determined by virtue of the decision of the BNB itself on the suspension of the fulfilment of all the KTB's obligations that at that point in time there was also no prospect of repayment.

95. Although the BNB took the view that the KTB faced imminent insolvency and the BNB prevented repayment of the deposit in question for some time through its own decision, it did not make the determination pursuant to Article 1(3)(i) of Directive 94/19 within the five-day time limit which would have given rise to compensation for the depositors concerned under Article 7(1) and Article 10(1). This constitutes a sufficiently serious breach of Article 1(3)(i) of the directive.

96. It is for the referring court to examine whether there is a direct causal link between that breach and the alleged damage.

97. It follows that, under circumstances such as those at issue, the incorrect application of Article 1(3)(i) of Directive 94/19 constitutes a sufficiently serious breach of EU law for the purposes of triggering the liability of the Member State concerned. The other circumstances mentioned by the referring court in its eighth question do not alter this finding.

3. First and second questions

98. Lastly, by its first two questions, the referring court wishes to know whether EU law precludes the possibility of two different procedures applying in Bulgaria with different conditions for making claims for damages against the State for breach of EU law.

35 In this respect the directive is different from the Commission's original Proposal for a Council Directive on deposit-guarantee schemes, in which the suspension of payments needed not necessarily be declared by an administrative authority; in that proposal, it was sufficient 'for it actually to last for ten consecutive days' (COM(92) 188 final, p. 29).

36 See above, point 46 of this Opinion.

37 The clarity and precision of the rule breached is among the factors which may possibly be taken into consideration in examining the existence of a sufficiently serious breach of EU law; see judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraphs 55 and 56).

99. One possibility in Bulgaria, under the Law on obligations and contracts, which provides for a general claim for damages, is the Code of Civil Procedure. On the other hand, under the Law on liability of the State and of municipalities for damage, which regulates the liability of the State and of municipalities for damage as a result of unlawful legal measures and unlawful action or failure to act on the part of their bodies and employees in the performance of their duties, the Code of Administrative Procedure may be relevant. [38]

100. According to the referring court, the two procedures have the following differences: the administrative court procedure has the benefit that liability is not fault-based, costs are lower and jurisdiction may also be conferred on the place of residence of the injured party. However, that procedure is applicable only if damage arose as a result of annulled unlawful legal measures or unlawful action or failure to act by the administration. In addition, it is disputable whether such a procedure can be initiated against the BNB, as it is public authority, but not an administrative authority.

101. According to settled case-law, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from EU law. [39] This means that although Member States are obliged to make reparation for the consequences of damage caused by the State on the basis of the rules of national law on liability, the designation of the competent courts and the detailed procedural rules for making the claim for damages against the State under EU law fall in principle within the procedural autonomy of the Member States.

102. EU law is not therefore required to designate which procedure is to be applied, where more than one is possible. Nevertheless, EU law does contain principles to which regard must be had in choosing the appropriate procedure.

103. EU law thus precludes more restrictive conditions from being imposed under national law for the liability of the State under EU law than those developed by the Court in its case-law. However, fault-based liability, as required in this case by the Law on obligations and contracts within the framework of the Code of Civil Procedure, goes beyond the three conditions laid down by EU law for the liability of the State (a rule which confers rights on individuals, a sufficiently serious breach and a direct causal link between that breach and the damage sustained [40]). [41]

104. EU law also provides that the obligation to make good damage applies in any case in which a Member State breaches EU law. This holds good whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation. [42]

105. It follows that, from the point of view of EU law, the obligation to make good damage rests in principle on the Member States as a whole and not on the respective public authority which is responsible for a breach of EU law. Domestic law may certainly provide for the public authority responsible for the damage sustained to be held liable and that may entail a certain procedure. This may not mean, however, that legal protection for individuals is weakened.

38 See the comments on national law in points 14 to 17 of this Opinion.

39 See judgments of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 42 and the case-law cited); of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 50); and of 14 September 2017, *Petrea* (C-184/16, EU:C:2017:684, paragraph 58).

40 See above, point 86 of this Opinion.

41 See point 87 of this Opinion.

42 See judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 32), and of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 46 and the case-law cited).

106. In the present case, domestic law provides for the liability of the State, but not for the liability of the BNB, under the Law on liability of the State and of municipalities for damage within the framework of the Code of Administrative Procedure. Because the BNB is undoubtedly a public authority for the purposes of EU law, it is for the national court to examine whether the liability rules for the BNB weaken the position of individuals compared with the rules governing the liability of the State for other public authorities such that the assertion of the claim for damages against the State under EU law is impaired.

107. Within the scope of its procedural autonomy, the Member State must also have regard to the principles of equivalence and effectiveness: the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States in respect of claims of breaches of EU law must not be less favourable than those relating to similar domestic claims (principle of equivalence) and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (principle of effectiveness). [43]

108. As regards the principle of equivalence, it must be stated that in this case none of the rules mentioned by the referring court distinguishes, according to its wording, between whether the liability of the State is based on a breach of EU law or national law. It is also not apparent from the request for a preliminary ruling that situations in EU law would be treated less favourably than domestic situations. [44]

109. However, in this instance, the uncertainty over the procedure to be applied to claims seeking to establish the liability of the State for breaches of EU law alone gives grounds for an infringement of the principle of effectiveness, as that uncertainty makes it excessively difficult for individuals to seek legal remedies to obtain reparation, starting with the identification of the court — an administrative court or a civil court — before which an action is to be brought.

110. Furthermore, it is doubtful whether the principle of effectiveness precludes national provisions like the Bulgarian Code of Administrative Procedure under which the unlawful legal measure on which the breach of EU law is based must have been annulled or the unlawfulness of the action or failure to act resulting in the breach must have been determined.

111. The Court has made clear in this respect that national courts may enquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him. [45]

112. However, it would be contrary to the principle of effectiveness to oblige injured parties to have recourse systematically to all the legal remedies available to them. [46] It is for the referring court to determine in light of all the circumstances of the main proceedings whether Mr Kantarev could reasonably be required, prior to his legal remedy for obtaining reparation, to avail himself of other legal remedies for annulling the measures of the BNB or for determining the unlawfulness of its action or failure to act. [47]

43 See judgments of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 43); of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 58); of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 31 and the case-law cited); and of 9 September 2015, *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565, paragraph 50).

44 See, in a similar case, judgment of 15 March 2017, *Aquino* (C-3/16, EU:C:2017:209, paragraphs 50 and 51).

45 Judgment of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 75); see also judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 84); of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 124); and of 24 March 2009, *Danske Slagterier* (C-445/06, EU:C:2009:178, paragraph 60).

46 Judgments of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 77), and of 24 March 2009, *Danske Slagterier* (C-445/06, EU:C:2009:178, paragraph 62).

47 Judgment of 24 March 2009, *Danske Slagterier* (C-445/06, EU:C:2009:178, paragraph 64).

113. Lastly, it is doubtful whether the fact that in Bulgarian law the assertion of a claim for damages against the State under EU law is contingent on an — albeit proportionate — advance payment of legal costs in the form of a fee runs counter to the principle of effectiveness. It is common in many Member States for national law to require an — albeit proportionate — advance payment of legal costs and this does not in itself infringe the principle of effectiveness. The competent court must nevertheless examine whether it might represent an insurmountable obstacle to access to the courts [48] and whether in that case there is a possibility of exemption from payment.

114. In the light of the above considerations, it must therefore be stated that EU law does not prohibit the possibility of two different procedures for making claims seeking to establish State liability as a result of breaches of EU law applying in Bulgaria, depending on the public authority concerned, provided it is clear to individuals which procedure they must have recourse to in a specific case and that procedure permits the effective assertion of the claim for damages under EU law. It is for the referring court to examine whether the procedures applicable to claims seeking to establish State liability made against the BNB satisfy those conditions.

V. Conclusion

115. In the light of the above statements, I propose that the Court answer the request for a preliminary ruling from the Administrativen sad — Varna (Administrative Court, Varna, Bulgaria) as follows:

(1) Article 1(3)(i) of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes is to be interpreted as meaning that the determination that deposits are unavailable must be made within five working days after the competent authority has first become satisfied that a credit institution has not repaid deposits which are due and payable, irrespective of the decision on the insolvency of the credit institution and the withdrawal of its licence. Special supervisory measures must also not have suspensory effect on the determination that deposits are unavailable. That determination must, furthermore, be made in a manner that indicates unequivocally to the deposit-guarantee scheme that the time limit under Article 10(1) of Directive 94/19 has begun to run. Lastly, the determination that a deposit is unavailable may not be made contingent on a duty of the depositor to request repayment from the credit institution.

(2) Under circumstances like those in the main proceedings, the incorrect application of Article 1(3)(i) of Directive 94/19 constitutes a sufficiently serious breach of EU law for the purposes of triggering the liability of the Member State concerned.

(3) EU law does not prohibit the possibility of two different procedures for making claims seeking to establish State liability as a result of breaches of EU law applying in Bulgaria, depending on the public authority concerned, provided it is clear to individuals which procedure they must have recourse to in a specific case and that procedure permits the effective assertion of the claim for damages under EU law. It is for the referring court to examine whether the procedures applicable to claims seeking to establish State liability made against the BNB satisfy those conditions.

48 Judgment of 22 December 2010, *DEB* (C-279/09, EU:C:2010:811, paragraph 61).