REPORTS OF CASES

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 26 February 2015

Case C-671/13

VĮ Indėlių ir investicijų draudimas
Virgilijus Vidutis Nemaniūnas
(Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Lithuania))

(Deposit-guarantee and investor-compensation schemes — Directives 94/19/EC and 97/9/EC — Exclusion of holders of certificates of deposit and bonds issued by a credit institution from any guarantee or compensation scheme — Possibility of relying before a national court on the provisions of Directives 94/19/EC and 97/9/EC against a State-owned deposit-insurance and compensation-payment company — Exclusion from an investor-compensation scheme of debt securities issued by a credit institution which has not used those securities or drawn a distinction between investment funds and other funds available to it)

1. The Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania) has provided the Court with the opportunity to rule for the first time on a number of questions relating to the coordination of the schemes for the protection of deposits and investors laid down in Directive 94/19/EC\(^1\) and Directive 97/9/EC, respectively. The fact that the Lithuanian legislature has transposed the two directives in the same legislation involves the risk that the guarantees provided for in the two directives may overlap or, at the other extreme, that the exclusions specifically allowed in each directive may operate indiscriminately in respect of any financial instrument. This is why it is important to draw attention to the specific nature of the subject-matter of each directive and, consequently, to the need for proper coordination of their respective protection schemes.

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\(^1\) — Original language: Spanish.


I – Legislative framework

A – EU law

1. Directive 94/19

2. In accordance with the sixteenth recital in the preamble to Directive 94/19, ‘... the minimum guarantee level prescribed in this Directive should not leave too great a proportion of deposits without protection in the interest both of consumer protection and of the stability of the financial system ...’

3. According to the eighteenth recital in the preamble to the directive, ‘... 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’.

4. Article 1(1) of Directive 94/19 defines deposit as ‘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’.

5. In accordance with the first subparagraph of Article 3(1) of the directive, ‘[e]ach 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’.

6. Article 7(1) and (2) of the directive provides as follows:

‘1. Deposit-guarantee schemes shall stipulate that the aggregate deposits of each depositor must be covered up to ECU 20 000 in the event of deposits’ being unavailable.

...’

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.

7. Point 12 of the list of exclusions in Annex I refers to ‘[d]ebt securities issued by the same institution and liabilities arising out of own acceptances and promissory notes’.

2. Directive 97/9

8. The fourth recital in the preamble to Directive 97/9 reads as follows:

‘Whereas 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; whereas 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’.
9. The ninth recital in the preamble to the directive is worded as follows:

‘Whereas the definition of investment firm includes credit institutions which are authorised to provide investment services; whereas every such credit institution must also be required to belong to an investor-compensation scheme to cover its investment business; whereas, 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/EC ‚…; whereas, 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/EC and money held in connection with investment business; whereas Member States should be allowed to determine which Directive shall apply to such claims.’

10. Article 1(4) of the directive defines ‘investor’ as ‘any person who has entrusted money or instruments to an investment firm in connection with investment business’.

11. In accordance with Article 1(3) of Directive 97/9, for the purposes of the directive, ‘instruments’ means those instruments listed in Section B of the Annex to Directive 93/22/EEC. 4

12. Article 2(2) and (3) of Directive 97/9 provides as follows:

‘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/EC, 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.’

4 — Council Directive of 10 May 1993 on investment services in the securities field (OJ 1993 L 141, p. 27) (‘Directive 93/22’). The instruments listed in Section B of the Annex thereto are the following: 1. (a) Transferable securities. (b) Units in collective investment undertakings. 2. Money-market instruments. 3. Financial-futures contracts, including equivalent cash-settled instruments. 4. Forward interest-rate agreements (FRAs). 5. Interest-rate, currency and equity swaps. 6. Options to acquire or dispose of any instruments falling within this section of the Annex, including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates.’
13. Article 4(1) and (2) of Directive 97/9 provides as follows:

1. Member States shall ensure that schemes provide for cover of not less than ECU 20 000 for each investor in respect of the claims referred to in Article 2(2).

Until 31 December 1999 Member States in which, when this Directive is adopted, cover is less than ECU 20 000 may retain that lower level of cover, provided it is not less than ECU 15 000. That option shall also be available to Member States to which the transitional provisions of the second subparagraph of Article 7(1) of Directive 94/19/EC apply.

2. A Member State 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.\(^5\)

3. Directive 86/635/EEC\(^6\)

14. Under Article 20(1) of Directive 86/635, the entry ‘Debts evidenced by certificates’ must include ‘both debt securities and debts for which negotiable certificates have been issued, in particular deposit receipts, “bons de caisse” and liabilities arising out of own acceptances and promissory notes’.

4. Directive 2004/39/EC\(^7\)

15. Section C of Annex I to Directive 2004/39 sets out the list of financial instruments to which the directive refers. Point 2 includes ‘money-market instruments’ within the definition of ‘financial instruments’.

16. Point 19 of Article 4(1) of Directive 2004/39 defines ‘money-market instruments’ as ‘those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment’.

5. Regulation (EC) No 25/2009\(^8\)

17. In accordance with Part 1, Section 2, point (g) of Annex I to Regulation No 25/2009, ‘money market instruments’ means ‘instruments normally traded on the money market which are liquid and have a value which can be accurately determined at any time’.

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\(^5\) Annex I lists the following exclusions: 1. Professional and institutional investors ... 2. Supranational institutions, government and central administrative authorities. 3. Provincial, regional, local and municipal authorities. 4. Directors, managers and personally liable members of investment firms, persons holding 5% or more of the capital of such investment firms, persons responsible for carrying out the statutory audits of investment firms’ accounting documents and investors with similar status in other firms within the same group as such a firm. 5. Close relatives and third parties acting on behalf of the investors referred to in point 4. 6. Other firms in the same group. 7. Investors who have any responsibility for or have taken advantage of certain facts relating to an investment firm which gave rise to the firm’s financial difficulties or contributed to the deterioration of its financial situation. 8. Companies which are of such a size that they are not permitted to draw up abridged balance sheets under Article 11 of the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies.


B – National law

18. Article 2(3) of Lithuanian Law No IX-975 of 20 June 2002 on the insurance of deposits and of liabilities to investors (‘the Lithuanian Law on deposit insurance’) provides that ‘depositor’ means 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 that law.

19. Article 3(1) of that law provides that the insurance is to cover depositors’ deposits in national currency (LTL) and in a foreign currency, while Article 3(4) provides that, inter alia, debt securities (certificates of deposit) issued by the entity with insurance itself (in the present case, the Bank) cannot be covered by the insurance.

20. In accordance with the second sentence of Article 9(1) of the Lithuanian Law on deposit insurance, 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 – Facts

21. The reference for a preliminary ruling derives from two joined cases in which two individuals, Vitoldas Guliaivičius and Virgilijus Vidutis Nemaniūnas, seek a declaration that agreements for the acquisition of a certificate of deposit and for subscription to bonds concluded with a bank (Snoras) are invalid, claiming that they were not properly informed about the features and conditions of the financial instruments in question or about the financial position of Snoras, which became insolvent shortly after the conclusion of those agreements.

22. In the case of the agreement for the acquisition of a certificate of deposit, the appellate court found in favour of Vitoldas Guliaivičius but an appeal in cassation was brought against that judgment by VI Indėlių ir investicijų draudimas (‘IID’), a State undertaking dealing with the protection of deposits and investments in the event of the insolvency of financial institutions. In the case of the bond subscription agreements, the action brought by Virgilijus Vidutis Nemaniūnas was dismissed at first instance and on appeal, and he finally brought an appeal in cassation.

23. The Supreme Court of Lithuania, which is seised of both appeals in cassation, now seeks a preliminary ruling and points out that the courts which gave judgment at first instance and on appeal dealt only with Snoras’ alleged unlawful conduct in relation to the information provided concerning the risks involved in the transactions at issue. However, the dispute must also be resolved from the point of view of the legislation relating to the protection of the applicants in their capacity as depositors or investors.

III – The questions referred for a preliminary ruling

24. The questions referred for a preliminary ruling on 17 December 2013 are worded as follows:

‘(1) Is Article 7(2) of Directive 94/19, applied in conjunction with point 12 of Annex I to that directive, to be understood and interpreted as meaning that, where a Member State excludes from the guarantee depositors of a credit institution who possess debt securities (certificates of deposit) issued by that institution, that exclusion can be applied only in the event that the abovementioned certificates of deposit fully conform to (possess) all the features characterising
them as financial instruments within the meaning of Directive 2004/39 (having regard also to other measures of EU law, for example, Regulation (EC) No 25/2009 of the European Central Bank), inter alia their negotiability on a secondary financial market?

(2) If the relevant Member State elects to transpose Directives 94/19 and 97/9 into national law in such a way that schemes for depositor and investor protection are laid down in a single legal measure (a law), are Article 7(2) of Directive 94/19, applied in conjunction with point 12 of Annex I to that directive, and Article 2(2) of Directive 97/9, taking account of Article 2(3) of Directive 97/9, to be understood and interpreted as meaning that it is not possible for no protection (guarantee) scheme for the purposes of the abovementioned directives to apply to holders of certificates of deposit and of bonds?

(3) Having regard to the fact that under national legislation none of the possible protection schemes provided for in Directives 94/19 and 97/9 is applicable to holders of certificates of deposit and bonds issued by a credit institution:

(a) Do Article 3(1), Article 7(1) (as subsequently amended by Directive 2009/14) and Article 10(1) of Directive 94/19, in conjunction with Article 1(1) of that directive which defines the term ‘deposit’, display the necessary clarity, detail and unconditionality and confer rights on individuals, so that they could be relied upon by individuals before a national court to found their claims for payment of compensation against the insurer which has been established by the State and is responsible for making payment?

(b) Do Articles 2(2) and 4(1) of Directive 97/9 display the necessary clarity, detail and unconditionality and confer rights on individuals, so that they could be relied upon by individuals before a national court to found their claims for payment of compensation against the insurer which has been established by the State and is responsible for making payment?

(c) Should the above questions (3(a) and 3(b)) be answered in the affirmative, which of the two possible protection regimes must a national court choose to apply when deciding a dispute between a private person and a credit institution and involving the participation of the insurer, established by the State, responsible for administration of the depositor and investor protection schemes?

(4) Are Articles 2(2) and 4(2) of Directive 97/9 (in conjunction with Annex I to that directive) to be understood and interpreted as precluding national legislation under which the investor-compensation scheme is not applicable to investors who possess debt securities issued by a credit institution by reason of the type of financial instrument (debt securities) and having regard to the fact that the entity with insurance (the credit institution) has not transferred or used investors’ funds or securities without the investor’s consent? Is it relevant to the interpretation of the abovementioned provisions of Directive 97/9, as regards investor protection, that the credit institution which has issued the debt securities — the issuer — is at the same time also the custodian of those financial instruments (intermediary) and that the investors’ funds are not separated from other funds of the credit institution?

25. The referring court asks, in short: (1) about the scope of the possible exclusion of the guarantee provided for by Directive 94/19; if that exclusion is interpreted strictly — which, in the referring court’s view, it should be — it will not be applicable to the agreements at issue; (2) and (3) whether Directive 94/19 and Directive 97/9 were correctly transposed into Lithuanian law and, if it is found that they were incorrectly transposed, whether it is possible for individuals to rely on the direct application of those directives; (4) whether it is possible for the national legislation not to apply to a certain type of investor by reason of the type of financial instrument.
IV – The procedure before the Court of Justice

26. Written observations were lodged by Snoras, IID, the Republic of Lithuania and the Commission. The hearing, held on 20 November 2014, was also attended by the representatives of Virgilijus Vidutis Nemanijunas and Vitoldas Guliauciws, and the latter presented oral argument.

V – Examination of the questions referred

A – The first question

27. The first question directed to the Court by the Lietuvos Aukščiausiasis Teismas is concerned specifically with Directive 94/19, and relates in particular to the option granted to the Member States in Article 7(2) of that directive, in conjunction with point 12 of Annex I thereto, to exclude from the guarantee provided for therein ‘certificates of deposit’, which, in principle, should benefit from that directive under Article 1 thereof.

28. More specifically, the referring court asks whether that option to exclude certificates of deposit extends only to certificates which have all the features of a financial instrument within the meaning of Directive 2004/39, inter alia their negotiability on a secondary financial market.

1. Arguments of the parties

29. Vitoldas Guliauciws argues that the case concerns a term deposit which, since it is not negotiable on the capital market, cannot be regarded as an investment product and, as a result, cannot be excluded from the guarantee provided for in Directive 94/19.

30. Snoras and IID submit that the Republic of Lithuania was entitled to exercise the option provided for in Article 7(2) of Directive 94/19 and, therefore, to exclude certificates of deposit from the guarantee. They maintain, in that regard, that the definition of such certificates in Lithuanian law corresponds to that laid down in Regulation No 25/2009 and Directive 2004/39. They argue that the latter cannot be applied for the purposes of interpretation of that definition without infringing the principle of non-retroactivity.

31. The Republic of Lithuania contends that, for the purpose of achieving the objectives of Directive 94/19 — namely, the freedom to provide services in the banking sector, the stability of the banking system and protection for savers — the EU legislature opted for minimum harmonisation. The directive did not create a system of cover for all types of deposit and depositor, and provided for the possibility that Member States could exclude certain deposits from the guarantee. In the Republic of Lithuania’s opinion, the certificates of deposit at issue in the main proceedings are encompassed by the concept of ‘[d]ebt securities issued by [a credit] institution’ in point 12 of Annex I to Directive 94/19 and the Republic of Lithuania was therefore entitled to exclude them from the deposit guarantee.

32. Concerning the last point, the Lithuanian Government maintains that Directive 94/19 does not restrict the concept of debt securities to instruments having the features of financial instruments within the meaning of Directive 2004/39, which neither refers to nor amends Directive 94/19, from which it follows that the adoption of Directive 2004/39 did not have any bearing on the exclusion provided for in point 12 of Annex I to Directive 94/19.
33. For its part, the Commission submits, first, that in order to determine whether certificates of deposit may be included in the concept of ‘any credit balance ... evidenced by a certificate issued by a credit institution’ laid down in Article 1 of Directive 94/19, it is necessary to refer to Article 20(1) of Directive 86/635, which includes certificates of deposit in the definition of debts evidenced by negotiable certificates. Second, the Commission claims that, having established that certificates of deposit may be covered by the concept of deposit laid down in Article 1 of Directive 94/19, the need to construe narrowly the exclusion provided for in Article 7(2) of that directive does not mean, in its opinion, that that exclusion may be applied only to debt securities having the features of financial instruments within the meaning of Directive 2004/39.

2. Assessment

34. The answer to the first question must be derived from an interpretation of two provisions of Directive 94/19 in conjunction with each other. The first is Article 1, which defines deposit as ‘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’.

35. Having regard strictly to the wording of Article 1 of Directive 94/19, it is clear that the legislature included within the category of ‘deposit’ two different concepts or definitions. First, in the words of the directive, ‘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’. Second, as a different concept from the previous one, ‘any debt evidenced by a certificate issued by a credit institution’.

36. In 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. 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.

37. In the first case, Article 1 of Directive 94/19 refers to debts which must be repaid under the legal and contractual conditions applicable to the accounts in which they are left or to the normal banking transactions from which those debts are derived as a result of a temporary situation. It is clear, to my mind, that that repayment obligation excludes the possibility that the debt may be transferred or negotiated since, strictly speaking, it is a deposit entrusted to the institution.

9 — Emphasis added.
38. However, in the second case, Article 1 of the directive refers explicitly to debts evidenced by a certificate, in other words, an instrument that has the inherent feature of being negotiable. That is apparent from Directive 86/635, Article 20(1) of which provides that the item ‘Debts evidenced by certificates’ must include ‘both debt securities and debts for which negotiable certificates have been issued, in particular deposit receipts’. In the same vein, point 19 of Article 4(1) of Directive 2004/39 defines ‘money-market instruments’ as ‘those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit’ and commercial papers and excluding instruments of payment.

39. Consequently, it is clear that, for the purposes of EU law, in particular Directive 94/19, certificates of deposit are a type of ‘deposit’ within the meaning of that directive, and are characterised specifically by the fact that they may be transferred.

40. The question is then whether certificates of deposit so characterised are included in the cases which, under Article 7(2) of Directive 94/19, Member States may exclude from the guarantee provided for in the directive or in respect of which the Member States may grant a lower level of guarantee.

41. Under Article 7(2) of Directive 94/19, ‘Member States may provide that certain depositors or deposits shall be excluded from guarantee or shall be granted a lower level of guarantee’. As is clear from the use of the word ‘certain’, that is not a general possibility and it is instead restricted to the depositors and deposits which the directive lists in Annex I.

42. Having examined the depositors and deposits referred to in Annex I, it should be noted, as far as the latter are concerned, that virtually all of them are consistent with the definition of deposit and, as far as the former are concerned, that the majority of these are also depositors of a public nature. The annex includes deposits by insurance undertakings (point 2), deposits by government and administrative authorities (points 3 and 4), deposits by collective investment undertakings (point 5), deposits by pension and retirement funds (point 6), deposits by persons holding a certain level of responsibility in the management or auditing of a credit institution (points 7, 8 and 9) and deposits in foreign currency (point 13). Those are all cases of deposits whose specific features are derived from the character of their respective holders. It is specifically that character which justifies the possibility of excluding such deposits from the protection afforded by Directive 94/19. That is either because, in the case of depositors of a public nature, the protection which the directive provides for individuals is not necessary, or because the depositors concerned have had some responsibility for the situation which has made necessary the protection concerned.

43. The only cases listed in Annex I which do not relate to the status of the depositor are, first, those provided for in point 10 (‘non-nominative deposits’), from which it may be inferred, a contrario, that ‘nominative deposits’ cannot be excluded, and, second, which is relevant here, those listed in point 12, which refers to ‘[d]ebt securities issued by the same institution and liabilities arising out of own acceptances and promissory notes’. Typically, that means certificates of deposit.

11 — See, in that connection, Cremades Bañón, F., *Certificados de depósito en las imposiciones a plazo*, Murcia, 1979, p. 102. Typically, these are ‘fixed-term’ deposits or ‘time’ deposits, the liquidity of which is provided by the issuing of certificates which include the right to repayment of the capital deposited. In that regard, see Cortés, I.J., op. cit., p. 541, who defines certificates of deposit as ‘títulos valores, a la orden, transmisibles por endoso de modo que el titular puede 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]. See also Recalde, A., ‘Certificado de depósito’, *Enciclopedia Jurídica Básica*, vol. I, Civitas, Madrid, 1995, p. 1016.

12 — Emphasis added.

13 — Emphasis added.
44. Accordingly, in my opinion, there can be no doubt that the Republic of Lithuania was permitted under Directive 94/19 to exclude certificates of deposit from the guarantee or to lower the amount of the guarantee for such certificates, which are taken to be negotiable financial instruments since, for the reasons set out, negotiability is an inherent feature of such instruments in EU law.

45. Nevertheless, the Lithuanian legislature did not exclude certificates of deposit in general but rather, in accordance with Directive 94/19, only those issued by the insured credit institution itself. Since Directive 94/19 allows the exclusion of those certificates of deposit, no objection can be raised against the Lithuanian legislature.

46. I believe, however, that only certificates of deposit within the meaning of EU law may be excluded, that is to say, they must be negotiable certificates, with the result that, if that condition is not satisfied and the certificates concerned are, for example, nominative certificates, the fact that they were issued by the insured institution is irrelevant. In other words, if, owing to their features, the financial instruments at issue are not negotiable and, therefore, irrespective of how they are designated, are not certificates of deposit in the strict sense, they will not be covered by the possibility of exclusion provided for in Directive 94/19.

47. In any event, it is for the national court to determine whether the instruments at issue in the main proceedings conform to the type of certificate of deposit which, in accordance with Directive 94/19 and in the light of the criterion relating to their negotiability or non-negotiability, are — or are not — covered by the guarantee provided for in that directive.

48. For the reasons set out, I propose that the answer to the first question should be that Article 7(2) of Directive 94/19, in conjunction with point 12 of Annex I thereto, must be interpreted as meaning that Member States may exclude from the guarantee depositors of a credit institution who possess certificates of deposit issued by that institution, provided that those certificates are negotiable instruments, a matter which it falls to the national court to determine. If that is not the case, the deposits in question must be regarded as not excluded from the guarantee provided for in that directive.

B – The fourth and second questions

49. In my view, the second and fourth questions referred by the Lietuvos Aukščiausiasis Teismas should be answered together.

50. The fourth question concerns a different directive from that referred to above — Directive 97/9 — regardless of the fact that Directive 97/9 and Directive 94/19 were transposed by the national legislature in the same legislation.

51. What that question specifically asks is whether the Lithuanian legislature correctly transposed Directive 97/9 by excluding from the guarantees provided for therein certain investments, such as debt securities, in particular, certificates of deposit which cannot be transferred or negotiated.

14 — The criterion of negotiability is, to my mind, the one which best accords with the objective of the exception permitted by Directive 94/19 and, as we shall see, the most appropriate for coordinating that directive with the objective of the investor compensation directive. In my opinion, it is revealing that, for example, German law excludes bearer certificates from the guarantee provided for in Directive 94/19 (Paragraph 1(2) of the Law on deposit guarantee and investor compensation (Einlagensicherungs- und Anlegerentschädigungsgesetz of 16 July 1998 (BGBl. I, p. 1842)), as amended by the Law of 15 July 2014 (BGBl. I, p. 934)). On the same lines, the Spanish legislature guarantees as deposits nominative deposit certificates (Article 4(4)(c) of Royal Decree 2606/1996 of 20 December establishing the legal framework for the deposit guarantee fund of credit institutions (Real Decreto 2606/1996, de 20 de diciembre, por el que se establece el régimen jurídico del fondo de garantía de depósitos de entidades de crédito) (BOE No 307 of 21 December).
52. The referring court asks, in particular, whether Articles 2(2) and 4(2) of Directive 97/9, in conjunction with Annex I thereto, must be interpreted as precluding national legislation which excludes from the compensation scheme investors who possess debt securities issued in the circumstances characterising the situation at issue in the main proceedings.

53. As we shall see, the answer to that question is closely linked to the second question submitted by the referring court, which asks whether, since Directives 94/19 and 97/9 were transposed by the same national law, Article 7(2) of Directive 94/19, in conjunction with point 12 of Annex I thereto, and Article 2(2) of Directive 97/9, in the light of Article 2(3) of Directive 97/9, is to be interpreted as meaning that holders of certificates of deposit and bonds must be able to rely on one of the protection schemes provided for in those directives.

1. Arguments of the parties in connection with the fourth question

54. In the opinion of Snoras and IID, the insurance provided for by Directive 97/9 is not connected to the type of financial instrument but rather to the person who has custody of that instrument (the financial intermediary) and that insurance does not cover the risk of insolvency of the issuer. Furthermore, where, as is the case here, the investor’s funds are transferred to the issuer as the price of the financial instruments acquired, the sums paid by the investor cannot be regarded as investment funds covered by the guarantee in Article 2 of Directive 97/9. In the present case, the funds were transferred voluntarily to Snoras in accordance with agreements concluded with Vitoldas Guliavičius and Virgilijus Vidutis Nemaniūnas, while, moreover, the agreements provided that the bank was authorised to use its clients’ funds. In those circumstances, the fact that Snoras is at the same time the issuer and also the intermediary in relation to the securities is irrelevant for the purposes of interpreting Directive 97/9.

55. The Lithuanian Government asserts that the Supreme Court erred in stating that the investor-compensation scheme is not applicable by reason of the type of financial instrument. In the Lithuanian Government’s opinion, the scheme is not applicable because the insolvent institution did not use or transfer the securities or the funds without the consent of Vitoldas Guliavičius or Virgilijus Vidutis Nemaniūnas. In addition, the Republic of Lithuania submits that it is irrelevant that Snoras was both the issuer and the intermediary in relation to the debt securities at issue, since the sums transferred to it by the investors were considered for the purchase of the securities and the investors could demand the repayment of those sums only under the conditions stipulated in the applicable agreements. In short, there is nothing to suggest that the investors’ assets were appropriated or used without their consent.

56. The Commission argues that the scheme set out in Article 2(2) and Article 4(2) of Directive 97/9 provides for compensation to be paid in respect of certificates of deposit and bonds where two conditions are satisfied. First, the instruments in question must be financial instruments within the meaning of Directive 2004/39, in other words, they must be instruments which can be dealt in on the money market. Second, the credit institution must not have returned to investors the instruments belonging to them or must not have repaid money owed or belonging to investors and held on their behalf in connection with certificates of deposit. The Commission submits that it is for the referring court to determine whether both conditions are satisfied in the present case. However, the Commission observes that, for the purposes of satisfying the first condition, the mere failure to transfer the instruments to the holder or to a financial intermediary and register them in a central depositary does not exclude the possibility that those instruments are negotiable.
2. Arguments of the parties in connection with the second question

57. Vitoldas Guliavičius submits that the two directives must be coordinated in such a way that the guarantee provided for by one of them can always be applied, so that the exclusion of certain financial instruments cannot lead, without further ado, to a lack of protection for investors.

58. The Republic of Lithuania, Snoras and IID all maintain that Directive 94/19 and Directive 97/9 pursue different objectives: the former, the maintenance of depositor confidence in credit institutions and the stability of the financial system; the latter, the protection of investors against the risk of fraud, professional negligence and management errors by the investment firm, without entailing a guarantee against the actual risk of investment as such. Those parties take the view that compensation is appropriate only in the event of the insolvency of the credit institution or investment firm and only if the conditions laid down by the Lithuanian and EU legislation are satisfied. They state that, as far as Directive 97/9 is concerned, it is the condition imposed by Article 9(1) of the Lithuanian Law on deposit insurance which must be satisfied.

59. In addition, those parties all contend that the two directives enable the Member States to exclude from the guarantee certain categories of deposits and investors. However, the parties argue that Directive 97/9 does not provide that categories excluded from the protection conferred by Directive 94/19 must automatically be protected under Directive 97/9 or vice-versa. That is because, although the directives are interconnected, the mere fact that they were both transposed by the same national law does not mean that all depositors and investors are entitled in any event to claim compensation on account of the insolvency of the credit institution or investment firm.

60. According to the Commission, while the two directives differ in terms of their scope and the conditions for their application, and as regards the level of protection they afford, it is possible that the systems overlap in some cases, an eventuality for which rules exist to prevent compensation being paid more than once; in particular, the ninth recital in the preamble to Directive 97/9 and Article 2(3) of that directive.

61. The Commission points out that the two directives pursue the common objective of ensuring a minimum level of protection for small investors in view of their vulnerability vis-à-vis financial institutions. However, the exclusion of certain debt securities under Article 7(2) of Directive 94/19, in conjunction with point 12 of Annex I thereto, must be interpreted independently of whether such securities are covered by the guarantee laid down in Directive 97/9 or are excluded therefrom. It follows from this that it cannot be ruled out that individuals may not be entitled to benefit from either guarantee.

3. Assessment

62. Directive 97/9 ensures the protection of investors which it seeks to achieve if the conditions laid down in Article 2(2) thereof are satisfied; those conditions relate to situations where, owing to its financial position, an investment firm is unable to meet its obligations to its investors. In those circumstances, Directive 97/9 provides that cover must be provided (A) to repay money owed to or belonging to investors and held on their behalf in connection with investment business, or (B) to return to investors any instruments belonging to them and held, administered or managed on their behalf in connection with investment business. That must all be ‘in accordance with the legal and contractual conditions applicable’.

63. Article 1(3) of Directive 97/9, provides that, for the purposes of the directive, ‘instruments’ is to mean the instruments listed in Section B of the Annex to Directive 93/22, that is, inter alia, money-market instruments, which, as we saw in point 38, include certificates of deposit in accordance with point 19 of Article 4(1) of Directive 2004/39.
64. Under Directive 97/9, Member States may provide for certain exclusions from the guarantee scheme. In particular, the EU legislature set out in Annex I a list of possible exclusions, all of which are based on the investor's personal or institutional status, so that, for example, professional or public investors and managers and personally liable members of an investment firm or their close relatives may be excluded.

65. Under the Lithuanian legislation — which, as we know, transposes both Directive 94/19 and Directive 97/9 in the same legislative text — certificates of deposit issued by the credit institution itself are excluded from the guarantee. As a result of the 'merger' of the two directives under the Lithuanian legislation, it is not possible to determine whether such certificates are excluded as deposits or as investments, in other words, which of the two possibilities of exclusion permitted by the directives was adopted by the Lithuanian legislature. The Lithuanian Government, Snoras and IID all maintain that the exclusion from the guarantee in the present case is not derived from the fact that Snoras issued the securities at issue. The decisive point, in their opinion, is the fact that Snoras did not use or transfer those securities without the consent of Vitoldas Guliavičius or Virgilijus Vidutis Nemanijunas.

66. It is quite clear, to my mind, that Directive 97/9 is not intended to cover the risk inherent in all investment transactions but only certain risks associated with the insolvency of investment firms. However, where, as is the case in the main proceedings, the issuer of the securities and the intermediary are one and the same credit institution it becomes difficult to delineate the risk connected with the credit institution's financial position, on the one hand, and the risk related to the investment, on the other.

67. In fact, Directive 97/9 allows for the possibility that there may be debts in respect of which, because they originate from investment firms which are credit institutions, it is not easy to establish whether they constitute a deposit protected by Directive 94/19 or funds deposited in such institutions in connection with investment transactions protected by Directive 97/9. That is the reason why, in accordance with the ninth recital in the preamble to Directive 97/9, ‘Member States should be allowed to determine which Directive shall apply to such claims’ in those cases.

68. I believe that the possibility thus offered to the Member States is based on the assumption that, however difficult it may be to determine whether such cases are concerned with deposits or investments, the EU legislature intended that one or other of the protection schemes laid down by each of the directives in question should ultimately be applied, which means that the national laws and the respective national courts must make possible the preliminary task of classifying as a deposit or an investment the financial instrument concerned in each specific case.

69. In my view, that follows from the ninth recital in the preamble to Directive 97/9, which states that in view of the fact that ‘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 [... without], however, it [being] 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/EC ...’.

70. Article 2(3) of Directive 97/9 provides, in a way which is consistent with the foregoing, that ‘[a]ny 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/EC shall be directed by that Member State to a scheme under one or other of those Directives as that Member State shall consider appropriate’. However, the same provision also stipulates that ‘[n]o claim shall be eligible for compensation more than once under those Directives’.
71. In the case of the Lithuanian legislation, the two directives were transposed in only one legislative instrument which provides for a single protection scheme. In my opinion, that legislative solution, consisting of the creation of a single protection scheme, cannot be called into question at all, since the recital cited above refers expressly to the possibility of ‘a single scheme’. However, in accordance with the same recital, that is only in the event that such a scheme ‘meets the requirements both’ of Directive 94/19 and Directive 97/9.

72. Accordingly, the fact that, under the Lithuanian legislation, a certificate of deposit issued by a credit institution is excluded from the protection laid down for deposits cannot, under any circumstances, have the effect of excluding that certificate of deposit from the protection for which it might be eligible as an investment instrument. On the contrary, the protection scheme created by the Lithuanian legislature must meet the requirements of both Directive 94/19 and Directive 97/9 since, as we have seen, Directive 97/9 requires that credit institutions authorised to provide investment services must belong to a compensation scheme in relation to their investment business.

73. The exclusion would be possible only if Directive 97/9 had laid down such an exception. However, in determining the situations covered by the guarantee provided for therein, Directive 97/9 refers only to the fact that the investment firm is unable to meet its obligations ‘for reasons directly related to its financial circumstances’ (Article 2(2) of Directive 97/9), without referring to the condition required by the Lithuanian legislature, that is, the use of funds without consent.

74. Accordingly, as a second interim conclusion, I propose that the answer to the fourth question should be that Articles 2(2) and 4(2) of Directive 97/9 (in conjunction with Annex I to that directive) must be interpreted as precluding national legislation which excludes from the compensation scheme laid down therein certificates of deposit issued by a credit institution where that institution has not transferred or used investors’ funds or securities without the investors’ consent.

C – The third question

75. Finally, in what seems to me to be the logical order to deal with the questions referred by the Lietuvos Aukščiausiasis Teismas, I shall focus on the analysis of its third question, which asks whether, as the protection provided for in Directives 94/19 and 97/9 is excluded by the national legislation, individuals may rely on certain provisions of those two directives before a national court.

76. I will state now that, in the event that the exclusion of the instruments at issue from the scope of the protection laid down in Directive 94/19 is compatible with that directive, the question of direct effect will arise only in relation to Directive 97/9, inasmuch as the national legislation has unlawfully excluded the protection to be afforded under the latter directive.

1. Arguments of the parties

77. Snoras and IID agree with the position adopted by the Lithuanian Government, arguing that the provisions of the directives invoked by the referring court are not applicable to Snoras, as a private entity, or to IID, a State undertaking participating in the main proceedings as a third party. They claim, lastly, that should it be held that the two directives may be applied directly, the application of Directive 97/9 should take precedence.
78. The Lithuanian Government disputes the assertion of the referring court to the effect that, in accordance with the national legislation, neither of the protection schemes provided for in Directive 94/19 or Directive 97/9 can be applied to the holders of certificates of deposit and bonds issued by a credit institution. The Lithuanian Government submits that, while it is the case that Directive 94/19 is not applicable on account of the derogation laid down in Article 7(2), the scheme laid down in Directive 97/9 can be applied. The reason why no compensation was paid in the present case is that the condition laid down in Article 9 of the Lithuanian law on deposit insurance has not been met.

79. As far as the question of direct effect is concerned, the Republic of Lithuania maintains that, since Directive 94/19 and Directive 97/9 were correctly transposed, the question is irrelevant and, in any event, neither directive satisfies the conditions required to produce that effect.

80. For its part, the Commission believes that the question concerning the clarity, detail and unconditionality of Directive 94/19 is inappropriate, since, in the present case, and in accordance with Article 7(2) thereof, certificates of deposit were lawfully excluded from the protection provided for by that directive. As regards Directive 97/9, the Commission submits that the appropriate course of action would be for the referring court to apply the relevant national provisions in such a way that they are compatible with the interpretation of Article 2(2) and Article 4(2) of that directive to which recourse must be had, according to the Commission, in order to reply to the referring court’s fourth question.

2. Assessment

81. In its third question, the referring court starts from the premiss that ‘under national legislation none of the possible protection schemes provided for by Directives 94/19 and 97/9 is applicable to holders of certificates of deposit and bonds issued by a credit institution’. That being so, the referring court asks whether it is possible for Directive 94/19 and Directive 97/9 to be applied directly.

82. As I have already stated, the need to apply Directive 97/9 directly would arise where the protection provided for in Directive 94/19 had been lawfully excluded and the instruments at issue were not eligible for compensation as investments because they did not satisfy the condition laid down for that purpose by the Lithuanian legislature, namely that the funds must have been used without consent.

83. If that were ultimately the case, I believe that the fact that the public nature of IID, a State undertaking whose object is the protection of deposits and investments in the event of the insolvency of financial institutions, would, in principle, justify the direct application of Directive 97/9, since the main proceedings are not solely between private parties. However, as we know, that on its own would not be sufficient to produce that result, since it is necessary, first of all, for the provision the direct effect of which is sought to be sufficiently clear, detailed and unconditional.

84. In accordance with settled case-law of the Court, in cases of non-transposition or incorrect transposition of a directive whose provisions are not subject to any conditions and are sufficiently precise, individuals may rely on those provisions against the State before the national courts.

15 — In the words of the judgment in Association de médiation sociale, C-176/12, EU:C:2014:2, at paragraph 36, ‘even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties’. See also to that effect Kücükdeveci, C-555/07, EU:C:2010:21, paragraph 46.

16 — Settled case-law since Van Duyn, 41/74, EU:C:1974:133. Moreover, the Court has always accepted a broad definition of the concept of State for those purposes; in that connection, see Marshall, 152/84, EU:C:1986:84.
85. I believe that that condition is also met in the present case since, although Directive 97/9 does not of itself create an investor-compensation scheme, such a scheme was created by the Lithuanian legislature in its full extent and detail. Thus, the only factor which can prevent the instruments at issue from being covered by that scheme — in the event that, for the reasons set out, they are to be regarded as investment instruments, a matter which it is for the referring court to determine — is a condition imposed by the Lithuanian legislature (use without consent) which, in my opinion, is not compatible with Directive 97/9.

86. In that respect, the provision in Directive 97/9 regarding the delimitation of the cases protected is of itself sufficiently clear, precise and unconditional to be capable of being relied on directly against the provisions of the national legislation.

87. Accordingly, Directive 97/9 has direct effect in that regard and, since the main proceedings are not solely between individuals, it may be applied in those proceedings by the referring court. To that end, it will suffice if the condition laid down by the Lithuanian legislature but not provided for by Directive 97/9 is not applied, so that the protection scheme established by the Lithuanian legislature can provide cover, if appropriate, for the instruments at issue.

88. Accordingly, as a final interim conclusion, I propose that the answer to the third question should be that, by virtue of the direct effect of Directive 97/9, the referring court must, if appropriate, refrain from applying the condition relating to use without consent laid down by the national legislature in defining the scope of the investments included in the protection scheme provided for by Directive 97/9.

VI – Conclusion

89. In the light of the foregoing considerations, I propose that the Court give the following replies to the Lietuvos Aukščiausiasis Teismas:

(1) Article 7(2) of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, in conjunction with point 12 of Annex I thereto, must be interpreted as meaning that Member States may exclude from the guarantee depositors of a credit institution who possess certificates of deposit issued by that institution, provided that those certificates are negotiable instruments. It is for the national court to determine whether the certificates at issue meet that condition.

(2) Articles 2(2) and 4(2) of Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes (in conjunction with Annex I to that directive) must be interpreted as precluding national legislation which, where any overlap with Directive 94/19 has been ruled out, excludes from the compensation scheme laid down therein certificates of deposit issued by a credit institution where that institution has not transferred or used investors’ funds or securities without the investors’ consent.

(3) By virtue of the direct effect of Directive 97/9, the referring court must refrain from applying the condition relating to use without consent laid down by the national legislature in defining the scope of the investments included in the protection scheme provided for by that directive.