Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 2 June 2016[1]

Case C-76/15

Paul Vervloet and Others
(Request for a preliminary ruling

from the Grondwettelijk Hof (Constitutional Court, Belgium))

(Competition — State aid (Article 107(1) TFEU) — Belgian guarantee scheme protecting the shares of individual members of recognised financial cooperatives — Validity of the European Commission decision prohibiting the guarantee scheme (Decision 2014/686/EU) — Standstill obligation (Article 108(3) TFEU) — Deposit-guarantee schemes (Directive 94/19/EC))

I – Introduction

1. Managing the global economic and financial crisis that erupted in 2008 has raised within the European Union a multitude of issues with which the Court of Justice, among others, has had to deal again and again. In recent years, there have been at least two landmark cases involving matters of constitutional law in which the Court has been called upon to assess the legality of a number of EU measures aimed at strengthening economic and monetary union.[2] Less spectacular, but nonetheless of great economic, social and political significance, are certain measures adopted by the Member States with a view to stabilising their respective national financial sectors and protecting the savings deposits of Union citizens. The present preliminary ruling proceedings concern just such a measure.

2. As part of the recapitalisation of the Belgian-French Dexia Bank, which was in serious difficulty, the Belgian State gave a guarantee to the numerous natural persons[3] who were at that time members of three ARCO Group[4] financial cooperatives (hereinafter also referred to as 'ARCO financial cooperatives' or simply 'ARCO'). ARCO was then one of Dexia's main shareholders.

3. The aforementioned guarantee for shares held by private individuals in the ARCO Group cooperatives (hereinafter also referred to as 'the ARCO guarantee') encountered legal opposition in two respects.

1 — Original language: German.

2 — Judgments in *Pringle* (C-370/12, EU:C:2012:756) and *Gauweiler and Others* (C-62/14, EU:C:2015:400).

3 — Hereinafter also referred to (in keeping with the terminology used by the European Commission in this case) as 'individuals', 'private individuals' or 'individual shareholders / members'.

4 — The ARCO Group consists of several cooperatives whose origins date back to Belgium's Christian Workers' Movement of the 1930s, that is to say in the Algemeen Christelijk Werknemersverbond (ACW) and the Mouvement Ouvrier Chrétien (MOC). According to the information submitted by ARCO to the Court, some 7% of Belgium's population are members of ARCO financial cooperatives, 99% of whose shares are held by private individuals. Similarly, the referring court states that approximately 800 000 private individuals are affected. Since the end of 2011, the three ARCO financial cooperatives, namely Arcopar, Arcofin and Arcoplus, have gone into liquidation.

4. First, the ARCO guarantee was looked at by the European Commission, which, in 2014, by Decision 2014/686/EU,[5] classified the underlying guarantee scheme as State aid and declared it to be incompatible with the internal market. The Commission ordered the Kingdom of Belgium to recover the associated advantages and to make no payments under the ARCO guarantee. That decision is currently the subject of two actions for annulment pending before the Court of Justice of the European Union.[6]

5. Secondly, the ARCO guarantee attracted to the scheme a number of private and institutional investors in Belgium who had invested their money not in shares in ARCO Group cooperatives but, either directly or indirectly through holding companies, in shares in Dexia or other capital companies and now felt disadvantaged because they did not qualify for such a guarantee. By their actions against the Belgian State, they instituted legal proceedings which have now reached the Grondwettelijk Hof (Constitutional Court of the Kingdom of Belgium).

6. This Court must now address both aspects of the ARCO guarantee, following the reference made by the Belgian Constitutional Court. In addition to the validity of Commission Decision 2014/686, the Court must also examine whether a guarantee scheme such as the Belgian one is compatible with the EU deposit-guarantee legislation laid down in Directive 94/19/EC[7] and with the prohibition on State aid laid down in Articles 107(1) TFEU and 108(3) TFEU.

II – Legal framework

A – *EU law*

7. The EU law framework applicable to this case is defined, first, by Articles 107 TFEU, 108 TFEU and 296 TFEU as well as Articles 20 and 21 of the Charter of Fundamental Rights, and, secondly, by Directive 94/19.[8] I shall confine myself below to reproducing only the relevant provisions of that directive.

8. For the purposes of Directive 94/19, Article 1 thereof contains, inter alia, the following definitions:

‘1. *deposit* shall mean any credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution must repay under the legal and contractual conditions applicable, and any debt evidenced by a certificate issued by a credit institution.

Shares in United Kingdom and Irish building societies apart from those of a capital nature covered in Article 2 shall be treated as deposits.

…

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

…’

5 — Commission Decision of 3 July 2014 on State aid SA.33927 (12/C) (ex 11/NN) implemented by Belgium — Guarantee scheme protecting the shares of individual members of financial cooperatives, notified under document C(2014) 1021 (OJ 2014 L 284, p. 53).

6 — *Belgium* v *Commission* (T-664/14) and *Arcofin and Others* v *Commission* (T-711/14).

7 — Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ 1994 L 135, p. 5).

8 — Directive 94/19 has since been repealed and replaced by a new version, although with effect only 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). Consequently, Directive 94/19 alone remains applicable to the present case.

9. The first subparagraph of Article 3(1) of Directive 94/19 is worded as follows:

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

10. Reference must also be made also to Article 2 of Directive 94/19:

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

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

— all instruments which would fall within the definition of "own funds" in Article 2 of … Directive 89/299/EEC … on the own funds of credit institutions,

— deposits arising out of transactions in connection with which there has been a criminal conviction for money laundering as defined in Article 1 of Council Directive 91/308/EEC …'

B – *National law*

11. The principal item of Belgian legislation relevant to this case is the Law of 22 February 1998 establishing the organic statute of the National Bank of Belgium ('National Bank Law').

12. Royal Decree of 3 March 2011, which was subsequently ratified by the Belgian parliament,[9] incorporated into the National Bank Law a new Article 36/24, effective from 1 April 2011, which, in the version material to the dispute in the main proceedings, reads in extract as follows:'(1) In the event of a sudden crisis on the financial markets or in the event of a serious threat of a systemic crisis, the King, with a view to limiting the extent or the consequences of that crisis, may, after obtaining the opinion of the bank:

…

2. put in place a system for granting a State guarantee in respect of commitments entered into by the institutions, subject to the supervision prescribed by the aforementioned laws, that He shall determine, or grant the State guarantee in respect of certain claims held by those institutions;

3. put in place, if necessary by means of regulations adopted in accordance with subparagraph 1, a system for granting the State guarantee with a view to refunding to members who are natural persons their share of the capital of cooperatives, recognised in accordance with the Royal Decree of 8 January 1962 laying down the conditions governing the recognition of national cooperative groupings and cooperatives, which are institutions subject to the supervision prescribed by the aforementioned laws or at least half of the assets of which are invested in such institutions;

…

9 — Article 36/24 of the National Bank Law was incorporated by Article 195 of the aforementioned Royal Decree. The Royal Decree has the force of law, since it was confirmed retroactively to the date of its entry into force by Article 298 of the Law of 3 August 2012 on certain forms of joint portfolio administration.

The Royal Decrees … shall cease to have effect if they have not been confirmed by law within twelve months from their date of entry into force. The confirmation shall be retroactive to the date of entry into force of the Royal Decrees. The Royal Decrees adopted pursuant to paragraph 1(2) to (6) shall be deliberated in the Council of Ministers.

…'

13. As is clear from the order for reference, that provision (like its predecessor provisions too[10]) was adopted in the context of the global economic and financial crisis of 2008. It is intended to facilitate the adoption of measures to limit the extent and consequences of any sudden crisis on the financial markets or a serious threat of a systemic crisis. So far as specifically concerns financial cooperatives, moreover, the Belgian legislature took the view that, in certain cases, shares in such businesses possess all the characteristics of a savings product and were therefore to be protected in the same way as bank deposits or certain kinds of life insurance.

14. The Royal Decree of 10 October 2011 was then adopted, on the basis of Article 36/24(1), first subparagraph, point 3, of the National Bank Law. This enabled recognised cooperatives operating in the financial sector to participate on a voluntary basis in the Fonds spécial de protection des dépôts et des assurances sur la vie (special protection fund for deposits and life insurance) introduced in Belgium in 2008. At the same time, the aforementioned fund was renamed the 'Fonds spécial de protection des depots, des assurances sur la vie et du capital de sociétés coopératives agréés (special protection fund for deposits, life insurance and the capital of recognised cooperatives).

15. Finally, the capital protection applications made by three recognised ARCO Group cooperatives, namely Arcopar, Arcofin and Arcoplus, were accepted by Royal Decree of 7 November 2011. No other cooperatives applied for the issue of such guarantees.

III – Facts and main proceedings

16. The Constitutional Court of the Kingdom of Belgium currently has before it three joined cases of the Raad van State (Belgian Council of State) which raise the issue of the constitutionality of Article 36/24 of the National Bank Law, a provision which, as I have already indicated, the Belgian legislature adopted in response to the global economic and financial crisis which erupted in 2008.

17. Those legislative review proceedings were prompted by the scheme, introduced by the Belgian State on the basis of Article 36/24(1), first subparagraph, point 3, of the National Bank Law, for providing guarantees for shares in certain recognised financial cooperatives, in so far as they are held by natural persons, up to the legally established maximum of EUR 100 000 per investor.

18. The intention to grant such a guarantee had been announced some time before in two government press communications the first of which was issued on 10 October 2008 and the second on 21 January 2009.[11] The ARCO Group also posted the communication of 21 January 2009 on its website on the same day.

19. The Belgian State did not notify the European Commission of the aforementioned guarantee scheme until 7 November 2011, the date on which the ARCO financial cooperatives were admitted by Royal Decree to the Belgian deposit-guarantee scheme.[12]

10 — Earlier legislation the content of which was essentially identical to some of the provisions cited from of Article 36/24(1) of the National Bank Law had been in place since 2009, first, in Article 117a of the Law of 2 August 2002 on supervision of the financial sector and financial services and, later, in Article 105 of that same Law.

11 — These were a press release issued by the Finance Minister on 10 October 2008 and a press release issued by the Prime Minister and Finance Minister on 21 January 2009.

12 — Recital 1 of Decision 2014/686.

20. At the request of the Council of State, the Constitutional Court must now clarify whether the guarantee scheme provided for in Article 36/24(1), first subparagraph, point 3, of the National Bank Law is compatible with the principles of equal treatment and non-discrimination as enshrined in Articles 10 and 11 of the Belgian Constitution. The applicants' allegation before the Council of State is, in essence, that the guarantee scheme leads to discrimination between individual shareholders of financial cooperatives, on the one hand, and various shareholders of other capital companies and institutions operating on the market, on the other.

21. Preliminary to the Constitutional Court's assessment of the constitutionality of Article 36/24 is the question whether, in adopting the contested guarantee scheme, the Belgian State has infringed EU law, in particular the provisions on deposit guarantees and the law on State aid. In order to be able to answer that question, the Constitutional Court considers it necessary to seek a preliminary ruling from the Court of Justice.

IV – Request for a preliminary ruling and proceedings before the Court

22. By judgment of 5 February 2015, received on 19 February 2015, the Belgian Constitutional Court referred the following questions to the Court of Justice for a preliminary ruling under Article 267 TFEU:[13]

(1) Must Articles 2 and 3 of Directive 94/19/EC, where appropriate read in conjunction with Articles 20 and 21 of the Charter of Fundamental Rights of the European Union and with the general principle of equality, be interpreted as meaning that

  (a) they impose an obligation on the Member States to guarantee the shares of recognised cooperatives operating in the financial sector in the same way as deposits?

  (b) they preclude a Member State from entrusting to the body which is partially responsible for guaranteeing the deposits referred to in that directive the task of also guaranteeing, in an amount up to EUR 100 000, the value of the shares of the members, being natural persons, of a recognised cooperative operating in the financial sector?

(2) Is Decision 2014/686/EU compatible with Articles 107 TFEU and 296 TFEU in so far as it classifies the guarantee scheme which forms the subject of that decision as new State aid?

(3) In the event of a negative answer to the second question, must Article 107 TFEU be interpreted as meaning that a scheme concerning the State guarantee granted to the members, being natural persons, of recognised cooperatives operating in the financial sector, within the meaning of Article 36/24(1)(1)(3) of the National Bank Law, constitutes new State aid which must be notified to the European Commission?

(4) In the event of an affirmative answer to the second question, is Decision 2014/686 compatible with Article 108(3) TFEU if it is interpreted as holding that the State aid at issue was put into effect before 3 March 2011 or 1 April 2011 or on one or other of those dates, or, conversely, if it is interpreted as holding that the State aid at issue was put into effect at a later date?

(5) Must Article 108(3) TFEU be interpreted as precluding a Member State from adopting a measure, such as that contained in Article 36/24(1)(1)(3) of the National Bank Law, if that measure puts State aid into effect or constitutes State aid which has already been put into effect and that State aid has not yet been notified to the European Commission?

13 — Judgment No 15/2015, which can be viewed on the Belgian Constitutional Court's website at < http://www.const-court.be/de/common/home.html > (last visited on 22 March 2016).

(6) Must Article 108(3) TFEU be interpreted as precluding a Member State from adopting, without prior notification to the European Commission, a measure, such as that contained in Article 36/24(1)(1)(3) of the National Bank Law, if that measure constitutes State aid which has not yet been put into effect?

23. In January 2016, at the Court’s request, the referring court clarified the relevance of the second to sixth questions to the dispute in the main proceedings, pursuant to Article 101 of the Rules of Procedure.

24. The applicants in the dispute in the main proceedings (Mr Vervloet and Others, on the one hand, and the municipality of Schaerbeek and the Ogeo Fund pension fund, on the other), the three ARCO Group financial cooperatives appearing as interveners in the main proceedings (Arcopar, Arcofin and Arcoplus), as well as the Kingdom of Belgium and the European Commission participated in the written procedure. The same parties were also represented at the hearing on 6 April 2016.

V – Assessment

25. By its long list of questions, the referring court wishes to ascertain, in essence, whether the Belgian State infringed EU law in creating, in the context of the economic and financial crisis which erupted in 2008, a guarantee scheme for the benefit of individual members of certain financial cooperatives.

A – *Admissibility of the request for a preliminary ruling*

26. Before I turn to the substantive assessment of the questions referred, a few words on the admissibility of the request for a preliminary ruling are called for. After all, some of the parties to the proceedings have called into question the relevance of points of EU law to the judgment to be given in the main proceedings on the ground that those proceedings are concerned only with Belgian constitutional law and neither Directive 94/19 nor the law on State aid (nor the question of the selectivity of aid either) has any bearing on them.

27. It should be noted in this regard that questions referred for a preliminary ruling on EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[14]

28. None of those scenarios can be said to obtain in the present case.

29. It is true that, in this case, the Belgian Constitutional Court has been called upon to examine the contested guarantee scheme provided for in Article 36/24(1), first subparagraph, point 3, of the National Bank Law in the light of the principles of equal treatment and non-discrimination as enshrined in Articles 10 and 11 of the Belgian constitution. However, the Constitutional Court clearly considers the questions of EU law which it has submitted to be crucial to that examination. It indicated as much in its order for reference and elaborated on the point in its further clarifications under Article 101 of the Rules of Procedure. The parties to the proceedings, in particular the municipality of Schaerbeek and the Ogeo Fund, also made this clear at the hearing before the Court.

14 — Judgment in *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 25); see also the judgments in *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraphs 34 and 35); *Afton Chemical* (C-343/09, EU:C:2010:419; paragraphs 13 and 14); and *Association Kokopelli* (C-59/11, EU:C:2012:447, paragraphs 28 and 29); on the presumption of relevance, see also the judgment in *Beck and Bergdorf* (C-355/97, EU:C:1999:391, paragraph 22).

30. The Constitutional Court begins by analysing very convincingly the preliminary question of whether the guarantee scheme at issue is in accordance with EU law. From this it then draws conclusions with respect to the existence or otherwise of a prohibited difference in treatment within the meaning of the Belgian Constitution.

31. After all, should it follow from EU law that the aforementioned guarantee scheme is a requirement of EU law (for example, because the provisions on deposit guarantees contained in Directive 94/19 impose an obligation to that effect on the Belgian State), then, by extension, this might constitute a justification for any difference in treatment between investors. On the other hand, should it prove to be the case that EU law precludes such a guarantee scheme (for example, because it was introduced in breach of the provisions of Directive 94/19 or the requirements of the law on State aid), then, by extension, that scheme might not be such as to justify any difference in treatment between investors within the meaning of the Belgian constitution.

32. Consequently, the questions referred are not obviously irrelevant to the judgment to be given in the main proceedings and there can therefore be no serious doubt as to the admissibility of the request for a preliminary ruling.

B – *Substantive assessment of the questions referred*

33. In substance, the Court is called upon to assess a guarantee scheme such as the Belgian one, first, in the light of the EU-law provisions on deposit guarantees (first question; see in this regard section 1 immediately below) and, secondly, from the point of view of the prohibition of State aid under EU law (second to sixth questions; see in this regard section 2 further below).

1. The EU-law provisions on deposit guarantees (first question)

34. By its first question, the referring court wishes to ascertain, in essence, whether a guarantee scheme such as that at issue here is consistent with the EU-law requirements relating to deposit guarantees. To that end, the Constitutional Court asks the Court of Justice to clarify the meaning of Articles 2 and 3 of Directive 94/19 when read in the light of Articles 20 and 21 of the Charter of Fundamental Rights and the general principle of equal treatment.

35. Whereas ARCO is of the opinion that the contested guarantee scheme is necessary in the light of the meaning and purpose of the deposit guarantee regime provided for in Directive 94/19, the municipality of Schaerbeek and the Ogeo Fund take the opposite view. Belgium and the Commission consider that, in principle, such a guarantee scheme is neither required nor prohibited by that directive. Mr Vervloet and his fellow individual applicants maintain, for their part, that the guarantee scheme does not constitute a transposition of Directive 94/19 and that extending the deposit-guarantee regime to shares in financial cooperatives is contrary to the scheme of that directive.

36. As I shall explain below, Directive 94/19 is essentially neutral on an issue such as that in question here. Extending the deposit-guarantee regime to shares in financial cooperatives is neither required (see in this regard section (a) immediately below) nor prohibited (see in this regard section (b) further below) by that directive.

(a) No requirement under Directive 94/19 to extend the deposit-guarantee regime to shares in financial cooperatives (first part of the first question)

37. It must be clarified first of all whether it was *a requirement* of Directive 94/19 to extend a national deposit-guarantee scheme such as the Belgian one also to privately-held shares in financial cooperatives.

38. The obligation incumbent on the Member States to ensure that within their territories deposit-guarantee schemes are introduced and officially recognised follows from Article 3(1) of Directive 94/19. The extent of that obligation must be assessed in the light of the material and personal scope of the directive.

39. Materially, Directive 94/19 is applicable to *deposits*. According to the definition of that term in Article 1(1) of the directive, these are credit balances in accounts which must be repaid to the account holder and debts evidenced by certificates.

40. According to the information available to the Court, shares in Belgian financial cooperatives such as the ARCO Group are neither of these. Such shares are essentially participations in the *own capital* of the undertaking concerned, whereas deposits are distinguished by the fact that they form part of the *borrowed capital* of a credit institution.

41. Moreover, upon maturity, deposits must be paid back to depositors at nominal value, plus any agreed interest and minus any charges and taxes, whereas the amount of money which a member of a cooperative receives on withdrawal from the cooperative in question reflects the undertaking's performance and may accordingly be higher or lower than the capital invested.

42. Consequently, the acquisition of a share in a cooperative by an investor, however much it may have been sold to him as a savings product, is less comparable to a payment made into a bank account or the acquisition of a debenture than to the purchase of a share in a company, for which Directive 94/19 provides no guarantee.

43. Moreover, the contested shares in Belgian financial cooperatives also cannot be equated to shares in building societies as referred to in the second subparagraph of Article 1(1) of Directive 94/19. First, because that special extension of the concept of deposit relates by its very wording only to shares in British and Irish building societies, financial cooperatives governed by Belgian law, on the other hand, not being the concern of that provision. Secondly, because that special rule expressly does not apply to shares which are to be regarded as being of a capital nature. That, however, as I have already explained, is the very nature of shares in financial cooperatives such as those, at issue here, in the ARCO Group (inasmuch as they are participations in own capital).

44. As regards its personal scope, Directive 94/19 is applicable only to *credit institutions*. These, according to the definition of that term in Article 1(4) of the directive, are undertakings the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account.

45. In this respect too, the financial cooperatives at which the Belgian guarantee scheme is directed are deficient. For, according to the unanimous information provided by all the parties to the main proceedings, including ARCO itself, financial cooperatives such as those in the ARCO Group are *not* credit institutions. They neither receive deposits from the public nor usually grant credits for their own account in the manner characteristic of banks.

46. An interpretation of Directive 94/19 in the light of the general EU-law principle of equal treatment, as suggested by the Belgian Constitutional Court in its question, does not yield a different outcome.

47. The principle of equal treatment is a general principle of EU law which is enshrined in Articles 20 and 21 of the Charter of Fundamental Rights.[15] It cannot be interpreted and applied differently depending on which area of law is in issue.

48. According to settled case-law, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[16]

49. As indicated above,[17] from the point of view of the subject matter of the EU-law deposit guarantee scheme, the financial cooperative shares are crucially different from traditional deposits with credit institutions, even though, in many respects (such as, for example, their taxation, their regulation by the State and their popularity with the public), they may resemble traditional savings products. Accordingly, there is no requirement in EU law on grounds of equal treatment to extend a national deposit-guarantee scheme such as the Belgian one to such shares in cooperatives.

50. Consequently, Belgium had no obligation under EU law, pursuant either to Directive 94/19 or to the general principle of equal treatment, to extend its national deposit-guarantee scheme to that form of capital investment.

(b) No prohibition under Directive 94/19 against extending the deposit-guarantee regime to shares in financial cooperatives (second part of the first question)

51. It must also be considered whether Directive 94/19 *prohibited* a national deposit-guarantee scheme such as the Belgian one from being extended also to shares in financial cooperatives held by private individuals.

52. In order to answer that question, regard must be had primarily to the second indent of Article 2 of Directive 94/19. In accordance with that provision, all instruments which would fall within the definition of own funds in Article 2 of Directive 89/299, including not least ‘capital, in so far as it has been paid up’, are excluded from any repayment by deposit-guarantee schemes.

53. At first sight, that ground of exclusion does appear to be relevant here. For, as I have already said, the financial cooperative shares in question are an instrument by which the investor acquires a participation in the own capital of the undertaking concerned in much the same way as when he purchases shares in a company.[18]

54. On closer examination, however, it becomes apparent that the ground of exclusion in the second indent of Article 2 of Directive 94/19 relates only to the own funds of *credit institutions*. For that indent makes express reference to ‘own funds’ ‘which would fall within the definition of … Article 2 of Directive 89/299 on the own funds of credit institutions …’. As I have already mentioned,[19] however, recognised financial cooperatives governed by Belgian law are *not* credit institutions.

15 — Judgments in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (C-550/07 P, EU:C:2010:512, paragraph 54); and *Sky Italia* (C-234/12, EU:C:2013:496, paragraph 15); see, to the same effect, the judgment in *Ruckdeschel and Others* (117/76 and 16/77, EU:C:1977:160, paragraph 7).

16 — Judgments in *Arcelor Atlantique and Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 23); *S.P.C.M. and Others* (C-558/07, EU:C:2009:430, paragraph 74); *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (C-550/07 P, EU:C:2010:512, paragraph 55); *Sky Italia* (C-234/12, EU:C:2013:496, paragraph 15); and *P and S* (C-579/13, EU:C:2015:369, paragraph 41).

17 — See in this regard, in particular, points 40 to 42 and 45 of this Opinion.

18 — See, in this regard, points 40 to 42 of this Opinion.

19 — See point 45 of this Opinion, above.

55. Consequently, the second indent of Article 2 of Directive 94/19 does not, in principle, preclude the national deposit-guarantee scheme from being extended to shares in financial cooperatives held by private individuals.

56. What is more, the fact that the directive provides for only a minimum level of harmonisation in matters relating to deposit guarantees[20] supports the view that the Member States have some discretion when it comes to including further situations not provided for under EU law in their national deposit-guarantee schemes.

57. Nonetheless, the Member States are not at complete liberty to extend their national deposit-guarantee schemes at will beyond the matter of guarantees for deposits with credit institutions provided for in Directive 94/19 to other situations. It is true that, in this regard, they are not required to observe the EU-law principle of equal treatment, since this is binding on national authorities only in the implementation of EU law (see Article 51(1) of the Charter of Fundamental Rights). However, they must not undermine the practical effectiveness of the deposit-guarantee regime which Directive 94/19 is intended to establish throughout the internal market.

58. As the Commission rightly emphasises in this regard, the practical effectiveness of the deposit-guarantee regime might be undermined in this way if a Member State encumbered its national deposit-guarantee scheme predominantly with risks not directly related to the purpose of that scheme. After all, the higher the risks to be secured are, the more the deposit guarantee is watered down and the less the deposit-guarantee scheme is able (from essentially the same resources) to contribute towards the attainment of the objective pursued by Directive 94/19, which is to promote the harmonious development of the activities of credit institutions, strengthen the banking system and protect savers.[21]

59. Whether the guarantee regime at issue does in fact undermine the practical effectiveness of the Belgian deposit-guarantee scheme is a matter which the national courts must assess. In so doing, they will have to bear in mind that a guarantee such as that provided by ARCO includes a large number of small investors in the deposit-guarantee scheme, that financial cooperatives have not made any contribution in the past towards the financing of the scheme[22] and that they were only admitted to the scheme in the first place a few days before the guarantee was invoked (that is to say, about a month before their decision to go into voluntary liquidation). They have therefore obtained from the national deposit-guarantee scheme a significantly more lucrative return than other undertakings which have been affiliated contributors to the scheme for longer.

60. Moreover, it goes without saying that there are other EU-law provisions (in particular, the requirements of the law on State aid laid down in Articles 107 and 108 TFEU[23]) which must also not be infringed.

(c) Interim conclusion

61. All things considered, therefore, Directive 94/19 must be interpreted as meaning that, while it does not oblige the Member States to include shares held by natural persons in recognised financial cooperatives in their respective national deposit-guarantee schemes, it also does not prevent them from doing so, provided that the practical effectiveness of the deposit-guarantee regime is not undermined and other provisions of EU law are not infringed as a result.

20 — See, to this effect, recitals 8, 16 and 17 of Directive 94/19.

21 — See recital 1 of Directive 94/19.

22 — As the order for reference makes clear, participation by the financial cooperatives in the deposit-guarantee scheme was voluntary and only the owners of shares issued before 2011 (that is to say, before their inclusion in the scheme) qualified for protection.

23 — See, in this regard, my submissions concerning the second to sixth questions in points 62 to 127 of this Opinion.

2. The EU-law requirements arising from the law on State aid (second to sixth questions)

62. By its second to sixth questions, the referring court wishes to ascertain whether a guarantee scheme such as that at issue here runs counter to the EU-law requirements arising from the law on State aid. In essence, the Constitutional Court wishes to determine whether that guarantee scheme constitutes new State aid within the meaning of Article 108(3) TFEU which should have been notified to the Commission and should not have been put into effect before it had been authorised by the Commission. That issue is a golden thread running through all of questions two to six.

63. On the other hand, the compatibility of the guarantee scheme with the internal market, in particular in the light of Article 107(3)(b) TFEU, on which several parties to the proceedings have submitted observations before the Court, does *not* form part of the subject-matter of the request for a preliminary ruling from the Constitutional Court.

(a) Validity of Commission Decision 2014/686 (second question)

64. By its second question, the referring court first puts under the microscope Decision 2014/686, the validity of which it asks the Court to examine. After all, in so far as that decision has not been annulled by the EU judicature following an action for its annulment or declared invalid following a request for a preliminary ruling, the Constitutional Court remains bound by the Commission's assessment contained in it.[24] That assessment states that the ARCO guarantee constitutes a new State aid scheme which was unlawfully implemented, that the advantages which it has conferred must be recovered and that no payments must be made under it.

65. It is clear from the order for reference that, in the main proceedings before the Belgian courts (Constitutional Court and Council of State), the three ARCO Group financial cooperatives are calling into question the validity of Decision 2014/686, in essence, by recourse to the same arguments as those on which they also based their action for the annulment of that decision before the General Court of the European Union.[25] Ultimately, therefore, by examining the validity of that decision, this Court will not only very much determine the course to be followed by the proceedings before the national court, but will also, to some extent, give a preliminary judgment on the first-instance proceedings before the EU judicature.[26]

66. The complaints which ARCO directs against Decision 2014/686, as summarised in the order for reference, are concerned, first, with the concept of State aid under Article 107(1) TFEU and, secondly, with the obligation to state reasons incumbent on the Commission under Article 296(2) TFEU. I shall now turn to each of those two factors in succession.

i) The concept of State aid

67. According to Article 107(1) TFEU, '[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

24 — On the obligation of national courts to abide by Commission decisions in the area of State aid law, see the judgment in *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, in particular the last sentence of paragraph 41) and the order in *Flughafen Lübeck* (C-27/13, EU:C:2014:240, in particular the last sentence of paragraph 24); see, to the same effect, the judgment in *Masterfoods and HB* (C-344/98, EU:C:2000:689, paragraphs 49 to 52), from the point of view of EU antitrust law (now Articles 101 and 102 TFEU).

25 — *Arcofin and Others* v *Commission* (T-711/14), pending; see also *Belgium* v Commission (T-664/14), pending.

26 — Thus, in October 2015, the Sixth Chamber of the General Court decided to stay the proceedings in Cases T-664/14 and T-711/14 pending the judgment of the Court of Justice in the present case.

68. Classification as 'aid' within the meaning of Article 107(1) TFEU requires all the conditions laid down in that provision to be satisfied.[27]

69. First, there must be intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Thirdly, it must confer an advantage on the recipient. Fourthly, it must distort or threaten to distort competition.[28]

70. It is settled case-law that, when examining whether those conditions have been satisfied, what matters is not so much the subjective objectives pursued by the national authorities (the guarantee scheme at issue is without any doubt based on the good intention of protecting private individuals from the loss of their savings while at the same time helping to stabilise the national financial system) as the effects of the measure adopted.[29]

71. The issue in the present case is, first, whether the Belgian guarantee scheme confers a selective advantage on the ARCO cooperatives (third condition for the existence of aid) and, secondly, whether it is liable to affect trade between Member States and distort competition on the internal market (second and fourth conditions for the existence of aid).[30]

– *The ARCO cooperatives as beneficiaries of the guarantee scheme*

72. First, the Commission submits in recitals 80 to 84 of Decision 2014/686 that ARCO was 'the only real beneficiary of the guarantee scheme'.

73. ARCO counters this with the objection that the true beneficiaries of the guarantee scheme are, first, the individual members of the ARCO financial cooperatives, because they alone are guaranteed to have their capital repaid up to a maximum of EUR 100 000, and, secondly, Dexia Bank, which the aforementioned guarantee scheme was intended to help rescue.

74. Such an objection is irrelevant, however. After all, the mere fact that other persons concerned (the individual members of financial cooperatives and Dexia Bank) were able to derive advantages from the contested guarantee scheme does not by any means preclude ARCO itself from also being regarded as a beneficiary, not to say the main beneficiary, of the scheme (or, as the Commission put it, 'the only real beneficiary').

75. In particular, ARCO fails to take into account in this regard the fact that all measures which, whatever their form, *are likely directly or indirectly to favour certain undertakings* are to be regarded as State aid within the meaning of Article 107(1) TFEU.[31] There is no doubt that the Belgian guarantee scheme conferred at least an indirect advantage on ARCO as an undertaking operating in the financial sector. For it was that guarantee scheme alone which protected the ARCO Group from

27 — Judgments in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraph 74); *Commission* v *Deutsche Post* (C-399/08 P, EU:C:2010:481, paragraph 38); *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 74); *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraph 45); and BVVG (C-39/14, EU:C:2015:470, paragraph 23).

28 — Judgments in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraph 75); *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 74); *BVVG* (C-39/14, EU:C:2015:470, paragraph 24); and *EasyPay and Finance Engineering* (C-185/14, EU:C:2015:716, paragraph 35).

29 — Judgments in *Heiser* (C-172/03, EU:C:2005:130, paragraph 46); *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraph 17); and *BVVG* (C-39/14, EU:C:2015:470, paragraph 52); see, similarly, the judgment in *Bouygues and Bouygues Télécom* v *Commission* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 102).

30 — What is *not* in issue, on the other hand, according to the order for reference in the main proceedings, is that the contested guarantee scheme emanates from the State and that State resources are used to operate it (first condition of Article 107(1) TFEU).

31 — Judgments in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraph 84); *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 83); and *France* v *Commission* (C-559/12 P, EU:C:2014:217, paragraph 94); see, to the same effect, *Costa* v *ENEL* (6/64, EU:C:1964:66, ECR [1964] 1253, 1272).

the imminent flight of its private investors from the three ARCO financial cooperatives [32] and, at the same time, enabled it to participate as principal shareholder in the recapitalisation of Dexia Bank being planned at that time. Moreover, it should be recalled that the ARCO financial cooperatives (unlike all the other financial cooperatives) applied to join the guarantee scheme on their own initiative. It is unlikely that they would have done so had they not expected to derive a specific economic advantage from it.

76. Equally unconvincing is ARCO's counterargument that an outflow of equity capital would not necessarily have been disadvantageous to the three ARCO financial cooperatives. After all, if an undertaking's equity capital falls, its debt-equity ratio increases and its creditworthiness diminishes, with the result that it can henceforth acquire new capital only on less favourable terms. Particularly in a situation such as that facing ARCO, which had made a substantial economic commitment at that time by participating in the attempt to rescue Dexia Bank, it is important not to overlook this point.

– *Selectivity of the advantage*

77. Article 107(1) TFEU prohibits aid 'favouring certain undertakings or the production of certain goods', that is to say selective aid. [33] According to case-law, the selectivity of the advantage is characterised by the fact that certain undertakings or the production of certain goods are favoured in comparison with others which, in the light of the objective pursued by the scheme in question, are in a comparable factual and legal situation. [34]

78. In recitals 100 to 107 of Decision 2014/686, the Commission states that the guarantee scheme at issue confers on ARCO an advantage which is 'clearly selective'. [35]

79. ARCO, on the other hand, disputes the claim that it has enjoyed such a selective advantage. In its view, financial cooperatives are in a factual and legal situation comparable to that of suppliers of traditional savings products, with the result that extending the Belgian deposit guarantee scheme to the members of such financial cooperatives is fully in conformity with that scheme.

80. That argument is unconvincing, however. As I explained in more detail earlier in connection with Directive 94/19, shares in financial cooperatives such as the ARCO Group cooperatives are, in the light of the objectives pursued by the deposit guarantee regime, less comparable to traditional deposits with credit institutions than to company shares. [36] According to the information which they have themselves supplied, the aforementioned financial cooperatives are not in the nature of credit institutions. [37]

32 — In this regard, see also recital 100 of Decision 2014/686 ('... In the case of the measure, it has helped [ARCO] to maintain their existing capital, convincing existing cooperative shareholders not to withdraw from those financial cooperatives ..., which was a particularly important advantage in the nervous market situation which characterised the period immediately following the bankruptcy of Lehman Brothers ...'). I would add that the possibility under Belgian law of limiting the withdrawal of cooperative members to 10% of the cooperative's capital per year does not in any way militate against the assumption that ARCO benefited from the guarantee scheme; at most, that possibility limits the extent of the advantage conferred on ARCO.

33 — Judgment in *Eventech* (C-518/13, EU:C:2015:9, paragraph 54).

34 — Judgments in *Heiser* (C-172/03, EU:C:2005:130, paragraph 40) and *Eventech* (C-518/13, EU:C:2015:9, paragraph 55); see, to the same effect, the judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 41).

35 — See, in particular, the first sentence of recital 101 of Decision 2014/686.

36 — See, in particular, points 40 to 42 of this Opinion, above.

37 — See point 45 of this Opinion, above.

81. It follows that, in the light of the objectives pursued by the deposit guarantee regime, financial cooperatives such as the ARCO Group cooperatives were *not* in a position comparable to that of credit institutions such as to make it seem only natural for them to be included in the Belgian deposit-guarantee scheme under the guarantee regime at issue. On the contrary, their position was more comparable to that of undertakings which offer for sale participations in their ownership in the form of company shares and thus make available to the public a form of capital investment which is not, in principle, subject to any deposit-guarantee regime.

82. The judgment in *Paint Graphos*,[38] relied on by ARCO and Belgium, does not support a different conclusion.

83. In that judgment, the Court examined, in the context of tax law, the conditions under which an advantage conferred by a Member State is selective in such a way as to constitute State aid within the meaning of Article 107(1) TFEU. In short, according to that judgment, an advantage is selective if the measure derogates from the common regime inasmuch as it differentiates between economic operators who, in the light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation.[39]

84. According to the 'common regime' applicable in the present case, capital investments are not, in principle, subject to deposit-guarantees. Only *deposits* with *credit institutions* are covered by the deposit-guarantee regime, whereas investments in the form of participations in undertakings the value of which depends on the undertaking's performance do not, in principle, qualify for the guarantee regime.

85. If Belgium nonetheless makes certain forms of participation in an undertaking (in the present case, shares held by private individuals in the capital of recognised financial cooperatives) subject to a deposit-guarantee scheme, it is, in the words of the judgment in *Paint Graphos*, introducing a 'differentiation between economic operators'.

86. A differentiation is made between financial cooperatives, on the one hand, and other cooperatives or companies, on the other hand, that is to say between economic operators which (despite exhibiting many characteristics that are specific to their respective legal forms[40]) are in any event, in the light of the objectives pursued by the deposit-guarantee scheme, in a comparable factual and legal situation. After all, those undertakings can all open up their capital to private investors, but only participations in the capital of the former undertakings (financial cooperatives) qualify for the deposit-guarantee scheme.

87. It follows that, by that criterion too, which the Court established in the judgment in *Paint Graphos* and in a number of other judgments,[41] financial cooperatives are selectively favoured here.

88. The Commission is therefore entirely right to assume in Decision 2014/686 that the guarantee scheme at issue conferred a selective advantage within the meaning of Article 107(1) TFEU on the ARCO Group financial cooperatives.

38 — Judgment in *Paint Graphos* (C-78/08 to C-80/08, EU:C:2011:550).

39 — Judgment in *Paint Graphos* (C-78/08 to C-80/08, EU:C:2011:550, in particular paragraph 49; see also paragraph 65); similar assertions can also be found, in abundance, elsewhere in the Court's case-law; see, for example, the judgments in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraphs 41 and 42); *Portugal* v *Commission* (C-88/03, EU:C:2006:511, paragraphs 54 and 56); *Commission* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 73 and 75); and *P* (C-6/12, EU:C:2013:525, paragraph 22).

40 — The Court too fully recognises the 'special characteristics peculiar to cooperative societies' in the judgment in *Paint Graphos* (C-78/08 to C-80/08, EU:C:2011:550 paragraph 61). Contrary to the view expressed by ARCO, however, that reference must not be misconstrued as meaning that cooperatives are always and without exception in a situation different from that of commercial companies. The decisive criterion is always whether the economic operators 'are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question' (see again, in this regard, the case-law cited in footnote 39).

41 — See again, in this regard, the case-law cited in footnote 39.

– Distortion of competition and adverse effect on trade between Member States

89. ARCO also takes issue with the Commission's assumption in recitals 108 and 109 of Decision 2014/686 that the guarantee scheme at issue 'distorts competition' and that it 'most definitely has an effect on Union-wide trade'.

90. However, for the most part, the arguments put forward by ARCO in this regard, as summarised in the order for reference, are again based on the alleged similarity between shares in financial cooperatives and traditional savings deposits. I made the point earlier, in another context, that these arguments are unsound.[42]

91. That said, it must be recalled that, according to settled case-law, for the purposes of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition.[43]

92. As regards, first, any distortion of competition, the Commission has convincingly argued[44] that the guarantee scheme at issue armed the ARCO Group financial cooperatives against capital outflows or at least diminished and delayed those outflows. This obviously gave them a competitive advantage over other undertakings operating in the financial sector, particularly at a time when there was considerable nervousness on the markets as a result of the global economic and financial crisis, with banks in particular seriously struggling to obtain fresh capital, and there was an omnipresent risk that small investors in particular would withdraw their capital.

93. As regards, next, any adverse effect on trade within the European Union, this must always be assumed to be the case not least where the national measure in question strengthens one undertaking's position in relation to that of others. For these purposes, the favoured undertaking need not itself be involved in the intra-Union trade. The mere fact that an economic sector such as the financial services sector has been largely liberalised at EU level, and competition has been enhanced as a result, may mean that the State aid has a real or potential effect on trade between Member States.[45]

94. ARCO's reference in this regard to the allegedly low values of the individual participations held by private members in the ARCO Group financial cooperatives is unconvincing. For, first of all, the effects of the contested guarantee scheme on competition and trade between Member States must be assessed by reference to all the cooperative shareholdings covered by that scheme, not by reference to the protected capital of an individual private investor. Secondly, the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that competition might be distorted or that trade between Member States might be affected.[46]

95. Consequently, the Commission's conclusion that the guarantee scheme at issue distorts competition and affects trade between Member States is not open to objection (at least not on the basis of the complaints reproduced in the order for reference).[47]

42 — See, in particular, points 40 to 42, 45, 80 and 84 to 88 of this Opinion.

43 — Judgments in *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraph 140); *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 76); *Eventech* (C-518/13, EU:C:2015:9, paragraph 65); and *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraphs 46 and 49).

44 — Recital 108 of Decision 2014/686.

45 — Judgments in *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraphs 141 to 143); *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraphs 77 and 78); and *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraph 51).

46 — See, to this effect (in particular in relation to the effect on trade between Member States), the judgments in *Belgium* v *Commission* (C-142/87, EU:C:1990:125, paragraph 43); *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraph 81); and *Eventech* (C-518/13, EU:C:2015:9, paragraph [68]).

47 — Recital 110 of Decision 2014/686.

ii) Obligation to state reasons

96. Last but not least, the referring court wishes to ascertain, by this second question, whether Decision 2014/686 is vitiated by a failure to state reasons.

97. The obligation to state the reasons for an act of EU law follows from Article 296(2) TFEU and, moreover, as part of the right to good administration, is also enshrined in Article 41(2)(c) of the Charter of Fundamental Rights of the European Union.

98. Since, as I have already said, in order for a measure to be categorised as 'State aid' for the purposes of Article 107(1) TFEU, all four of the conditions laid down in that provision must be fulfilled,[48] the Commission must, in a decision in which it assumes that a measure constitutes State aid, give reasons for that decision which relate to all four of those conditions.[49]

99. Decision 2014/686 satisfies that requirement. In the preamble to that decision,[50] the Commission sets out detailed arguments as to why it assumes that the measure at issue in the present case constitutes State aid and in those arguments carries out in the requisite level of detail an appropriate assessment of each of the four conditions set out in Article 107(1) TFEU.

100. ARCO nonetheless complains that the statement of reasons for Decision 2014/686 is not sufficiently detailed, particularly given that that decision 'does not follow a fixed decision-making practice'.

101. This argument must be rejected, particularly since the complaints reproduced in the order for reference and in ARCO's written pleadings are based on extremely vague and generically framed allegations and do not contain any specific indication of how the Commission's findings are supposed to be incomprehensible and which aspects of the case are supposed to lack sufficient detail.

102. Moreover, it is true that, in accordance with settled case-law, the statement of reasons for an EU measure must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review.[51]

103. However, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296(2) TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.[52]

104. In the present case, it is sufficiently clear from the Commission's comments in the preamble to Decision 2014/686 why the Commission found that every one of the conditions for the existence of State aid within the meaning of Article 107(1) TFEU was satisfied. Moreover, ARCO in particular was adequately aware of the context in which Decision 2014/686 was adopted, having been a principal party to the earlier administrative proceedings.[53]

48 — On these four conditions, see points 68 and 69 of this Opinion, above.

49 — Judgment in *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraph 45).

50 — See recitals 91 to 110 of Decision 2014/686.

51 — Judgments in *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 63); *Italy* v *Commission* (C-66/02, EU:C:2005:768, paragraph 26); *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraph 44); and *Dole Food and Dole Fresh Fruit Europe* v *Commission* (C-286/13 P, EU:C:2015:184, paragraphs 93 and 94).

52 — Judgments in *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 63); *Italy* v *Commission* (C-66/02, EU:C:2005:768, paragraph 26); and *Dole Food and Dole Fresh Fruit Europe* v *Commission* (C-286/13 P, EU:C:2015:184, paragraphs 93 and 94).

53 — See, in this regard, recitals 55 to 57 of Decision 2014/686.

105. Finally, ARCO's criticism of the case-law[54] cited in (footnote 65 to) Decision 2014/686 is also unconvincing. After all, contrary to what ARCO appears to assume, the Commission does not at all maintain that the judgments which it cites concern exactly the same issue as that involved in the present case. Rather, the Commission simply seeks to draw a parallel with those judgments, a fact made adequately clear by the statement of reasons for that decision.[55] Whether the conclusions which the Commission draws from that case-law are substantively sound is a material matter which has nothing to do with whether it has complied with the obligation to state reasons as a formal requirement.[56]

iii) Interim conclusion

106. All things considered, therefore, the examination of the questions referred in relation to the concept of State aid within the meaning of Article 107(1) TFEU and the obligation to state reasons laid down in Article 296(2) TFEU has disclosed no factor such as to affect the validity of Decision 2014/686.

107. While it is true that, should the Court of Justice concur with that view, its judgment in this regard would not have any formally binding effect on the General Court in pending Cases T-664/14 and T-711/14, it would certainly constitute a not insignificant *de facto* precedent with regard to the outcome of those proceedings. It is of course still open to the General Court to annul Decision 2014/686 on other grounds not addressed in the present preliminary ruling proceedings.

(b) Existence of new State aid (third question)

108. The referring court's third question, like the second one before it, concerns once again the concept of new State aid within the meaning of Articles 107(1) TFEU and 108(3) TFEU. It is raised only in the event that the second question is answered in the negative.

109. If the second question is answered in line with my proposal,[57] the Constitutional Court will have to regard Decision 2014/686 as valid and treat the ARCO guarantee as new State aid, as the Commission declared it to be. There is therefore no need to answer the third question.

(c) Obligations incumbent on the Member States under Article 108(3) TFEU (fourth to sixth questions)

110. By its fourth, fifth and sixth questions, which may be considered together, the referring court wishes to ascertain, in essence, whether a guarantee scheme such as that at issue in this case infringes Article 108(3) TFEU.

54 — That is to say, the judgments in *Germany* v *Commission* (C-156/98, EU:C:2000:467); *Netherlands* v *Commission* (C-382/99, EU:C:2002:363); and *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission* (T-445/05, EU:T:2009:50).

55 — See, in this regard, recital 100 of Decision 2014/686.

56 — Judgments in *Italy* v *Commission* (C-66/02, EU:C:2005:768, paragraphs 26 and 55); *Régie Networks* (C-333/07, EU:C:2008:764, paragraph 71); *Commission* v *Italy and Wam* (C-494/06 P, EU:C:2009:272, paragraph 33); *Gascogne Sack Germany* v *Commission* (C-40/12 P, EU:C:2013:768, paragraph 46); and *Total* v *Commission* (C-597/13 P, EU:C:2015:613, paragraph 18).

57 — See in this regard point 106 of this Opinion, above.

i) Obligations incumbent on the national authorities in the light of the sequence of events

111. It is true that, in each of these questions, the referring court considers the facts of the main proceedings in the light of the different points in time at which the national authorities each took particular steps to establish the guarantee scheme at issue, from the mere announcement to the statutory authorisation contained in Article 36/24(1), first subparagraph, point 3, of the National Bank Law to its actual implementation by Royal Decree. Ultimately, however, the decisive criterion in all three of the questions concerned is whether that guarantee scheme was put into effect by the Belgian State in breach of Article 108(3) TFEU.

112. In relation to new State aid, Article 108(3) TFEU imposes a twofold obligation on the Member States. First, they are required to inform the Commission, in sufficient time to enable it to submit its comments, of any plans to grant or alter State aid (*notification obligation*, see the first sentence of Article 108(3) TFEU). Secondly, they must not put their proposed measures into effect until this procedure has resulted in a final decision (*prohibition on implementation* or *standstill obligation*, see the third sentence of Article 108(3) TFEU). Both obligations are the expression of the preliminary review of new State aid carried out by the Commission, which is essential for ensuring the proper functioning of the internal market.[58]

113. It is common ground in the present case that the guarantee scheme at issue was not notified to the Commission until 7 November 2011, that is to say the date on which the three ARCO financial cooperatives were formally admitted to the Belgian scheme by Royal Decree.

114. Contrary to the view expressed by Belgium, notification at such a late stage cannot under any circumstances be regarded as being in sufficient time within the meaning of the first sentence of Article 108(3) TFEU.

115. It may be that the Belgian deposit guarantee fund has not as yet made any actual payments to private members of recognised financial cooperatives. As the Commission rightly points out, however, State aid is regarded as being ‘granted’ or ‘put into effect’, and thus implemented, within the meaning of Article 108(3) TFEU not at the point when funds are actually disbursed by the State or through State resources but immediately upon the occurrence or likely occurrence of the distortion of competition on the internal market, as referred to in Article 107(1) TFEU, that is associated with that aid. After all, the standstill obligation is designed to ensure that a system of aid cannot become operational before the Commission has had a reasonable period in which to study and decide upon it.[59]

116. It is impossible to determine precisely when such a distortion of competition occurred or was likely to occur in the present case without carrying out a detailed examination. On the basis of the information supplied to the Court in the order for reference, there is much to support the proposition, which certainly cannot be ruled out, that, even by its first government communication of 10 October 2008, the Belgian State announced the proposed aid measure in a sufficiently specific manner and, by that act alone, exerted a considerable impact on competition.[60] On the contrary, in the light of the nervousness present on the market at the height of the economic and financial crisis that erupted in 2008, there is much to support the proposition that (as, indeed, the Commission

58 — Judgments in *France* v *Commission* (C-301/87, EU:C:1990:67, paragraph 17); *Centre d’exportation du livre français* (C-199/06, EU:C:2008:79, paragraphs 36 and 37); *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraphs 25 and 26); and *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraphs 18 and 19).

59 — Judgments in *France* v *Commission* (C-301/87, EU:C:1990:67, paragraph 17); *Centre d’exportation du livre français* (C-199/06, EU:C:2008:79, paragraph 36); and *Banco Privado Português und Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraph 57).

60 — The Court has already had an opportunity, in another context, to establish the extent of the potential impact of press releases or even statements by authorities and public institutions on developments on the financial markets; see, for example, the judgments in *Bouygues and Bouygues Télécom* v *Commission* (C-399/10 P and C-401/10 P, EU:C:2013:175, in particular, paragraphs 131 and 132) and *Gauweiler and Others* (C-62/14, EU:C:2015:400).

concluded in Decision 2014/686[61]), that government communication was intended to reassure members of financial cooperatives such as those in the ARCO Group and thus strengthened the competitive position of those undertakings. It follows that, in the light of its effects on the market, and notwithstanding all of the differences in its legal form, that government communication was not dissimilar to a guarantee.[62]

117. Ultimately, however, there is no need for the purposes of these proceedings to determine whether State aid was implemented immediately upon the release of the first statement in the government communication of 10 October 2008 or not until the Royal Decree of 7 November 2011, or, alternatively, on one of the days between those two dates to which the national court refers. After all, as the Commission rightly pointed out in Decision 2014/686,[63] the announcement of the guarantee scheme and the individual legal steps taken to put it in place must be regarded as a single intervention.[64] Given that, by the time the Royal Decree of 7 November 2011 was adopted at the latest, the beneficiaries of the guarantee scheme at issue had acquired a legal right to be admitted to the national deposit-guarantee scheme, the State aid was no longer in draft form[65] but was to be regarded as 'granted'[66] and therefore 'put into effect' or implemented within the meaning of Article 108(3) TFEU.

118. The notification of the guarantee scheme to the Commission on that very same day, 7 November 2011, was therefore late. Since that notification did not take place in sufficient time before the proposed introduction of the guarantee scheme, but, at best, simultaneously with the introduction of that scheme, the principle of preliminary review by the Commission was infringed.[67] Even assuming that certain measures to deal with the economic and financial crisis of 2008 were particularly pressing, there would without any doubt have been sufficient opportunity between 2008 and 2011 to notify the Commission of the proposed aid in good time.

119. All things considered, it must therefore be concluded that, by notifying the guarantee scheme at issue on 7 November 2011, Belgium infringed both the notification obligation under the first sentence of Article 108(3) TFEU and the standstill obligation under the third sentence of Article 108(3) TFEU, and thus granted unlawful State aid.

ii) The specific matter of the validity of Decision 2014/686 in the light of Article 108(3) TFEU (fourth question)

120. It is also appropriate, in the context of Article 108(3) TFEU, to look at a further issue which the referring court raised by its fourth question. The Court is asked to clarify whether, in Decision 2014/686, the Commission made an error with respect to the point in time at which the State aid constituted by the contested deposit-guarantee scheme was put into effect.

61 — Recitals 100 and 108 of Decision 2014/686.

62 — On the classification of a guarantee as an advantage within the meaning of State aid law, see the judgments in *Residex Capital IV* (C-275/10, EU:C:2011:814, paragraph 39) and *France* v *Commission* (C-559/12 P, EU:C:2014:217, paragraph 96).

63 — Recitals 85 to 90 of Decision 2014/686.

64 — On the possibility of consecutive measures of State intervention being regarded as a single intervention for the purposes of Article 107(1) TFEU, see the judgment in *Bouygues and Bouygues Télécom* v *Commission* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraphs 103 and 104).

65 — See, in this regard, the judgments in *Waterleiding Maatschappij* v *Commission* (T-188/95, EU:T:1998:217, paragraph 118) and *ThyssenKrupp Acciai Speciali Terni* v *Commission* (T-62/08, EU:T:2010:268, paragraph 235).

66 — See, to this effect, the judgments in *Magdeburger Mühlenwerke* (C-129/12, EU:C:2013:200, paragraph 40) and *Diputación Foral de Álava and Others* v *Commission* (T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01, EU:T:2009:315, paragraph 172).

67 — See, to the same effect, the judgment in *Commission* v *Italy* (169/82, EU:C:1984:126, paragarph 11), in which the Court held that the Italian Republic had failed to fulfil its obligations under Article 93(3) of the EEC Treaty (now Article 108(3) TFEU) because it did not notify the draft laws at issue in that case until after they had been adopted. See also the judgment in *ThyssenKrupp Acciai Speciali Terni* v *Commission* (T-62/08, EU:T:2010:268, paragraphs 235 and 236).

121. This question is raised only in the event that the second question is answered in the affirmative. If, in the context of the second question, the Court concludes, in line with my proposal,[68] that Decision 2014/686 infringes neither Article 107(1) TFEU nor Article 296(2) TFEU, it must then consider, in the context of the fourth question, whether Decision 2014/686 is valid from the point of view of any infringement of Article 108(3) TFEU.

122. This question appears to have been prompted by the fact that the Constitutional Court considers that Decision 2014/686, in which the Commission expressly finds that Belgium has infringed Article 108(3) TFEU,[69] is not entirely clear with respect to the point in time at which the Commission assumes the State aid to have been put into effect. The Constitutional Court appears to be uncertain whether the Commission considers the State aid to have been put into effect before or after the adoption of Article 36/24 of the National Bank Law. For the two dates mentioned by the Constitutional Court in the fourth question relate specifically to that event. Article 36/24 was incorporated into the National Bank Law by Royal Decree on 3 March 2011 and the new provision entered into force on 1 April 2011.

123. In the [second] sentence of recital 110 of Decision 2014/686, the Commission states that the elements constituting State aid were ‘in place at the latest when the Royal Decree of 10 October 2011 was adopted’. It goes on to say that ‘the advantage created by the measure was already in existence as from the announcement by the Belgian authorities on 10 October 2008 that such a measure would be created’.

124. It is true that that wording does not in itself make it absolutely clear whether the Commission considers the guarantee scheme at issue to have been ‘granted’ or ‘put into effect’ within the meaning of Article 108(3) TFEU as early as 10 October 2008 or not until 10 October 2011. The drafting of Decision 2014/686 is not exactly a model of clarity in this regard, although the reference to an ‘advantage’ which had existed since the first announcement may well be more likely to indicate that the Commission took the earlier of the two dates, that is to say 10 October 2008, as the effective date.

125. For the purposes of the present preliminary ruling proceedings, however, there is ultimately no need to establish whether, in its Decision, the Commission considered the earlier or the later date to be material. After all, the Commission’s finding in recital 143 of Decision 2014/686 that ‘Belgium has unlawfully implemented [the guarantee scheme at issue] in breach of Article 108(3) [TFEU]’ is correct irrespective of whether the State aid is more properly to be regarded as having been ‘granted’ or ‘put into effect’ within the meaning of Article 108(3) TFEU on the earlier or later date. What matters is that, at the time when it was notified to the Commission on 7 November 2011, the guarantee scheme at issue had in any event already been put into effect, with the result that its notification did not under any circumstances take place in sufficient time and the State aid must for that reason alone be regarded as unlawful.

126. Consequently, the examination of the fourth question has also disclosed no factor such as to indicate that the Commission erred in law in its application of Article 108(3) TFEU or to affect on that account the validity of Decision 2014/686.

68 — See, in this regard, my submissions on the second question in points 64 to 106 of this Opinion, above.

69 — Recital 143 of Decision 2014/686.

iii) Interim conclusion

127. In short, the answer to the second to sixth questions referred should be that a guarantee scheme such as the Belgian one at issue constitutes new State aid. If such a measure is not notified to the Commission in sufficient time before the occurrence or likely occurrence of the distortion of competition on the internal market that is associated with that State aid, it must be regarded as having been unlawfully put into effect within the meaning of Article 108(3) TFEU.

VI – Conclusion

128. In the light of the foregoing submissions, I propose that the Court's answer to the request for a preliminary ruling from the Belgian Constitutional Court should be as follows:

(1) Directive 94/19/EC must be interpreted as meaning that, while it does not oblige the Member States to include shares held by natural persons in recognised financial cooperatives such as those in the main proceedings in their respective national deposit-guarantee schemes, it also does not prevent them from doing so, provided that the practical effectiveness of the deposit-guarantee scheme is not undermined and other provisions of EU law are not infringed as a result.

(2) The examination of the questions referred has disclosed no factor such as to affect the validity of Directive 2014/686/EU.

(3) A guarantee scheme such as that authorised by Article 36/24(1), first subparagraph, point 3, of the Belgian National Bank Law constitutes new State aid. If such a guarantee scheme is not notified to the European Commission in sufficient time before the occurrence or likely occurrence of the distortion of competition on the internal market that is associated with it, it must be regarded as having been unlawfully put into effect within the meaning of Article 108(3) TFEU.