OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 25 November 2003 [1]

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I — Introduction

1. The present reference for a preliminary ruling relates to the question whether Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes [2] ('Directive 94/19') or other banking directives give depositors the right to require banking supervisory authorities to take measures. In addition, it concerns the scope of the principle of State liability for damage suffered by an individual as a result of breaches of Community law attributable to the State.

2 — OJ 1994 L 135, p. 5.

II — Legal background

A — *Community law*

1. Directive 94/19

2. Article 3 of Directive 94/19 states as follows:

'1. Each Member State shall ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognised. ...

A Member State may, however, exempt a credit institution from the obligation to belong to a deposit-guarantee scheme where that credit institution belongs to a system which protects the credit institution itself and in particular ensures its liquidity and solvency, thus guaranteeing protection for depositors at least equivalent to that provided by a deposit-guarantee scheme, and which, in the opinion of the competent authorities, fulfils the following conditions:

— the system must be in existence and have been officially recognised when this Directive is adopted,

— the system must be designed to prevent deposits with credit institutions belonging to the system from becoming unavailable and have the resources necessary for that purpose at its disposal,

— the system must not consist of a guarantee granted to a credit institution by a Member State itself or by any of its local or regional authorities,

— the system must ensure that depositors are informed in accordance with the terms and conditions laid down in Article 6.

...

2. If a credit institution does not comply with the obligations incumbent on it as a member of a deposit-guarantee scheme, the competent authorities which issued its authorisation shall be notified and, in collaboration with the guarantee scheme, shall take all appropriate measures including the imposition of sanctions to ensure that the credit institution complies with its obligations.

3. If those measures fail to secure compliance on the part of the credit institution, the scheme may, where national law permits the exclusion of a member, with the express consent of the competent authorities, give not less than 12 months' notice of its intention of excluding the credit institution from membership of the scheme. Deposits made before the expiry of the notice period shall continue to be fully covered by the scheme. If, on the expiry of the notice period, the credit institution has not complied with its obligations, the guarantee scheme may, again having obtained the express consent of the competent authorities, proceed to exclusion.

4. Where national law permits, and with the express consent of the competent authorities which issued its authorisation, a credit institution excluded from a deposit-guarantee scheme may continue to take deposits if,

before its exclusion, it has made alternative guarantee arrangements which ensure that depositors will enjoy a level and scope of protection at least equivalent to that offered by the officially recognised scheme.

5. If a credit institution the exclusion of which is proposed under paragraph 3 is unable to make alternative arrangements which comply with the conditions prescribed in paragraph 4, then the competent authorities which issued its authorisation shall revoke it forthwith.'

3. Article 7 states:

'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.

...

3. This Article shall not preclude the retention or adoption of provisions which offer a higher or more comprehensive cover for deposits. In particular, deposit-guarantee schemes may, on social considerations, cover certain kinds of deposits in full.

...'

2. Directive 77/780/EEC — the First Banking Coordination Directive

4. Article 6 of First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions [3] ('the First Banking Coordination Directive') imposes certain checking requirements on the competent authorities so that they may continuously monitor the solvency and liquidity of credit institutions and the other measures which may serve to ensure that savings are protected.

5. The 12th recital states:

'... equivalent financial requirements for credit institutions will be necessary to ensure similar safeguards for savers and fair conditions of competition between comparable groups of credit institutions'.

3 — OJ 1977 L 322, p. 30.

3. Directive 89/646/EEC — the Second Banking Coordination Directive

6. Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC [4] ('the Second Banking Coordination Directive') is designed, according to the fourth recital in its preamble, 'to achieve only the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the Community and the application of the principle of home Member State prudential supervision'.

4. Directive 89/299/EEC — the Own Funds Directive

7. Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions [5] supplements the Second Banking Coordination Directive, which presupposes that 'own funds' be defined.

8. Article 7 of the directive provides that compliance with the conditions laid down in Articles 2 to 6 must be proved to the satisfaction of the competent authorities.

5. Other banking directives

9. The 15th recital in the preamble to European Parliament and Council Directive 95/26/EC of 29 June 1995 amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (UCITS), with a view to reinforcing prudential supervision [6] states:

'... for the purpose of strengthening the prudential supervision of financial undertakings and protection of clients of financial undertakings, it should be stipulated that an auditor must have a duty to report promptly to the competent authorities, wherever, as provided for by this Directive, he becomes aware, while carrying out his tasks, of certain facts which are liable to have a serious effect on the financial situation or the administrative and accounting organisation of a financial undertaking'.

4 — OJ 1989 L 386, p. 1.
5 — OJ 1989 L 124, p. 16.
6 — OJ 1995 L 168, p. 7.

10. The 11th recital in the preamble to Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis [7] states:

'... supervision of credit institutions on a consolidated basis must be aimed at, in particular, protecting the interests of the depositors of the said institutions and at ensuring the stability of the financial system'.

11. The 11th recital in the preamble to Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions [8] states:

'... common basic standards for the own funds of institutions are a key feature in an internal market in the investment services sector, since own funds serve to ensure the continuity of institutions and to protect investors'.

12. The second question submitted for a preliminary ruling also makes reference to some of the recitals in the preamble to Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field. [9]

B — *National law*

13. Paragraph 6(3) and (4) of the Kreditwesengesetz (Law on Credit Institutions; 'the KWG'), in the version applicable to the main proceedings, provide:

'3. The Bundesaufsichtsamt [Federal Banking Supervisory Office] may, in the context of the functions assigned to it, issue to an institution and its managers orders which are appropriate and necessary in order to prevent or remedy defects within the institution which could jeopardise the security of the assets entrusted to it or affect the proper performance of banking transactions or financial services.

4. The Bundesaufsichtsamt shall exercise the functions assigned to it under this Law and other Laws only in the public interest.'

14. Paragraph 33 of the KWG governs the refusal of authorisation to engage in banking

7 — OJ 1992 L 110, p. 52.
8 — OJ 1993 L 141, p. 1.
9 — OJ 1993 L 141, p. 27.

transactions and provide financial services, while Paragraph 35 relates, inter alia, to the revocation of such authorisation. Paragraph 44 governs inspections of banking institutions and Paragraph 45 provides for, inter alia, withdrawals to be prohibited or restricted if the institution's own funds or liquidity are inadequate. Under Paragraph 46 interim measures may be taken in certain circumstances. Paragraph 46a allows orders to be issued prohibiting the institution from disposing of assets or making payments, requiring the closure of the institution or forbidding it from accepting payments.

15. Paragraph 839(1) of the Bürgerliches Gesetzbuch [10] (Civil Code; 'the BGB') states:

'If an official wilfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom. If the official is only negligent, a claim can be laid against him only if the injured party cannot obtain compensation in another way.'

16. The first sentence of Article 34 of the Grundgesetz (Basic Law; 'the GG') [11] states:

'If a person infringes, in the exercise of a public office entrusted to him, the obligations incumbent upon him as against a third party, liability therefor shall attach in principle to the State or to the body in whose service he is engaged.'

III — Facts and main proceedings

17. Mr Peter Paul, Ms Cornelia Sonnen-Lütte, Ms Christel Mörkens and other persons ('Paul and others') had deposits with BVH Bank für Vermögensanlagen und Handel AG in Düsseldorf ('BVH Bank'), which did not belong to any deposit-guarantee scheme. In 1987 BVH Bank had received authorisation from the Bundesaufsichtsamt für das Kreditwesen (Federal Banking Supervisory Office; 'the Bundesaufsichtsamt') to engage in banking transactions, subject to the condition that it engage in deposit business only if it was a member of the guarantee scheme of an association of credit institutions and, as long as that was not the case, that it inform customers that there was no guarantee scheme.

18. From 1987 to 1992 BVH Bank applied unsuccessfully for admission to the deposit-guarantee fund of the Bundesverband deutscher Banken e.V. (Federal Association of German Banks); it then withdrew from the admission process since it did not fulfil the conditions for admission.

10 — RGBl. 1896, p. 195
11 — BGBl. 1949, p. 1.

19. The bank's difficult financial situation prompted the Bundesaufsichtsamt to carry out special inspections under Paragraph 44 of the KWG in 1991, 1995 and 1997. Following the third special inspection, the Bundesaufsichtsamt ordered a moratorium under Paragraph 46a of the KWG, with effect from 19 August 1997.

20. On 14 November 1997 the Bundesaufsichtsamt filed a petition for compulsory winding-up and withdrew the bank's authorisation to engage in banking transactions.

21. The winding-up proceedings were opened on 1 December 1997. On 17 June 1993, 28 February 1994 and 7 June 1995 Paul and others had opened term deposit accounts with BVH Bank. They have so far failed to obtain payment of their claims arising from the accounts, which were established for the insolvency schedule as amounting to DEM 131 455.80, DEM 101 662.51 and DEM 66 976.20. To what extent they are entitled to a dividend on winding-up is still undecided.

22. Paul and others claimed damages from the Bundesrepublik Deutschland (Federal Republic of Germany) on the grounds that it failed to transpose Directive 94/19 into national law by the deadline of 1 July 1995 [12] and that the Bundesaufsichtsamt failed to discharge its prudential supervision obligations properly. They maintained that in view of the bank's circumstances brought to light by the special inspections, the Bundesaufsichtsamt should already have declared a moratorium or taken measures under Paragraphs 6(3), 33, 45 and 46 of the KWG before they paid in their deposits. In particular, the circumstance, of which the Bundesaufsichtsamt was aware, that the bank did not fulfil, even in the past, the conditions for admission to the deposit-guarantee fund should have given grounds for initiating prudential inspections.

23. The Landgericht (Regional Court), Bonn, upheld the action in relation to the late transposition of Directive 94/19 and awarded the maximum compensation of ECU 20 000 laid down in that directive, on the legal ground of State liability under Community law.

24. However, the remaining complaint was unsuccessful before both the Landgericht and, on appeal, the Oberlandesgericht (Higher Regional Court), Cologne. Both courts rejected the claim of Paul and others for damages on the basis of official liability because — even assuming that a breach of duty had occurred — the Bundesaufsichtsamt had no official duty towards them, as under Paragraph 6(4) of the KWG it performs the tasks assigned to it solely in the public interest.

12 — Directive 94/19 was not transposed into German law until 16 July 1998.

25. Paul and others then appealed on a point of law to the Bundesgerichtshof (Federal Court of Justice), asserting in essence that Paragraph 6(4) of the KWG was inconsistent with a number of directives by means of which the law on banking supervision had been increasingly harmonised, including for the protection of savers and depositors.

26. Although in the view of the Bundesgerichtshof it seems possible that the rights conferred on deposit creditors extend to measures by the authorities which are necessary in order to establish the deposit-guarantee scheme and ensure that it continues to function properly, the Bundesgerichtshof doubts whether the requirements of Directive 94/19 confer on the plaintiffs the right to receive compensation in the full amount for the loss of their deposits.

27. In the opinion of the Bundesgerichtshof, Article 3(2) to (5) of Directive 94/19 thus serve only to establish and preserve the ability of the deposit-guarantee scheme to function properly.

28. According to the Bundesgerichtshof, the decisive issue for the legal assessment of the appeal is whether Paragraph 6(4) of the KWG founds official obligations only in the public interest or whether that provision must be disregarded on account of the precedence accorded to provisions of Community law. For that reason, by an order of 16 May 2002 it stayed the proceedings and referred questions to the Court for a preliminary ruling.

IV — The questions referred

'1. Do the provisions of Articles 3 and 7 of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes ... confer on the depositor, in addition to the right to be compensated by a deposit-guarantee scheme up to the amount specified in Article 7(1) in the event of his deposit being unavailable, the more far-reaching right to require that the competent authorities avail themselves of the measures mentioned in Article 3(2) to (5) and, if necessary, revoke the credit institution's authorisation?

In so far as such a right is conferred on the depositor, does that also include the right to claim compensation for damage resulting from the misconduct of the competent authorities, beyond the amount specified in Article 7(1) of the directive?

2. Do the provisions, as listed below, of directives harmonising the law on the prudential supervision of banks — either individually or in combination and, if so, from what date onwards — confer on the saver and investor rights to the effect that the competent authorities of the Member States must take prudential supervisory measures, with which they are charged by those directives, in the interests of that category of persons and must incur liability for any misconduct,

or does Directive 94/19/EC on deposit-guarantee schemes contain an exhaustive set of special provisions for all cases of unavailability of deposits?

Do Council Directives

— First Council Directive 77/780/EEC of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions ...: Article 6(1), 4th and 12th recitals in the preamble;

— Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC...: Articles 3, 4 to 7, 10 to 17, 11th recital in the preamble;

— Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions ...: Article 7 in conjunction with Articles 2 to 6;

— European Parliament and Council Directive 95/26/EC of 29 June 1995 ...: 15th recital in the preamble.

— 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis ...: 11th recital in the preamble;

— 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions ...: eighth recital in the preamble;

— 93/22/EEC of 10 May 1993 on investment services in the securities field: ... 2nd, 5th, 29th, 32nd, 41st and 42nd recitals;

provide assistance with interpretation for the purpose of answering the above question, regardless of whether they otherwise contain law applicable in the present case?

3. Should the Court find that all or any one of the directives cited above confer (s) on savers or investors the right to require the competent authorities to avail themselves of prudential supervisory measures in their interest, the following further questions are submitted:

Does a right for a saver or investor to have prudential supervisory measures taken in his interest have direct effect in proceedings brought against the Member State concerned in the sense that the national rules which preclude such a right must be disregarded,

or does a Member State which has failed to respect that right of savers or investors when transposing directives incur liability only in accordance with the principles governing claims for damages against the State under Community law?

In the latter case, has the Member State committed a sufficiently serious breach of Community law where it has failed to recognise that a right to have prudential supervisory measures taken is conferred?'

V — Admissibility

A — *Arguments of the parties*

29. *Paul and Others* state, in response to the objections of other parties that the questions referred are inadmissible, that the claims made in the main proceedings have not been disputed. The measures that should have been taken include the revocation of authorisation.

30. In the view of the *German Government*, the questions referred are admissible, because they relate to the interpretation of Community law and do not seek to ascertain whether misconduct did or did not occur.

31. The *Spanish Government* considers the first question referred to be inadmissible, because the deposits were made before expiry of the deadline for transposition of the directive. The second question is inadmissible because the supervisory measures are not specified. The third question is also inadmissible, because it follows on from the first and second questions.

32. *Ireland* observes that the second part of the first question may be hypothetical if Directive 94/19 was not yet in force at the time of the facts in the case. Ultimately, however, it is for the national court to assess the necessity of the question it has submitted for a preliminary ruling.

33. The *United Kingdom Government* expresses doubt as to the admissibility of the second question. In its view, the factual and legal context has not been adequately defined, because it is not clear from the main proceedings what supervisory measures should have been adopted.

34. The *Commission* raises the question whether the present proceedings are not purely hypothetical in nature. The Bundesaufsichtsamt subjected BVH Bank to supervisory measures, without this preventing the collapse of the bank and the loss of deposits. In the Commission's view, the very basis of the proceedings is therefore questionable, namely that if the directive had been transposed in due time prudential supervision would have taken place and the loss of deposits would have been averted.

B — *Assessment*

35. In accordance with the case-law of the Court, the admissibility of questions referred depends on several conditions being met.

36. The requirement to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. [13]

37. In this connection the Court has stated that the requirement for the national court to define the factual and legislative context of

13 — Judgment in Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6, and orders in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 4, Case C-378/93 *La Pyramide* [1994] ECR I-3999, paragraph 14, Case C-458/93 *Saddik* [1995] ECR I-511, paragraph 12, and Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 15.

the questions it is asking is less pressing where the questions relate to specific technical points and enable the Court to give a useful reply even where the national court has not given an exhaustive description of the legal and factual situation. [14]

38. Hence, even if the view were to be taken that the information set out in the order for reference is not exhaustive, it is nevertheless sufficient to enable the Court to give a useful reply.

39. Furthermore, the information provided in decisions making references serves not only to enable the Court to give helpful answers but also to enable the governments of the Member States and other interested parties to submit observations pursuant to Article 20 of the Statute of the Court. The Court has pointed out that it is its duty to ensure that the opportunity to submit observations is maintained, bearing in mind that, by virtue of the abovementioned provision, only the decisions making references are notified to the interested parties. [15]

40. As shown by the number and content of the written observations submitted to the Court, in particular from Member States, this requirement is also met.

41. Finally, the order for reference also meets the requirement that the national court state the precise reasons causing it to question the interpretation of Community law and to consider it necessary to refer questions to the Court for a preliminary ruling. [16]

42. It follows that the questions referred for a preliminary ruling are admissible.

VI — The first question referred

43. In its first question the Bundesgerichtshof seeks in essence to ascertain whether Articles 3 and 7 of Directive 94/19 have direct effect and confer on depositors the right to require the banking supervisory authorities of the Member State in question to take the measures mentioned in Article

14 — Judgment in Case C-316/93 *Vaneetveld* [1994] ECR I-763, paragraph 13, and orders in Case C-326/95 *Banco de Fomento e Exterior* [1996] ECR I-1385, paragraph 8, and Case C-66/97 *Banco de Fomento e Exterior* [1997] ECR I-3757, paragraph 9.

15 — Judgment in Joined Cases 141/81, 142/81 and 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6, *Saddik*, cited in footnote 13, paragraph 13, and *Laguillaumie*, cited in footnote 13, paragraph 24.

16 — Orders in Case C-101/96 *Italia Testa* [1996] ECR I-3081, paragraph 6, Case C-9/98 *Agostini* [1998] ECR I-4261, paragraph 6, and *Laguillaumie*, cited in footnote 13, paragraph 16.

3(2) to (5) of Directive 94/19. In addition, it asks whether, if that is the case, depositors may claim compensation for damage beyond the amount specified in Article 7(1) of Directive 94/19.

A — *Main arguments of the parties*

44. *Paul and Others* are alone among the parties in contending that Directive 94/19 includes the protection of depositors among its objectives and confers certain rights on them, especially on grounds of effectiveness. In their view, the rights conferred include the right to require that the competent banking supervisory authorities avail themselves of the measures mentioned in Article 3(2) to (5) of Directive 94/19, that is to say, if necessary revoke the credit institution's authorisation.

45. In addition, the plaintiffs maintain that where supervisory obligations are breached, there is a right to compensation on the basis of State liability. In their view, State liability is not limited by Article 7, which does not make exhaustive provision with regard to liability. Nor would a finding of State liability in the present case open the floodgates, as German law sets high requirements with regard to liability.

46. In contrast, the *German, United Kingdom, Portuguese and Spanish Governments, Ireland* and the *Commission* essentially consider that Article 3(2) to (5) of Directive 94/19 do not establish more far-reaching obligations to protect depositors.

47. The *German Government* considers that the measures under Article 3(2) to (5) of Directive 94/19 serve solely to maintain the deposit-guarantee system and do not establish rights for individuals. It bases its view that rights are not created on the wording, broad logic and objective of Directive 94/19 and — as does the Commission — on the principle of legal certainty.

48. As regards the liability in respect of banking supervisory measures, the German Government considers Article 7 to be an exhaustive provision. In its view, the directive would have made express provision if more extensive liability had been intended, given the far-reaching consequences it would have.

49. According to the *Spanish Government*, Directive 94/19 serves solely to bring about harmonisation in the banking sector and creates no rights for individuals, except in Article 7(1). In its opinion, neither the

conditions for such rights nor those for State liability are fulfilled in the present case.

50. In the view of *Ireland*, the purpose of Directive 94/19 is solely to bring about minimum harmonisation. Only Articles 7(1) and 10(1) have direct effect. Article 3(2) to (5) are intended merely to ensure that credit institutions comply with their obligations under a deposit-guarantee scheme. For that reason, Article 3(2) to (5) cannot by their very nature create rights for individuals. Nor does the directive regulate the form and nature of the guarantee scheme.

51. With regard to liability, Ireland points out that it is questionable whether there is a link between an infringement of Article 3(2) to (5) (failure to take supervisory measures) and damage caused to a depositor. In any case, other conditions for State liability are not fulfilled. The provisions at issue confer no rights on individuals and a sufficiently serious breach has not been committed, given the considerable discretion available to the national authorities.

52. In the opinion of the *Portuguese Government*, an individual can only require the competent authorities to establish a deposit-guarantee scheme that ensures him the return of his deposits up to a set figure, as the measures listed in Article 3(2) to (5) of Directive 94/19 serve only to bestow permanence and effectiveness on the deposit-guarantee scheme.

53. The *United Kingdom Government* stresses that a claim for compensation in excess of the amount laid down in Article 7(1) of Directive 94/19 is expressly precluded by the 24th recital in the preamble to that directive. State liability cannot place the depositor in a better situation than if Directive 94/19 had been correctly transposed and applied.

54. According to the *Commission*, by its very wording Article 3 of Directive 94/19 accords individuals no right to require that the supervisory authorities take measures under Article 3(2) to (5). As these provisions make no reference to the category of persons affected, it is impossible to determine the category of persons who might have such a right. Furthermore, Article 7(3) of Directive 94/19 expressly provides that it is a matter for the Member States to offer a higher or more comprehensive cover for deposits. Nor can an individual right of the depositor to the taking of supervisory measures be deduced from the spirit and purpose of Directive 94/19. The Commission justifies its position

by citing the case-law of the Court.[17] To grant depositors the right to supervisory measures would run counter to the system, as Community consumer-protection law does not provide for preventive rights, only entitlement to compensation. In any case, supervisory measures are to be taken in the general interest.

55. In the view of the Commission, given the unclear situation for Member States it would not be compatible with the principle of legal certainty if a right to require supervisory measures were to be deduced from Directive 94/19.

56. Lastly, the Commission opposes any relaxation of the conditions for State liability and considers that it would be unreasonable to hold the Member States responsible in this context.

B — *Assessment*

57. As regards first of all the terminology, different terms are used in the literature for the same legal phenomenon, such as direct effect, or direct applicability.[18] In the remarks that follow I shall adhere to the terminology used by the Court, which regularly speaks of direct effect in connection with directives.[19]

58. The national court's first question raises two fundamental issues, which need to be examined separately. The first relates to the direct effect of Articles 3 and 7 of Directive 94/19. The second requires examination of the extent to which any infringement of these provisions can give rise to claims for compensation on the basis of State liability.

1. The direct effect of Articles 3 and 7 of Directive 94/19

59. In the proceedings before the Court the parties have addressed repeatedly and in a variety of ways the question of whether and to what extent Directive 94/19 pursues the objective of consumer protection, in other words protection of the depositor. It must be pointed out in this regard that the stated objective of a directive alone is not decisive,

17 — Judgment in Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405.

18 — For a fundamental treatment of the question, see Klein, *Unmittelbare Geltung, Anwendbarkeit und Wirkung von Europaischem Gemeinschaftsrecht*, Saarbrucken 1988, p. 3 et seq., and Klagian, 'Die objektiv unmittelbare Wirkung von Richtlinien', *Zeitschrift fur offentliches Recht*, 2001, p. 305 (p. 306 et seq.).

19 — See Iarass, *Grundfragen der innerstaatlichen Bedeutung des EG-Rechts — Die Vorgaben des Rechts der Europaischen Gemeinschaft für die nationale Rechtsanwendung und die nationale Rechtssetzung nach Maastricht*, Cologne 1994, p. 68.

as it is the individual provision whose direct effect is to be examined that matters. That Directive 94/19 also serves the interests of depositors is not disputed, but ultimately that alone is not the determining factor, because, amongst other reasons, a directive may be designed to pursue several objectives. This is true of Directive 94/19, as many of the recitals in the preamble demonstrate.

60. The Court has consistently held that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State in proceedings before the national courts if that State has failed to implement the directive in national law by the end of the period prescribed or has failed to implement the directive correctly. [20]

61. In this connection, it must first be pointed out that in its order for reference the national court expressly states that Directive 94/19 had not yet been transposed into German law at the time relevant to the main proceedings.

20 — See to this effect the judgments in Case 8/81 *Becker* [1982] ECR 53, paragraph 25, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 7, Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 29, Case C-193/91 *Mohsche* [1993] ECR I-2615, paragraph 17, and Case C-134/99 *IGI* [2000] ECR I-7717, paragraph 36.

62. It therefore remains for me to examine whether the provisions of the directive which are at issue are unconditional in content and sufficiently precise for an individual to be able to rely on them as against the State.

(a) Article 7 of Directive 94/19

63. The direct effect of Article 7 of Directive 94/19, cited in the first question from the national court, is (i) undisputed and (ii) not the subject of the reference for a preliminary ruling, since the entitlement laid down by this provision has already been recognised in the main proceedings and a corresponding order made against the defendant.

64. It must also be pointed out that Article 7 deals with certain rights to compensation but makes no reference to supervisory measures, which are the subject of the first question from the national court.

(b) Article 3(1) of Directive 94/19

65. Similar considerations apply to Article 3(1) of Directive 94/19. This provision

essentially establishes the obligation of each Member State to ensure that 'within its territory one or more deposit-guarantee schemes are introduced and officially recognised'. In addition, it authorises the Member States under certain circumstances to exempt a credit institution from the obligation to belong to a deposit-guarantee scheme.

66. Article 3(1) of the directive does not, however, contain any provisions specifically regarding supervisory measures, which are the subject of the first question from the national court. Provisions of that kind are to be found in the remaining paragraphs of Article 3 of Directive 94/19.

67. The first question is therefore to be construed as asking whether the provisions of Article 3(2) to (5) of Directive 94/19 confer on individuals the right to require the competent authorities to avail themselves of the measures provided for in those paragraphs.

(c) Article 3(2) to (5) of Directive 94/19

68. Before examining whether the relevant supervisory provisions of the directive are unconditional and precise, I wish to draw attention to a further problem in this connection.

69. Without there being need for closer investigation, it is obvious that, as a result of the laying down of authorisation requirements and monitoring arrangements, Article 3(2) to (5) of Directive 94/19 will regularly have an onerous impact on credit institutions if they are acknowledged to have direct effect. The question therefore arises whether onerous provisions of this kind in a directive that benefit third parties can have direct effect, so that an individual can rely on them before national courts.

70. It can be considered, however, that this problem has been largely resolved as a result of the judgment in the *Großkrotzenburg* case. [21] That case concerned the question of the direct effect of provisions of an environmental directive, [22] according to which the results of an environmental impact assessment are to be taken into account in the procedure for approving the construction of certain types of facilities. This requirement can cause difficulty for operators of facilities.

21 — Judgment in Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189.

22 — Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

The Court found that these provisions of a directive were directly effective, without attaching other conditions apart from requiring that they be sufficiently precise.

71. Hence the judgment of the Court is to be understood as meaning that provisions of a directive have direct effect even if they have onerous effects for third parties. [23]

72. A provision of a directive is unconditional if it lays down an obligation which is neither subject to any material condition nor, in order to be implemented or effective, requires the adoption of any measure lying within the discretion of the Community institutions or the Member States. [24]

73. On the other hand, a provision of a directive is sufficiently precise if it generally and unambiguously meets certain requirements relating to material content and to the persons covered. [25] The precision of both the material scope of a provision of a directive and the category of persons to whom it applies depends on the completeness of the rules in question. Such 'legal completeness' is acknowledged by the Court [26] if the relevant provisions can be applied without the Member States adopting further implementing measures.

74. I shall now proceed to examine the provisions on supervisory measures [27] in order to ascertain whether they are unconditional and sufficiently precise. [28]

75. All the provisions to be examined, that is to say Article 3(2) to (5) of Directive 94/19, regulate only relations between the credit institutions involved, the authorities and the guarantee scheme. None of these provisions concerns legal relationships of depositors with their credit institution, the authorities

23 — See Epiney, 'Unmittelbare Anwendbarkeit und objektive Wirkung von Richtlinien', *Deutsches Verwaltungsblatt*, 1996, p. 433 (p. 437).

24 — Judgments in Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 13 et seq., Case 28/67 *Molkerei-Zentrale Westfalen/Lippe* [1968] ECR 143, and Case C-236/92 *Comitato di coordinamento per la difesa della cava and Others* [1994] ECR I-483.

25 — *Becker*, cited in footnote 20, paragraph 27.

26 — Judgment in Joined Cases 372/85, 373/85 and 374/85 *Traen and Others* [1987] ECR 2141, paragraph 25.

27 — On the direct effect of the provisions of directives on supervision in the banking and insurance sectors, see Gratias, *Staatshaftung für fehlerhafte Banken- und Versicherungsaufsicht im Europäischen Binnenmarkt*, 1999, p. 150 et seq., and Schenke and Ruthig, 'Amtshaftungsanprüche von Bankkunden', *Neue Juristische Wochenschrift*, 1994, p. 2324.

28 — See Jarass, Voraussetzungen der innerstaatlichen Wirkung des EG-Rechts', *Neue Juristische Wochenschrift*, 1990, p. 2420 (p. 2422 et seq.); Winter, 'Direktwirkung von EG-Richlinien', *Deutsches Vertwaltungsblatt*, 1991, p. 657; Augi and Baratella, 'Neue Entwicklungen in der Rechtsprechung des Europäischen Gerichtshofs zur direkten Anwendbarkeit von Gemeinschaftsrichtlinien', *The European Legal Forum*, 2000, p. 83 et seq.; Jiménez-Blanco Carrillo de Albornoz, 'De nuevo sobre el efecto de las directivas', *Noticias de la Unión Europea*, 2002, p. 115; Colgan, 'Triangular situations: the coup de grâce for the denial of horizontal direct effect of Community directives', *European Public Law*, 2002, p. 545; Edward, *Direct effect: myth, mess or mystery?*, 2002, p. 215.

or the guarantee scheme. The provisions lay down a series of powers and obligations of the credit institutions, the authorities and the guarantee scheme, but no rights or duties for depositors.

76. Furthermore, it has to be emphasised that supervisory measures in general and those specified in Article 3(2) to (5) in particular do not serve solely the interests of depositors, let alone the interests of the depositors of the credit institution involved. The purpose of supervisory measures is to ensure that credit institutions meet their obligations. Before supervisory measures are taken, a comprehensive weighing of many interests must take place, in which the interests of particular depositors may from time to time conflict with those of other depositors or particular public interests. The protection of interests other than those of depositors, such as the interest in a functioning banking system, even precludes, as a matter of principle, the taking into consideration of the interests of depositors alone.

77. Against this background, to recognise the rights of individuals, namely depositors, would require that the latter could also assert interests other than their own, that is to say also interests of the general public. Individuals' rights are only recognised, however, where it is a matter of protecting the legal interests of the persons concerned. A more far-reaching acknowledgement of rights would open up the possibility that a public-interest action (*actio popularis*) might be brought. This does not, however, accord with the principle of Community law whereby directives have direct effect.

78. Pursuant to Article 3(2), the competent authorities in collaboration with the guarantee scheme are to take all 'appropriate measures', [29] including the imposition of sanctions, to ensure that the credit institution complies with its obligations.

79. I am in no doubt that the content of Article 3(2) of Directive 94/19 does not meet the criterion of unconditionality. This is already evident from the wording, according to which the competent authorities together with the guarantee schemes have an obligation to take all 'appropriate measures'. The competent authorities and the guarantee schemes are thereby accorded considerable discretion, which is incompatible with the requirement that the provision be unconditional in content. Since the 'appropriate measures' still require more concrete expression, the obligation is also insufficiently precise.

29 — On direct effect in conjunction with this criterion, see *Comitato di coordinamento per la difesa della cava and Others*, cited in footnote 24.

80. As to Article 3(3) of Directive 94/19, the scheme 'may', where national law permits the exclusion of a member and with the express consent of the competent authorities, give not less than 12 months' notice of its intention of excluding the credit institution from membership of the scheme. Furthermore, the guarantee scheme 'may' also proceed to exclusion.

81. This provision too is merely conditional, as any exclusion is again within the discretion of the relevant deposit-guarantee scheme ('may') and also requires the express consent of the competent authorities. Furthermore, the effectiveness of exclusion depends on national law, so that the Member States have considerable discretion even after transposing Directive 94/19. The reference to national law also means that the provision is insufficiently precise, as further implementing measures by the Member States are required for it to become effective.

82. Article 3(4) of Directive 94/19 differs from the other provisions in that it at least mentions depositors. However, the permission that this provision grants to credit institutions to accept deposits makes no difference to the fact that it also only regulates the powers of credit institutions (to take deposits) and the authorities (to grant consent), and not rights of depositors.

83. Like Article 3(3), Article 3(4) makes reference to national law. Under Article 3(4), a credit institution excluded from a deposit-guarantee scheme 'may', 'with the express consent of the competent authorities which issued its authorisation, ... continue to take deposits'. As this provision is again permissive and requires the consent of the competent authorities to become effective, it too fails to meet the requirement that it be unconditional in content and sufficiently precise.

84. Lastly, the same must also be true of Article 3(5) of Directive 94/19, which refers to Article 3(3) and (4).

85. In view of my comments so far, I therefore conclude that Article 3(2) to (5) of Directive 94/19 do not confer on depositors the right to require that the competent authorities avail themselves of the measures mentioned in those paragraphs.

2. The liability of the Member State

86. In the second part of its first question the Bundesgerichtshof seeks in essence to ascertain whether an individual may claim compensation on the basis of State liability to cover damage suffered because the Bundesaufsichtsamt allegedly failed to take the measures provided for in Article 3(2) to (5) of Directive 94/19. [30]

87. At this point it has to be emphasised that the present proceedings do not concern whether the incorrect transposition or incorrect application of Article 7 of Directive 94/19 can give rise to claims on the basis of State liability.

88. It must be noted first that according to established case-law a Member State is liable for loss or damage caused to individuals as a result of breaches of Community law for which the State can be held responsible. Such breaches include the failure to transpose directives properly. [31] The fact that the infringed provision does not have direct effect does not in principle preclude the right to claim compensation. [32]

89. In particular, where the obligation to transpose a directive has been breached, the Court specifies three conditions [33] that have to be met for there to be a right to reparation under State liability: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the Member State and the damage sustained. [34]

90. It is now settled case-law that it is, in principle, for the national courts to apply the conditions governing liability of Member States for damage caused to individuals by breaches of Community law, in accordance with the guidelines laid down by the Court. [35]

30 — See Gratias, 'Zur staatshaftungsrechtlichen Relevanz der verspäteten Umsetzung der EG-Einlegerschutzrichtlinie und zur Rechtmäßigkeit des § 6 IV KWG', *Neue Juristische Wochenschrift*, 2000, p. 786; Gratias, cited in footnote 27.

31 — See the judgments in Case C-392/93 *British Telecommunications* [1996] ECR I-1631, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I-5063, Joined Cases C-94/95 and C-95/95 *Bonifaci and Others* [1997] ECR I-3969, Case C-319/96 *Brinkmann* [1998] ECR I-5255 and Case C-140/97 *Rechberger and Others* [1999] ECR I-3499.

32 — See the judgments in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraphs 18 to 22, and in Case C-97/96 *Daihatsu-Händler* [1997] ECR I-6843, paragraph 25.

33 — See Jarass, 'Haftung für die Verletzung von EU-Recht durch nationale Organe und Amtsträger', *Neue Juristische Wochenschrift*, 1994, p. 881.

34 — See the judgments in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 40, and *Brinkmann*, cited in footnote 31, paragraph 24.

35 — Judgments in *Brasserie du Pêcheur and Factortame*, cited in footnote 32, paragraphs 55 to 57, *British Telecommunications*, cited in footnote 31, paragraph 41, *Denkavit and Others*, cited in footnote 31, paragraph 49, Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 58, and Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 100.

91. It is in principle [36] for the national court to verify whether or not the conditions governing State liability for a breach of Community law are fulfilled in a specific case. However, it also accords with the current practice for the Court [37] to establish itself whether the conditions necessary for liability of the Member State to be incurred are fulfilled in a specific case if it has all the necessary information.

92. As in the present case the Court has all the necessary information, I suggest that the Court also make a conclusive assessment.

93. It must also be noted here that the fact that the alleged breach relates to the failure to take supervisory measures does not of itself militate against a finding of State liability. The decisive issue is, rather, whether the conditions established by case-law are fulfilled.

(a) The conferment of rights on individuals

94. With regard to the facts of the case, it must first be ascertained whether the purpose of Article 3(2) to (5) of Directive 94/19 is to confer rights on individuals.

95. In my opinion, Article 3(2) to (5) of Directive 94/19 serve merely to enhance the efficiency and effectiveness of the deposit-guarantee schemes prescribed in Article 3(1). They make no direct reference to individual depositors, who are not specified as being addressed by these provisions, in contrast with Article 7(1) of the directive. [38]

96. It can be seen from the very wording of the abovementioned provisions that they regulate only legal relationships between the competent authorities and the credit institutions and between the guarantee schemes and the credit institutions. As has rightly been stated by many of the participants in the case, the opposite interpretation would impede the supervisory activity of the competent authorities, as it might expose them to substantial claims for compensation.

97. The 24th recital in the preamble to Directive 94/19 also confirms that provisions

36 — Judgments in *British Telecommunications*, cited in footnote 31, paragraph 41, and in *Denkavit and Others*, cited in footnote 31, paragraph 49.

37 — See, for example, *British Telecommunications*, cited in footnote 31, paragraph 41 et seq., *Denkavit and Others*, cited in footnote 31, paragraph 49 et seq., and *Köbler*, cited in footnote 35, paragraph 101 et seq.

38 — With regard to purely de facto and indirectly-obtained advantages for individuals, see Ukrow, *Richterliche Rechtsfortbildung durch den EuGH*, 1995, p. 292.

relating to supervisory measures create no rights for individuals. According to that recital, 'this Directive *may not result in the Member States or their competent authorities being made liable* in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognised'. [39]

98. In addition, the content of Article 3(2) to (5) of Directive 94/19 is not in any way determinable. As I have already mentioned, there is considerable discretion for the competent authorities in the exercise of the powers conferred on them by Article 3(2) to (5).

99. As far as the amount of any claim for compensation is concerned, Article 7(1) of Directive 94/19 expressly provides that 'the aggregate deposits of each depositor must be covered up to ECU 20 000'. That is the limit if Directive 94/19 is correctly transposed into national law.

39 — Emphasis added.

100. In the event of the incorrect transposition or application of a directive or a provision thereof, the injured parties are to placed only in the position in which they would have found themselves if the breach had not occurred. In other words, Community law does not demand higher compensation. This militates against a right to compensation in excess of the amount stated in Article 7(1) of Directive 94/19. [40]

101. In the light of all of these considerations, I reach the conclusion that Article 3(2) to (5) of Directive 94/19 confer no rights on individuals. In case the Court should take a different view, I shall also examine the other conditions for liability on the part of Member States.

(b) Sufficiently serious breach

102. It must first be pointed out that not every breach of Community law justifies a right to compensation. Rather, the breach of Community law must be sufficiently serious. In this regard it is questionable whether, in

40 — To this effect, see Deckert, 'Zur Haftung des Mitgliedstaates bei Verstoßen seiner Organe gegen europaisches Gemeinschaftsrecht', *Europarecht*, 1997, p. 230 et seq.

the light of the most recent case-law, [41] it is still important to ascertain whether or not the Member State has wide discretion. But even if one continues to assume that the scope for discretion matters, it is evident from the case-law of the Court that 'where ... a Member State fails ... to take any of the measures necessary to achieve the result prescribed by a directive within the period it lays down, that Member State manifestly and gravely disregards the limits on its discretion'. [42]

103. Pursuant to Article 14(1) of Directive 94/19, the Member States were required to bring into force the laws, regulations and administrative provisions necessary for them to comply with the directive by 1 July 1995. The Federal Republic of Germany did not, however, transpose Directive 94/19 by that deadline.

104. In as clear a case of non-transposition as this, it is not therefore necessary to examine whether other criteria are met, such as the degree of clarity and precision of the breached provision, the extent of discretion that the breached provision gives the national authorities, intent, excusability or non-excusability of any error in law and the fact that the conduct of a Community institution may have contributed to the omission, introduction or retention of national measures and practices in contravention of Community law.

(c) Direct causal link

105. The last requirement in order for there to be a right to compensation is that there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. In respect of this issue too, jurisdiction in a specific case rests in the first place with the national court, but if the Court has sufficient information it may give the national court indications or even make the final assessment itself.

106. In my opinion, here the national court must decide whether, in the event of timely transposition supervisory measures pursuant to Article 3(2) to (5) of Directive 94/19 would not only actually have been taken but would also have averted the loss of deposits.

41 — See the judgments in Cases C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 39, and *Köbler*, cited in footnote 35.
Express reference to discretion, by contrast, is to be found in the judgments in Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, paragraph 109, *Rechberger and Others*, cited in footnote 31, paragraph 51, Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 38, and Case C-118/00 *Larsy* [2001] ECR I-5063, paragraph 38.

42 — *Francovich and Others*, cited in footnote 34, paragraph 44, and *Dillenkoffer and Others*, cited in footnote 31, paragraph 26.

107. In view of the fact that, as the Commission points out, the Bundesaufsichtsamt carried out supervisory measures at BVH Bank in 1991 and 1995 without this preventing the collapse of the bank and hence the loss of deposits, I doubt whether in fact there is a direct causal link.

108. In the light of the foregoing, it is clear that a depositor cannot claim compensation for damage resulting from the misconduct of the competent authority, beyond the amount specified in Article 7(1) of Directive 94/19.

VII — The second question referred

A — *Main arguments of the parties*

109. *Paul and others* take the view that the right of depositors to require the competent authorities to take supervisory measures in the interests of depositors can be derived from the directives listed in the national court's second question, as all of the directives referred to protect third parties and, in addition, serve as an aid to interpreting Directive 94/19. At the same time, by adopting the abovementioned directives the Community legislature created an ever denser system of banking supervisory provisions that now constitutes an overall regulatory framework. If further banking supervisory directives were not designed to protect third parties, they nevertheless fitted into this overall regulatory framework. Accordingly, Directive 94/19 does not constitute an exhaustive set of special provisions for all cases in which deposits are unavailable.

110. In contrast, the *Portuguese Government* is of the opinion that Directive 94/19 contains an exhaustive set of special provisions that determines the maximum protection to which an individual is entitled as against the State or the relevant scheme in the field of banking supervision. Neither Directive 94/19 nor other directives give private individuals an individual right to supervision or the taking of particular supervisory measures by the competent authorities. Also, the mention of protection of the saver or investor in recitals to, or provisions of, the directives referred to in the national court's question cannot be understood to mean that their interests have been taken into account directly and individually in the directives.

111. The *German*, *United Kingdom* and *Italian Governments* essentially share the view of the Portuguese Government.

112. According to the German Government, the objective of the directives mentioned in the second question from the national court is merely to standardise the basic characteristics of national banking supervision systems in order to ensure freedom to provide services and freedom of establishment and

hence to create a single internal market in banking services. The obligations of the Member States have no counterpart in rights for individuals. As the provisions listed have no direct effect, a 'web of directives' cannot have such effect either.

113. The *Spanish Government*, which essentially supports this line of argument, emphasises that individual rights cannot in any case be derived from recitals.

114. The *United Kingdom Government* points out that, in contrast to Article 7(1) and (6) of Directive 94/19, none of the directives listed in the question from the national court creates for depositors a right to compensation. Supervisory measures serve a variety of purposes, and sometimes conflicting interests must be taken into consideration.

115. According to the *Italian Government*, it can be seen from the objectives of the banking coordination directives that they are not intended to bestow rights on depositors but merely to lay down certain minimum rules for the proper operation of the Community credit market. The Italian Government also points to the case-law of the Court, [43] according to which rights for individuals cannot be deduced from programmatic objectives contained in recitals. An overall examination of the directives reveals that, except in particular exceptional cases, saver protection is only ever part of the general purpose of the regulations in question, without savers being granted clear rights or even particular obligations being established to their advantage.

116. In its written observations, *Ireland* points to the preamble of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, [44] which lays down fundamental principles for banking supervision, namely non-discrimination and the creation of equal conditions of competition. It is difficult to see from the system established by Directive 2000/12 how it may be contended that the provisions of the directives mentioned in the second question from the national court conferred rights on savers and depositors.

117. As far as Community law is concerned, Directive 94/19 contains an exhaustive set of special provisions regulating deposit-guarantee schemes. It does not, however, exhaustively regulate the unavailability of deposits

43 — Judgment in Case C-106/89 *Marleasing* [1990] ECR I-4135.

44 — OJ 2000 L 126, p. 1.

under Community law, only requiring the Member States to provide for a harmonised minimum level of deposit protection.

118. Lastly, in the view of the *Commission* an individual right for depositors to require supervisory measures to be taken cannot be derived from either the wording or the spirit and purpose of the directives listed in the order for reference, whether considered individually or in combination. A combined examination of the relevant directives is out of the question in any case, because the Member States cannot be required to ascertain whether these directives set objectives and, if so, what those objectives are.

B — *Assessment*

119. In the first part of its second question, the Bundesgerichtshof seeks to ascertain whether certain directives listed in this question, either individually or in combination, confer on depositors the right to require the competent authorities of the Member State to take supervisory measures, or whether Directive 94/19 contains an exhaustive set of special provisions for all cases of unavailability of deposits.

120. The Bundesgerichtshof also asks whether certain directives it names specifically provide assistance with interpretation for the purpose of answering the above question.

1. The first part of the second question

(a) The First Banking Coordination Directive

121. As stated in the second recital in its preamble, the purpose of the First Banking Coordination Directive is solely to make it easier to take up and pursue the business of credit institutions by eliminating the most obstructive differences between the laws of the Member States as regards the rules to which these institutions are subject. The First Banking Coordination Directive essentially requires the Member States to authorise credit institutions and at the same time lays down minimum requirements for such authorisation.

122. In accordance with the case-law of the Court,[45] 'the [First Banking Coordination] Directive constitutes no more than a first step towards the achievement of a common

45 — See the judgment in Case 166/85 *Bullo and Bonvento* [1987] ECR 1583, paragraph 7.

market for credit institutions, designed, in particular, to achieve overall supervision of a credit institution operating in several Member States'.

123. It is already clear from the objectives of the First Banking Coordination Directive that individuals are granted absolutely no right to require supervisory measures to be taken, as this directive only lays down the common principles for the procedure for authorising credit institutions.

124. Moreover, the very wording of the First Banking Coordination Directive confers no rights on individuals to have supervisory measures taken — however they may be structured — as the directive contains no pertinent unconditional and sufficiently precise provisions on which a depositor might rely before national courts. Although it is true that, in accordance with the fourth recital in the preamble to the directive, the 'measures to coordinate credit institutions must, both in order to protect savings and to create equal conditions of competition between these institutions, apply to all of them', this does not in any way confer rights on individuals, particularly as it is only a recital and not an actual provision of the directive. Depositor protection is not singled out in the recital but is mentioned in conjunction with other objectives, namely the creation of equal conditions of competition.

(b) The Second Banking Coordination Directive

125. Like the First Banking Coordination Directive, which it amended, the Second Banking Coordination Directive coordinates the laws, regulations and administrative provisions on the taking-up and pursuit of the business of credit institutions.

126. The provisions listed by the Bundesgerichtshof in its question mainly contain precise rules on the conditions for authorisation. However, specific pointers to depositor protection are to be found only in the preamble or in connection with the freedom of establishment and the freedom to provide services, without being subsequently crystallised in substantive provisions. Thus, according to the 11th recital, 'the harmonisation of certain financial and investment services will be effected, where the need exists, by specific Community instruments, with the intention, in particular, of protecting consumers and investors'.

127. For reasons similar to those adduced in the case of the First Banking Coordination Directive, the Second Banking Coordination Directive also does not confer on individuals

the right to require the competent authorities to take supervisory measures and bear liability in the event of misconduct.

(c) The Own Funds Directive

128. The Own Funds Directive is a necessary supplement to the Second Banking Coordination Directive which requires the adoption of rules on own funds. The objectives of the Own Funds Directive are first to ensure the stability of the banking system by setting minimum standards for own funds and secondly to create equal conditions of competition for authorised credit institutions by harmonising the law on banking supervision.

129. The provisions of the Own Funds Directive cited by the Bundesgerichtshof do not, however, contain any indication that an individual could claim the right to have supervisory measures taken. The protection of savers is thus referred to only in the first recital which states that 'common basic standards for the own funds of credit institutions are a key factor in the creation of an internal market in the banking sector since own funds serve to ensure the continuity of credit institutions and to protect savings'. Nor, therefore, does the Own Funds Directive confer rights on an individual to have supervisory measures taken, as such rights cannot be deduced from recitals, and in addition the recitals are indeterminate in content.

(d) Directive 95/26

130. Directive 95/26, which was adopted in the wake of the collapse of Bank of Credit and Commerce International (BCCI), amends a series of directives, including the First and Second Banking Coordination Directives. It reinforces the criteria for authorisation to conduct business and expands the scope for supplying information to the relevant supervisory bodies.

131. According to the 15th recital in its preamble, Directive 95/26 serves the 'protection of clients'.

132. In this regard, it must be pointed out that recitals in general have limited effect. Their effect is not so far-reaching as to enable an individual to derive rights from

one or several recitals. Rights of individuals can be established only by a provision in the substantive part of a directive, which in addition must meet the conditions for having direct effect.

133. In no event, however, does the direct effect of one directive, in this case Directive 94/19, depend on recitals in the preamble to another directive, here Directive 95/26.

134. In the light of these observations, I reach the conclusion that Directive 94/19 constitutes an exhaustive set of special provisions for all cases of unavailability of deposits, especially as that directive alone grants depositors, in Article 7(1) and (6), an express right to compensation that can be enforced before national courts. The directives listed in the first part of the second question referred do not confer on individuals the right to require the competent authorities to take prudential supervisory measures and to bear liability for any misconduct.

2. The second part of the second question

135. As to the possibility that further directives may be of assistance in interpretation, it has to be pointed out that all of the directives listed in the second part of the second question mention the protection of depositors, customers and the like only in recitals.

136. The recitals listed may well be of assistance in interpreting the directives in question, but these directives do not provide for the investor rights that are relevant here. This, in combination with the main objective of the directives listed in the second part of the second question, namely the realisation of the internal market, cannot therefore have the effect of conferring on individuals the right to have supervisory measures taken.

VIII — The third question referred

137. In the light of my remarks regarding the first and second questions, I consider there is no need to answer the third question.

IX — Conclusion

138. In the light of all the foregoing, I propose that the Court reply as follows to the questions from the national court:

1. Article 3(2) to (5) of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes are to be interpreted as not conferring on depositors the right to require that the competent authorities avail themselves of the measures mentioned in Article 3(2) to (5).

   Directive 94/19 is to be interpreted as meaning that a depositor cannot claim compensation for damage resulting from misconduct of the competent authorities, beyond the amount specified in Article 7(1) of the directive.

2. Directive 94/19 contains an exhaustive set of special provisions for all cases of unavailability of deposits.

   The directives listed in the second question referred for a preliminary ruling are of no interpretive assistance.