OPINION OF ADVOCATE GENERAL LÉGER

delivered on 10 December 1996 *

1. The Federal Republic of Germany has brought an action for the annulment of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes [1] (hereinafter 'the Directive' or 'the contested Directive'), on the grounds, first, that Article 57(2) of the EC Treaty, on the basis of which it was adopted, is inadequate as a legal basis and, second, that the Directive does not state the reasons on which it is based, as required by Article 190 of the EC Treaty.

2. In the alternative, the applicant asks the Court to annul three provisions of the Directive:

— the second subparagraph of Article 4(1), which prohibits the 'export' of guarantees by laying down that the cover provided for depositors at branches set up by credit institutions in other Member States may not exceed the cover offered by the corresponding guarantee scheme of the host Member State;

— Article 4(2), according to which a Member State whose deposit-guarantee scheme exceeds the level or scope of cover provided in another Member State must establish a deposit-guarantee scheme which branches of credit institutions authorized in such other State may join in order to supplement their guarantee; and

— the second sentence of the first subparagraph of Article 3(1), which lays an obligation on credit institutions to join a guarantee scheme.

3. The Council and the Parliament, supported by the Commission, contend that the Court should reject the action.

I — Adoption of the Directive

4. In the wider context of building the European banking system and with a view to completing the structure already achieved, the Commission adopted Recommendation 87/63/EEC, [2] which was intended to encourage Member States to set up deposit-guarantee schemes.

* Original language: French.

1 — OJ 1994 L 135, p. 5.

2 — Commission Recommendation of 22 December 1986 concerning the introduction of deposit-guarantee schemes in the Community (OJ 1987 L 33, p. 16).

5. On 14 April 1992, considering that the recommendation had not achieved the desired result, the Commission submitted a proposal for a directive 'on deposit-guarantee schemes', [3] the principle of which the Parliament accepted on 10 March 1993. The Parliament proposed some amendments, which were largely incorporated, such as an increase in the level of cover. [4] On 7 June 1993 the Commission submitted an amended proposal to the Council, [5] which was essentially confirmed in the Council's common position of 25 October 1993.

6. The Parliament was again consulted on the proposed directive in accordance with the procedure in Article 189b for joint decision-making by the European Parliament and the Council, recently introduced into the Treaty of Rome by the Treaty on European Union and applicable to directives adopted under the third sentence of Article 57(2) of the Treaty. In its decision of 9 March 1994, [6] the Parliament made numerous amendments to the Council's common position. As a result of persistant disagreement between the two institutions, the Conciliation Committee met to agree a joint text, allowing the Directive to be adopted on 30 May 1994.

7. Directive 94/19 is one of the first to be adopted under the Article 189b procedure. Above all, it is, to my knowledge, the first to result from the conciliation process provided for in that article.

8. One of the main characteristics of Article 189b is that it allows acts to be adopted without requiring unanimity. In this new procedural framework, the Council effectively acts by qualified majority, except where it has to act in relation to those amendments made by the Parliament on which the Commission has expressed a negative opinion, in which case the Council must once again act by unanimity.

9. The vote of the Federal Republic of Germany not having sufficed to prevent the Directive from being adopted, the German Government has instituted this action.

10. In substance, it argues that its own deposit-guarantee scheme allows the objectives pursued by the Directive to be achieved, without having recourse to such constraints.

3 — OJ 1992 C 163, p. 6.
4 — OJ 1993 C 115, p. 91.
5 — OJ 1993 C 178, p. 14.
6 — OJ 1994 C 91, p. 85.

II — General structure of Directive 94/19

11. The main purpose of the Directive is to introduce bank deposit-guarantee schemes in all Member States and to harmonize the relevant guarantees as from a minimum amount.

12. Under Article 3(1) and (4) of the Directive:

'1. Each Member State shall ensure that *within its territory one or more deposit-guarantee schemes are introduced and officially recognized.* Except in the circumstances envisaged in the second subparagraph and in paragraph 4, no credit institution authorized 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.*

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 recognized 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 institutuion 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 9.

Those Member States which make use of this option shall inform the Commission accordingly; in particular, they shall notify the Commission of the characteristics of any such protective systems and the credit institutions covered by them and of any subse-

quent changes in the information supplied. The Commission shall inform the Banking Advisory Committee thereof.

4. Where national law permits, and with the express consent of the competent authorities which issued its authorization, 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 recognized scheme.' [7]

13. Under Article 4(1) and (2):

'1. Deposit-guarantee schemes introduced and officially recognized in a Member State in accordance with Article 3(1) *shall cover the depositors at branches set up by credit institutions in other Member States.*

Until 31 December 1999 neither the level nor the scope, including the percentage, of cover provided *shall exceed the maximum level or scope* of cover offered by the corresponding guarantee scheme within the territory of the host Member State.

Before that date, the Commission shall draw up a report on the basis of the experience acquired in applying the second subparagraph and shall consider the need to continue those arrangements. If appropriate, the Commission shall submit a proposal for a Directive to the European Parliament and the Council, with a view to the extension of their validity.

2. Where the level and/or scope, including the percentage, of cover offered by the host Member State guarantee scheme exceeds the level and/or scope of cover provided in the Member State in which a credit institution is authorized, the host Member State shall ensure that there is an officially recognized deposit-guarantee scheme within its territory which a branch may join voluntarily in order to *supplement the guarantee* which its depositors already enjoy by virtue of its membership of its home Member State scheme.

The scheme to be joined by the branch shall cover the category of institution to which it belongs or most closely corresponds in the host Member State.' [8]

7 — My emphasis.

8 — My emphasis.

14. Article 7 sets the minimum amount of the guarantee. In particular, under Article 7(1) and (3):

'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.

Until 31 December 1999 Member States in which, when this Directive is adopted, deposits are not covered up to ECU 20 000 may retain the maximum amount laid down in their guarantee schemes, provided that this amount is not less than ECU 15 000.

3. This Article shall not preclude the retention or adoption of provisions which offer a *higher or more comprehensive cover* for deposit.' [9]

15. Under Article 9, credit institutions are *obliged to inform* depositors about the relevant deposit-guarantee scheme.

16. Article 10 sets at *three months* the time-limit within which the guarantee schemes are to pay unavailable deposits.

III — The German system of bank guarantees

17. The German deposit-guarantee system, as it emerges from the German Government's pleadings and from the replies given to the Court at the hearing, displays the following characteristics.

18. Created in 1976, the deposit-guarantee fund of the Federal Association of German Banks is a voluntary insurance body, which is not under State control and which is organized by the Federal Association itself. There are also other guarantee schemes: that of the cooperative banks or that of the savings banks, for example.

19. Almost all credit institutions set up in Germany belong to a guarantee scheme. In October 1993, only five institutions which had their head office in Germany and which were authorized to hold deposits, including those of small savers, were not members.

9 — My emphasis.

20. The protection provided by the German guarantee scheme is particularly effective, since it covers almost all deposits, making the level of protection in Germany the highest in the Community.

21. In Germany, any credit institution which does not belong to an authorized deposit-guarantee body is required to inform its customers of that fact before an account is opened.

22. The national supervisory authorities may prohibit a credit institution from receiving payments if it does not belong to a guarantee scheme and is threatened with insolvency.

23. The deposit-guarantee fund of the Federal Association of German Banks is authorized by its member companies to obtain all the necessary information from the Bundesaufsichtsamt für das Kreditwesen (Federal Supervisory Agency for Credit Institutions) and the Deutsche Bundesbank (Federal Bank of Germany), so that it is in a position to check the details provided by the banks. Moreover, it has the right to read the company documents of the member banks and to check them on the spot.

24. The credit institutions must send to the national supervisory authorities the verification reports drawn up by the guarantee scheme.

IV — The principal claim

A — *Legal basis for the Directive*

25. The legal basis chosen by the Community legislature is Article 57(2), which entrusts the Council with the responsibility for issuing directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. It is drafted as follows:

'[In order to make it easier for persons to take up and pursue activities as self-employed persons], the Council shall, before the end of the transitional period, issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall decide on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons. *In other cases the Council shall act in accordance with the procedure referred to in Article 189b.*' [10]

10 — My emphasis.

26. Article 57(2) is one of the provisions, referred to in Article 7a, which serve as the legal basis for measures adopted by the Community with the aim of progressively establishing the internal market.

27. The Federal Republic of Germany claims that Article 57(2) of the Treaty cannot constitute the sole legal basis for the Directive, because its aim is rather to strengthen protection for depositors than to allow the completion of the single banking market.

28. According to the applicant, the main objective, being consumer protection, could be achieved only by relying on Article 235 of the EC Treaty, given that Articles 100a and 129a do not apply, so that Articles 57 and 235 should apply simultaneously. It concludes that, in the absence of the unanimity required by Article 235 of the Treaty, the Directive was not lawfully adopted. [11]

29. The Council, the Parliament and the Commission consider, however, that the main purpose of the Directive is to complete the single banking market, to strengthen the stability of the banking system and to establish equal competition, whereas consumer protection is only an incidental effect, inherent in that purpose.

30. Once again, therefore, in order to determine the procedure for adopting a measure of Community legislation, it is necessary to define the respective fields of application of two provisions, each of which might serve as its legal basis.

31. The Court has consistently held [12] that the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review, such as the aim and content of the measure.

32. To the extent that harmonization aims, by definition, to bring existing laws into closer alignment, the nature of such a step should be examined in order to determine the relevant legal basis.

33. The purpose of harmonizing national rules is both to impose similar constraints on all Member States, where these are justified, and to establish common rules or objectives. Every measure of harmonization therefore combines its main objective of bringing laws into closer alignment with the purpose of those laws themselves. There is therefore a natural tendency for such measures to be founded on a joint legal basis: that which authorizes harmonization and that which relates to the purpose of the legislation. At

11 — Pages 6 to 16 of the French translation of the application.

12 — See, for example, Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 11, and Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraph 10.

first sight, it may therefore seem necessary to require systematically that measures which harmonize laws have a joint legal basis.

34. The Court has ruled on how to reconcile two legal bases which are justified when a measure pursues a dual objective. It has distinguished cases in which the two aims were indissociable, [13] making it justifiable 'to adopt the relevant measures on the basis of the two relevant provisions', [14] from those where one of those aims must be considered incidental to the other, the latter thereby constituting the only legal basis for the measure in question. [15] It is in the light of those principles that the issue in this case should be examined.

35. As regards the *aim* pursued, it seems that freedom of establishment and freedom to provide services in the banking sector, on the one hand, and the stability of the banking system and protection for savers, on the other, clearly constitute the two objectives of the Directive. That point is not in issue between the parties, which none the less differ in their determination of which should take precedence over the other and, as a result, serve to indicate the chosen legal basis.

36. The dual objective of the contested Directive is expressed in the following terms:

'Whereas, in accordance with the objectives of the Treaty, the harmonious development of the activities of credit institutions throughout the Community should be promoted through the elimination of all restrictions on the right of establishment and the freedom to provide services, while increasing the stability of the banking system and protection for savers'. [16]

37. It is, however, difficult, in the light of the preamble alone, to identify which of the two prevails. The presence of both in numerous recitals (see in particular the first, second, fifth, eighth, thirteenth, fourteenth, twenty-third and twenty-fifth recitals on the need for harmonization and the third, ninth, eleventh and sixteenth recitals on consumer protection) suggests that a joint legal basis is necessary.

38. The difficulty in establishing a hierarchy between the two objectives is equally evident on reading the *content* of the Directive. This can be explained by the fact that the very purpose of a large number of the principles laid down by rules aimed at harmonizing bank deposit-guarantee schemes is to protect depositors. At first glance, it might be con-

13 — See Case C-300/89 *Commission* v *Council*, cited above, paragraph 13.

14 — Ibid., paragraph 17.

15 — See Case C-70/88 *Parliament* v *Council* [1991] ECR I-4529, paragraph 17, and Case C-187/93 *Parliament* v *Council* [1994] ECR I-2857, paragraph 25.

16 — First recital in the preamble.

sidered that if the legislature has set up a system for harmonizing bank deposit-guarantee schemes, it has done so at least as much in order to guarantee protection for depositors who had previously not enjoyed any, or at any rate optimal, protection as in order to impose identical constraints on all economic operators in this area, with a view to aligning the statutory conditions under which they pursue their activities. The Directive itself bears witness to this by requiring all institutions to belong to a guarantee scheme (Article 3(1)). The legislature also shows itself to be directly concerned with the fate of depositors when, for example, it limits payment of the guarantee to three months from the time when the deposit becomes unavailable (Article 10(1)).

39. However, whilst the requirement as regards protection may chronologically precede harmonization, I do not consider that harmonization should therefore be seen as secondary; on the contrary, it should be considered paramount as far as Directive 94/19 is concerned.

40. In the first place, freedom of establishment and freedom to provide services, which are prerequisites for a single banking market, presuppose that the taking-up and pursuit of activities as self-employed persons have been made easier by coordination of the provisions laid down by law, regulation or administrative action in Member States, with a view to eliminating any differences which constitute unjustified obstacles. This need for coordination is asserted by Article 57(2) of the Treaty as an independent objective the importance of which, according to the same provision, justifies the need to achieve it within a limited period. It forms an integral part of the more general objective of the internal market, set out in Article 7a of the Treaty.

41. In the second place, certain provisions of the contested Directive were dictated by considerations extraneous to or even, in fact, in conflict with any concern for consumer protection.

42. One such example is with the level of guarantee chosen in Article 7(1) of the Directive, justified, according to the 16th recital, by the fact that it would not be appropriate 'to impose throughout the Community a level of protection which might in certain cases have the effect of encouraging the unsound management of credit institutions'. Even if Member States are still free to go beyond that minimum level, the text clearly expresses the legislature's concern to achieve, at the cost of limiting protection for depositors, a balance intended to guarantee the stability of the system as a whole, the very existence of which could otherwise be threatened by too great a desire to defend its customers.

43. The 'export prohibition' laid down in the second subparagraph of Article 4(1) is another illustration of the importance in the Directive of the objective of ensuring the harmonization and stability of the banking

system. In practice, it limits both the level and the scope of the cover provided by the guarantee offered by a credit institution of one Member State which has set up a branch in another Member State offering a lower guarantee. There again, protection of depositors is sacrificed, even if only temporarily, to the demands of progressive harmonization.

44. The same is true of the rule set out in Article 4(2) of the Directive, according to which it is for the host Member State, and not for the home Member State, to ensure that there is a guarantee scheme within its territory which a branch may join voluntarily in order to supplement the guarantee which its depositors already enjoy in the home Member State. Whilst such supplementary cover does indeed improve consumer protection, the fact that the host Member State, rather than the home Member State, is chosen for its implementation is unrelated to such a purpose.

45. Furthermore, Article 8 places a restriction on the application of the bank guarantee by specifying that the level of the guarantee applies, not to each deposit, but to aggregate deposits with the same credit institution, whatever the number of deposits.

46. Conversely, every provision in the Directive favourable to depositors can be related to the initial objective of harmonization with a view to completing the internal market. The articles referred to by the applicant [17] to show that the main objective was that of protection lay down rules without which no measure of harmonization aiming to establish the internal market could be complete.

47. Article 3 of the Directive, for example, requires the introduction of at least one guarantee scheme within the territory of each Member State, which is the very least that could be done if the intention is to harmonize a minimum level of deposit guarantees as part of the completion of the single banking market.

48. The same is true of Article 7, laying down a minimum rate of cover which, as I have already pointed out, was adopted at an intentionally intermediate level. [18]

49. As a further example, the obligation on credit institutions to inform, imposed by Article 9, amounts to a minimum general obligation which the applicant has not shown not to have already formed part of the statutory rules put in place by some of the States having had a guarantee scheme

17 — Pages 9 and 10 of the French translation of the application.
18 — See point 42 of this Opinion.

before the contested Directive was adopted [19] and whose extension to other Member States thus falls within the stated aim of harmonization of the schemes.

50. Finally, Article 10 lays down a common time-limit for all Member States within which depositors' claims must be paid by the deposit-guarantee schemes. There again, there are no grounds for supposing that the time-limit chosen is more favourable to depositors than that which may have been laid down by those Member States which already had a deposit-guarantee scheme. Furthermore, the time-limit could, in any case, have been even shorter than the one adopted. In fact, it seems above all to have been a question of establishing one time-limit common to all.

51. Moreover, it is natural that the objective of harmonization, achieved in some cases, as we have seen, by a limitation of the guarantee offered to certain depositors, should be paralleled by an increase in protection for other depositors, such as where the Directive provides for the obligatory creation of a system of protection where none existed, or establishes the minimum amount of the guarantee. That increase in the level of protection in some Member States could be seen as a principle requiring a distinct legal basis if, in the context of the Directive as a whole and in the wider framework of the Community, it did not, on the contrary, appear as part of a general, systematic aim of coordinating legislation, which improved the position of certain depositors only as an additional effect.

52. However, the Federal Republic of Germany claims that the two aims of the Directive are of equal importance and make it necessary to rely on two legal bases; on that assumption, my view is that Article 129a applies.

53. I agree with the applicant and the Council that Article 129a(1)(a) of the Treaty is not appropriate. That provision is aimed at measures taken by the Community, pursuant to Article 100a, with a view to contributing to the attainment of a high level of consumer protection in the context of the completion of the internal market. However, whilst Article 100a and Article 57(2) of the Treaty have in common the fact that they enact rules intended to complete the internal market, the first referring to Article 7a of the Treaty, in which that concept is defined, and express reference being made to the second in Article 7a, Article 100a only applies 'save where otherwise provided in this Treaty'. Consequently Article 57(2), whose field of application, limited to the coordination of rules concerning the taking-up and pursuit of activities as self-employed persons, is more restricted, makes it impossible for Article 100a and, as a result, Article 129a(1)(a), to apply.

19 — According to the applicant, a similar obligation to inform appears to exist in Germany: see the second paragraph on p. 53 of the French translation of the application.

54. On the other hand, I do consider that Article 129a(1)(b) applies, on the above assumption. It entrusts the Community with the task of 'contribut[ing] to the attainment of a high level of consumer protection through specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and *economic interests of consumers* and to provide adequate information to consumers'. [20]

55. The applicant does not agree that this provision is applicable. It considers that, by authorizing only specific action, Article 129a(1)(b) only allows those measures which do not fall within the categories in Article 189 to be adopted, in contrast to those to which subparagraph (a) refers. According to the applicant, it concerns action plans and programmes, to the exclusion of the measures listed in that provision. [21]

56. It adds that Article 129a(1)(b) can only support and supplement the policy pursued by the Member States. However, the conditions for such action are lacking in this case because two Member States have not previously introduced a deposit-guarantee scheme. [22]

57. However, nothing in the text implies that its field of application is limited. On the contrary, when the legislature intends to limit powers so that only actions of a non-binding nature can be taken, this is clearly expressed, as in Articles 126, 128 and 129 of the Treaty, where the measures intended to contribute to the attainment of objectives connected with education, culture and public health are classified as 'incentive measures'. Likewise, care is taken expressly to exclude from the areas covered by such provisions any proposals for harmonization, [23] which generally necessitate reliance on mandatory provisions.

58. Moreover, when Article 129a refers to specific action which 'supports and supplements the policy pursued by the Member States to protect the ... economic interests of consumers and to provide adequate information to consumers', it does not indicate that such action is to be linked to the policy of each Member State in a given sphere.

59. Since it is not drafted in such a way as to imply the restriction imputed to it in the German Government's reasoning, subparagraph (b) should, on the contrary, be understood as describing specific action which supports and supplements the policy pursued by the Member States as a whole in the

20 — My emphasis.

21 — Pages 12 to 14 of the French translation of the application.

22 — Pages 11 and 12 of the French translation of the reply.

23 — Each of the provisions mentioned above includes the following sentence: '...the Council ... shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States.'

general area of the protection of the economic interests of consumers.

60. It matters little, therefore, that some Member States have not introduced a deposit-guarantee scheme. It is enough that internally there is an overall policy undertaken to protect the interests of consumers, a fact of which there is no doubt.

61. Another reason supporting the application of Article 129a(1)(b) is that, by stating that 'The Community shall *contribute* to the attainment of a high level of consumer protection ...', Article 129a asserts the supplementary nature of the power devolved upon the Community by the Treaty on the subject of consumer protection. Reliance on Article 129a(1)(a) is not justified for the reasons already elaborated. [24] On the other hand, the application of Article 129a(1)(b) is confirmed by the fact that, according to the Community legislature, the objective of consumer protection pursued in the field of bank deposit-guarantees has not yet been attained. The fifth recital of the Directive states that: 'the action the Member States have taken in response to Commission recommendation 87/63/EEC of 22 December 1986 concerning the introduction of deposit-guarantee schemes in the Community has not fully achieved the desired result'. [25]

24 — See point 53 of this Opinion.

25 — Recommendation 87/63, cited above.

62. The broad logic of the objectives set by the Treaty and the procedures it lays down to attain them also give useful guidance for ascertaining the legal basis. The fact that the procedures laid down in Articles 57(2), 100a and 129a are the same shows that the areas covered by those provisions (the regulation of activities as self-employed persons, the harmonization of rules concerning the establishment and functioning of the internal market and the contribution of the Community to the attainment of a high level of consumer protection, respectively) are, from an institutional perspective, considered to be of equal importance and justify an identical decision-making process, in which the Parliament must intervene under its joint decision-making power.

63. As a result, it would be difficult to show that the provisions of the Directive, although they fall within one of those areas, are of such a nature as to justify having recourse to a stricter adoption procedure.

64. It follows from the above that Article 129a(1)(b) allows the adoption of binding provisions and that, should a second legal basis be necessary for the contested Directive to be lawful, it would have to be that article.

65. Since the Article 189b procedure, used to adopt the Directive, is the same as that prescribed by Article 129a, the omission of any reference to the latter amounts to a purely formal defect which cannot render the contested measure null and void. [26] It is true that consultation of the Economic and Social Committee is obligatory under Article 129a, whereas it is not required by Article 57(2). There is, however, no dispute that such consultation took place, [27] so there is no actual irregularity which can justify the annulment of Directive 94/19.

66. These considerations lead me to propose that the Court should rule out the need to rely on Article 235 of the Treaty, which, as an enabling provision of last resort, applies only in the absence of any other legal basis.

67. Moreover, it is unreasonable to claim that the stability of the banking system justifies reliance on Article 235 as the basis for the Directive on the ground that this objective falls outside Article 57(2), [28] when the coordination of national rules on bank deposit guarantees is specifically intended to prevent any sudden, wholesale transfer of funds from one Member State to another as a result of an excessive disparity in the level of the proposed guarantees.

68. The plea alleging lack of legal basis must therefore be rejected.

B — *The requirement to state reasons*

69. The Federal Republic of Germany also claims that Directive 94/19 contains an inadequate statement of the reasons on which it is based, in the light of Article 190 of the Treaty. The text does not show that account was taken of the principle of subsidiarity, as laid down in the second paragraph of Article 3b of the Treaty. It asserts that this principle is subject to judicial review by the Court and that the two conditions under which it is possible to derogate from the principle that competence remains with the Member States have not been shown to have been fulfilled. [29] [30]

70. It does not seem to me that the relevant authorities have ignored the requirement to state reasons; in view of the exclusive competence of the Community, the Council and the Parliament were not, in my opinion, required to justify the need to apply the principle of subsidiarity.

26 — See Case 165/87 *Commission* v *Council* [1988] ECR 5545, paragraph 19.

27 — Opinion of the Economic and Social Committee on the Proposal for a Council Directive on deposit-guarantee schemes of 22 October 1992 (OJ 1992 C 332, p. 13).

28 — Page 13 of the French translation of the reply.

29 — Under the second paragraph of Article 3b, in areas which do not fall within its exclusive competence, the Community is to take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

30 — Pages 16 to 19 of the French translation of the application.

71. The Court has held concerning Article 190 that in order to satisfy the requirement to state reasons 'Community measures must include a statement of the facts and law that led the institution in question to adopt them, so as to make possible review by the Court and so that the Member States and the nationals concerned may have knowledge of the conditions under which the Community institutions have applied the Treaty'. [31] Furthermore, the Court has specified that 'failure to refer to a precise provision of the Treaty need not necessarily constitute an infringement of essential procedural requirements when the legal basis for the measure may be determined from other parts of the measure', but that 'explicit reference is indispensible where, in its absence, the parties concerned and the Court are left uncertain as to the precise legal basis'. [32]

72. In the first recital in the preamble to the Directive, the legislature states the need to promote 'the harmonious development of the activities of credit institutions throughout the Community', going on to infer, in the second recital, that 'it is indispensable to ensure a harmonized minimum level of deposit protection wherever deposits are located in the Community'.

73. It notes, in the fifth recital, that the action taken by the Member States in response to the 1986 recommendation [33] 'has not fully achieved the desired result' and that 'that situation may prove prejudicial to the proper functioning of the internal market'.

74. The Community authorities note therefore that, in spite of the Commission recommendation, the action taken on deposit guarantees at a national level is inadequate and insist on the need for national schemes to be harmonized. They thereby justify having recourse to action at the Community level which is more binding than a mere recommendation, in order to remedy the inaction of the Member States.

75. In my opinion, however, although adequate for the purposes of Article 190, the reasons given by the Community authorities to justify their intervention in the light of the principle of subsidiarity are based on an inaccurate view of Community competence.

76. The Commission argues that the Community action concerns an area in which any concurrent competence of the Member States is excluded, so that any application of the principle of subsidiarity is ruled out. [34]

31 — See, in particular, Case 158/80 *Rewe* [1981] ECR 1805 and Case 45/86 *Commission* v *Council*, cited above, paragraph 5.

32 — See Case 45/86 *Commission* v *Council*, cited above, paragraph 9.

33 — Recommendation 87/63, cited above.

34 — Page 4 of the French translation of the statement in intervention.

77. By asserting that the principle of subsidiarity has been respected, the Council and the Parliament seem to consider that competence is shared. [35]

78. The applicant, too, denies that the Community has exclusive competence in the completion of the internal market. [36]

79. It argues that, as long as the Community has not exercised its power to harmonize laws in a given area, the Member State is entitled to adopt whatever measures it deems necessary. The opposite view would, it believes, have the unacceptable result that Member States would have no right, prior to harmonization, to implement measures aimed at removing obstacles to the internal market and to promote Community integration themselves. It adds that an acknowledgement that the Community has exclusive competence with regard to the internal market would be tantamount to entrusting the Community with exclusive competence in almost all fields of activity, provided that the measure in question removed obstacles to the internal market. [37]

80. It is true that the completion of the internal market is not always a matter for the exclusive competence of the Community. The relevant provisions lay down various procedures. In Article 100a(4), for example, the legislature envisages the possibility, under certain conditions, for Member States 'to apply national provisions' after the adoption of a harmonization measure.

81. Nor does the Treaty systematically exclude the competence of the Member States in the more general area of harmonization, as shown by Article 118a on the harmonization of conditions concerning improvements in the health and safety of workers in the working environment. [38] In this case, the main task of harmonization falls to the Member States.

82. In such cases, however, competence is clearly stated to be shared. In contrast, at no time does Article 57 refer to the competence of the Member States. It entrusts the Community alone with the responsibility for the coordination of national legislation in this field, which shows that, *from the very outset*, the authors of the Treaty considered that, as regards the taking-up and pursuit of activities as self-employed persons, coordination was better achieved by action at Community rather than national level.

35 — Paragraph 27 of the Council's defence, paragraphs 24 et seq. of the Parliament's defence.

36 — Second paragraph on page 19 of the French translation of the application and paragraph 4 on page 16 et seq. of the French translation of the reply.

37 — Page 6 et seq. of the French translation of the applicant's reply to the Commission's statement in intervention.

38 — Article 118a of the Treaty provides that 'Member States ... shall set as their objective the harmonization of conditions in [the] area [of the health and safety of workers], while maintaining the improvements made'.

83. It is, indeed, logical for harmonization of laws to be achieved through rules common to the different Member States. As the Court stated in a recent judgment, [39] such an objective necessarily implies 'Community-wide action'.

84. It should be recalled, moreover, that in the present case, the exclusive competence of the Community, as provided for in Article 57(2), is principally concerned with the *coordination* of laws on the taking-up and pursuit of activities as self-employed persons. It does not cover the entire competence of the Member States as regards those laws themselves.

85. When the exclusive competence of the Community is limited to the harmonization of laws, as it is in this case, it does not thereby deprive the Member States of their power to enact new rules in the relevant field. Of course, harmonization necessarily entails some amendment of the substantive rules in force in certain Member States. However, those States still retain complete freedom as long as the Community authorities have not taken action to harmonize national laws. Nor is there anything to prevent them from enacting rules drafted from the outset so as to take account of those enacted by other Member States. Furthermore, once Community harmonization has been completed, the Member States can once again intervene provided that they do not undermine the harmonized rules; their scope for action in that regard therefore depends naturally on the degree of harmonization.

86. It follows from the above that, in the area to which the Directive relates, the Community is acting not under subsidiary powers but in clear accordance with its exclusive powers, so that the Community authorities were not required to demonstrate that the conditions laid down in the second paragraph of Article 3b were satisfied.

87. On a more general level, I should point out how useful I consider it could be, for the purpose of ensuring proper application of the principle of subsidiarity, for the obligation to state reasons laid down in Article 190 of the Treaty to be enforced with particular rigour whenever the Community legislature takes action to lay down new rules.

88. The principle of subsidiarity is set out in the Treaty on European Union as a basic principle of Community law, in accordance with the positions adopted at the Edinburgh European Council. [40] In the interinstitutional declaration on democracy, transparency and

39 — Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 47.

40 — *Bulletin of the European Communities*, No 12, 1992, Annex 1 to Part A, paragraph I.15, p. 14.

subsidiarity, the Community authorities concluded that each institution must show that this principle has been observed. [41]

89. That being the case, considering the importance of the principle of subsidiarity in allocating powers between the Member States and the Community and taking into account the need for the Court to exercise its control over the conditions in which the Community institutions have applied the Treaty, it does not seem excessive to expect those institutions, in the future, systematically to state reasons for their decisions in view of the principle of subsidiarity.

90. All measures adopted by the Community should thus indicate, either implicitly or explicitly, but in any event clearly, on what basis the authority concerned is acting — even if only to state, where this is the case, that the principle of subsidiarity does not come into play.

V — The alternative claim

91. In the event that the Federal Republic of Germany is unsuccessful in its main claim for the annulment of the Directive in its entirety, it seeks, in the alternative, the annulment of the second paragraph of Article 4(1) ('export' prohibition), Article 4(2) (supplementary guarantee) and the second sentence of Article 3(1) (compulsory membership).

A — *Prohibition on exceeding the cover offered by the guarantee scheme of the host Member State — the 'export' prohibition*

92. Article 4(1) of the Directive provides that the deposit-guarantee schemes are to cover the depositors at branches set up by credit institutions in other Member States and that, until 31 December 1999, neither the level nor the scope of cover provided may exceed the maximum level or scope of cover offered by the corresponding guarantee scheme within the territory of the host Member State.

93. The German Government considers that the reasons which led the Council and the Parliament to make such a prohibition are not clearly expressed and that as a result this provision *infringes Article 190 of the Treaty*. [42]

41 — 'Inter-Institutional Agreement on procedures for implementing the principle of Subsidiarity', *Bulletin of the European Communities*, No 10, 1993, paragraph 2.2.2, p. 119.

42 — Pages 21 and 22 of the French translation of the application.

94. In view of the principles laid down by the Court, [43] that argument does not seem to be acceptable. In my opinion, an examination of the recitals in the preamble to the Directive clearly shows why the decision was taken to prohibit the 'export' of more comprehensive guarantees.

95. Thus, the 14th recital refers to threats to market stability which could result from an immediate confrontation between guarantee schemes and specifies that the level and scope of cover should not become an instrument of competition.

96. Should the preamble clarify further what should be understood by those terms? I do not think so: whatever one's opinion on the relevance of the reasons given for adopting the contested provision, there can be no confusion as to their precise meaning.

97. Similarly, it is clear from the tenor of the Directive that, by describing the 'export' prohibition as intended to avoid market disturbances caused by rates of cover exceeding those offered in the host Member State, the legislature meant that it wished to avoid a situation in which depositors with banks in that State, alerted to the new potential offered by a credit institution from another Member State, might suddenly and simultaneously transfer their deposits in order to benefit from a more comprehensive deposit guarantee, to the detriment of the national banking system, at the risk of destabilizing it and depriving it of a large part of its custom.

98. It is also perfectly clear, on reading the contested Directive, that the reason for the prohibition originates in the concern to limit, at least temporarily, competition by guarantee schemes.

99. Since these provisions are sufficiently clear and reveal the aim pursued by the Community authorities, any insistence on additional clarification seems excessive.

100. Moreover, the applicant criticizes the Directive for *making freedom of establishment more difficult, or even impossible*, contrary to the aim, pursued by Article 57(2), of facilitating the taking-up and excercise of activities as self-employed persons. [44]

101. In implementing the Directive, the Federal Republic of Germany, whose deposit-

43 — See point 71 of this Opinion.

44 — Pages 23 to 26 of the French translation of the application.

guarantee scheme seems to be particularly protective of depositors, will certainly have to forego one of the competitive advantages it enjoys in developing the operation of its banking institutions outside its territory. However, the achievement of an objective defined by the Treaty cannot be measured by the yardstick of a single Member State, particularly when it falls within the sphere of legislative harmonization, in which, as an inherent part of the process of approximation, the Member States must make concessions, as long as these are not disproportionate and the objective defined can in fact be achieved at a Community level.

102. In this case, the prohibition in the second paragraph of Article 4(1) of the Directive is enacted for a five-year period and therefore on a provisional basis. It does not permanently deprive credit institutions in certain Member States of a means of expanding within the Community.

103. On the contrary, it is justified by the legitimate concern of avoiding over-hasty harmonization capable of weakening national schemes which, because recently established, have not had the time to achieve any significant reduction in disparities between guarantees. The Federal Republic of Germany is certainly not the only Member State to have to submit to an 'export' prohibition. For the moment, however, more schemes will benefit from the rule than will not — a consideration which, in my opinion, vindicates the contested measure.

104. The real impact of this prohibition, which is both limited in time and confined to credit institutions set up in a Member State for whose banks the guarantee is lower, must be assessed in the light of the overall thrust of the contested Directive. The effects of the Directive will include setting up a guarantee scheme in two member States, increasing, according to the German Government itself, [45] the guarantee in five Member States to the minimum level of harmonization (ECU 20 000) laid down by the Directive, and encouraging the setting-up of branches in any Member State without having to go through the host Member State's scheme.

105. Finally, it cannot be maintained that this objective is jeopardized by the need, of which the applicant complains, to calculate different contribution rates, which has not been shown to give rise to insuperable difficulties.

106. In the light of those considerations — and even though they are far from exhausting the contribution made by the contested text — the restriction in Article 4 cannot lead to the conclusion that the Directive restricts the taking-up and pursuit of activities as self-employed persons.

45 — Ibid., page 25, second paragraph.

107. The German Government further claims that the 'export' prohibition is *incompatible with the objective of a high level of consumer protection* laid down by Article 3(s) and Article 129a of the Treaty. [46]

108. I do not share this point of view because, for reasons I have already set out, [47] I do not consider that to be the main objective pursued by the Directive, which cannot, therefore, be made subject to it. Whilst it cannot be disputed that, under Article 3(s), 'the activities of the Community ... include ... a contribution to the strengthening of consumer protection', those activities must be carried out 'as provided by this Treaty'. The relevant provisions are set out in Article 129a, the only article in Title XI, headed 'Consumer Protection', which, as I have said, I do not consider to constitute the legal basis for the Directive.

109. As regards the view that the objective of consumer protection is an aim of the same rank as that laid down in Article 57(2) of the Treaty, it is clear from an examination of the Directive that the new rules of harmonization justify and counterbalance the 'export' prohibition — which is, it must be borne in mind, temporary — by the lasting improvement in the general level of deposit-guarantee schemes. [48]

46 — Ibid., pages 26 to 28.

47 — See point 39 et seq., of this Opinion.

48 — See points 35 et seq. and 104 of this Opinion.

110. In addition, the Federal Republic of Germany maintains that the 'export' prohibition is *contrary to the principle of proportionality* on the ground that, whilst it may be suitable for preventing distortions in competition, it is neither essential nor reasonable. [49]

111. It should be observed at the outset that the Court has consistently held that in order to establish whether a provision of Community law conforms with the principle of proportionality, it is important to ascertain whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it. When there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued. [50]

112. No one questions that the prohibition is capable of preventing market disturbances. However, the applicant maintains that the objective pursued could have been achieved by the less aggressive means of a protective clause authorizing the relevant authority to intervene only in the event of a crisis. [51]

49 — Pages 28 to 37 of the French translation of the application.

50 — See, in particular, Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21, and, more recently, Case C-84/94 *United Kingdom* v *Council*, cited above, paragraph 57.

51 — See, in particular, page 31 et seq. of the French translation of the application.

113. By adopting the Directive against the opinion of the German Government and by choosing a preventive prohibition, the Council as well as the Parliament considered that the effectiveness of that provision could justify the constraints created by the contested measure.

114. However, by its argument that the risks could be as effectively overcome by a protective system triggered on a case-by-case basis by a threat of market disturbances, the applicant seeks to show that the objective pursued could have been achieved without resorting to constraints such as that of the 'export' prohibition.

115. The Court must thus assess the respective advantages and disadvantages of the system under criticism and the one proposed by the Federal Republic of Germany, which presupposes that it will evaluate a complex economic situation.

116. In such a case, even if it cannot be ruled out that other means for achieving the desired result could have been envisaged, the Court cannot substitute its assessment for that of the Community legislature as to the appropriateness or otherwise of measures adopted — unless the applicant can prove a manifest error of assessment or misuse of power, or can show that the legislature clearly exceeded its discretion. [52]

117. Similarly, when the Community legislature is obliged, in connection with the adoption of rules, to assess their future effects, which cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question. [53]

118. In this case, the effects of the contested rules depend on hypothetical situations and are therefore for a large part uncertain. A comparison between the two schemes would imply, in particular, a precise analysis of the actual risks of market disturbances entailed by differences in the levels of protection, the ability of the relevant authorities to identify, within an adequate time period, the early warning signs indicating an imminent crisis and to stop undesirable movements of capital in time.

52 — See, in particular, Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 90 and, more recently, Case C-84/94 *United Kingdom* v *Council*, cited above, paragraph 58.

53 — See, in particular, Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 14 and Case C-280/93 *Germany* v *Council*, cited above, paragraph 90.

119. The German Government states the disadvantages of the solution put forward in the Directive, but does not show that a protective clause could provide a higher or even a comparable guarantee. It merely claims that, assuming there is a real risk of deposits being transferred from the banks of one Member State to branches of foreign banks offering better protection, there will be enough time to take protective measures to prevent any withdrawal which might threaten the existence of local banks. No evidence whatsoever has been given for that theory.

120. The fact that certain Treaty articles allow the Member States to use protective measures in other situations does not imply that there is a 'protective measures theory' in Community law which systematically favours the use of this kind of provision where there is a risk of disturbances in certain markets. In the exercise of their power of assessment, the Community authorites can therefore decide, having taken account of the characteristics of the market in question and the uncertain nature of the situation to be avoided, that a more effective and methodical system is required.

121. Moreover, the applicant does not show that the provisions to which it refers as providing for protective measures can be directly transposed into the field to which the Directive applies. Their purpose is either different (Article 226 of the Treaty relates to the serious deterioration in the economic situation of a given area and Council Regulation (EEC) No 3916/90 of 21 December 1990 concerns measures to be taken in the event of a crisis in the market in the carriage of goods by road [54]), or goes beyond the mere risk of movements of capital within the territory of the same Member State (Article 73 of the Treaty and Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of Treaty [55]).

122. Nor do those provisions involve any commitment on the part of the Community authorities requiring them, in the future, to use protective measures every time a market is threatened with disturbances. They only apply to the cases set out and can in no way bind the Community legislature.

123. On those grounds, it seems to me that the application for annulment of the second paragraph of Article 4(1) of the Directive should be rejected.

54 — Regulation on measures to be taken in the event of a crisis in the market in the carriage of goods by road (OJ 1990 L 375, p. 10).

55 — OJ 1988 L 178, p. 5.

B — *Obligation to accept branches in the deposit-guarantee schemes of the host Member State*

124. Article 4(2) of Directive 94/19 provides that:

'Where the level and/or scope, including the percentage, of cover offered by the host Member State guarantee scheme exceeds the level and/or scope of cover provided in the Member State in which a credit institution is authorized, the host Member State shall ensure that there is an officially recognized deposit-guarantee scheme within its territory which a branch may join voluntarily in order to supplement the guarantee which its depositors already enjoy by virtue of its membership of its home Member State scheme.

The scheme to be joined by the branch shall cover the category of institution to which it belongs or most closely corresponds in the host Member State.'

125. The German Government maintains that the obligation this imposes on a Member State to accommodate branches wishing to supplement the guarantee offered by their home Member State is contrary to the principle of home Member State control and infringes the principle of proportionality. [56]

126. None of the parties questions that *the principle of home Member State control* constitutes the guiding principle which has prevailed in the harmonization of the financial services sector.

127. However, it has not been shown that, in the various texts harmonizing banking law, the Community authorities have adopted that principle with the intention of applying it systematically to measures which fall within this sector in the future.

128. Were they to have done so, moreover, they would be bound only because of the need to respect the legitimate expectations of citizens entitled to expect the application of the principle in question, which is not the case here.

129. The Community authorities are therefore entitled to depart from the home Member State principle.

56 — Pages 37 to 49 of the French translation of the application.

130. It nevertheless remains the case that the Directive is chiefly based on this rule, as shown by the seventh recital in the preamble, which indicates that a branch no longer requires authorization in the host Member State, that its solvency will be monitored by the competent authorities of its home Member State and that the guarantee scheme 'can only be that which exists for that category of institution in the State in which that institution's head office is situated, in particular because of the link which exists between the supervision of a branch's solvency and its membership of a deposit-guarantee scheme'.

131. In this way it emphasizes that credit institutions do remain subject to the home Member State principle so that the contested departure from the rule seems to be limited to the specific situation where the host Member State offers a branch a higher guarantee than that offered by the home Member State.

132. Moreover, the applicant questions the need for the sort of supplementary cover set out in the Directive, which, although likely to achieve its objective, infringes the rights of the host Member State's deposit-guarantee schemes and could have been replaced by less restrictive measures, in accordance with the *principle of proportionality*.

133. I do not share that view. Firstly, the weight of the burden on the guarantee scheme of the host Member State should be seen in perspective. It concerns principally a supplementary guarantee which, until 31 December 1999, is limited to the amount above ECU 15 000 for the States in which, when the Directive is adopted, deposits are not covered to a limit of ECU 20 000 and to the amount above that for the others.

134. It should be observed that other Member States have already exceeded the minimum amount laid down by the Directive, thereby reducing accordingly the help sought from the most effective guarantee schemes. Yet more will wish to increase the level of guarantee in the future, in accordance with the objective of harmonization pursued by the Directive.

135. Secondly, if a branch considers that the difference between the guarantees is not sufficient to justify membership of a supplementary scheme, or if, whatever the level, the guarantee is not a decisive factor in gaining entry to the market of the host Member State, it is entitled not to join the supplementary cover scheme.

136. Furthermore, as the Parliament observes, voluntary membership of the supplementary guarantee scheme has to be subject to the conditions laid down by the

host Member State's scheme, which form an essential requirement in exchange for the benefits which it must guarantee should difficulties arise. [57]

137. This is clear from:

— Article 4(3) of the Directive, which provides: 'Admission shall be conditional on fulfilment of the relevant obligations of membership, including in particular payment of any contributions and other charges';

— paragraph (a) of Annex II to the Directive, according to which 'the host Member State scheme will retain full rights to impose its objective and generally applied rules on participating credit institutions'; and

— paragraph (d) of Annex II, which provides that 'host Member State schemes will be entitled to charge branches for supplementary cover on an appropriate basis which takes into account the guarantee funded by the home Member State scheme'.

138. If the fees paid by the credit institution are set on the basis of objective criteria which take into account the risk presented by the branch — which should logically relate to the difference between the guarantees or the absence of any guarantee offered by the home Member State scheme — the obligation on certain host Member States to provide supplementary cover does not seem to impose an excessive burden on their guarantee scheme.

139. The principles defined in Article 5 of the Treaty, in the 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, [58] and in Annex II to the Directive provide an answer to the argument that the deposit-guarantee scheme of the host Member State cannot adequately monitor the solvency of a branch or anticipate payment difficulties.

140. Under the first paragraph of Article 5 of the Treaty, Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting in particular from action taken by the institutions of the Community. That provision, the Court has ruled, lays a duty on Member States and their institutions

57 — Paragraph 62 of the defence.

58 — OJ 1977 L 322, p. 30.

'to cooperate in good faith' and to facilitate application of a Community-law provision, a Member State must 'assist every other Member State which is under an obligation under Community law'. [59]

141. Article 7(1) of Directive 77/780, as amended by the second Council Directive 89/646/EEC of 15 December 1989, [60] provides:

'The competent authorities of the Member States concerned shall collaborate closely in order to supervise the activities of credit institutions operating, in particular by having established branches there, in one or more Member States other than that in which their head offices are situated. They shall supply one another with all information concerning the management and ownership of such credit institutions that is likely to facilitate their supervision and the examination of the conditions for their authorisation and all information likely to facilitate the monitoring of such institutions, in particular with regard to liquidity, solvency, deposit guarantees, the limiting of large exposures, administrative and accounting procedures and internal control mechanisms.'

59 — Cases C-251/89 *Athanasopoulos and Others* [1991] ECR I-2797, paragraph 57, and Case 235/87 *Matteucci* [1988] ECR 5589, paragraph 19.

60 — OJ 1989 L 386, p. 1.

142. Paragraph (a) of Annex II to Directive 94/19 provides that 'the host Member State scheme ... will be able to require the provision of relevant information and have the right to verify such information with the home Member State's competent authorities'.

143. It is therefore recognized that the relevant authorities of the host Member State have the right of access to full information on the credit institution of another Member State, including its parent company.

144. The effectiveness of such a rule as regards the credit institution is guaranteed by Article 4(4) of the Directive, which allows the guarantee scheme, with the consent of the authorities competent for issuing the authorization, to exclude any branch which has not complied with the obligations incumbent on it as a member of a deposit-guarantee scheme.

145. Likewise, Article 4(4) obliges the authorities competent for issuing the authorization to take all appropriate measures to ensure that those obligations are complied with.

146. In this way, the home Member State is required to collaborate in such a way as to

provide the host Member State's scheme with the information necessary to carry out its task as regards foreign branches belonging to its scheme.

147. It follows that the constraints referred to by the German Government do not seem disproportionate in view of the objective pursued and that, consequently, it cannot reasonably be claimed that the principle of proportionality has been infringed.

C — *Compulsory membership*

148. According to Article 3(1) of the Directive, each Member State is to ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognized. Furthermore, unless an exception applies, no credit institution authorized in a Member State may take deposits unless it is a member of such a scheme.

149. The Federal Republic of Germany considers that such compulsory membership is contrary both to the third paragraph of Article 3b of the EC Treaty and to the principle of proportionality. [61]

150. It claims that the chosen solution of compelling membership of the guarantee scheme is contrary to the national German scheme, which amounts to 'well-established national arrangements' in the meaning given to that phrase by the Edinburgh European Council, [62] and not to 'alternative ways' provided to the Member States, within the meaning of the same text. The introduction of a guarantee scheme in all the Member States, or the harmonization of those schemes which already exist, would have been enough and the applicant considers that it is unnecessary to compel membership.

151. Finally, the German Government adds that, in order to protect savers, it is enough to guarantee their deposits up to a certain minimum cover, to require by law that, before an account is opened, customers are told whether or not the credit institution belongs to a guarantee scheme, to oblige the bank to pass on to the national supervisory authorities the verification reports drawn up by the guarantee scheme and, finally, to enable the national authorities to prevent a credit institution threatened with insolvency from receiving payments if it does not belong to a guarantee scheme.

152. The text mentioned above, an extract from the Edinburgh European Council, expresses the wish of the Council to respect

61 — Pages 50 to 55 of the French translation of the application.

62 — *Bulletin of the European Communities*, No 12, 1992, Annex 1 to Part A, I.19, p. 15.

'well-established national arrangements' and to provide Member States with 'alternative ways to achieve the objectives of the measures'.

153. However, according to the text, respect for national practices is guaranteed '[w]hile respecting Community law', and the use of 'alternative ways' depends on the appropriateness of the cases involved. By toning down its words the Council clearly conveys its concern not to subject Community legislation systematically to respect for national traditions.

154. In this case, the adoption of the Directive and the absence of any objection by Member States other than the Federal Republic of Germany, shows that the question whether well-established national arrangements are respected remains only with regard to the guarantee scheme of that one State.

155. The German Government states that, in October 1993, of the 300 institutions authorized to accept deposits and having their head office in Germany, only five belonged to no guarantee scheme, and that the ratio of unprotected to protected deposits amounted to a little over one in a thousand. [63]

156. As a result, the compulsory membership introduced by the Directive and accepted by the other Member States does not appear to amount to a real constraint for Germany capable of disrupting the operations of credit institutions set up in its territory.

157. Conversely, the option left for the Member States to choose the principle of a guarantee scheme with voluntary membership would create the risk, itself difficult to quantify, that a significant proportion of deposits would elude any guarantee. In the absence of adequate harmonization, the national markets would not offer all the security that banks' customers are entitled to expect.

158. An obligation to inform customers whether a credit institution is or is not a member of a guarantee scheme does not seem to me to provide future depositors with decisive guidance in their choice of bank.

63 — Page 36 of the French translation of the reply.

159. In their choice of credit institution, future customers are presented with many more decisive criteria, particularly when, having accepted the idea of entrusting their money to a particular bank, its future insolvency is often a distant concern and the need to belong to a guarantee scheme a superfluous precaution.

160. Finally, I should add that the system introduced by Article 3(1) of the Directive is not one of absolute constraint. It leaves the Member States free to introduce and recognize several deposit-guarantee schemes within their territory, thereby allowing the credit institutions to choose the one which will suit them best. Furthermore, the Directive gives the Member States the possibility, under certain conditions, of exempting a credit institution from compulsory membership 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 offered by a deposit-guarantee scheme. [64]

161. There are therefore no grounds for granting the application for annulment of the second sentence of the first paragraph of Article 3(1) of the Directive.

162. In conclusion, I consider the action instituted by the Federal Republic of Germany to be without foundation. On the contrary, it seems to me that the contested Directive pursues the harmonization of banking law by seeking a high degree of alignment between of the laws of the Member States, whilst allowing a respite for those States which do not yet have a deposit-guarantee scheme, or whose guarantee scheme does not yet offer an adequate level of protection, all in compliance with Community rules.

Conclusions

163. Consequently, I recommend that the Court should:

— reject the application;

— order the applicant to pay the costs.

64 — Second paragraph of Article 3(1) of the Directive.