Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

4 October 2018 *

(Reference for a preliminary ruling — Deposit guarantee schemes — Directive 94/19/EC — Article 1(3)(i) — Article 10(1) — Definition of 'unavailable deposit' — Liability of a Member State for harm caused to individuals by breaches of EU law — Sufficiently serious breach of EU law — Procedural autonomy of the Member States — Principle of sincere cooperation — Article 4(3) TEU — Principles of equivalence and effectiveness)

In Case C-571/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad — Varna (Varna Administrative Court, Bulgaria), by decision of 4 November 2016, received at the Court on 14 November 2016, in the proceedings

Nikolay Kantarev

v

Balgarska Narodna Banka,

intervening parties:

Okrazhna prokuratura — Varna,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, E. Levits, A. Borg Barthet, M. Berger and F. Biltgen, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– N. Kantarev, by K. Boncheva and M. Ekimdzhiev, advokati,

– Balgarska Narodna Banka, by A. Kalaydzhiev, R. Georgiev and M. Kalaydzhieva, advokati,

– the European Commission, by P. Mihaylova, A. Steiblytė and H. Krämer, acting as Agents,

* Language of the case: Bulgarian.

after hearing the Opinion of the Advocate General at the sitting on 7 June 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(3)(i) and of Article 10(1) of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ 1994 L 135, p. 5), as amended by Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 (OJ 2009 L 68, p. 3) ('Directive 94/19').

2 The request has been made in proceedings between Mr Nikolay Kantarev and the Balgarska Narodna Banka (Bulgarian Central Bank, 'the BNB') concerning the harm that Mr Kantarev claims to have sustained due to the late payment of the guaranteed deposit on the basis of deposits made to a current account opened with Korporativna Targovska Banka ('KTB Bank') which became unavailable.

Legal context

European Union law

Directive 94/19

3 The first, second, fourth, eighth, ninth, eleventh, twenty-first and twenty-fourth recitals of Directive 94/19 state:

'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;

Whereas, when restrictions on the activities of credit institutions are eliminated, consideration should be given to the situation which might arise if deposits in a credit institution that has branches in other Member States become unavailable; whereas it is indispensable to ensure a harmonised minimum level of deposit protection wherever deposits are located in the Community; whereas such deposit protection is as essential as the prudential rules for the completion of the single banking market;

…

Whereas the cost to credit institutions of participating in a guarantee scheme bears no relation to the cost that would result from a massive withdrawal of bank deposits not only from a credit institution in difficulties but also from healthy institutions following a loss of depositor confidence in the soundness of the banking system;

…

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

Whereas deposit-guarantee schemes must intervene as soon as deposits become unavailable;

…

Whereas the harmonisation of deposit-guarantee schemes within the Community does not of itself call into question the existence of systems in operation designed to protect credit institutions, in particular by ensuring their solvency and liquidity, so that deposits with such credit institutions, including their branches established in other Member States, will not become unavailable; whereas such alternative systems serving a different protective purpose may, subject to certain conditions, be deemed by the competent authorities to satisfy the objectives of this Directive; whereas it will be for those competent authorities to verify compliance with those conditions;

…

Whereas information is an essential element in depositor protection and must therefore also be the subject of a minimum number of binding provisions: …

…

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

4 The first paragraph of Article 1(1) and Article 1(3) of that directive provide:

'For the purposes of this Directive:

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

…

3. "unavailable deposit" shall mean a deposit that is due and payable but has not been paid by a credit institution under the legal and contractual conditions applicable thereto, where either:
   (i) the relevant competent authorities have determined that in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and to have no current prospect of being able to do so.

   The competent authorities shall make that determination as soon as possible and in any event no later than five working days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable; or
   (ii) a judicial authority has made a ruling for reasons which are directly related to the credit institution's financial circumstances which has the effect of suspending depositors' ability to make claims against it, should that occur before the aforementioned determination has been made.'

5 Article 7(1) and (1a) of the directive provides:

'1. Member States shall ensure that the coverage for the aggregate deposits of each depositor shall be at least EUR 50 000 in the event of deposits being unavailable.

1a. By 31 December 2010, Member States shall ensure that the coverage for the aggregate deposits of each depositor shall be set at EUR 100 000 in the event of deposits being unavailable.

…’

6 Under Article 10(1) of the directive:

‘Deposit-guarantee schemes shall be in a position to pay duly verified claims by depositors in respect of unavailable deposits within 20 working days of the date on which the competent authorities make a determination as referred to in Article 1(3)(i) or a judicial authority makes a ruling as referred to in Article 1(3)(ii). That time limit includes the collection and transmission of the accurate data on depositors and deposits, which are necessary for the verification of claims.

In wholly exceptional circumstances, a deposit-guarantee scheme may apply to the competent authorities for an extension of the time limit. Such extension shall not exceed 10 working days.

…’

Directive 2009/14

7 Recitals 11 and 12 of Directive 2009/14 state:

‘(11) Furthermore, in cases where the payout is triggered by a determination of the competent authorities, the decision period of 21 days currently provided for should be reduced to five working days in order not to impede rapid payout. The competent authorities should, however, first be satisfied that a credit institution has failed to repay deposits which are due and payable. That assessment should be subject to the judicial or administrative procedures of the Member States.

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

Bulgarian law

8 Article 1(1) and (2) of the Zakon za otgovornostta na darzhavata i obshtinite za vredi (Law on Liability of the State and of Municipalities for Damage) (DV No 60, of 5 August 1988, ‘the Law on State Liability’) provides:

‘1. The State and the municipalities shall be liable for damage sustained by citizens and legal persons following illegal acts, actions or failure to act by their bodies and employees within the scope or at the time of administrative activity.

2. Actions brought under paragraph 1 shall be heard in accordance with the procedure laid down in the Administrativnoprotsesualen kodeks [Code of Administrative Procedure] …’

9 Article 8(1) and (3) of that law provides:

‘1. Compensation for damage sustained under the conditions laid down in Article 1(1) to Article 2(1) and (2) and Article 2a to Article 2b(1) shall be claimed in accordance with the procedure laid down in this Law and not according to the ordinary procedure of civil law.

…

3. Where a law or decree provides for a specific form of compensation, this Law shall not apply.'

10 Article 45 of the Zakon za zadalzheniata i dogovorite (Law on Obligations and Contracts) (DV No 275, of 22 November 1950) provides:

'Any person who causes harm to another as a result of his wrongdoing shall compensate such harm. In all cases of harm resulting from unlawful action, wrongdoing shall be presumed unless proved otherwise.'

11 Under Article 49 of the Law on Obligations and Contracts:

'Any person who entrusts another to act on his behalf shall be liable for the harm caused by the latter within the scope or in the performance of such action.'

12 The Zakona za garantirane na vlogovete v bankite (Law on Guarantees for Bank Deposits) (DV No 49, of 29 April 1998) governs the creation, purpose and activities of the Bank Deposit Guarantee Fund ('the Fund'). In accordance with Article 1a of the Supplementary Provisions 2009 (DV No 44, of 12 June 2009), that law transposes the provisions of Directives 94/19 and 2009/14.

13 Article 23(1), (2), (5) and (6) of that law reads as follows:

'1. The Fund shall reimburse the bank debt in question to the depositors thereof up to the thresholds guaranteed where the [BNB] has withdrawn the banking licence of the commercial bank.

2. The Fund shall reimburse the guaranteed amounts of the deposits through one or several of the commercial banks designated by the management board.

…

5. The reimbursement of the sums by the Fund shall begin no later than 20 working days from the date on which the [BNB] took the decision referred to in paragraph 1.

6. In exceptional circumstances, the Fund may extend the period referred to in paragraph 5 by no more than 10 working days.'

14 Article 24(1) of that law provides:

'From the date on which the [BNB] took the decision referred to in Article 23(1) there shall be subrogation of rights from those of the depositors as against the bank to the Fund up to the guaranteed amount irrespective of the sum and irrespective of the date on which the Fund made payments under the guarantee to each depositor.'

15 The Zakona za Bulgarskata narodna banka (Law on the Bulgarian Central Bank) (DV No 46, du 10 June 1997) governs the status, objectives and responsibilities of the BNB.

16 Article 1(1) of that law provides:

'The [BNB] is the central bank of the Republic of Bulgaria. It is a legal person.'

17 Article 2(6) of that law provides:

'The [BNB] shall be responsible for the regulation and the implementation of the supervision of the activities of the other banks established in the country in order to maintain the stability of the banking system and protect the interests of depositors.'

18 Under Article 16 of the law, the management board of the BNB shall, inter alia, 'grant, refuse and withdraw the licences of banking, payment systems operators, payment and electronic money institutions pursuant to the conditions and detailed rules laid down in legislation; … place banks under special supervision pursuant to the conditions and detailed rules laid down in the Law on Credit Institutions'.

19 The Zakona za kreditnite institutsii (Law on Credit Institutions) (DV No 59, of 21 July 2006) governs the conditions and licencing procedure, the exercise of credit institutions' activities, monitoring their compliance with prudential requirements and the cessation of their activities for the purposes of guaranteeing a stable, reliable and secure banking system, the protection of depositors' interests and information duties by the BNB in the field of banking regulation and prudential supervision.

20 Under Article 1(2) of the Law on Credit Institutions, the BNB is the 'competent authority in the Republic of Bulgaria for banking supervision within the meaning of Article 4(1)(40) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1)'.

21 Article 36(2) and (3) of that law provides:

'2. The [BNB] must withdraw a licence granted to a bank in the event of insolvency if:

(1) the bank has not paid a payable monetary obligation for more than seven working days, the non-payment is directly related to the financial situation of that bank and the [BNB] considers it improbable that the bank will pay payable monetary obligations within an appropriate time, or

(2) its equity capital is in deficit.

3. The [BNB] shall take the decision referred to in paragraph 2 within five working days from the declaration of insolvency.'

22 Article 79(8) of that law provides:

'The [BNB], its bodies and agents shall not be liable for harm sustained in the performance of their duties of supervision, unless they have acted intentionally.'

23 Article 115 of the Law on Credit Institutions reads as follows:

'1. For the purposes of restructuring a bank exposed to a risk of insolvency, the [BNB] may place that bank under special supervision.

2. A bank shall be regarded as exposed to a risk of insolvency if:

(1) the proportion of the total equity capital of the bank is less than the stipulated minimum level;

(2) the [BNB] considers that the liquid assets of the bank will not be sufficient for the bank to perform its obligations on the day they become payable; or

(3) the bank has not paid one or several obligations payable to its creditors.

…’

24 Under Article 116 of that law:

‘1. In the cases referred to in Article 115(1) the [BNB] shall place the bank in question under special supervision and:

(1) appoint receivers, if receivers have not yet been appointed, and determine the extent of their powers;

(2) set the duration and form of the special supervision.

2. In the cases referred to in paragraph 1, the [BNB] may:

(1) lower the rate of interest on the obligations of the bank to their average market value;

(2) suspend in full or in part the performance of all obligations or certain obligations of that bank for a specified period;

(3) restrict its activities in full or in part;

…’

25 Article 119(5) of that law provides:

‘In the cases referred to in Article 116(2)(2), the bank shall not be financially liable for the non-performance of obligations the performance of which has been suspended following special supervision. During special supervision there shall be no late payment interest or interest for the non-performance of the monetary obligations of a bank the performance of which has been suspended, whereas standard interest on such obligations shall be payable and paid after the bank is no longer under special supervision.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

26 On 4 March 2014, the applicant concluded with KTB Bank a framework agreement on payment services and an addendum to that agreement concerning the opening of a current account. That addendum stated, inter alia, that the amounts paid into that account were covered by the Fund. In addition, there was supposed to be a fixed-rate interest on the amounts paid into that account, the interest of which should have been paid once a year or on the date of closure of that account and was also covered by the Fund.

27 Since KTB Bank was experiencing a liquidity crisis following mass withdrawals of deposits it held, on 20 June 2014, its representatives made a request to the BNB for that credit institution to be placed under special supervision. They also notified the BNB that the credit institution had suspended payments and all banking transactions. By a decision of the same day, the management board of the BNB placed KTB Bank under special supervision for a period of three months. Performance of the credit institution’s obligations was suspended and its activities limited. Receivers were appointed and instructed by the BNB to have the assets and the liabilities of that institution audited by independent auditors.

28 According to the audit, KTB Bank's financial results were in deficit and it no longer met the requirements for equity capital under EU law. Consequently, by a decision of 6 November 2014, the BNB, first, withdrew KTB Bank's banking licence, second, agreed that measures should be taken for instituting insolvency proceedings against KTB Bank and, third, decided that the Fund was to be notified.

29 The account of the applicant in the main proceedings was closed *ex officio* on 6 November 2014, which triggered, under Bulgarian law, the reimbursement of Mr Kantarev's deposit under the deposit-guarantee scheme.

30 On 4 December 2014, a Bulgarian credit institution, instructed by the Fund to reimburse the deposits held by KTB Bank, paid Mr Kantarev in the amount of 86 973.81 Bulgarian leva (BGN) (approximately EUR 44 465), including interest due on 6 November 2014, the date on which KTB Bank's licence was withdrawn, namely BGN 2 673.81. In that regard, until 1 July 2014, the interest rate on the deposit of the applicant in the main proceedings complied with the terms of the contract whereas, from that date and until 6 November 2014, the applicable interest rate was set by a decision of the management board of the BNB of 30 June 2014, which reduced the interest rate on deposits with KTB Bank.

31 Subsequently, in a judgment of 22 April 2015, the Sofiyski gradski sad (Sofia City Court, Bulgaria) declared that KTB Bank had been insolvent from 6 November 2014. The BNB appealed against that part of the judgment before the Sofiyski apelativen sad (Court of Appeal, Sofia, Bulgaria) which set aside the judgment at first instance by finding that the date of insolvency was 20 June 2014, the date at which KTB Bank's equity capital was in deficit.

32 In early 2016, Mr Kantarev brought an action against the BNB before the Administrativen sad Varna (Varna Administrative Court, Bulgaria), under Article 4(3) TEU, on the ground that, irrespective of the Law on Guarantees for Bank Deposits, the BNB should have found that there were unavailable deposits in accordance with Article 1(3)(i) of Directive 94/19, that is to say no later than five working days after the adoption of the decision to place KTB Bank under special supervision. The BNB therefore breached EU law and must pay him damages. In that regard, Mr Kantarev claims that the late reimbursement of his deposit caused him to lose late payment interest.

33 By order of 12 March 2016, the referring court stayed the main proceedings on the ground that the conditions set out in Article 1(1) of the Law on State Liability had not been satisfied. That order was, however, set aside by the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) in an order of 18 July 2016. In that order, the referring court provided the referring court with guidance in respect of several factors to be taken into account in disposing of the case.

34 In the light of that guidance, the referring court considers that the success of Mr Kantarev's action depends, first, on whether the BNB is liable according to the conditions set out in Article 1(1) of the Law on State Liability or according to the conditions set out in the Law on Obligations and Contracts. It states, in that regard, that the case-law of the Bulgarian courts is inconsistent as regards the jurisdiction of the civil or administrative courts to rule on actions for damages for harm caused by a breach of EU law. It specifies that the Varhoven administrativen sad (Supreme Administrative Court) has been inconsistent in its case-law by holding, in some cases, that, since the BNB is neither an administrative body nor a body financed by the State budget, it was not subject to the Law on State Liability and, in other cases, that it should be regarded as subject to that law on the ground that it is a body with State powers.

35 The referring court also states that there are substantial differences in terms of procedure and the constituent elements of liability laid down in the Law on State Liability and the Law on Obligations and Contracts. Thus, the Law on State Liability, which applies only if harm is sustained as the result of an annulled illegal measure or unlawful action or failure to act by the administration, provides for a system of strict liability. Under that law, the applicant may pay a fixed fee on bringing the action and

may bring the action before the courts of his habitual residence. By contrast, in the case of an action brought under the Law on Obligations and Contracts, the applicant must pay the State a fee corresponding to a certain percentage of the value in dispute and must bring the action before the courts of the defendant's habitual residence or the place where the harm occurred. It is also necessary, as a substantive condition for an action such as that in the main proceedings, that the applicant prove that the BNB was negligent or the existence of an intentional act on the part of that institution.

36 Second, in terms of substance, it is for the referring court to determine whether the BNB was under a duty to take the decision provided for under Article 1(3)(i) of Directive 94/19 as a result of which it is necessary, in disposing of the case, to ascertain whether that provision was correctly transposed by the Bulgarian legislation. In that context, the referring court raises the issue of the conditions set out in that directive for determining the unavailability of deposits, in order to ascertain the date on which those conditions were satisfied. In that context, the referring court finds that, first, in order to trigger the application of the deposit-guarantee, the BNB was able merely to withdraw a credit institution's licence and, second, the BNB decided, before withdrawing KTB Bank's licence, to place KTB Bank under special supervision in order to protect it from insolvency. In that regard, the referring court considers that reimbursement under the deposit-guarantee by the Fund is independent of the decision to place under special supervision.

37 Third, the referring court asks, in essence, whether Article 1(3)(i) and Article 10(1) of Directive 94/19 grant depositors the right to claim damages from the State for breach, by the competent authority, of the period for determining the unavailability of deposits of a credit institution.

38 In that regard, the referring court states that the national case-law is again inconsistent. Depositors' actions against the BNB have been upheld on the ground that the BNB breached provisions of EU law with direct effect and other actions have been dismissed on grounds that the delay in reimbursement was attributable to the Fund and not to the BNB, that reimbursement was impossible in so far as the institution in question's banking licence had not been withdrawn or that the provisions of Directive 94/19 did not have direct effect and that, if it were found that the directive had been incorrectly transposed, it would not be the BNB which was liable but the State itself.

39 The referring court considers that the BNB has breached EU law, but harbours doubts as to whether there has been a 'sufficiently serious breach', within the meaning of EU law. It finds, in that regard, that the BNB took the decision on the restructuring measure in question in the general interest by thus providing protection to depositors equivalent to that provided for in Directive 94/19 and that interest applied to the deposits throughout that period.

40 In those circumstances, the Administrativen sad Varna (Varna Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

(2) Are Article 4(3) TEU and the requirements laid down in the judgment of the Court of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428) to be interpreted as precluding [the possibility of] actions for damages based on an infringement of EU law being heard in a procedure such as that under Article 45 and Article 49 of the Law on Obligations and

Contracts, which requires payment of a proportionate fee and proof of fault, and also in a procedure such as that under Article 1 of the Law on Liability of the State and of Municipalities for Damages, which provides for objective liability and includes special rules to facilitate access to the courts, but which is nevertheless applicable only to damage arising from annulled unlawful legal measures and unlawful action/failures to act by the administration and does not cover infringements of EU law committed by other State authorities through legal action/failures to act not annulled under the procedure in question?

(3) Are Article 1(3)(i) and Article 10(1) of Directive 94/19 to be interpreted as permitting a legislative approach such as that taken in Article 36(3) of the Law on Credit Institutions and Article 23(5) of the Law on Guarantees for Bank Deposits (repealed), under which "the condition that the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and to have no current prospect of being able to do so" is synonymous with the declaration of the insolvency of the institution and the withdrawal of its authorisation and the deposit-guarantee scheme takes action from the time of withdrawal of the banking licence?

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

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

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

(7) Do Article 1(3)(i) and Article 10(1) of Directive 94/19 have direct effect and do they confer on holders of deposits in a bank which is a member of a deposit-guarantee scheme, in addition to their right to compensation under that scheme up to the amount specified in Article 7(1) of Directive 94/19, the right to hold the State liable for an infringement of EU law by bringing an action against the authority required to determine the unavailability of deposits, seeking compensation for the damage which has arisen as a result of the late payment of the guaranteed deposit, if the decision under Article 1(3)(i) was taken after the expiry of the time limit of five days laid down in the directive and that lateness is due to the effect of a reorganisation measure which was intended to protect the bank from insolvency and was adopted by that authority, or, in circumstances like those in the main proceedings, do they permit a national provision such as

Article 79(8) of the Law on Credit Institutions, under which the [BNB], its organs and persons authorised by them are liable for damage arising in the performance of their supervisory activity only if it was caused intentionally?

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

Consideration of the questions referred

Admissibility

41 In disputing the admissibility of the request for a preliminary ruling, first, the BNB claims that the questions referred are irrelevant and unconnected to the facts in the main proceedings. In addition, it claims that it is for the national court and not the Court of Justice to determine whether Mr Kantarev actually sustained harm and, if there has been a breach of Directive 94/19, the Bulgarian legislature alone is responsible as the only body empowered to transpose that directive into national law. Second, the BNB maintains that it follows from the judgment of 12 October 2004, *Paul and Others* (C-222/02, EU:C:2004:606) that an individual cannot claim compensation for harm resulting from defective supervision on the part of the national authority responsible for supervising credit institutions if the reimbursement of depositors provided for by Directive 94/19 is ensured.

42 In that regard, in the first place, the procedure provided for in Article 267 TFEU is a means of cooperation between the Court of Justice and national courts. It follows that it is for the national courts alone which are seised of the case and are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court (judgment of 2 March 2017, *Pérez Retamero*, C-97/16, EU:C:2017:158, paragraph 20 and the case-law cited).

43 Consequently, where questions submitted by national courts concern the interpretation of a provision of European Union law, the Court is, in principle, obliged to give a ruling (judgment of 2 March 2017, *Pérez Retamero*, C-97/16, EU:C:2017:158, paragraph 21 and the case-law cited).

44 Nevertheless, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted to it (judgment of 2 March 2017, *Pérez Retamero*, C-97/16, EU:C:2017:158, paragraph 22 and the case-law cited).

45 The present case does not fall under either situation. The referring court has stated that, in support of his action for damages, the applicant in the main proceedings relies on an incorrect application of Directive 94/19 and has stated reasons as to why it considers the answers to the questions referred necessary in order to dispose of the case in the main proceedings.

46 In the second place, as regards the line of argument based on the judgment of 12 October 2004, *Paul and Others* (C-222/02, EU:C:2004:606), Article 267 TFEU always allows a national court, if it considers it desirable, to refer questions of interpretation to the Court (judgment of 26 May 2011, *Stichting Natuur en Milieu and Others*, C-165/09 to C-167/09, EU:C:2011:348, paragraph 52 and the case-law cited). Thus the relevance and scope of that judgment must be examined in the course of the analysis of the substance of the questions referred.

47 Accordingly, the request for a preliminary ruling must be regarded as admissible.

Substance

The third and sixth questions

48 By its third and sixth questions, which it is appropriate to consider together, in the first place, the referring court asks, in essence, whether Article 1(3), and Article 10(1) of Directive 94/19 must be interpreted as precluding, first, national legislation according to which the determination that deposits have become unavailable is concomitant with the insolvency of that credit institution and the withdrawal of that institution's banking licence and, second, derogation from the time limits provided by those provisions for the purposes of determining that deposits have become unavailable and of reimbursing those deposits on the ground that the credit institution must be placed under special supervision.

49 In that regard, it should be made clear that it is clear from the express wording of the first paragraph of Article 1(3)(i) of Directive 94/19 that the necessary and sufficient condition for determining whether a deposit that is due and payable has become unavailable is that, in the view of the relevant competent authority, a credit institution appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and to have no current prospect of being able to do so.

50 In addition, the second paragraph of Article 1(3)(i) of Directive 94/19 specifies that that determination must be made, by that relevant competent authority, 'as soon as possible' and 'no later than five working days after first becoming satisfied [that the credit institution in question] has failed to repay deposits which are due and payable'.

51 It follows from those provisions that the determination that deposits of a credit institution have become unavailable cannot depend on the insolvency of the credit institution in question or on the withdrawal of its banking licence.

52 First, the unavailability of deposits must be determined within a very short period, without waiting for the necessary conditions for initiating insolvency proceedings or withdrawing a banking licence to be satisfied.

53 Second, the circumstances of insolvency of the credit institution and withdrawal of its banking licence differ from those set out in Article 1(3)(i) of Directive 94/19. For instance, withdrawal of a credit institution's banking licence may, inter alia, result from failure to join a deposit-guarantee fund without, however, meaning that the deposits of that institution have become unavailable.

54 In addition, a credit institution's insolvency and withdrawal of its banking licence tend to indicate that the credit institution is facing long-term difficulties. By contrast, since Article 1(3)(i) of Directive 94/19 subjects determination of the unavailability of deposits to the condition of the credit institution appearing unable 'for the time being' to repay the deposit and of having no current prospect of being able to do so, the unavailability may be temporary.

55 It follows that the determination of unavailability of deposits must take place even in the event of temporary difficulties, provided that the credit institution in question is unable to repay a deposit that is due and payable and that there is no current prospect of it being able to do so.

56 That interpretation is borne out by the twofold objective pursued by Directive 94/19. In that regard, it should be noted that that directive is intended, as its first and fourth recitals indicate, both to protect depositors and to ensure the stability of the banking system, by preventing massive withdrawal of deposits not only from a credit institution in difficulties but also from healthy institutions following a loss of public confidence in the soundness of the banking system (judgment of 22 March 2018, *Anisimovienė and Others*, C-688/15 and C-109/16, EU:C:2018:209, paragraph 83).

57 As regards that twofold objective, it is imperative that the deposit-guarantee intervene, and as stated in the eighth and ninth recitals of that directive, within a 'very short period' as soon as a credit institution's deposits become unavailable.

58 First, the protection of depositors requires that their deposits be reimbursed as soon as possible from the time of their unavailability so that such depositors are not deprived of their savings and not, as a result, unable, in particular, to meet their daily expenses. Second, the stability of the banking system also calls for the swift reimbursement of depositors in order to avoid a credit institution's financial difficulties, even if temporary, from resulting in massive withdrawal of deposits and those difficulties thereby spreading to the rest of the banking system.

59 Indeed, having regard to the wording of Article 1(3)(i) of Directive 94/19 and in particular to the fact that that provision states that the relevant competent authority must determine that deposits have become unavailable if 'in [its] view' the necessary conditions in that regard are satisfied, that authority has some latitude. However, that latitude concerns its assessment of the conditions set out in that provision, not those conditions as such, nor the timing of such a determination.

60 As regards the possibility of derogating from the time limit for determining whether deposits are unavailable so that the credit institution may be placed under special supervision, clearly the period set out in the second paragraph of Article 1(3)(i) of Directive 94/19 is, according to the wording of that provision, a mandatory time limit, from which no other provision of that directive provides for a derogation.

61 In addition, to allow the relevant competent authorities to derogate from the time limit set out in Directive 94/19 for determining that deposits are unavailable so that the credit institution may be placed under special supervision would run counter to the requirement of prompt action which follows from that directive. It is clear both from the twofold objective pursued by that directive, as mentioned in paragraph 56 above, and from the reduction of that time limit, from 21 to five days, introduced by Directive 2009/14, that such a determination must be made within a very short period.

62 Furthermore, the explanatory memorandum to the Proposal for a Council Directive on deposit-guarantee schemes of 4 June 1992 [COM(92) 188 final, OJ 1992 C 163, p. 6], which led to the adoption of Directive 94/19, states, precisely, that the payment of the deposit-guarantee should be based on the objective finding that a depositor has been deprived of the funds which should have been repaid by the credit institution 'in order to speed up the payout of the guaranteed amount' and 'not to link this payout with the uncertainties of the procedures of reorganising and liquidating the credit institution'.

63 Indeed, recital 12 of Directive 2009/14 states that 'deposits may be considered unavailable once [measures for the] early intervention or reorganisation [of the credit institution in question] have been unsuccessful'.

64 However, first, recital 12 refers only to the possibility of regarding deposits as unavailable where early intervention or reorganisation measures have been unsuccessful without subjecting the determination of unavailability to the fact that such preventative measures have failed.

65 Second, it is to be noted that the second sentence of that recital specifies that that possibility 'should not prevent competent authorities from making further restructuring efforts during the payout delay' and therefore implies that such measures do not affect the determination of the unavailability of deposits, nor their reimbursement.

66 As regards the time limit for reimbursing the deposits set out in Article 10(1) of Directive 94/19, it is clear from the wording of that provision that an extension of that time limit is possible only in the case of 'wholly exceptional circumstances' and that such extension 'shall not exceed 10 working days'.

67 As regards a defaulting credit institution, placing it under special supervision, in order to prevent it from becoming insolvent, is not a wholly exceptional circumstance, but, on the contrary, a circumstance inherent to the activities of a credit institution and to the measure which may be adopted to remedy such a situation.

68 In any event, the fact that the extension of the time limit for reimbursing deposits is reduced to 10 working days shows that that extension does not concern measures which could be adopted in order to avoid that credit institution from becoming insolvent, since those measures require more than 10 days before taking full effect.

69 In the light of all those factors, the answer to the third and sixth questions is that Article 1(3), and Article 10(1) of Directive 94/19 must be interpreted as precluding, first, national legislation according to which the determination that deposits have become unavailable is concomitant with the insolvency of that credit institution and the withdrawal of that institution's banking licence and, second, derogation from the time limits provided by those provisions for the purposes of determining that deposits have become unavailable and of reimbursing those deposits on the ground that the credit institution must be placed under special supervision.

The fourth question

70 By its fourth question, the referring court asks, in essence, whether Article 1(3)(i) of Directive 94/19 must be interpreted as meaning that the unavailability of deposits held by a credit institution must be determined expressly by the relevant competent authorities or whether it may be inferred from other acts of those authorities — such as the decision of the BNB to place KTB Bank under special supervision — or presumed from circumstances such as those in the main proceedings.

71 In that regard, the point must be made that Article 1(3)(i) of Directive 94/19 merely sets out the circumstances in which the relevant competent authorities must make a determination that the deposits of a credit institution are unavailable, and does not specify the form in which such a determination must be made.

72 However, it should be noted that, first, within the scheme of Directive 94/19, a determination that the deposits of a credit institution are unavailable triggers reimbursement of deposits by the guarantee schemes and, second, in accordance with Article 10(1) of that directive, that determination is the starting point for the period of time in which that reimbursement must take place.

73 Thus, in the light of those factors, the unavailability of deposits of a credit institution, within the meaning of Article 1(3)(i) of Directive 94/19 must necessarily be expressly determined by the relevant competent authorities responsible for determining whether deposits are unavailable, since any other interpretation would create a situation of uncertainty, which that directive precisely seeks to remedy.

74 It is clear from the twenty-first recital of Directive 94/19 that information is an essential element in depositor protection. In addition, as set out in paragraph 56 above, that directive seeks to achieve two closely related objectives, namely the stability of the banking system and depositor protection. Those objectives require that depositors may determine with certainty whether their deposits are unavailable and the moment from which they will be subject to a reimbursement procedure, in order to avoid any panic capable of jeopardising the stability of the banking system.

75 Furthermore, since the determination that deposits are unavailable triggers the reimbursement of those deposits and is the starting point for the period of time in which it must take place, depositors and the depositor-guarantee fund must be provided with an express, clear and specific decision enabling them to know swiftly and with certainty whether, following the assessment set out in Article 1(3)(i) of Directive 94/19, deposits have been determined to be unavailable. Such a decision ensures, first, that the deposit-guarantee fund is in a position to initiate a reimbursement procedure and to ascertain when the time limit set out in Article 10(1) of Directive 94/19 begins to run and, second, that depositors may rely on the rights conferred on them by that directive.

76 It follows that an express decision must be adopted in order to determine whether deposits are unavailable and that the deposit-guarantee fund must be informed of that decision as soon as it is adopted.

77 In addition, the unavailability of deposits cannot be inferred from other acts taken by the competent national authority such as placing a bank under special supervision or presumed on the basis of circumstances such as those at issue in the main proceedings, since they do not result from an assessment of the unavailability of deposits such as the assessment laid down in Article 1(3)(i) of Directive 94/19.

78 Therefore, the answer to the fourth question is that Article 1(3)(i) of Directive 94/19 must be interpreted as meaning that the unavailability of deposits within the meaning of that provision must be determined expressly by the competent national authority and cannot be inferred from other acts of the national authorities — such as the decision of the BNB to place KTB Bank under special supervision — nor presumed from circumstances such as those in the case in the main proceedings.

The fifth question

79 By its fifth question, the referring court asks, in essence, whether Article 1(3) of Directive 94/19 must be interpreted as meaning that a determination that a bank deposit is unavailable, within the meaning of that provision, is subject to the condition that the account holder must first make an unsuccessful request for payment of funds from the credit institution.

80 In that regard, it follows from Article 1(1) read in conjunction with Article 1(3)(i) of Directive 94/19 that, although deposits must be repaid under the legal and contractual conditions applicable, the assessment of their unavailability is, by contrast, determined exclusively by the conditions laid down in Article 1(3)(i) of that directive.

81 That provision does not subject a determination that funds are unavailabile to a prior unsuccessful payout of funds.

82 As the European Commission correctly observes that determination is related to the objective financial situation of the credit institution and concerns the deposits held by that institution as a whole and not each of the deposits which it holds. Thus, the fact that that credit institution has not paid out certain deposits and that the conditions set out in Article 1(3)(i) of Directive 94/19 are satisfied is sufficient for a determination that all deposits held by that institution are unavailable.

83 Furthermore, the twofold objective pursued by Directive 94/19, as is clear from paragraph 56 above, could not be achieved if the holders of a deposit were required to have made an unsuccessful request for payment of funds of the credit institution in question in order for that deposit to be capable of being regarded as 'unavailable'.

84 First, such a requirement would be liable to diminish depositor confidence in the deposit-guarantee scheme and to give rise to situations of massive requests for payment of deposits.

85 Second, such a requirement would complicate the procedure for determining whether deposits were unavailable and jeopardise the objective of prompt action in Directive 94/19.

86 Moreover, in circumstances such as those in the main proceedings, where all of a credit institution's transactions and payments have been suspended, such a condition is even less justified since it is not necessary and its satisfaction would, in practice, be very difficult, if not impossible, given that the holder of a deposit is not necessarily able to prove that he has made a prior request for payment and that that request was unsuccessful.

87 Therefore, the answer to the fifth question referred is that Article 1(3)(i) of Directive 94/19 must be interpreted as meaning that a determination that a bank deposit is unavailable, within the meaning of that provision, cannot be subject to the condition that the account holder must first make an unsuccessful request for payment of funds from the credit institution.

The seventh and eight questions

88 By its seventh and eighth questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 1(3)(i) and Article 10(1) of Directive 94/19 must be interpreted as having direct effect and conferring on depositors the right to bring an action for damages for harm allegedly sustained due to late reimbursement of deposits, on the ground of State liability, for a breach of EU law against the public authority responsible for determining whether the deposits of a credit institution, such as the BNB, are unavailable. If so, the referring court asks for further clarification on the concept of a 'sufficiently serious' breach within the meaning of EU law and is uncertain of the relevance of certain facts of the case for the purposes of that assessment.

89 As a preliminary matter, it is important to note that, contrary to what the BNB submits and as the Advocate General stated in points 78 to 82 of her Opinion, the facts which gave rise to the case in the main proceedings may be distinguished from those giving rise to the judgment of 12 October 2004, *Paul and Others* (C-222/02, EU:C:2004:606), as a result of which that judgment cannot provide answers to the questions posed by the referring court.

90 It is clear from the judgment of 12 October 2004, *Paul and Others* (C-222/02, EU:C:2004:606) that, where national law has established a deposit-guarantee scheme, Directive 94/19 does not preclude national legislation which limits individuals from claiming damages for harm sustained by insufficient or deficient supervision on the part of the national authority supervising credit institutions or from pursuing State liability under EU law on the ground that those responsibilities of supervision are fulfilled in the general interest.

91 In the present case, the referring court wishes to know whether a Member State may be held liable for an incorrect transposition of Directive 94/19 and for an incorrect implementation of the deposit-guarantee mechanism set out in that directive.

92 In that regard, it should be noted that, according to settled case-law, the principle of State liability for loss and damage caused to individuals as a result of breaches of European Union law for which the State can be held responsible is inherent in the system of the treaties on which the European Union is based (judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 29 and the case-law cited).

93 Thus, it is for each Member State to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with EU law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation (judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 46 and the case-law cited).

94 In addition, the Court has repeatedly held, concerning the conditions for incurring the non-contractual liability of the State to make reparation for loss and damage caused to individuals as a result of breaches of EU law for which it is responsible, that individuals who have been harmed have a right to reparation if three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between that breach and the loss or damage sustained by the individuals (judgment of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 22 and the case-law cited).

95 It also follows from settled case-law that it is, in principle, for the national courts to apply the criteria for establishing the liability of Member States for damage caused to individuals by breaches of EU law, in accordance with the guidelines laid down by the Court for the application of those criteria (judgments of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 48 and of 19 June 2014, *Specht and Others*, C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 100).

96 As to whether Article 1(3)(i) and Article 10(1) of Directive 94/19 have direct effect and confer the right to bring an action for damages for the harm caused by late reimbursement of deposits, it must be made clear from the outset that, since the applicant is relying, before the referring court, on harm caused by a breach of Article 1(3)(i) of Directive 94/19 by the BNB, there is no need for the Court to rule on Article 10(1) of that directive.

97 As to whether Article 1(3)(i) of Directive 94/19 has direct effect, although such a condition is not required by the case-law for the purposes of holding a Member State liable for a breach of EU law (see, by analogy, judgment of 5 March 1996, *Brasserie du pêcheur* and *Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraphs 21 and 22), the referring court nevertheless states that if that provision has direct effect, the BNB breached EU law by failing to apply it in lieu of the national legislation transposing Directive 94/19.

98 In that regard, it must be stated that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the Member State where the latter has failed to transpose the directive into domestic law by the end of the period prescribed or where it has failed to transpose it correctly (judgment of 25 June 2015, *Indėlių ir investicijų draudimas and Nemaniūnas*, C-671/13, EU:C:2015:418, paragraph 57).

99 Indeed, Article 1(3)(i) of Directive 94/19 leaves it to the discretion of the Member States to designate the authority responsible for determining whether deposits are unavailable and to the discretion of that authority to assess the financial situation of the relevant credit institution.

100 However, by stating that the relevant authority must determine whether deposits are unavailable as soon as possible and in any event no later than five working days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable, that provision lays down an unconditional and sufficiently precise obligation with which it is for the BNB, the authority designated for determining whether deposits are unavailable, to ensure compliance within the course of its responsibilities.

101 Such an interpretation does not affect the fact that the matter of whether a public authority has breached EU law must be determined by the national courts according to the law of the Member State in question.

102 As to whether Article 1(3)(i) of Directive 94/19 constitutes a rule of EU law intended to confer rights on specific individuals, it should be noted that Directive 94/19 aims, inter alia, to protect depositors.

103 In addition, the determination that deposits are unavailable directly affects the legal situation of a depositor since that determination triggers the deposit-guarantee mechanism and, accordingly, the reimbursement of depositors.

104 In those circumstances, it is clear that Article 1(3)(i) of Directive 94/19 constitutes a rule of EU law intended to confer rights on individuals.

105 As regards the condition in respect of there being a sufficiently serious breach of EU law, it should be noted that, according to the Court's case-law, such a breach implies a manifest and grave disregard by the Member State for the limits set on its discretion. The factors which may be taken into consideration in that regard include, inter alia, the clarity and precision of the rule breached, the measure of discretion left by that rule to the national authorities, whether any error of law was excusable or inexcusable, whether the infringement and the damage caused was intentional or involuntary, or the fact that the position taken by an EU institution may have contributed towards the omission, adoption or retention of national measures or practices contrary to EU law (see, to that effect, judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 56).

106 In the present case, it must be pointed out that although the BNB has, under Article 1(3)(i) of Directive 94/19 some latitude as regards the determination that a credit institution's deposits are unavailable, that latitude is nevertheless circumscribed.

107 Article 1(3)(i) of Directive 94/19 clearly sets out the conditions to which the determination that deposits are unavailable is subject and the time limit in which such a determination must be made.

108 Accordingly, if the conditions set out in Article 1(3)(i) of Directive 94/19 are satisfied, the relevant national authority must determine that deposits are unavailable within the mandatory time limit of five days.

109 It is clear from analysis of the facts in the case in the main proceedings that, following the information provided by KTB Bank with regard to the financial difficulties and liquidity problems it faced, the BNB placed KTB Bank under special supervision due to a risk of insolvency and decided to suspend all of KTB Bank's payments and banking transactions. Thus, the supervisory measures taken by the BNB show that it harboured doubts, in the light of the financial situation of KTB Bank, concerning the ability of KTB Bank to repay the deposits quickly. In addition, the measures taken by the BNB for the suspension of KTB Bank's payments and transactions prevented KTB Bank from repaying the deposits.

110 In addition to those factors, it will also be for the referring court, for the purposes of assessing the illegality of the BNB's actions, to take into account whether the damage caused was intentional or involuntary.

111 Lastly, the other facts mentioned by the referring court are irrelevant in determining whether, in the circumstances of the case in the main proceedings, by not determining that deposits were unavailable within the time limit of five days laid down in Article 1(3)(i) of Directive 94/19, the BNB committed a serious breach within the meaning of EU law.

112 In the first place, the fact that the Fund did not have sufficient funds to cover all the guaranteed deposits is irrelevant in so far as that factor is not included amongst those that the relevant national authority must take into consideration for the purposes of determining whether it is appropriate to determine that deposits are unavailable.

113 In the second place, the fact that, during the period in which payments were suspended, the credit institution had been placed under special supervision in order to protect it from insolvency and the fact that the deposit of the applicant in the main proceedings was repaid after the finding, established by the BNB, that the restructuration measures had failed are also irrelevant. First, as the Court has made clear in reply to the third question referred, Directive 94/19 does not subject the determination that deposits are unavailable to the insolvency of a credit institution. Second, Directive 94/19 aims to protect depositors by requiring that the deposits which they hold are guaranteed and repaid within very short periods of time.

114 Third, the fact that the deposit of the applicant in the main proceedings was repaid with the applicable interest, including from 20 June 2014 to 6 November 2014, relates to the harm sustained by Mr Kantarev and not to whether there was a sufficiently serious breach of Article 1(3)(i) of Directive 94/19.

115 In the light of the previous factors and subject to findings to be made by the referring court, the failure to determine that deposits were unavailable within the time limit of five days laid down in Article 1(3)(i) of Directive 94/19, despite the fact that the conditions clearly set out in that provision had been satisfied, is capable of constituting, on the facts of the case in the main proceedings, a sufficiently serious breach, within the meaning of EU law, since the other facts mentioned by the referring court are irrelevant in that regard.

116 As regards the third condition for a finding of State liability due to a breach of EU law, it is for the referring court to ascertain whether, as seems to be the case from the file before the Court, there is a direct causal link between the breach of Article 1(3)(i) of Directive 94/19 and the harm sustained by Mr Kantarev.

117 In the light of all of the foregoing considerations, the answer to the seventh and eighth questions is that Article 1(3)(i) of Directive 94/19 has direct effect and constitutes a rule of law intended to confer rights on individuals allowing depositors to bring an action for damages for the harm sustained by late repayment of deposits. It is for the referring court to ascertain, first, whether the failure to determine that deposits were unavailable within the time limit of five working days laid down in that provision, despite the fact that the conditions which were clearly set out in that provision were satisfied, in the circumstances of the case in the main proceedings, amounts to a sufficiently serious breach, within the meaning of EU law and, second, whether there is a direct causal link between that breach and the harm sustained by a depositor, such as Mr Kantarev.

The first and second questions

118 By its first and second questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 4(3) TEU and the principles of equivalence and effectiveness must be interpreted as, in the absence of a specific procedure in Bulgaria holding that Member State liable for harm caused by a national authority's breach of EU law, precluding national legislation, such as that at issue in the main proceedings, which, first, provides for two different remedies falling within the

jurisdiction of different courts subject to different conditions, and, second, subjects the right of individuals to obtain damages to the intention of the national authority in question to cause the harm, to the requirement that the individual provide proof of fault, to payment of a flat-rate fee or one proportionate to the value in dispute, or to prior annulment of the administrative measure which caused the harm.

119 In that regard, the referring court states that there are opposing views in the case-law as regards the legal rules applicable to actions brought against the BNB on the ground of breach of EU law, certain courts having held that such actions are governed by the Law on State Liability whereas other courts have held that they are governed by general tort law as laid down in the Law on Obligations and Contracts. In addition, the Law on the Bulgarian Central Bank limits the liability of the BNB for actions taken in the course of its supervisory responsibilities only to harm caused by intentional acts.

120 It should be noted from the outset that, according to the Court's case-law, the three conditions referred to in paragraph 94 above are sufficient to give rise to a right to reparation for individuals (judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 65 and the case-law cited).

121 It follows that, while EU law does not at all rule out the possibility of a State being liable in less restrictive conditions on the basis of national law, it precludes, by contrast, additional conditions from being imposed under national law in that regard (judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 66 and the case-law cited).

122 It should also be noted that, in the absence of EU legislation in the field, it is for the internal legal order of each Member State to designate the competent courts and lay down detailed procedural rules for legal proceedings intended to safeguard the rights which individuals derive from EU law (judgment of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 46 and the case-law cited).

123 However, the Court has also made clear that, subject to the right to reparation which flows directly from EU law where the relevant necessary conditions are satisfied, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused, provided that the conditions for reparation of loss and damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (principle of effectiveness) (judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 31 and the case-law cited).

124 The principle of equivalence requires that all the rules applicable to actions apply without distinction to actions alleging infringement of EU law and to similar actions alleging infringement of national law (judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 50 and the case-law cited).

125 According to the principle of effectiveness, national procedural rules must not be such as to render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 52 and the case-law cited).

126 In the present case, as regards the substantive conditions to which an action such as that of the applicant in the main proceedings is subject, by subjecting the right to damages to an intention on the part of the BNB to cause harm, the Law on the Bulgarian Central Bank subjects that right to a condition additional to that of a sufficiently serious breach of EU law.

127 As regards the condition laid down in the Law on Obligations and Contracts requiring the applicant in the main proceedings to provide proof of wrongdoing, the Court has already held that, while certain objective and subjective factors connected with the concept of 'fault' under a national legal system may be relevant, in the light of the case-law referred to in paragraph 105 above, for the purpose of

determining whether or not a given breach of EU law is sufficiently serious, the obligation to make reparation for loss or damage caused to individuals cannot depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of EU law (judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 67 and the case-law cited).

128 Accordingly, first, EU law precludes, in the context of an action such as that in the main proceedings, the right to damages from being subject to the intention of the national authority in question to cause the harm. The liability of the BNB in a case such as that in the main proceedings cannot therefore be determined under the conditions laid down in the Law on the Bulgarian Central Bank. Second, it is for the referring court to establish whether the concept of 'fault', within the meaning of the Law on Obligations and Contracts, goes beyond that of a sufficiently serious breach of EU law.

129 As regards national procedural rules, it should be noted that the matter of whether the jurisdiction of a national court and the procedure for disposing of a case must depend on the nature of the public authority responsible for the breach and of the alleged action or failure to act falls within the procedural autonomy of the Member States (see, to that effect, judgment of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 47).

130 As the Advocate General stated in point 102 of her Opinion, where more than one procedure is possible, EU law is not required to designate which is to be applied. Nevertheless, in choosing the appropriate procedure and, therefore, the rules of liability, regard must be had both to the conditions for holding the State liable for harm caused to individuals for breaches of EU law which follow from the Court's case-law and the principles of equivalence and effectiveness.

131 As regards the principle of equivalence, no information has been laid before the Court which could lead it to question whether the rules established by the Law on State Liability or by the Law on Obligations and Contracts comply with that principle.

132 As regards the principle of effectiveness, the referring court is uncertain, first, as to whether the fee which must be paid under the Law on State Liability and under the Law on Obligations and Contracts complies with that principle.

133 In that regard, it should be borne in mind that every case in which the question arises as to whether a rule of national procedure makes the exercise of rights conferred on individuals by the legal order of the European Union impossible or excessively difficult must be analysed by reference to the importance of that provision in the proceedings as a whole, the way in which the proceedings are conducted and the special features of that provision, before the various national bodies (see, to that effect, judgment of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 36).

134 Accordingly, it must be established whether the national legislation subjects the exercise of the action for damages to the payment of the fee and whether there is any possibility of exemption.

135 Account must also be taken of the amount of the fee which must be made and whether or not that fee might represent an insurmountable obstacle to access to the courts (see, by analogy, judgment of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraph 61).

136 According to the documents in the case file submitted to the Court, in a case such as that in the main proceedings, a natural person such as Mr Kantarev must, in order to bring an action under the Law on State Liability, pay a fixed-fee of BGN 10 (approximately EUR 5) and for an action under the Law on Obligations and Contracts, a proportional fee, capped at 4% of the value in dispute.

137 In the light of the information laid before the Court, a fixed-fee in the amount of BGN 10 (approximately EUR 5) would not appear to represent an insurmountable obstacle to access to the courts, which is for the referring court to ascertain.

138 By contrast, it cannot be ruled out that a proportional fee, capped at 4% of the value in dispute does not represent an insurmountable obstacle to the exercise of the action for damages, in particular, if there is no possibility of exemption from the payment of such a fee, which is for the referring court to ascertain.

139 Second, the referring court asks whether the fact that the Law on State Liability limits the right to damages only to cases in which the harm was caused by an annulled illegal measure or unlawful action or failure to act by the administration complies with the principle of effectiveness.

140 In that regard, it must be pointed out that, with regard to the use of the available legal remedies in order to establish the liability of a Member State for breach of EU law, the Court has previously held that national courts may enquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, inter alia, he availed himself in time of all the legal remedies available to him (judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 75 and the case-law cited).

141 It is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the loss or damage himself (judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 76 and the case-law cited).

142 However, it is clear from the case-law that it would be contrary to the principle of effectiveness to oblige injured parties to have recourse systematically to all the legal remedies available to them even if that would give rise to excessive difficulties or could not reasonably be required of them (judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 77 and the case-law cited).

143 Thus, the duty to seek prior annulment of the administrative measure which caused the harm is not, per se, contrary to the principle of effectiveness. However, such a duty may make it excessively difficult to obtain reparation for the loss or damage caused by the infringement of EU law if, in practice, that annulment is precluded (see, to that effect, judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 51) or highly circumscribed.

144 In the present case, the point must be made that the requirement that a measure of an administrative authority be illegal or its action or failure to act unlawful is not a procedural requirement, but a condition for holding the State liable, akin to the concept of a sufficiently serious breach within the meaning of EU law.

145 By contrast, subjecting State liability and, therefore, the right to damages, to the prior annulment, under the procedure provided for that purpose, of the administrative measure which caused the harm is a procedural requirement.

146 In order to establish whether that requirement is, in a situation such as that at issue in the main proceedings, contrary to the principle of effectiveness, it is for the referring court to ascertain, in respect of the facts of the case in the main proceedings as a whole, of the Bulgarian legislation and, in particular, of the procedural possibilities for bringing actions for the annulment of administrative acts and of the conditions to which such annulment is subject, whether the annulment of the administrative measure which caused the harm in question is, in principle, precluded or highly circumscribed.

147 Article 4(3) TEU and the principles of equivalence and effectiveness must be interpreted as, in the absence of a specific procedure in Bulgaria holding that Member State liable for harm caused by a national authority's breach of EU law:

– not precluding national legislation which provides for two different remedies falling within the jurisdiction of different courts subject to different conditions, provided that the referring court ascertains whether, in respect of national law, a national authority such as the BNB must be held liable on the basis of the Law on State Liability or the Law on Obligations and Contracts and that each of the two remedies complies with the principles of equivalence and effectiveness;

– precluding national legislation which subjects the right of individuals to obtain damages to the additional condition that the national authority in question intended to cause the harm;

– not precluding national legislation which subjects the right of individuals to obtain damages to the duty of providing proof of fault provided that, which it is for the referring court to ascertain, the concept of 'fault' does not go beyond that of a 'sufficiently serious breach';

– not precluding national legislation which provides for the payment of a fixed-fee or fee proportional to the value in dispute provided that, which it is for the referring court to ascertain, the payment of a fixed-fee or fee proportional to the value in dispute is not contrary to the principle of effectiveness, in the light of the amount and level of the fee, whether or not that fee might represent an insurmountable obstacle to access to the courts, whether it is mandatory and of the possibilities of exemption; and

– not precluding national legislation which subjects the right of individuals to obtain damages to prior annulment of the administrative measure which caused the harm, provided that, which it is for the referring court to ascertain, that requirement may reasonably be required of the injured party.

Costs

148 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 1(3) and Article 10(1) of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, as amended by Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009, must be interpreted as precluding, first, national legislation according to which the determination that deposits have become unavailable is concomitant with the insolvency of that credit institution and the withdrawal of that institution's banking licence and, second, derogation from the time limits provided by those provisions for the purposes of determining that deposits have become unavailable and of reimbursing those deposits on the ground that the credit institution must be placed under special supervision.**

2. **Article 1(3)(i) of Directive 94/19, as amended by Directive 2009/14, must be interpreted as meaning that the unavailability of deposits within the meaning of that provision must be determined expressly by the competent national authority and cannot be inferred from other acts of the national authorities — such as the decision of the Balgarska Narodna Banka**

(Bulgarian Central Bank) to place Korporativna Targovska Banka under special supervision — nor presumed from circumstances such as those in the case in the main proceedings.

3. **Article 1(3)(i) of Directive 94/19, as amended by Directive 2009/14, must be interpreted as meaning that a determination that a bank deposit is unavailable, within the meaning of that provision, cannot be subject to the condition that the account holder must first make an unsuccessful request for payment of funds from the credit institution.**

4. **Article 1(3)(i) of Directive 94/19, as amended by Directive 2009/14, has direct effect and constitutes a rule of law intended to confer rights on individuals allowing depositors to bring an action for damages for the harm sustained by late repayment of deposits. It is for the referring court to ascertain, first, whether the failure to determine that deposits were unavailable within the time limit of five working days laid down in that provision, despite the fact that the conditions which were clearly set out in that provision were satisfied, on the facts of the case in the main proceedings, amounts to a sufficiently serious breach, within the meaning of EU law and, second, whether there is a direct causal link between that breach and the harm sustained by a depositor, such as Mr Nikolay Kantarev.**

5. **Article 4(3) TEU and the principles of equivalence and effectiveness must be interpreted as, in the absence of a specific procedure in Bulgaria holding that Member State liable for harm caused by a national authority's breach of EU law:**

   – **not precluding national legislation which provides for two different remedies falling within the jurisdiction of different courts subject to different conditions, provided that the referring court ascertains whether, in respect of national law, a national authority such as the Bulgarian Central Bank must be held liable on the basis of the Zakon za otgovornostta na darzhavata i obshtinite za vredi (Law on Liability of the State and of Municipalities for Damage) or the Zakon za zadalzheniata i dogovorite (Law on Obligations and Contracts) and that each of the two remedies complies with the principles of equivalence and effectiveness;**

   – **precluding national legislation which subjects the right of individuals to obtain damages to the additional condition that the national authority in question intended to cause the harm;**

   – **not precluding national legislation which subjects the right of individuals to obtain damages to the duty of providing proof of fault provided that, which it is for the referring court to ascertain, the concept of 'fault' does not go beyond that of a 'sufficiently serious breach';**

   – **not precluding national legislation which provides for the payment of a fixed-fee or fee proportional to the value in dispute provided that, which it is for the referring court to ascertain, the payment of a fixed-fee or fee proportional to the value in dispute is not contrary to the principle of effectiveness, in the light of the amount and level of the fee, whether or not that fee might represent an insurmountable obstacle to access to the courts, whether it is mandatory and of the possibilities of exemption; and**

   – **not precluding national legislation which subjects the right of individuals to obtain damages to prior annulment of the administrative measure which caused the harm, provided that, which it is for the referring court to ascertain, that requirement may reasonably be required of the injured party.**

[Signatures]