

**Summary of the judgment of 4 October 2018 in Case C-571/16 (*Nikolay Kantarev v Balgarska Narodna Banka*); ECLI:EU:C:2018:807**

This reference for a preliminary ruling from the *Administrativen sad – Varna* (Varna Administrative Court, Bulgaria) concerns the interpretation of the 1994 Directive on Deposit Guarantee Schemes (DGS)<sup>1</sup>, as amended in 2009 (Directive 2009/14/EC)<sup>2</sup> but is relevant for the application of the current Directive (2014/49)<sup>3</sup>, as well, since the main provisions in this case are the same or similar under current law. The judgment is also relevant for the liability of national central banks and supervisory authorities for incorrect application of EU law: the Court emphasises the scope of ‘Francovich’ liability which may require disregarding a national statutory limitation of supervisory liability to cases of intentional harm.

The case originated in the liquidity crisis<sup>4</sup> and ultimate demise of a Bulgarian commercial bank, *Korporativna Targovska Banka* (KTB) which led to damage of a depositor who sued *Balgarska Narodna Banka* (BNB), the Bulgarian central bank, for alleged failings in invoking the deposit guarantee system. The depositor, Mr. Kantarev, asserted that BNB should have declared deposits at KTB to be unavailable at most five working days after it had placed KTB under special supervision (on 20 June 2014), and not only after the commercial bank had been officially closed and its licence was withdrawn (on 6 November 2014).

Interestingly, the dispute setting apart the depositor and the central bank concerned compensation for late payment of the deposit only, Mr. Kantarev having been reimbursed for the principal and interest. The compensation for late payment sought<sup>5</sup> is BGN 3,710.91, or approximately € 2,000. Also noteworthy is that Bulgarian law has in the meantime been amended and that EU law no longer contains a fixed time limit for determining that deposits are unavailable, as the AG mentions<sup>6</sup>.

Questions of the liability of BNB under Bulgarian and EU law were raised and resulted in eight preliminary questions, which the Court answers following its own order.

The third and sixth questions concern the interpretation of Article 1(3) on the unavailability of deposits<sup>7</sup>, and Article 10(1) on the maximum repayment period after such unavailability<sup>8</sup> of Directive 94/19: the Bulgarian court asks whether national law establishing that the determination that deposits have become unavailable is concomitant with the insolvency of the credit institution and the withdrawal of its banking licence is compatible with the 1994 DGS Directive. It also wishes to know whether derogation from the time limits provided for is acceptable under the Directive.

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<sup>1</sup> [Directive 94/19/EC](#) of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, OJ L 135/5, 31.05.1994.

<sup>2</sup> [Directive 2009/14/EC](#) of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the pay-out delay, OJ L 68/3, 13.3.2009.

<sup>3</sup> [Directive 2014/49/EU](#) of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast), OJ L 173/149, 12.6.2014.

<sup>4</sup> “[A] massive bank run”, as the European Banking Authority describes the issue in its *Recommendation to the Bulgarian National Bank and Bulgarian Deposit Insurance Fund on action necessary to comply with Directive 94/19/EC*, [EBA/REC/2014/02](#), 17 October 2014.

<sup>5</sup> See paragraph 27 of the Opinion of Advocate General (AG) Kokott of 7 June 2018; ECLI:EU:C:2018:412.

<sup>6</sup> See paragraph 5 of the Opinion of AG Kokott.

<sup>7</sup> Currently: Article 2(1)(8) Directive 2014/49/EU; see the texts of the provisions at the end of this document.

<sup>8</sup> Currently: Article 8(1),(2)-(6) Directive 2014/49/EU.

Based on the express wording of the provisions<sup>9</sup>, the CJEU finds “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.” The Court finds 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”<sup>10</sup>. The supervisory authority has to act within five working days<sup>11</sup>. The Court notes that unavailability of deposits must be determined at short notice without waiting for the conditions for insolvency proceedings or revocation of the licence to be fulfilled<sup>12</sup>, since unavailability of deposits may be a temporary phenomenon, contrary to long-term difficulties that may lead to insolvency or licence withdrawal.

The Court relies on the twofold objective of the DGS Directive found in an earlier case<sup>13</sup>: “Directive 94/19 is intended (...) 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”. There is emphasis on the practical need for swift action<sup>14</sup> to protect depositors: “deposits [are to] 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”. The Court also sees “swift reimbursement of depositors” as necessary “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”, i.e. to avoid a bank run becoming a widespread bank panic<sup>15</sup>.

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As to the five-day period for determining the unavailability of deposits, the Court sees this as mandatory<sup>16</sup>. Derogating therefrom “would run counter to the requirement of prompt action” that the Directive sets<sup>17</sup>. The judgment quotes the intention set out in the explanatory memorandum to the Directive to base pay-out 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 pay-out of the guaranteed amount’” and “not to link this pay-out with the uncertainties of the procedures of reorganising and liquidating the credit institution”.<sup>18</sup>

The fourth question whether the unavailability of deposits must be determined expressly by the competent authority or may be inferred from other acts of the authority, or presumed from circumstances, is answered clearly: an express determination is called for<sup>19</sup>. Similarly, the Court makes short shrift with the suggestion in the fifth question that “the account holder must first make

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<sup>9</sup> Paragraph 53 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka* (underlining added, RS)

<sup>10</sup> Paragraph 49 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

<sup>11</sup> Paragraph 50 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

<sup>12</sup> Paragraphs 52 and 53 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka* (underlining added, RS).

<sup>13</sup> Paragraph 83 of its judgment of 22 March 2018 in Joined Cases C-688/15 and C-109/16 (*Anisimovienė and Others*); [EU:C:2018:209](#).

<sup>14</sup> Prompt Corrective Action (PAC) is a term used in the context of supervision of banks.

<sup>15</sup> Paragraph 58 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

<sup>16</sup> Paragraph 60 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

<sup>17</sup> Paragraph 61 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

<sup>18</sup> Paragraph 62 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

<sup>19</sup> Paragraphs 73, 76 and 78 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

an unsuccessful request for payment of funds from the credit institution". As this is not stipulated in the provision and would "diminish depositor confidence in the deposit-guarantee scheme and to give rise to situations of massive requests for payment of deposits": no action by the depositor is called for in order to determine that a bank deposit is unavailable.<sup>20</sup>

The seventh and eighth questions relate to the direct effect of the Directive's two core provisions on the unavailability of deposits and the maximum repayment period, and to the right to bring an action for damages against the relevant public authority, for a breach of EU law due to late reimbursement of deposits, relying on State liability.<sup>21</sup> The Court distinguishes this case from the *Peter Paul* case<sup>22</sup>: whereas *Peter Paul* established that Directive 94/19 did not preclude a Member State which had established a deposit-guarantee scheme, from adopting "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", here the issue at stake is State liability for incorrect transposition and implementation of the 1994 DGS Directive<sup>23</sup>. The AG explains more clearly that, in *Peter Paul*, the Member State (Germany) had failed to implement the DGS Directive and was ordered to reimburse the affected depositors who, in addition, claimed to have a right of compensation for the absence of adequate supervisory measures, invoking supervisory liability for the occurrence of the losses as such. The Court had denied this additional right for depositors to have certain supervisory measures adopted on the basis of the Directive. In the current case, State liability for incorrect transposition and application of the compensation mechanism is at stake, namely belated pay-out.<sup>24</sup>

3 The Court reiterates that "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" and specifies the three conditions for establishing such State liability: "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".<sup>25</sup>

Focusing on the provision that Mr. Kantarev relies on against BNB in the Bulgarian proceedings, the Court notes that direct effect of a provision is not required by the case-law for the purposes of holding a Member State liable for a breach of EU law. It finds Article 1(3)(i) of Directive 94/19 to be "unconditional and sufficiently precise" and to be "intended to confer rights on specific individuals", so that this provision has direct effect, and can be relied on in court by a depositor against a Member State that failed to correctly implement it into national law.<sup>26</sup>

The CJEU then analyses the facts of the case. Whilst leaving the assessment of liability to the Bulgarian court to make and to find "a manifest and grave disregard by the Member State for the limits set on its discretion" (the standard of proof required for a "sufficiently serious breach of EU

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<sup>20</sup> Paragraphs 79-87 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

<sup>21</sup> Paragraph 88 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

<sup>22</sup> Judgment of 12 October 2004, in Case C-222/02 (*Paul and Others*); [EU:C:2004:606](#).

<sup>23</sup> Paragraphs 90-91 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

<sup>24</sup> Paragraphs 78-85 of the Opinion of AG Kokott; "Mr Kantarev does not consider the supervisory authorities responsible for the loss of his deposit, but for failure to comply with the compensation arrangements provided for in Directive 94/19."

<sup>25</sup> Paragraphs 92-94 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

<sup>26</sup> Paragraphs 96-104 and 117 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

law”, one of the three conditions for holding a State liable for incorrect implementation of EU law), it concludes that BNB had “harboured doubts” on the ability of KTB to repay deposits quickly and had imposed measures (suspension of KTB’s payments and transactions) that prevented KTB from repaying deposits. The Court finds other facts mentioned by the referring court irrelevant in determining whether BNB “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, (...) committed a serious breach within the meaning of EU law”.<sup>27</sup> With this, the claimant has a strong case against BNB in the Bulgarian proceedings<sup>28</sup>.

In respect of specificities of Bulgarian law on State liability (which can be established under different legislation with distinct procedural conditions and diverse remedies)<sup>29</sup>, the Court finally answers the first and second questions on the effectiveness and equivalence criteria: national law needs to provide an effective remedy that is equivalent to conditions for reparation of loss and damage resulting from domestic claims for reparation of injury by State behaviour. In a crucial paragraph (126), the Court finds that “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”, so that this limitation of liability needs to be discarded when deciding the case. Also, “to provide proof of wrongdoing”, as one piece of Bulgarian legislation potentially available to decide the case on requires, may go beyond the EU law requirements for reparation<sup>30</sup>. A requirement to establish an intention to cause harm is not in line with the EU criteria for reparation of damages by a State in serious lack of compliance with an EU law obligation<sup>31</sup>. These considerations of the CJEU deserve a scrutiny by lawmakers and central banks or supervisory authorities across the EU.<sup>32</sup> The liability regimes for supervisory action, or inaction, differ from State to State<sup>33</sup>, as the ECB acknowledged in her recent Opinion on the liability regime in Romania<sup>34</sup>, referring to an earlier Opinion on the situation in Austria<sup>35</sup> and to Principle 2 of the Basel Committee on Banking Supervision’s [Core Principles for Effective Banking Supervision](#).<sup>36</sup>

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<sup>27</sup> Paragraphs 105-117 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

<sup>28</sup> Where Mr. Kantarev can also rely on the EBA’s findings in its 2014 [Recommendation](#) pursuant to Article 17(3) of Regulation (EU) No 1093/2010 (see 4 above), which states: “The BNB has breached Union law by failing to make the necessary determination of the unavailability of assets in accordance with the requirements of Article 1(3)(i) of Directive 94/19/EC. The BNB has also taken a discretionary decision to suspend all obligations, a decision which breaches Union law by removing access by protected depositors to their protected deposits, access which is protected by Directive 94/19/EC by ensuring availability of protected deposits through the relevant deposit guarantee scheme where direct access through the deposit-holder is not available.”

<sup>29</sup> Summarised by AG Kokott in paragraph 100 of her Opinion.

<sup>30</sup> Paragraph 127 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

<sup>31</sup> Paragraph 128 of the judgment in *Nikolay Kantarev v Balgarska Narodna Banka*.

<sup>32</sup> See: Danny Busch and Stef Keunen, *Beperking aansprakelijkheid AFM en DNB is strijdig met het Europees recht* (‘Limitation of liability of [Dutch conduct of business supervisor] AFM and [Dutch central bank] DNB conflicts with EU law’), *Het Financieele Dagblad*, 30 January 2019.

<sup>33</sup> See Table 4 - Selected limitation of liability regimes for prudential supervisors in my [ADEMU Working Paper 2017/077](#), *Competences and alignment in an emerging future After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop*.

<sup>34</sup> Opinion of the European Central Bank of 11 December 2018 on amendments to the liability regime concerning the Board members and employees of *Banca Națională a României* ([CON/2018/56](#)).

<sup>35</sup> Opinion of the European Central Bank of 23 June 2014 on measures accompanying the SSM Regulation ([CON/2014/43](#)).

<sup>36</sup> This principle (**Independence, accountability, resourcing and legal protection for supervisors**) concerns the supervisory authority’s “operational independence” and states in paragraph 9: “Laws provide protection to the supervisor and its staff against lawsuits for actions taken and/or omissions made while discharging their duties

## **DIRECTIVE 94/19/EC**

### *Article 1*

For the purposes of this Directive:

(...)

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.

(...); 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;

## **DIRECTIVE 2014/49/EU**

### *Article 2*

#### **Definitions**

1. For the purposes of this Directive the following definitions apply:

2. (...)

(8) '*unavailable deposit*' means a deposit that is due and payable but that has not been paid by a credit institution under the legal or contractual conditions applicable thereto, where either:

(a) the relevant administrative 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 the institution has no current prospect of being able to do so; or

(b) a judicial authority has made a ruling for reasons which are directly related to the credit institution's financial circumstances and which has the effect of suspending the rights of depositors to make claims against it;