JUDGMENT OF THE COURT
13 May 1997 *

In Case C-233/94,

Federal Republic of Germany, represented by Bernd Kloke, Oberregierungsrat at the Federal Ministry of Economic Affairs, acting as Agent, and Hans-Jörg Niemeyer, of the Brussels Bar, D-53107 Bonn,

applicant,

v

European Parliament, represented by Johann Schoo, Head of Division in its Legal Service, acting as Agent, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

and

Council of the European Union, represented by Jill Aussant, Legal Adviser, and Klaus Borchers and Jan-Peter Hix, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendants,

* Language of the case: German.

supported by

Commission of the European Communities, represented by Dimitrios Gouloussis, Legal Adviser, and Ulrich Wölker, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

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

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. C. Moitinho de Almeida, J. L. Murray and L. Sevón (Presidents of Chambers), C. N. Kakouris, P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann (Rapporteur), H. Ragnemalm, M. Wathelet and R. Schintgen, Judges,

Advocate General: P. Léger,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 5 November 1996,

after hearing the Opinion of the Advocate General at the sitting on 10 December 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 18 August 1994, the Federal Republic of Germany brought an action under Article 173 of the EC Treaty for annulment of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ 1994 L 135, p. 5, hereinafter 'the Directive') and, in the alternative, for annulment of the second subparagraph of Article 4(1), Article 4(2), and the second sentence of the first subparagraph of Article 3(1) of the Directive.

2 The Directive was adopted on the basis of the first and third sentences of Article 57(2) of the EC Treaty, in accordance with the procedure referred to in Article 189b of the Treaty. In the Council, the Federal Republic of Germany voted against its adoption.

3 The Directive was preceded by Commission Recommendation 87/63/EEC of 22 December 1986 concerning the introduction of deposit-guarantee schemes in the Community (OJ 1987 L 33, p. 16, hereinafter 'the Commission Recommendation'). According to Point 1(b) of the Commission Recommendation, the aim of the deposit-guarantee schemes was to cover the depositors of all authorized credit institutions, including the depositors of branches of credit institutions that had their head offices in other Member States.

4 Since it considered that its recommendation had not enabled the intended result to be fully achieved, the Commission submitted a proposal for a Council Directive on deposit-guarantee schemes (OJ 1992 C 163, p. 6) on 14 April 1992.

5 Article 3 of the Directive provides as follows:

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

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

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

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

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

— the system must ensure that depositors are informed in accordance with the terms and conditions laid down in Article 9.

Those Member States which make use of this option shall inform the Commission accordingly; in particular, they shall notify the Commission of the characteristics of any such protective systems and the credit institutions covered by them and of any subsequent changes in the information supplied. The Commission shall inform the Banking Advisory Committee thereof.

...

4. Where national law permits, and with the express consent of the competent authorities which issued its authorization, a credit institution excluded from a deposit-guarantee scheme may continue to take deposits if, before its exclusion, it has made alternative guarantee arrangements which ensure that depositors will enjoy a level and scope of protection at least equivalent to that offered by the officially recognized scheme.'

6 Article 4 provides that:

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

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

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

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

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

3. Member States shall ensure that objective and generally applied conditions are established for branches' membership of a host Member State's scheme in accordance with paragraph 2. Admission shall be conditional on fulfilment of the relevant obligations of membership, including in particular payment of any contributions and other charges. Member States shall follow the guiding principles set out in Annex II in implementing this paragraph.

4. If a branch granted voluntary membership under paragraph 2 does not comply with the obligations incumbent on it as a member of a deposit-guarantee scheme, the competent authorities which issued the authorization shall be notified and, in collaboration with the guarantee scheme, shall take all appropriate measures to ensure that the aforementioned obligations are complied with.

If those measures fail to secure the branch's compliance with the aforementioned obligations, after an appropriate period of notice of not less than 12 months the guarantee scheme may, with the consent of the competent authorities which issued the authorization, exclude the branch. Deposits made after the date of exclusion shall continue to be covered by the voluntary scheme until the dates on which they fall due. Depositors shall be informed of the withdrawal of the supplementary cover.

5. The Commission shall report on the operation of paragraphs 2, 3 and 4 no later than 31 December 1999 and shall, if appropriate, propose amendments thereto.'

7 Article 7 then provides as follows:

'1. Deposit-guarantee schemes shall stipulate that the aggregate deposits of each depositor must be covered up to ECU 20 000 in the event of deposits' being unavailable.

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

2. Member States may provide that certain depositors or deposits shall be excluded from guarantee or shall be granted a lower level of guarantee. Those exclusions are listed in Annex I.

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

...'

8 Articles 8 to 10 lay down the conditions for the implementation of the deposit-guarantee scheme.

The principal claim

9 In support of its principal claim, for the annulment of the Directive in its entirety, the German Government submits two pleas in law. The first is that the Directive was adopted on the wrong legal basis and the second that there has been a breach of the obligation to state reasons laid down by Article 190 of the EC Treaty.

The plea that the Directive was adopted on the wrong legal basis

10 The German Government considers that the first and third sentences of Article 57(2) of the Treaty, which provide that the Council and the Parliament are to issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons, cannot constitute the sole legal basis for the Directive. It claims that it follows from the first, second, fourth, sixteenth and seventeenth recitals in the preamble to the Directive that the Directive does not merely regulate banking operations but aims primarily to increase protection for depositors. Consequently, the Directive should also have been based on Article 235 of the Treaty. Since Article 57 is a special provision in relation to Article 100a, the

latter provision is not applicable in the present case. Article 129a of the Treaty, which specifically concerns the protection of consumers, which include depositors, does not empower the Council to adopt, besides measures adopted pursuant to Article 100a, measures falling within the scope of the legal acts provided for in Article 189 of the Treaty.

11 The German Government concludes that, in the absence of the unanimity required by Article 235 of the Treaty, the Directive was not correctly adopted.

12 It should be observed in this regard that, in the context of the organization of the powers of the Community, the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure (see, most recently, Case C-268/94 *Portugal* v *Council* [1996] ECR I-6177, paragraph 22).

13 In the present case, in accordance with its first recital, which refers to the objectives of the Treaty, which are formulated in general terms in Article 2 thereof, the Directive aims to promote the harmonious development of the activities of credit institutions throughout the Community by eliminating any restrictions on freedom of establishment and the freedom to provide services, while increasing the stability of the banking system and the protection of savers.

14 According to Article 3(c) of the Treaty, the Community's activities are to include the creation of an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital. Article 7a of the Treaty then provides that the Community is to adopt measures with the aim of establishing the internal market in accordance, in particular, with Article 57(2) of the Treaty.

15 Consequently, the measures adopted in accordance with the latter provision contribute to the abolition of the obstacles to free movement which may result in particular from a divergence between the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

16 As the Court has held on several occasions, in the absence of coordination at a Community level the Member States may, subject to certain conditions, impose national measures pursuing a legitimate aim that is compatible with the Treaty and is justified on overriding public interest grounds, which include the protection of consumers (see, in particular, Case 205/84 *Commission* v *Germany* [1986] ECR 3755).

17 Consequently, the Member States may, in certain circumstances, adopt or maintain measures constituting an obstacle to free movement. Article 57(2) of the Treaty authorizes the Community to eliminate obstacles of that kind in particular by coordinating the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. Since coordinating measures are concerned, the Community is to have regard to the public interest aims of the various Member States and to adopt a level of protection for that interest which seems acceptable in the Community.

18 The Directive provides for the compulsory participation by all credit institutions in guarantee schemes providing cover up to ECU 20 000 for the aggregate deposits of each depositor with a credit institution in the event of deposits' being unavailable. Moreover the deposit-guarantee systems introduced by a Member State in accordance with Article 3(1) of the Directive are to cover depositors in branches set up by credit institutions in other Member States.

19 The effect of the machinery established by the Directive is to prevent the Member States from invoking depositor protection in order to impede the activities of credit institutions authorized in other Member States. Accordingly, it is clear that the Directive abolishes obstacles to the right of establishment and the freedom to provide services.

20 Consequently, the Parliament and the Council correctly adopted the Directive on the basis of Article 57(2) of the Treaty and were not required to use any other legal basis.

21 The plea that the Directive was not adopted on the proper legal basis must therefore be rejected.

The plea of infringement of the obligation to state reasons

22 The German Government claims that the Directive must be annulled because it fails to state the reasons on which it is based, as required by Article 190 of the Treaty. It does not explain how it is compatible with the principle of subsidiarity enshrined in the second paragraph of Article 3b of the Treaty. The German Government adds that, since that principle limits the powers of the Community and since the Court has power to examine whether the Community legislature has exceeded its powers, that principle must be subject to review by the Court of Justice. Moreover, the obligation under Article 190 to state the reasons on which a measure is based requires that regard be had to the essential factual and legal considerations on which a legal measure is based, which include compliance with the principle of subsidiarity.

23 As to the precise terms of the obligation to state reasons in the light of the principle of subsidiarity, the German Government states that the Community institu-

tions must give detailed reasons to explain why only the Community, to the exclusion of the Member States, is empowered to act in the area in question. In the present case, the Directive does not indicate in what respect its objectives could not have been sufficiently attained by action at Member State level or the grounds which militated in favour of Community action.

24 As a preliminary point, it should be pointed out that in the context of this plea the German Government is not claiming that the Directive infringed the principle of subsidiarity, but only that the Community legislature did not set out the grounds to substantiate the compatibility of its actions with that principle.

25 The obligation under Article 190 to give reasons requires that the measures concerned should contain a statement of the reasons which led the institution to adopt them, so that the Court can exercise its power of review and so that the Member States and the nationals concerned may learn of the conditions under which the Community institutions have applied the Treaty (see, *inter alia*, Case C-41/93 *France* v *Commission* [1994] ECR I-1829, paragraph 34).

26 In the present case, the Parliament and the Council stated in the second recital in the preamble to the Directive that 'consideration should be given to the situation which might arise if deposits in a credit institution that has branches in other Member States became unavailable' and that it was 'indispensable to ensure a harmonized minimum level of deposit protection wherever deposits are located in the Community'. This shows that, in the Community legislature's view, the aim of its action could, because of the dimensions of the intended action, be best achieved at Community level. The same reasoning appears in the third recital, from which it is clear that the decision regarding the guarantee scheme which is competent in the event of the insolvency of a branch situated in a Member State other than that in which the credit institution has its head office has repercussions which are felt outside the borders of each Member State.

27 Furthermore, in the fifth recital the Parliament and the Council stated that the action taken by the Member States in response to the Commission's Recommendation has not fully achieved the desired result. The Community legislature therefore found that the objective of its action could not be achieved sufficiently by the Member States.

28 Consequently, it is apparent that, on any view, the Parliament and the Council did explain why they considered that their action was in conformity with the principle of subsidiarity and, accordingly, that they complied with the obligation to give reasons as required under Article 190 of the Treaty. An express reference to that principle cannot be required.

29 On those grounds, the plea of infringement of the obligation to state reasons is unfounded in fact and must therefore be rejected.

The alternative claim

30 In the alternative, the German Government claims that the Court should annul:

— the second subparagraph of Article 4(1) of the Directive, which lays down that the cover provided for depositors at branches set up by credit institutions in Member States other than those in which they are authorized may not exceed the cover offered by the corresponding guarantee scheme of the host Member State ('the export prohibition'),

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

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

The second subparagraph of Article 4(1)

31 First, the German Government claims that the statement of reasons for the export prohibition laid down in the second subparagraph of Article 4(1) of the Directive is insufficient.

32 Second, that prohibition is contrary to Article 57(2) of the Treaty, the objective of which is to facilitate the taking-up and pursuit of activities as self-employed persons in another Member State.

33 Third, the prohibition is incompatible with the Community's objective, laid down in Article 3(s) and Article 129a, of attaining a high level of consumer protection.

34 Fourth, the prohibition is contrary to the principle of proportionality.

The plea alleging infringement of the obligation to state reasons

35 The German Government claims that the 14th recital, which is the only relevant recital in this context, contains only a general statement of reasons and does not explain why the Council and the Parliament took the view that it was necessary that the level and scope of the guarantee should not become an instrument of competition. In particular, they should have specified the circumstances which, in their view, were of such a nature as to cause the market disturbances referred to therein.

36 In the light of the case-law referred to in paragraph 25 of this judgment, the Court finds that the Community institutions complied with their obligation to give reasons for the export prohibition. In the 14th recital they explained that market disturbances could be caused by branches of credit institutions offering levels of cover higher than those offered by credit institutions authorized in the host Member State and also stated that the level and the scope of cover offered by the guarantee scheme should not become an instrument of competition. They concluded that it was necessary, at least during an initial period, to stipulate that the level and scope of cover offered by a home Member State scheme to depositors at branches located in another Member State should not exceed the maximum level and scope offered by the corresponding scheme in the host Member State.

37 Those considerations clearly show the reasons for which the legislature adopted the second subparagraph of Article 4(1) of the Directive.

38 The plea of infringement of the obligation to state reasons must therefore be rejected.

The plea of infringement of Article 57(2) of the Treaty

39 The German Government claims that, by requiring branches to reduce the amount of their guarantee to that of the host Member State, the export prohibition makes it more difficult, and even impossible, for them to pursue their activities in that State and, accordingly, is contrary to the aim of Article 57(2), which is precisely to facilitate the taking-up and pursuit of activities as self-employed persons. The export prohibition also hinders the process of reducing differences between national guarantee schemes and is necessarily contrary to the objective of the Directive, which is to introduce deposit-guarantee schemes into all the Member States and to harmonize those which already exist. Those objectives should be achieved by a minimum level of harmonization and the mutual recognition of national schemes.

40 The German Government states that the German deposit-guarantee scheme applicable to the protection of savers in branches situated in other Member States is not recognized in those States, so that the level of protection there must be reduced. The resultant obligation on German credit institutions to establish different contribution rates for branches in other Member States gives rise to considerable difficulties and even prevents those institutions from setting up networks of subsidiaries in those other Member States, as they would have done had there been no export prohibition. According to the German Government, Italian, Danish and French credit institutions are also concerned since, pursuant to the Directive, they must reduce the level of protection for deposits made in branches situated in certain other Member States.

41 First of all, it should be noted that Article 57(2) of the Treaty authorizes the Parliament and the Council to issue directives concerning the taking-up and pursuit of

activities as self-employed persons, with a view to abolishing obstacles to the right of establishment and the freedom to provide services. It was apparent that such an obstacle was to be found in the fundamental differences between the deposit-guarantee systems existing in the various Member States. Consequently, the laws on those systems were harmonized in order to facilitate the activity of credit institutions at Community level.

42 In those circumstances, the export prohibition cannot be considered to be contrary to Article 57(2) solely on the ground that there are situations which are not to the advantage of the branches of credit institutions authorized in one particular Member State. When harmonization takes place, traders established in one Member State may lose the advantage of national legislation which was particularly favourable to them.

43 Second, it is true that the export prohibition is an exception to the minimum harmonization and mutual recognition which the Directive generally seeks to achieve. However, in view of the complexity of the matter and the differences between the legislation of the Member States, the Parliament and the Council were empowered to achieve the necessary harmonization progressively (see, to that effect, Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 27).

44 Finally, according to the Commission Recommendation, the deposit-guarantee systems of the host Member State should protect depositors of branches of credit institutions that have their head offices in other Member States. The second Council Directive of 15 December 1989, 89/646/EEC, on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ 1989 L 386, p. 1, hereinafter 'the Second Banking Directive') did not subsequently deal with the question of deposit-guarantee schemes. In those circumstances, it was conceivable that the pursuit of banking business by branches of institutions authorized in Germany would be affected by the obligation to join a guarantee scheme in another Member State set up in accordance with the Commission Recommenda-

tion. The second subparagraph of Article 4(1) of the Directive serves to diminish that barrier by reducing generally the influence of the host Member State's guarantee scheme to a mere limit on the maximum level of cover for depositors in branches set up by credit institutions authorized in other Member States, where that cover exceeds ECU 20 000 or, possibly, ECU 15 000. In any event, that limitation is much less onerous than the obligation to comply with different bodies of legislation on deposit-guarantee schemes in the various host Member States. It follows that the second subparagraph of Article 4(1) facilitated the taking-up and pursuit of banking activities in other Member States even in regard to branches of credit institutions authorized in Germany.

45 The plea of infringement of Article 57(2) of the Treaty must therefore be rejected.

The plea of incompatibility with the objective of a high level of consumer protection, as set out in Article 3(s) and Article 129a of the Treaty

46 The German Government states that, under Article 3(s) of the Treaty, consumer protection is a mandatory objective of the Community and that with the adoption of Article 129a a specific title, 'Consumer protection', was added to the Treaty. Moreover, it also follows from the first and sixteenth recitals in the preamble to the Directive that the Directive aims to increase protection for savers and that protection is greater where the amount of the guarantee is high.

47 According to the German Government, the export prohibition laid down in the second subparagraph of Article 4(1) is to the disadvantage not only of savers in a Member State in which cover is minimal and who have deposits in a branch of a credit institution authorized in a Member State requiring a high level of protection

but also of savers who have deposits in a Member State with a high level of protection and who wish to transfer them to a branch in a Member State where the protection is lower. Consequently, the abovementioned provision is contrary to the objective of the Treaty.

48 In that regard it suffices to point out that, although consumer protection is one of the objectives of the Community, it is clearly not the sole objective. As has already been stated, the Directive aims to promote the right of establishment and the freedom to provide services in the banking sector. Admittedly, there must be a high level of consumer protection concomitantly with those freedoms; however, no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State. The reduction in the level of protection which may thereby result in certain cases through the application of the second subparagraph of Article 4(1) of the Directive does not call into question the general result which the Directive seeks to achieve, namely a considerable improvement in the protection of depositors within the Community.

49 On those grounds, the plea of incompatibility of the second subparagraph of Article 4(1) with the objective, set out in Article 3(s) and Article 129a of the Treaty, of a high level of consumer protection must also be rejected.

The plea of infringement of the principle of proportionality

50 The German Government claims that, even in the case of harmonization measures, the Community legislature must remain within the discretion available to it, which is limited, in particular, by the principle of proportionality. That principle has not been complied with in the present case.

51 The German Government states that the export prohibition laid down in the second subparagraph of Article 4(1) of the Directive is, in principle, incompatible with Article 52 of the Treaty since it restricts the right of establishment. Branches are deprived of an element of competition as against the national banks of the host Member State to such an extent that, in certain cases, financial institutions may even be forced for that reason to refrain from establishing a network of branches in another Member State.

52 According to the German Government, the export prohibition is not necessary in order to achieve the objective of the Directive, namely to prevent the market disturbances which arise if customers withdraw their deposits from their national credit institutions in order to transfer them to the branches of approved credit institutions in other Member States, since there are alternatives to that prohibition which would result in a less severe disturbance to the business of credit institutions. It would thus, for example, have been possible to insert a protective provision for the benefit of credit institutions in the Member States where the protection of depositors is less extensive authorizing intervention only where a disturbance in a Member State is imminent.

53 Such a protective provision for periods of crisis would have been in conformity with the concept of safeguard measures in Community law and would have been wholly sufficient in this case. There was no reason to fear market disturbances on account of monetary transfers by depositors in branches of banks authorized in other Member States, since Article 9(3) of the Directive restricted the use of advertising of information concerning the deposit-guarantee schemes. In the absence of advertising, depositors would have become aware only gradually of more advantageous guarantee schemes and would not have all immediately made large withdrawals, so that the authorities concerned would have had time to adopt safeguard measures.

54 In response to those arguments it must be recalled that the Court has held that, in order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it (see, in particular, Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 57).

55 In assessing the need for the measure in question, it should be emphasized that the Community legislature was seeking to regulate an economically complex situation. Before the adoption of the Directive, deposit-guarantee schemes did not exist in all the Member States; moreover, most of them did not cover depositors with branches set up by credit institutions authorized in other Member States. The Community legislature therefore needed to assess the future, uncertain effects of its action. In so doing, it could choose between the general prevention of a risk and the establishment of a system of specific protection.

56 In such a situation the Court cannot substitute its own assessment for that of the Community legislature. It could, at most, find fault with its legislative choice only if it appeared manifestly incorrect or if the resultant disadvantages for certain economic operators were wholly disproportionate to the advantages otherwise offered.

57 According to the 14th recital in the preamble to the Directive, the Parliament and the Council chose to avoid, from the very beginning, any market disturbance resulting from the offer by branches of some credit institutions of higher cover than that offered by credit institutions authorized by the host Member State. Since the possibility of such a disturbance could not be wholly ruled out, it follows that the Community legislature has shown to the requisite legal standard that it was pursuing a legitimate objective. Moreover, the restriction constituted by the export

prohibition on the activities of the credit institutions concerned is not manifestly disproportionate.

58 It follows that the plea of infringement of the principle of proportionality must also be rejected.

59 On those grounds, the application for annulment of the second subparagraph of Article 4(1) of the Directive must be rejected.

Article 4(2)

60 According to the German Government, the obligation under Article 4(2) of the Directive to include branches in the host Member State's guarantee scheme in order to supplement the guarantee provided in the home Member State is contrary to the principle of supervision by the home Member State and to the principle of proportionality.

The plea of infringement of the principle of supervision by the home Member State

61 The German Government submits that at the time when the Directive was adopted the Community legislature was already bound by the principle that supervision

should be carried out by the home Member State. That principle, definitively laid down by the Second Banking Directive which the Member States were required to transpose by 1 January 1993, had been designated since 1985 in the Commission's White Book as an essential means of harmonizing and coordinating national provisions in the field of financial services. That White Book had been expressly approved by the European Council in 1985.

62 According to the German Government, by adopting Article 4(2) the Parliament and the Council infringed that principle. If use is made of the supplementary guarantee, then supervision of banks, the power of audit and the guarantee of deposits are no longer exclusively matters for the authorities or the guarantee scheme of the host Member State, but those competences are shared between the home State and the host State. As a result, the host Member State's deposit-guarantee scheme, which bears the risk of a branch's insolvency, is prevented by the Second Banking Directive from adequately reviewing the liquid assets and solvency of that branch.

63 The German Government also submits that, according to the case-law of the Court, the Community legislature may not, when exercising its powers, depart from its previous practice without stating reasons.

64 The Court finds, first, that it has not been proved that the Community legislature laid down the principle of home State supervision in the sphere of banking law

with the intention of systematically subordinating all other rules in that sphere to that principle. Second, since it is not a principle laid down by the Treaty, the Community legislature could depart from it, provided that it did not infringe the legitimate expectations of the persons concerned. Since it had not yet acted in regard to the guarantee of deposits, no such legitimate expectations could exist.

65 On those grounds, the plea of infringement of the principle of supervision by the home State must be rejected.

The plea of infringement of the principle of proportionality

66 According to the German Government, Article 4(2) of the Directive is contrary to the principle of proportionality because the measure which it enacts is not indispensable to the attainment of the objective pursued.

67 The German Government claims that the deposit-guarantee schemes of the host Member State should assume responsibility for the difference between the lower cover provided in the home Member State and the higher cover granted in the host Member State, and even, in certain cases, for the entire guarantee.

68 The supplementary guarantee therefore contains considerable risks for the deposit-guarantee schemes of the host Member State, since they are required to compensate depositors even though the host State is no longer in a position adequately to supervise the liquid assets and solvency of the branch and, therefore, to foresee or prevent the possible insolvency of a branch of a foreign institution. Those risks are in no way removed by the fact that, in accordance with the guiding principles set out in Annex II to the Directive, each guarantee scheme can require the provision

of all relevant information and has the right to verify such information with the home Member State's competent authorities. No provision requires the supervisory authorities of the home Member State to provide the necessary information.

69 The German Government therefore considers that a provision under which the deposit-guarantee schemes of the home Member State provides a supplementary guarantee for branches established in another Member State so as to enable them to meet the level of guarantee in the host Member State would have been a less radical solution. The advantage of those rules, which were moreover referred to in the 13th recital in the preamble to the Directive as an alternative to the supplementary guarantee, is that the risk of insolvency — and therefore the obligation to compensate depositors — is no longer transferred to the guarantee scheme of the host Member State but remains the responsibility of the home State, which has a far greater possibility of supervision.

70 The Court notes that, according to the 13th recital, Article 4(2) of the Directive seeks to remedy the disadvantages resulting from disparities in compensation and different conditions of competition, within the same territory, between national institutions and branches of institutions from other Member States. Moreover, in the 16th recital, the Community legislature states that the cost of funding guarantee schemes should be taken into account and that it would appear reasonable to set the harmonized minimum guarantee level at ECU 20 000. Article 7 of the Directive provides for the possibility of derogating from that minimum amount until 31 December 1999; until that date the security does not have to exceed ECU 15 000.

71 It is clear from those recitals and those provisions that the Community legislature did not wish to impose an excessive burden on home Member States which did not

yet have deposit-guarantee schemes or which had only schemes providing for a lower guarantee. In those circumstances, it could not require them to bear the risk associated with an additional cover resulting from a political decision of a particular host Member State. The alternative solution proposed by the German Government, namely compulsory supplementary cover by the schemes of the home Member State, would not therefore have achieved the intended aim.

72 Moreover, as the Advocate General observes in points 136 to 146 of his Opinion, the obligation imposed on the host State is subject to various conditions that are intended to ease its task. Thus, under Article 4(3), the host Member State may require branches wishing to join one of its guarantee schemes to pay a contribution and, by virtue of point (a) of Annex II to the Directive, require the home State to provide information on those branches. Furthermore, Article 4(4) of the Directive aims to ensure compliance with the obligations incumbent on such a branch as a member of the deposit-guarantee scheme. It follows from these various provisions that Article 4(2) does not have the effect of causing an excessive burden for the guarantee schemes of host Member States.

73 In view of all the foregoing considerations, the plea of infringement of the principle of proportionality must be rejected.

74 It follows that the application for annulment of Article 4(2) of the Directive must also be rejected.

The second sentence of the first subparagraph of Article 3(1)

75 The German Government claims that the membership obligation arising from the second sentence of the first subparagraph of Article 3(1) of the Directive is contrary to the third subparagraph of Article 3b of the Treaty and to the general principle of proportionality.

76 First of all, the German Government claims that the principle of proportionality laid down in the third subparagraph of Article 3b of the Treaty was specifically set out, in particular, in the conclusions of the European Council in Edinburgh relating to that provision, which provide that, when adopting legislative measures, the Community will endeavour to take account of well-established national practices and that the measures adopted by the Community must offer to the Member States alternative solutions to achieve the objectives pursued.

77 However, according to the German Government, when drawing up the second sentence of the first subparagraph of Article 3(1) of the Directive, the Parliament and the Council did not take account of the scheme existing in Germany as a 'well-established national practice' within the meaning of the guidelines of the European Council. Since 1976 there has been a deposit-guarantee fund of the Association of German Banks, membership of which is voluntary and which has always functioned effectively.

78 Likewise, the obligation under the Directive to join a scheme does not leave any room for the Member States to adopt 'different approaches' in regard to the application of the Directive, such as a voluntary deposit-guarantee scheme. The German Government considers that, since voluntary membership constitutes an advantage for credit institutions at a competitive level, they would join a deposit-guarantee scheme without being compelled to do so by the State. Thus, in Germany in October 1993 only five institutions, whose deposits are slight overall, had remained outside such a scheme.

79 Finally, the membership obligation imposes an excessive burden on the credit institutions. As is proved by the German scheme, depositors can be protected by other less restrictive measures, such as the obligation on a bank to inform its clients of its membership of a deposit-guarantee scheme.

80 Without it being necessary to determine the precise legal value of the conclusions of the European Council in Edinburgh on which the German Government relies in this context, it should be pointed out, first of all, that when the Community legislature harmonizes legislation all 'well-established national practices' cannot be respected.

81 Second, it appears that in the present case the Federal Republic of Germany is the sole Member State to invoke the voluntary membership of a deposit-guarantee scheme as such a practice.

82 Third, it is common ground that the Community legislature considered it to be necessary to ensure a harmonized minimum level of deposit-guarantee, wherever those deposits were located within the Community. Having regard to that requirement and to the fact that in some Member States there was no deposit-guarantee scheme, the legislature cannot be criticized for having provided for an obligation to join a scheme, despite the proper functioning of a voluntary membership scheme in Germany.

83 Finally, the German Government itself accepts that in October 1993 only five credit institutions out of 300 were not members of a deposit-guarantee scheme. The membership obligation therefore merely compels those few credit institutions to join and consequently cannot be considered to be excessive.

84 On those same grounds, the legislature cannot be criticized for not having provided for an alternative approach to compulsory membership, such as an obligation to inform customers of any membership of a scheme. That obligation would

not have made it possible to achieve the objective of ensuring a harmonized minimum level of guarantee for all deposits.

85 Consequently, the application for annulment of the second sentence of the first subparagraph of Article 3(1) of the Directive must be rejected.

86 It follows from all the above considerations that the application must be dismissed.

Costs

87 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the European Parliament and the Council of the European Union have applied for costs and the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs. Under the first subparagraph of Article 69(4), the Commission of the European Communities, which intervened in the proceedings, must bear its own costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the Federal Republic of Germany to pay the costs;

3. Orders the Commission of the European Communities to bear its own costs.

Rodríguez Iglesias Mancini Moitinho de Almeida

Murray Sevón Kakouris Kapteyn

Gulmann Edward Puissochet Hirsch

Jann Ragnemalm Wathelet Schintgen

Delivered in open court in Luxembourg on 13 May 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar *President*