Is the statutory limitation of liability of the AFM and DNB contrary to European Union law?

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Court of Justice of the European Union (CJEU), 4 October 2018, ECLI:EU:2018:807 (*Nikolay Kantarev v Balgarska Narodna Banka*)[2]

1 Introduction

Section 1:25d of the Dutch Financial Supervision Act (Wft) limits the liability of the Dutch financial supervisors, namely the AFM (the Dutch Authority for the Financial Markets) and DNB (the Dutch central bank), to cases in which the loss or damage is to a significant extent due to intent or gross fault. Does this go further than the 'sufficiently serious breach' which is set by EU law as a condition for member state liability? The judgment of the Court of Justice of the European Union (CJEU) currently under consideration has a direct bearing on how this question is answered.

Facts of the case

What were the facts of the case? Private investor Nikolay Kantarev brought an action against the Bulgarian bank supervisor *Balgarska Narodna Banka* (BNB) before the *Administrativen sad Varna* (Varna Administrative Court, Bulgaria) for a breach of EU law. More specifically, he claimed that the BNB had applied Article 1(3)(i) of the Deposit Guarantee Schemes Directive[3] incorrectly, as a result of which he had received the money he was due much later than the period stipulated in the provision. Kantarev had claimed under the deposit guarantee scheme because the bank where he had a deposit account (*Korporativna Targovska Banka*, below: KTB Bank) had got into difficulties as a result of the financial crisis. This prompted the BNB on 20 June 2014 to place the bank under special supervision and direct that its assets and liabilities be audited by external auditors. This audit showed that KTB Bank's financial results were in deficit and that the bank no longer met the requirements for equity capital under EU law. BNB then withdrew KTB Bank's banking licence by decision of 6 November 2014. On the same day Kantarev's account was closed *ex officio*. This meant that under the Bulgarian law implementing the Deposit Guarantee Schemes Directive the money in Kantarev's account had to be reimbursed under the deposit guarantee scheme. This eventually happened on 4 December 2014.

Kantarev contended that the Deposit Guarantee Schemes Directive had been incorrectly transposed and applied in Bulgaria. Determination of the unavailability of a deposit, which is a condition for application of the deposit guarantee scheme, is dependent, under the relevant Bulgarian Law, on withdrawal of the banking licence, whereas the Directive prescribes a fixed period for this purpose. The Varna Administrative Court (the Bulgarian administrative court of first instance) stayed the proceedings following a decision of the *Varhoven administrativen sad* (Supreme Administrative Court of Bulgaria) and referred eight questions to the Court of Justice for a preliminary ruling. These questions relate on the one hand to whether and, if so, how the BNB should have applied

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[2] This judgment has also been annotated in Dutch Law Reports (*NJ*) by V.P.G. de Serière.

[3] Directive 94/19/EC, OJ L 135, 31 May 1994, pp. 5-14 (below: the Deposit Guarantee Schemes Directive). See also in this connection: Directive 2009/14/EC, OJ L 68, 13 March 2009, pp. 3-7.

Article 1(3)(i) of the Deposit Guarantee Schemes Directive and, on the other, to what is required to establish the liability of the BNB for a breach of EU law, in particular the requirement of a 'sufficiently serious breach'.[4]

Legal framework

The provision central to this judgment is Article 1(3)(i) of the Deposit Guarantee Schemes Directive. In so far as relevant here, it reads as follows:

> *"* 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:*
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> *(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; (..)."*

This provision has been incorrectly transposed into Bulgarian law in the *Zakona na garantirane na vlogovete v bankite* (Law on Guarantees for Bank Deposits). Article 23(1), (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.*
>
> *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."*

Article 79(8) of the *Zakona za kreditnite institutsii* (Law on Credit Institutions) regulates the liability of the BNB:

> *"8. 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."*

Preliminary rulings

Applicable conditions for determining the unavailability of deposits

The Court of Justice considers first of all the conditions on which and the term within which the BNB should have determined the unavailability of the deposits of the KTB Bank. It starts from the premise that the clear implication of the wording of Article 1(3)(i) of the Deposit Guarantee

[4] See paragraph 40 of the judgment for a list of the questions referred for a preliminary ruling.

Schemes Directive is that in determining the unavailability of deposits it is sufficient for the competent authority to find that the credit institution concerned appears to be unable for the time being, on account of financial problems, to repay the deposits and to have no current prospect of being able to do so.[5] Other circumstances, such as the condition under Bulgarian law that the credit institution should be insolvent and its banking licence withdrawn, are not relevant to the determination if unavailability.[6]

The Court of Justice also stipulates (i) that the unavailability of deposits must be determined expressly by the competent authority and (ii) that the time limits specified in the Deposit Guarantee Schemes Directive for determining such unavailability and the payout of the deposits are mandatory.[7]

As the conditions for determining whether a deposit is 'unavailable' and the period within which this must be done are precise and sufficiently clear, Article 1(3)(i) has direct effect.[8] The Court of Justice indicates that the BNB should therefore have applied the provision of the Directive and not the incorrect Bulgarian transposition of that provision. So, in brief, Kantarev was entitled to invoke the provision of the Directive directly before the Bulgarian national courts.[9]

Conditions for liability of the BNB under EU law

In answering the follow-up question of whether the BNB is liable for the loss suffered by Kantarev as a result of the incorrect application of Article 1(3)(i) of the Deposit Guarantee Schemes Directive, the Court of Justice finds at the outset that this must be assessed by reference to the principle of member state liability under EU law.[10] According to this principle, an individual who has suffered loss is entitled to reparation where three conditions are met: (1) the rule of law infringed must be intended to confer rights on individuals; (2) the breach must be sufficiently serious; and (3) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party.[11]

As regards the first requirement, the Court of Justice notes that it is apparent from the recitals to the Deposit Guarantee Schemes Directive that it is mainly intended to protect depositors. Moreover, a determination that deposits are unavailable directly affects the legal position of the depositor since it triggers the operation of the deposit guarantee scheme and ultimately results in repayment. In

[5] Paragraph 49.
[6] Paragraphs 51-59.
[7] See paragraphs 73-77 and 60-62 respectively.
[8] See also in this connection: CJEU, 25 June 2015, ECLI:EU:C2015:418 (*Indėlių ir investicijų draudimas and Nemaniūnas*), paragraph 57.
[9] Paragraphs 97-101.
[10] The Court of Justice recognised this as a principle of EU law inherent in the system of the Treaty for the first time in the Francovich judgment, see: CJEU, 19 November 1991, ECLI:EU:C:1991:428 (*Francovich*).
[11] CJEU, 5 March 1996, ECLI:EU:C:1996:79 (*Brasserie du Pêcheur and Factortame*), paragraph 51 and more recently: CJEU, 28 July 2016, ECLI:EU:C:2016:602 (*Tomášová*), paragraph 22. As it makes no difference for this purpose what government institution is responsible for the breach, financial supervisors too can be held liable on the basis of this principle. In this connection, see: CJEU *Brasserie du Pêcheur and Factortame*, paragraph 32, R. Meijer, *Tien jaar lidstaataansprakelijkheid: een stand van zaken vanuit civielrechtelijk perspectief* (Ten years of Member State liability: the position from a civil law perspective) *MvV* 2011, pp. 106-107 and C.C. van Dam, *Liability of Regulators. An analysis of the liability risks for regulators for inadequate supervision and enforcement, as well as some recommendations for future policy*, London: British Institute of International and Comparative Law 2006, pp. 81 and 97 (downloadable at www.wodc.nl.).

view of these circumstances, it is clear that Article 1(3)(i) of the Deposit Guarantee Schemes Directive must be treated as a rule of EU law intended to confer rights on specific individuals.[12]

Next, it is necessary to examine whether there has been a sufficiently serious breach of EU law. Such a breach would be deemed to have occurred if there had been a manifest and grave disregard by the BNB for the limits set on its discretion.[13] The Court of Justice mentions in this connection some factors which may be taken into consideration in this regard, which include (the list is not exhaustive):

> *"(..) 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."*[14]

What the Court of Justice considers to be of decisive importance in this case is that Article 1(3)(i) of the Deposit Guarantee Schemes Directive circumscribes the latitude of the BNB by clearly setting out the conditions to which the determination that deposits are unavailable is subject and the time limit within which such a determination must be made. The BNB was therefore obliged to determine the unavailability of the deposits within the mandatory time limit of five working days after it first determined that the KTB Bank had failed to repay a deposit that was due and payable.[15] According to the Court of Justice, this determination took place on 20 June 2014 when the BNB decided to place the KTB Bank under special supervision and suspend its payments and transactions.[16] The Court of Justice states that the fact that the BNB did not determine the unavailability of the deposits until much later, despite the fact that the conditions clearly set out in that provision had long been satisfied, was capable of constituting a sufficiently serious breach within the meaning of EU law.[17] But ultimately it is for the Bulgarian national court to assess this as well as whether there is a direct causal link between the breach of Article 1(3)(i) of the Deposit Guarantee Schemes Directive by the BNB and the harm sustained by Kantarev.[18]

Limits on national liability conditions under EU law

After dealing with the conditions for liability under EU law and their implementation, the Court of Justice points out that although these conditions are necessary and sufficient to create a right to reparation for specific individuals. it is ultimately up to the Member State concerned to make reparation for the consequences of the loss and damage caused.[19] In other words, although the right to reparation flows directly from EU law, it must be implemented by reference to the liability conditions applicable under national law. However, the latter category of conditions cannot always

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[12] Paragraphs 102-104.
[13] CJEU *Brasserie du Pêcheur and Factortame*, paragraph 55. For a more extensive consideration of this requirement in relation to financial supervisors, see: E.J. van Praag, *Aansprakelijkheid van financiële toezichthouders naar Europees recht* (Liability of financial supervisors under European law), *SEW* 2014, vol. 5, pp. 219-220.
[14] Paragraph 105. See also in this connection: CJEU *Brasserie du Pêcheur and Factortame*, paragraph 56.
[15] Paragraphs 106-108.
[16] Paragraph 109.
[17] Paragraph 115.
[18] Paragraph 117. As regards the required causal link, the Court of Justice notes that it seems from the case file that a causal link does exist (see paragraph 116).
[19] Paragraphs 120-123. See also in this connection: CJEU, *Francovich*, paragraph 41 and CJEU *Brasserie du Pêcheur and Factortame*, paragraph 67.

be applied in full.[20] This is because it follows from the principle of Member State liability that the national conditions for liability for a breach of EU law may (i) not be less favourable than those relating to similar domestic claims and (ii) not be so framed as to make it, in practice, impossible or excessively difficult to obtain reparation.[21] These limitations are also sometimes referred to as the principles of equivalence and effectiveness respectively. The Court of Justice then examines whether the applicable Bulgarian legislation is consistent with these principles and concludes that this is not the case.

> *"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."*[22]

This finding means that the BNB's liability in the present case cannot be determined under the conditions laid down in the relevant Bulgarian legislation.[23]

Consequences for Dutch liability limitation under section 1:25d of the Dutch Financial Supervision Act (Wft)

So far this article has considered the validity of the liability limitation in relation to the Bulgarian supervisory authority. What is more important for the readers of this journal, however, is how this judgment affects the limitation of the liability of the AFM and DNB under section 1:25 of the Wft. Since 1 July 2012 this statutory provision has limited the liability of the AFM and DNB to cases in which the loss or damage is to a significant extent due to an intentional failure to perform their duties properly or an intentional failure to exercise their powers properly or is to a significant extent due to gross fault.

'Sufficiently serious breach' versus 'intent and gross negligence'

The first condition for liability under general Dutch law which has been significantly affected by the limitation of liability under section 1:25d of the Wft concerns attributability. Whereas torts could formerly be attributed on the basis of the criteria set out in Article 6:162, paragraph 3 of the Dutch Civil Code (namely fault, accountability by law or accountability according to generally accepted standards), the stricter criterion of intent or gross negligence now applies.[24] It is apparent

[20] For a detailed consideration of how EU law limits the application of national liability conditions, see: J.T. Tegelaar, *Immuun voor de Unie? (Semi)immuniteit van nationale financiële toezichthouders onder nieuw recht*, Ars Aequi, October 2016, pp. 711-712 (AA20160705); R. Meijer, *Staatsaansprakelijkheid wegens schending van Europees gemeenschapsrecht. De invloed van het Europese recht op het nationale stelsel van overheidsaansprakelijkheid* (diss. University of Amsterdam; Serie Recht en Praktijk, no. 156), Deventer: Kluwer (2007)), pp. 73-77; M.H. Wissink, *De Nederlandse rechter en overheidsaansprakelijkheid krachtens Francovich en Brasserie du Pêcheur*, SEW 1997, pp. 85-86.

[21] Paragraph 123. These rules were first formulated in CJEU, 16 December 1976, ECLI:EU:C:1976:188 (*Rewe*). See also in this connection: CJEU, 26 January 2010, ECLI:EU:C:2010:39 (*Transportes Urbanos y Servicios Generales*), paragraph 31 and the case law cited there.

[22] Paragraph 126.

[23] Paragraph 128.

[24] This also means, by the way, that the civil courts will no longer automatically follow the decision of an administrative court that a decision of an administrative authority is unlawful. In other words, where a decision of the AFM or DNB has been set aside by an administrative court, attributability can no longer, in principle, be taken for granted in subsequent civil liability proceedings. The civil courts must now assess whether there has been intent or gross negligence. Cf. *Parliamentary Papers II* 2011/12, 33058, 3, p. 4.

from the explanatory memorandum to the amending legislation that the concept of 'intent' requires that the ADM or DNB must either have wilfully and knowingly neglected their duties or otherwise have been aware that their acts or omissions would entail – or probably entail – improper performance of their duties.[25]

In view of these strict requirements, it is now assumed in the literature that there is virtually no chance of successfully holding the AFM and DNB liable.[26] So it perhaps comes as no surprise that the Court of Justice has confirmed that a national law stipulating that a financial supervisor can be liable only if it has acted intentionally goes beyond the criterion of a sufficiently serious breach under EU law.[27] What is more interesting is the next question: what constitutes 'gross negligence'? The Court of Justice says the following about this:

> *"(..) 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 (...) 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."*[28]

In other words, the Member States are free to use a concept of fault in their national liability conditions, but must ensure that it does not go beyond the concept of a sufficiently serious breach of EU law. According to the explanatory memorandum to the legislation, the Dutch concept of gross fault refers to 'conduct on the part of the su pervisory authority that is so 'reprehensible or indifferent' that improper performance of its duties is a real possibility.'[29] For a different interpretation, the legislator refers to the judgment of the Supreme Court in the case of *Codam v Merwede*, where it makes clear that the fault must be 'so reprehensible as to be bordering on intent'.[30] Although it remains to be seen how the Supreme Court will precisely define the concept of 'gross fault' in section 1:25d of the Wft, the previous case law of the Court of Justice on the liability of other national government bodies for breaches of EU law suggests that this condition too will go beyond the requirement of a sufficiently serious breach.[31] For example, the Court of Justice has held that national legislation limiting the liability of the Italian supreme court to cases where there has been serious misconduct or intentional fault is contrary to the conditions for liability resulting from the principle of Member State liability under EU law.[32] As it makes no difference

[25] *Parliamentary Papers II* 2011/12, 33058, 3, p. 5.
[26] See, for example, S. Sahtie, *Wettelijke aansprakelijkheidsbeperking voor DNB en AFM. Hoe hoog komt de nieuwe lat te liggen?*, *MvV* 2012, vol. 10, p. 274.
[27] For example, see: Van Praag 2014, p. 222, Tegelaar 2016, p. 713 and D. Busch & S. Keunen, *Een ruime uitleg van een beperkte aansprakelijkheid voor financiële toezichthouders* (annotation to Supreme Court judgment, 9 March 2018, ECLI:NL:HR:2018:309), *Ars Aequi* June 2018, p. 517 (AA20180518).
[28] Paragraph 127.
[29] *Parliamentary Papers II* 2011/12, 33058, 3, p. 5.
[30] Supreme Court, 12 March 1954, *NJ* 1955/386 (*Codam v Merwede*). It can be inferred from the reference to this judgment that the concept of 'gross fault' should be interpreted subjectively. This means that the AFM or DNB must have been aware that their conduct was wrong (deliberate recklessness). See Sahtie 2012, p. 275. Cf. E.J. van Praag, *'Toezichthoudersaansprakelijkheid voor onvoldoende toezicht en onrechtmatige besluiten*', in: D. Busch, C.J.M. Klaassen and T.M.C. Arons (eds.), '*Aansprakelijkheid in de financiële sector*' (Liability in the financial sector) (Serie Onderneming en Recht vol. 78), Deventer: Kluwer (2013)), p. 900; V.H. Affourit and R.D. Lubach, '*Toezichthoudersaansprakelijkheid onder de Wet aansprakelijkheidsbeperking DNB en AFM*' (Liability of supervisors under the Act limiting the liability of DNB and the AFM), O&A 2012, p. 178.
[31] Support for this view can be found in the literature. See Van Praag 2014, p. 222, Tegelaar 2016, pp. 712-713.
[32] See, for example, CJEU 13 May 2006, ECLI:EU:C:2006:391 (*Traghetti*) and CJEU 24 November 2011, ECLI:EU:C:2011:775 (*Commission v. Italy*). See also in this connection: Van Praag 2014, p. 222, Tegelaar 2016, pp. 712.

for the purposes of this principle what government body is responsible for the breach, it seems likely that the Court of Justice will extend this reasoning to other government bodies such as financial supervisors. If this happens, it would mean that the liability of the AFM or DNB for a breach of EU law could not be assessed by reference to the attributability requirement of intent or gross fault under section 1:25d of the Wft.

'Direct causal link' versus 'to a significant extent'

Section 1:25d of the Wft also has a bearing on the causality requirement. As hitherto the Court of Justice has unfortunately given little indication in its decisions on Member State liability as to how it proposes to implement the requirement of causality under EU law, this hampers comparison with the Dutch concept of causality.[33] What is in any event clear is that there must be a direct causal link between the breach of EU law and the loss or damage suffered by the individual.[34] It is assumed in the literature that the Court of Justice generally distinguishes between two steps in order to determine whether a direct causal link exists, namely (1) whether the loss or damage would have occurred without the breach, and (2) whether or not the loss or damage was immediate and foreseeable.[35] Often, however, the Court of Justice leaves it to the national court. In cases about Member State liability, to make a (final) decision on whether the required degree of causality exists in a particular case.[36] What probably plays a role here is that the issue of the causal link is closely bound up with the facts of the case, about which the national courts are generally better informed.[37] This does not mean, however, that in assessing causality the national courts may simply apply the national causality criterion. In view of the principles of equivalence and effectiveness, this is permitted only in so far as the relevant criterion does not raise the threshold for the injured party beyond the requirement under EU law of a direct causal link.

It follows in this connection from the text of the Dutch limitation of liability in section 1:25d of the Wft that the AFM and DNB can be held liable only if the loss or damage is due to a significant extent to their intent or gross fault. By acknowledging in this way that fault can have various causes, the legislator has clarified that the actions of the AFM and DNB which constitute intent or gross fault have been responsible to a major rather than a minor extent for causing the loss or damage.[38] Although here too it remains to be seen how the Supreme Court will precisely implement this liability condition, this criterion appears at first sight to be less restrictive than the requirement under EU law of a 'direct causal link'. If this does indeed prove to be the case, it is to be expected that the Dutch courts will have to assess the liability of the AFM or DNB for a breach of EU law by reference to the causality criterion in section 1:25d of the Wft, namely 'to a significant extent'. The Court of Justice does, after all, permit a situation in which a government body, on the basis of the

[33] Meijer 2007, p. 115. For some insight into the manner in which the Court of Justice deals in practice with the requirement of a causal link, see: CJEU 24 September 1998, ECLI:EU:C:1998:429 (*Brinkmann v Skatteministeriet*) and CJEU 15 June 1999, ECLI:EU:C:1999:306 (*Rechberger*). See also in this connection: Sieburgh 2014, pp. 509-514 and Meijer 2007, pp. 47-49.

[34] See, inter alia, CJEU, *Brasserie du Pêcheur and Factortame*, paragraph 65 and, more recently, CJEU 28 July 2016, ECLI:EU:C:2016:602 (*Tomášová*), paragraph 22 and the case law cited there.

[35] Sieburgh 2014, pp. 486 and 509. The first step is comparable to the requirement of a sine qua non link, which applied before the introduction of the limitation on liability. For a further consideration of the causality requirement in relation to the liability of financial supervisors, see: D. Busch, '*Aansprakelijkheid van financiële toezichthouders'(*Liability of financial supervisors), Nijmegen: Ars Aequi Libri 2010, pp. 46-52.

[36] See, for example, CJEU, *Brasserie du Pêcheur and Factortame*, paragraph 65. In the present judgment too, the Court of Justice leaves this decision to the national court (see paragraph 116).

[37] Meijer 2007, p. 47.

[38] *Parliamentary Papers II* 2011/12, 33058, 4, p. 4. See also in this connection: Sahtie 2012, p. 276.

applicable national rules on liability, is liable for a breach of EU law under less restrictive conditions than apply under the Community rules:

> *"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."*[39]

Peter Paul judgment revisited?

A last aspect of this judgment that requires discussion is its relationship with the well-known *Peter Paul* judgment of 2004.[40] In the latter judgment the Court of Justice held that various financial supervision directives, including the Deposit Guarantee Schemes Directive, were not intended to grant a right to compensation to individuals for inadequate and/or defective supervision by the competent national supervisory authority, save for the right to payout under the deposit guarantee scheme.[41] The BNB has invoked this judgment in the present case, but the Court of Justice has indicated that this is a different situation:

> *"It is clear from the judgment of 12 October 2004 (Peter Paul) 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.*
>
> *In the present case [however], 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."*[42]

In the *Peter Paul* case, the account holders had already received in full the guaranteed amount to which they were entitled under the Deposit Guarantee Schemes Directive, which had not been transposed into German law in time. However, that amount did not cover all the loss they had suffered. The residual loss too was claimed on the basis of Member State liability, but the Court of Justice held that this was not recoverable. In the present case, by contrast, the account holder did not receive the full guaranteed amount to which he was entitled under the Deposit Guarantee Schemes Directive as this had not been correctly transposed into Bulgarian law. As a result, he received the guaranteed amount much later than would have been the case under the directive and suffered late payment damage. In brief, the issue in the *Peter Paul* case was whether the account holders were entitled to compensation in excess of the guaranteed amount, whereas the present case is about compensation for late payment of the guaranteed amount. Strictly speaking, therefore, the judgments are not mutually contradictory.

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[39] Paragraph 121. See also in this connection: CJEU, 25 November 2010, ECLI:EU:C:2010:717 (*Fuß*), paragraph 66 and the case law cited there. An argument is also made in the literature that in practice it will often come down to application of the national causality criterion since it is unclear how precisely the criterion under EU law should be interpreted. See Meijer 2007, p. 48.

[40] CJEU, EC 12 October 2004, ECLI:EU:C:2004:606 (*Peter Paul).*

[41] As the Court of Justice had previously assumed quite readily that the protective norm criterion (*schutznorm*) under Community law had been fulfilled, this finding attracted considerable criticism in the literature, See, in particular, M. Tison, 'Do not attack the watchdog! Banking supervisor's liability after Peter Paul', *Working Paper, Financial Law Series, University of Ghent* 2005, pp. 26-29.

[42] Paragraphs 89-91. In this connection, see also the opinion of Advocate General Kokott of 7 June 2018, ECLI:EU:C:2018:412, paragraphs 77-84.

Nonetheless, the question arises of whether the approach adopted by the Court of Justice in the *Peter Paul* judgment is still sustainable in today's context.[43] On the basis of the *Peter Paul* judgment, it could be argued that EU law on financial supervision is not much inclined to award rights of compensation to private individuals, except in clear-cut circumstances of the kind that occurred in the present case. It can perhaps be argued that the primary aim of the EU financial supervision law that was central to the Peter Paul judgment was still to achieve a common market rather than provide investor protection, whereas investor protection is a key objective of the present (post-crisis) supervision legislation. This is fairly obvious in the case of the EU supervision rules treated in the Netherlands as belonging to the conduct-of-business rules.[44] Without attempting to be exhaustive, we would mention in this connection MiFID I/II (investment firms), UCITS/AIFMD (investment funds), IDD (insurance intermediaries), the Prospectus Directive/Prospectus Regulation (offering of securities to the public) and MAD/MAR (market abuse).[45] There might perhaps be more hesitation in respect of the EU supervision rules treated in the Netherlands as belonging to the prudential rules, but these rules too are increasingly intended to provide explicit protection for the interests of individuals. We would refer in this connection to CRD IV, the prudential banking directive, recital 47 of which states that:

> *"[s]upervision of institutions on a consolidated basis aims to protect the interests of depositors and investors of institutions (..)."* [46]

In view of this, it is almost inevitable that the Court of Justice will have to conclude in future cases that EU law on financial supervision does indeed grant rights to individuals, with all the attendant consequences.[47] It is in any event clear from the legislative history of the Wft that the AFM and DNB perform their supervision role not only in the public interest but also to protect 'clients' and 'consumers of financial services'.[48] In the Netherlands, we therefore have little trouble in accepting the conclusion that one of the aims of both the conduct-of-business rules and the prudential rules is to protect investors. In the unlikely event that the Court of Justice defines the limits more narrowly,

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[43] For a detailed consideration of this issue, see: J. Tegelaar, *Exit Peter Paul? Divergente toezichthoudersaansprakelijkheid in de Europese Unie voor falend financieel toezicht, bezien vanuit het Europeesrechtelijke beginsel van effectieve rechtsbescherming* (Exit Peter Paul?, Divergent liability of supervisors in the EU for deficient financial supervision, viewed from the perspective of the the principle of effective legal protection under EU law), The Hague/Leiden: Jongbloed 2017.

[44] Cf. Tegelaar 2017, p. 52.

[45] See: Directive 2004/39/EC, OJ L 145, 30 April 2004, pp. pp. 1-47 (*MiFID*); Directive 2014/65/EU, OJ L 173, 12 June 2014, pp. 349-496 (*MiFID II*), Directive 2009/65/EC, OJ L 302, 17 November 2009, pp. 32-96 (*UCITS*); Directive 2011/61/EU, OJ L 174, 1 July 2011, pp. pp. 1-73 (*AIFMD*); Directive 2016/97/EU, OJ L 26, 2 February 2016, pp. pp. 19-59 (*IDD*); Directive 2010/73/EU, OJ L 327, 11 December 2010, pp. 1-12 (*Prospectus Directive*); Regulation (EU) no. 2017/1129, OJ L 168, 30 June 2017, pp. pp. 12-82 *Prospectus Regulation*); Directive 2014/57/EU, OJ L 173, 12 June 2014, pp. 179-189 (*MAD*) and Regulation (EU) 596/2014, OJ L 173, 12 June 2014, pp. 1-61; (*MAR*). 'MiFID' stands for Markets in Financial Instruments Directive, 'UCITS' for Undertakings for Collective Investment in Transferable Securities; 'AIFMD' for Alternative Investment Fund Managers Directive, 'MAD' for Market Abuse Directive and 'MAR' for Market Abuse Regulation.

[46] Directive 2013/36/EU, OJ L 176, 27 June 2013, pp. 338-436 (*CRD IV*). 'CRD' stands for Capital Requirements Directive. In this connection, see also recital 91 to CRD IV and recitals 7, 123 and 127 to Regulation (EU) 575/2013, OJ L 176, 27 June 2013, pp. 1-337 (*CRR*). 'CRR' stands for Capital Requirements Regulation.

[47] See also in this connection: R. Meijer, *Tien jaar lidstaataansprakelijkheid: een stand van zaken vanuit civielrechtelijk perspectief* (Ten years of member state liability: the position from a civil law perspective) *MvV* 2011, p. 107.

[48] *Parliamentary Papers II* 2003/04, 29 708, no. 3, pp. 28-29. For more about this, see: D. Busch, *Naar een beperkte aansprakelijkheid van financiële toezichthouders?* (Towards limited liability of financial supervisors?) (inaugural speech at Radboud University Nijmegen) (Serie Onderneming en Recht vol. 61), Deventer: Kluwer (2011)), pp. 17-22; D. Busch, *Aansprakelijkheid van financiële toezichthouders* (Liability of financial supervisors), Ars Aequi Libri, Nijmegen 2010, pp. 41-45.

this need not necessarily affect the more liberal approach taken by the Netherlands. After all, the Court of Justice confirms in the present case that the national rules on the liability of supervisors may certainly be more flexible than the EU requirements for Member State liability.

Conclusion

This judgment confirms that the Dutch limitation of liability under section 1:25d of the Financial Supervision Act (Wft) may be partially excluded if the AFM or DNB breaches a rule of EU law in the performance of its powers of supervision. In view of the increasing Europeanisation of financial supervision law, this situation is likely to occur with increasing frequency.