

OPINION OF ADVOCATE GENERAL  
LÉGER  
delivered on 28 September 2004<sup>1</sup>

1. The present case follows on from the judgment of 13 December 2001 in the *Heininger* case.<sup>2</sup>

2. In that judgment, the Court held that Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises<sup>3</sup> applies to secured credit agreements, that is to say, loan agreements entered into in order to finance the purchase of immovable property. The Court concluded that consumers who entered into that kind of agreement in a doorstep situation had the right of cancellation under Article 5 of the Directive.

3. In the present case, the Landgericht Bochum (Regional Court, Bochum, Germany) has asked the Court to clarify the consequences of the earlier judgment. The national court asks whether the Directive may apply to a single financial transaction consisting not only of a secured credit agreement, but also a contract for the purchase of immovable property. The national court also asks whether, in that

kind of financial transaction, the exercise of the right of cancellation may entail not only the cancellation of the secured credit agreement, but also that of the contract for the purchase of immovable property.

## I — The legal context

### A — Community legislation

4. The Directive<sup>1</sup> aims to give consumers in the Member States a minimum degree of protection in relation to doorstep selling.

5. Article 1(1) of the Directive provides that the Directive applies to contracts concluded between a trader and a consumer during an excursion organised by the trader away from his business premises or during a visit by a trader to the consumer's home or to the consumer's place of work, where the visit does not take place at the express request of the consumer.

1 — Original language: French.

2 — Case C-481/99 [2001] ECR I-9945 ('the *Heininger* judgment').

3 — OJ 1985 L 372, p. 31 ('the Directive').

6. On the other hand, under Article 3(2)(a), the Directive does not apply to 'contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property'.

renunciation, the legal effects of such renunciation shall be governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received'.

7. Article 4 of the Directive states that the trader must inform the consumer of his right to cancel the contract within the periods laid down in Article 5 of the Directive.

10. In the *Heininger* judgment, the Court interpreted the Directive on two points.

8. Article 5 of the Directive provides as follows:

'1. The consumer shall have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law. ...

11. First, it held that the Directive applied to secured credit agreements, that is to say, credit agreements for financing the purchase of immovable property,<sup>4</sup> even if the agreement was secured by a charge on immovable property.<sup>5</sup> The Court took the view that this type of contract did not have as its subject 'a right relating to immovable property' within the meaning of Article 3(2)(a) of the Directive,<sup>6</sup> but a grant of funds which is linked to a corresponding obligation of repayment together with interest.<sup>7</sup> The Court concluded that a consumer who had entered into a contract of that type in a doorstep-selling situation had a right of cancellation under Article 5 of the Directive.<sup>8</sup>

2. The giving of the notice shall have the effect of releasing the consumer from any obligations under the cancelled contract.'

12. Second, the Court observed that the minimum period of seven days prescribed

9. With regard to the consequences of cancellation, Article 7 of the Directive states that 'if the consumer exercises his right of

4 – *Heininger* judgment, operative part, paragraph 1.

5 – *Ibid.*, paragraph 34.

6 – *Ibid.*, paragraph 32.

7 – *Ibid.*, paragraph 33.

8 – *Ibid.*, operative part, paragraph 1.

for cancellation must be calculated 'from receipt by the consumer of the notice' concerning his right of cancellation and that the trader was under an obligation to provide that information.<sup>9</sup> Consequently, the Court held that the Directive precluded a national measure imposing a time-limit of one year from the conclusion of the contract within which the right of cancellation under Article 5 of the Directive had to be exercised, where the consumer had not received the information specified in Article 4.<sup>10</sup>

#### B — German legislation

13. In Germany the Directive was transposed into national law by the Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften (Law on the cancellation of doorstep transactions and analogous transactions) of 16 January 1986.<sup>11</sup>

14. Paragraph 3(1) of that law provides that 'in the event of cancellation, each party shall return to the other whatever it has received'. Paragraph 3(3) states that 'for the right to use or apply goods and for the other services supplied up to the date of cancellation, the value of such right or services must be paid'.

15. In addition, the German legislature transposed Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit<sup>12</sup> by enacting the Verbraucherkreditgesetz (Consumer Credit Law) of 17 December 1990.<sup>13</sup> Paragraph 9 of that law provides as follows:

'1. A purchase agreement constitutes a transaction linked with the credit agreement if the credit serves to finance the purchase price and both agreements are to be regarded as a single economic unit. In particular, a single economic unit shall be presumed where the lender relies on the seller's cooperation in the preparation or conclusion of the credit agreement.

2. The consumer's declaration of intention to conclude the associated purchase agreement shall be valid only if the consumer does not revoke ... his declaration of intention to conclude the credit agreement.

The notice concerning the right of cancellation ... must state that, in the event of cancellation, the purchase agreement linked

9 — *Ibid.*, paragraph 45.

10 — *Ibid.*, operative part, paragraph 2.

11 — BGBl. I, p. 122 (the 'HWiG').

12 — OJ 1986 L 42, p. 48.

13 — BGBl., I, p. 2840 (the 'VerbrKrG').

with the credit agreement will not be valid either ... If the net amount of the credit has already been paid to the seller, the lender shall, in relation to the consumer and with regard to the legal effects of cancellation, be subrogated to the seller's rights and obligations arising from the purchase agreement ...

Biege GmbH, which acts as an intermediary in providing property and financial services, handled the marketing of the properties and arranged finance.

16. Paragraph 3(2), point 2, of the VerbrKrG states that certain provisions of that law, in particular Paragraph 9, do not apply to 'credit agreements in which credit is subject to the giving of security by way of a charge on immovable property and is granted on the usual terms for credits secured by a charge on immovable property and the intermediate financing of the same'.

19. In the context of this scheme, Mr and Mrs Schulte were contacted in February 1992 by a representative of Heinen & Biege GmbH. He offered them an investment by purchasing an apartment financed by a loan. For tax reasons, the property would have to be used by third parties and the purchase would have to be financed entirely by the loan, no repayments being made during the term of the loan agreement.

## II — Facts and procedure in the main proceedings

17. Since the end of the 1980s, Deutsche Bausparkasse Badenia ('the Bank') has financed the purchase of second-hand apartments.

20. Accordingly on 28 April 1992 Mr and Mrs Schulte purchased an apartment for DEM 90 519. The purchase agreement was signed before a notary, in accordance with the relevant German legislation.

18. These properties are generally blocks of flats constructed as social housing in the 1960s and 1970s which were purchased by Allgemeine Wohnungsvermögens AG, renovated and then offered for sale. Heinen &

21. To finance the purchase, on 7 April 1992 Mr and Mrs Schulte took out a loan of DEM 105 000 from the Bank, secured by a charge on the property for the same amount. The charge was created by a notarial deed of 8 May 1992. In the deed the purchasers also undertook personal liability for the payment of the amount of the charge and agreed to the possibility of the immediate enforcement of the loan agreement against their entire assets.

22. The purchasers also joined a pool for rental income, by virtue of which they waived the right to manage their property. Heinen & Biege GmbH collected the rental income and passed it to the owners in proportion to their investment, after deduction of the costs of maintaining the apartments.

23. Finally, the purchasers entered into two 'building savings' agreements with the Bank which were to serve for the repayment of their loan.

24. After the conclusion of these various agreements, the Bank, acting on the purchasers' instructions, paid the amount of the loan, namely DEM 101 850, directly to the vendor of the apartment.

25. When Mr and Mrs Schulte failed to meet their obligations, the Bank demanded repayment of the loan and sought to enforce recovery on the basis of the notarial deed of 8 May 1992.

26. In November 2002 the purchasers cancelled the loan agreement on the basis of the HWiG and instituted proceedings against enforcement before the court making the reference.

### **III — The reference for a preliminary ruling**

27. In its decision to refer, the Landgericht Bochum observes that, under Paragraph 3 of the HWiG, each party must return to the other whatever it has received and must pay for the use of the goods up to the date of cancellation. The national court adds that the Bundesgerichtshof (Federal Court of Justice, Germany), the supreme court in civil matters, has consistently held that a loan is deemed to have been 'received' even if the financial institution in question has paid the amount directly to a third party on the borrower's instructions.

28. It follows that, in the event of cancellation, the provisions of the HWiG require the borrower to repay the net amount of the credit, together with interest at the market rate. In addition, the repayment obligation takes immediate effect and relates to the entire loan.

29. The national court considers that this consequence is hard on the consumer and that other remedies could be envisaged in national law.

30. Accordingly the loan agreement and the contract for the purchase of real property could be described as an economic unit within the meaning of Paragraph 9 of the VerbrKrG. In that case, the cancellation of

the credit agreement would entail the cancellation of the purchase agreement pursuant to Paragraph 9(2) of the VerbrKrG. Therefore the consumer would no longer have to repay the loan to the lender, but only to transfer ownership of the property to it and pay for the use of the property up to the date of cancellation.

in force up to 30 September 2000) is not applicable to such agreements within the meaning of that provision.

31. Another approach would be to recognise the single financial transaction constituted by the loan agreement and the purchase contract without recourse to Paragraph 9 of the VerbrKrG. In that case, the cancellation of one agreement would entail the annulment of the other.

According to the settled case-law of several chambers of the Bundesgerichtshof, the secured credit agreement and the purchase of immovable property financed by the loan are not in principle deemed to be associated agreements constituting a single financial transaction .... In the case of a purchase of immovable property, even a layman with no knowledge of the law and no business experience knows that the lender and the vendor are, as a rule, two different persons. The legislature took this into account in providing, in Paragraph 3(2), point 2 [of the VerbrKrG], that the rules relating to associated agreements (Paragraph 9 of the VerbrKrG) do not apply to secured credit agreements within the meaning of Paragraph 3(2), point 2'.

32. However, the national court explains that the Bundesgerichtshof took neither of those two courses, even in judgments given after the *Heininger* judgment. The Bundesgerichtshof relies primarily on Paragraph 3 (2), point 2, of the VerbrKrG, which provides that Paragraph 9 of the VerbrKrG, concerning associated transactions, does not apply to credit agreements secured by a charge on immovable property. Consequently the Bundesgerichtshof found as follows in a judgment of 9 April 2002:

33. The Landgericht Bochum explains that, because of this case-law, the cancellation of the secured credit agreement does not affect the validity of the purchase contract for immovable property. Consumers must therefore repay the loan immediately, together with interest.

'If, by reason of [the *Heininger*] judgment, a right of cancellation [must be found to exist for secured credit agreements], when considering the legal effects of cancellation ..., account must be taken of the fact that, under Paragraph 3(2), point 2, of the VerbrKrG, Paragraph 9 of the VerbrKrG (in the version

34. The national court considers that this course of action is contrary to Community law. Although, under Article 7 of the Directive, the legal effects of cancellation

must be governed by national law, it is undisputed that the detailed rules chosen by the Member States must not jeopardise the effectiveness of Community law and, in particular, the right of cancellation conferred by the Directive.

35. In the present case, however, a consumer exercising his right of cancellation would be in a much less favourable situation than if the loan agreement were kept on foot because he would have to repay the loan immediately, with interest.

36. Consequently the Landgericht Bochum considers that the German authorities have not adopted appropriate measures to ensure the implementation of the Directive and to secure effective consumer protection.

#### IV — The questions referred

37. The national court has therefore decided to stay the proceedings and to refer the following four questions to the Court for a preliminary ruling:

(1) Does Article 3(2)(a) of the Directive [85/577] also cover contracts for the

purchase of immovable property which must be regarded as merely a component of a credit-financed capital investment model and in the case of which the contract negotiations conducted up to the conclusion of the contract were held in a doorstep-selling situation, as defined in Paragraph 1 of the [HWiG], both as regards the contract for the purchase of the immovable property and the loan agreement serving solely to finance that purchase?

(2) Are the requirements of the rule concerning a high level of protection in the field of consumer protection (Article 95 (3) EC) and the effectiveness of consumer protection safeguarded by the Directive [85/577] satisfied by a national legal system or the interpretation thereof which limits merely to the reversal of the loan agreement the legal effects of the revocation of the declaration of intent to enter into a loan agreement, even in connection with such capital investment models in which the loan would not have been granted at all without the acquisition of the immovable property?

(3) Is a national rule on the legal effects of cancelling a loan agreement to the effect that the cancelling consumer must pay back the loan proceeds to the financing bank, even though according to the plan drawn up for the capital investment the loan serves solely to finance the immo-

vable property and is paid directly to the vendor of the immovable property, consistent with the protective purpose of the rule on cancellation laid down in Article 5(2) of the Directive [85/577]?

39. The Bank observes that, in the present case, the Landgericht Bochum did not decide whether the credit agreement was concluded in a doorstep-selling situation and that, until that question is resolved, the reference for a preliminary ruling is of a hypothetical nature.

(4) Where a legal effect of cancellation, under national law, results in the consumer being required, after declaring cancellation, immediately to pay back — in accordance with the plan drawn up for the capital investment — the loan proceeds which have thus far not been redeemed at all, plus interest thereon at the normal market rate, is this effect contrary to the rule concerning a high level of protection in the field of consumer protection (Article 95(3) EC) and to the principle of the effectiveness of consumer protection enshrined in the Directive [85/577]?

40. As the Court is aware, it has consistently been held<sup>14</sup> that the procedure under Article 234 EC is an instrument for cooperation between the Court of Justice and national courts. In the context of that cooperation, it is for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine both the need for a preliminary ruling and the relevance of the questions which it submits to the Court.<sup>15</sup> Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling.<sup>16</sup>

#### V — Admissibility of the reference for a preliminary ruling

38. First of all, it is necessary to consider whether the reference for a preliminary ruling is admissible.

41. However, the Court has also stated<sup>17</sup> that it is for the Court of Justice, in order to confirm its own jurisdiction, to examine,

14 — Since the judgment of 1 December 1965 in Case 16/65 *Schwarze* [1965] ECR 877, 886.

15 — See, in particular, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-390/99 *Canal Satellite Digital* [2002] ECR I-607, paragraph 18; Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 24; and Case C-116/02 *Gasser* [2003] ECR I-14693, paragraph 23.

16 — See, in particular, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; *PreussenElektra*, cited above, paragraph 38; *Canal Satellite Digital*, cited above, paragraph 18; and *Arduino*, cited above, paragraph 24.

17 — Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21.



where necessary, the conditions in which a case has been referred to it by the national court. The spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions.<sup>18</sup>

42. Moreover, the Court has found that, in order to enable it to provide a useful interpretation of Community law, it is appropriate that, before making the reference to the Court, the national court should establish the facts of the case.<sup>19</sup>

43. In the present case, it is clear that the national court has not determined the question whether the credit agreement was concluded in a doorstep-selling situation, although the parties are clearly in dispute on this point.<sup>20</sup>

18 — See, in particular, *Bosman*, cited above, paragraph 60; *PreussenElektra*, cited above, paragraph 38; and *Canal Satellite Digital*, cited above, paragraph 18; and also Case C-451/99 *Čura Anlagen* [2002] ECR I-3193, paragraph 16; Case C-153/00 *Der Weduwe* [2002] ECR I-11319, paragraph 32; and Case C-147/02 *Alabaster* [2004] ECR I-3101, paragraph 54.

19 — See, in particular, Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 6, and Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 19.

20 — See the order for reference, p. 5; written observations of Mr and Mrs Schulte, p. 7; and written observations of the Bank, paragraph 1.

44. The national court takes the view that the outcome of the case depends, above all, on whether the Directive requires the consumer to repay the loan if the credit agreement is cancelled. The national court considered that, if the Court replied to that question in the affirmative, it would not be necessary to determine whether the disputed agreement fell within the scope of the Directive because, even assuming that were the case, Mr and Mrs Schulte would have to repay the loan to the Bank in any case.

45. Although the reasons for this course of action are understandable, it places the Court of Justice in a difficult situation with regard to its case-law. The present case differs from the *Heininger* case, where the national court clearly started from the premiss that the credit agreement fell within the scope of the Directive,<sup>21</sup> in that the Landgericht Bochum expressly left the question open.<sup>22</sup>

46. It follows that, as the file stands at present, the Court does not know whether the Directive applies to the dispute in the main proceedings. The Court is therefore uncertain that the judgment it gives will be applied in the main proceedings because, after further consideration, the national court may very well find that the credit agreement was not concluded in a doorstep-selling situation.

21 — See the *Heininger* judgment, paragraphs 25 and 26.

22 — See the order for reference, pp. 6 and 8.

47. In these circumstances, it appears difficult to find that the reference for a preliminary ruling is admissible. As the Bank observed, it is, as matters stand, of a hypothetical nature.

A — *The scope of the Directive*

51. The first question from the Landgericht Bochum relates to Article 3(2)(a) of the Directive.

48. Consequently I shall examine the questions from the Landgericht Bochum by way of an alternative reply.

52. The national court asks whether, because of that provision, the Directive may apply to a contract for the purchase of immovable property where that contract forms part of a single financial transaction which includes, in addition to the said contract, a secured credit agreement for the sole purpose of financing the purchase of the property, joining a scheme for pooling rental income and two building savings contracts.

VI — **The questions referred**

49. The reference for a preliminary ruling from the Landgericht Bochum raises three series of questions which must be examined in succession.

53. As we have seen, Article 3(2)(a) excepts from the scope of the Directive 'contracts for the construction, sale and rental of immovable property'.

50. The questions relate to the scope of the Directive<sup>23</sup> (A below), the effects of the cancellation of the credit agreement on the contract for the sale of immovable property<sup>24</sup> (B below) and the effects of cancellation on the secured credit agreement itself<sup>25</sup> (C below).

54. This exception is explained by the fact that the Directive aims to protect consumers from the element of surprise inherent in doorstep selling.<sup>26</sup> Contracts concluded away from business premises are generally characterised by the fact that it is the trader who initiates the negotiations and that the

<sup>23</sup> — First question.

<sup>24</sup> — Second question.

<sup>25</sup> — Third and fourth questions.

<sup>26</sup> — See the preamble to the Directive (fourth recital) and my Opinion in the *Heminger* case, points 33 to 38.

consumer is totally unprepared for negotiations.<sup>27</sup> Therefore the consumer is unable to compare the trader's offer with other offers<sup>28</sup> and cannot assess all the implications of his acts.<sup>29</sup>

55. However, the element of surprise is not found in contracts relating to immovable property, particularly not in contracts for the purchase of immovable property.

56. In most, if not all, Member States, the conclusion of immovable property contracts entails certain mandatory formalities. It may be necessary for the contract to be concluded before an appropriate public officer who must draw up the document and explain to the parties the meaning of their obligations. A certain period may also be required to elapse between the signing of the provisional contract and the final conclusion of the contract.

57. Consequently it is virtually impossible for a contract for the purchase of immovable property to be validly concluded in a door-step-selling situation. It was therefore logical

for the Directive to exclude contracts of that kind from its ambit.

58. In the present case, the national court asks whether the exclusion still applies even if the contract for the purchase of immovable property forms part of a single financial transaction which includes, in addition to the said contract, a secured credit agreement for the purpose of financing the purchase of the property.<sup>30</sup>

59. On this point, the French Government proposed at the hearing that the Court should take the same approach as in the judgment of 22 April 1999 in the *Travel Vac* case.<sup>31</sup>

60. In that case, one of the questions which arose was whether the Directive could apply, by reason of Article 3(2)(a), to timeshare properties within the meaning of Directive 94/47/EC.<sup>32</sup>

30 — In this connection, it will be noted that the national court started from the premiss that the disputed contracts, namely the secured credit agreement and the contract for the purchase of immovable property, constitute a single transaction. However, in the order for reference the national court itself explained that the Bundesgerichtshof had rejected that premiss. The latter has consistently held that 'the secured credit agreement and the purchase of immovable property financed by the loan are not in principle deemed to be associated agreements constituting a single financial transaction' (see point 32 of the present Opinion). Therefore the national court's first question seems to be based on a premiss which, on its own admission, is wrong in national law. However, even if the national court's premiss is accepted, I do not think the Directive applies to the transaction in question for the reasons set out in points 60 to 68 of this Opinion.

31 — Case C-423/97 [1999] ECR I-2195.

32 — Directive of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable property on a timeshare basis (OJ 1994 L 280, p. 83).

27 — Preamble to the Directive (fourth recital).

28 — *Ibid.*

29 — Case C-45/96 *Dietzinger* [1998] ECR I-1199, paragraph 19, and the *Heininger* judgment, paragraph 24.

61. On that point, the Court found that timeshare contracts such as that at issue in the main proceedings are 'not covered by the exception provided for in Article 3(2)(a) of Directive 85/577'.<sup>33</sup> The Court took the view that a contract of that kind 'not only concerns the right to use a timeshare apartment, but also concerns the provision of separate services of a value higher than that of the right to use the property'.<sup>34</sup>

62. It follows that one of the decisive aspects in that case was that the contract was not only for the purchase of a right relating to a property but also, and more importantly, for the supply of separate services such as the maintenance of the building, management and administration of the timeshare scheme, use of the common services of the residential estate and membership of an international club allowing the purchaser to exchange his holiday dates.<sup>35</sup>

63. Likewise the Court attached decisive importance to the fact that the value of the services was greater than that of the right to use the property. Under the contract, the purchaser had to pay ESP 1 090 000 (EUR 5 436.90), of which only ESP 285 000 (EUR 1 421.57) was the cost of the undivided share.

33 — *Travel Vac* judgment, cited above, paragraph 25.

34 — *Ibid.*

35 — *Ibid.*, paragraph 10.

The balance was made up of value added tax, the abovementioned services and membership of the said international club.<sup>36</sup>

64. However, the financial transaction at issue in the present case does not possess those characteristics.

65. As we have seen, it related mainly, if not entirely, to the purchase of a right of ownership of an immovable property.

66. It is true that Heinen & Biege GmbH also undertook to provide certain services concerning the management and administration of the apartment building.<sup>37</sup> However, it is clear that, financially speaking, those services represented only a very small proportion of the transaction in question.<sup>38</sup>

36 — *Ibid.*, paragraph 11.

37 — See the written observations of Mr and Mrs Schulte, p. 8.

38 — We have seen that the total price of the transaction (that is to say, the amount of the loan taken out by Mr and Mrs Schulte) was DEM 105 000 and that the price of the apartment they purchased was DEM 90 519. We also saw that the net amount of the loan, after the deduction of all costs relating to the conclusion of the agreements was DEM 101 850 and that this amount was paid in full by the Bank to the vendor of the apartment.

67. In those circumstances, I consider that the Court's ruling in the *Travel Vac* judgment cited above is not applicable to the financial transaction in the present case.

that exercise of the right of cancellation under Article 5 of the Directive entails the cancellation of the credit agreement only, and not that of the purchase contract.

68. I therefore propose that the reply to be given to the first question should be that, by reason of Article 3(2)(a), the Directive does not apply to a contract for the purchase of immovable property, even where the contract forms part of a single financial transaction which includes, in addition to the said contract, a secured credit agreement for the sole purpose of financing the purchase of a property, joining a scheme for pooling rental income and two 'building savings' contracts.

71. With regard to Article 95(3) EC, I think the reply to the national court's question is clear from the wording of that provision, which is as follows:

'The Commission, in its proposals [for directives] concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.'

*B — The effect of cancellation on the contract for the purchase of immovable property*

69. The second question from the national court seeks an interpretation of Article 95(3) EC and the Directive.

72. As the German Government has observed, this obligation does not fall upon the Member States, as in the case of the third paragraph of Article 249 EC,<sup>39</sup> but on the bodies involved in the Community legislative process. Article 95(3) EC is accordingly addressed to the Commission of the European Communities, the European Parliament and the Council of the European

70. The Landgericht Bochum asks whether, in the case of a single financial transaction consisting of a contract for the purchase of immovable property and a secured credit agreement for financing the purchase of the property, Article 95(3) EC and the Directive preclude a national measure which provides

<sup>39</sup> — Under this provision, 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

Union, not to the authorities of the Member States. Consequently it does not permit obligations to be imposed on those authorities in order to ensure the correct or effective implementation of a Community directive.

directive, the effects of a cancellation of that agreement ... on the contract for the purchase of the immovable property and on the provision of security in the form of a charge on it fall to be governed by national law.<sup>40</sup>

73. Therefore the reply to the first part of the second question from the Landgericht Bochum must be in the negative.

77. It follows that determining the effects of cancellation on the property purchase contract falls within the competence of the Member States.

74. With regard to the second part of that question, it will be noted that the Directive leaves it to the Member States to lay down the consequences of exercising the right of cancellation provided for in Article 5 of the Directive.

78. In the present case, the national court and certain interveners, such as Mr and Mrs Schulte and the Commission, consider that Community law imposes limits on that competence.

75. We have already seen that Article 7 of the Directive provides that 'the legal effects of such renunciation shall be governed by national laws'.

76. Furthermore, regarding secured credit agreements specifically, the Court has held that the Directive leaves it to the Member States to determine the effects of cancellation on the contract for the purchase of immovable property. In the *Heininger* judgment the Court stated that:

79. They refer to the purpose of the Directive and the concept of the practical effect or effectiveness of Community law. According to these interveners, although the national authorities are free to determine the effects of cancellation, they must, when adopting the detailed rules, ensure the full effectiveness of the Directive and the purpose which it pursues, namely the protection of consumers.

'Although a [secured] credit agreement ... falls within the scope of the doorstep-selling

<sup>40</sup> – Paragraph 35

80. However, they contend that that is not the case here because, in providing that the cancellation of the secured credit agreement does not affect the validity of the property purchase contract, the German legislation made it practically impossible or extremely difficult to exercise the right of cancellation.

81. In this connection it must be observed that the provisions of the Directive concerning immovable property contracts are particularly clear and definite.

82. As we have seen, Article 3(2)(a) expressly excludes from the scope of the Directive contracts for the ‘construction, sale and rental of immovable property’. Consequently there is no ambiguity or uncertainty in the Directive as to the fact that it does not apply to contracts for the purchase of immovable property.

83. Consequently I think it is not possible to refer to the purpose of the Directive or the practical effect to justify the opposite conclusion.

84. As I observed in my Opinion in the case of *Schilling and Nehring*,<sup>41</sup> teleological

interpretation and the concept of practical effect are not used by the Court on every occasion.

85. Careful examination of the case-law shows that purposive interpretation is used only where the provision in question is open to several interpretations.

86. This method is often used to confirm the meaning of a provision which, although not totally clear and unambiguous, generally leaves little room for doubt. In that case, recourse to the wording and recourse to the purpose of Community rules are complementary within the process of interpretation.<sup>42</sup>

87. Where it is difficult to interpret legislation from its wording alone, an interpretation based on purpose becomes fundamental. That is the case where the provision in dispute is ambiguous.<sup>43</sup> It is also the case

42 — See, for example, Case C-390/96 *Lease Plan* [1998] ECR I-2553, paragraph 28; Case C-355/96 *Silhouette International Schmied* [1998] ECR I-4799, paragraph 22; and Case C-286/95 P *Commission v ICI* [2000] ECR I-2341, paragraph 60.

43 — In Case 803/79 *Roudloff* [1980] ECR 2015, the Court held that, where the text of a provision is ambiguous, it should be interpreted in the light of the intention and purpose of the regulations of which the provision forms part.

41 — Case C-63/00 [2002] ECR I-4483, points 23 to 29.

where the provision constitutes a legal standard, indicative of the legislature's intention to leave it to the court to define the subject-matter case by case and to apply this appropriately to the matters before it.<sup>44</sup>

88. Conversely, teleological interpretation is not used where, as in the present case, the text in question is absolutely clear and unambiguous. In that case, the provisions of Community law are sufficient in themselves. Thus, in the case of an agricultural regulation, for example, the Court found that the wording of the provision in question was 'clear and unambiguous' and that it was therefore unnecessary to refer to the purpose of the directive.<sup>45</sup>

89. The same reasoning applies regarding the concept of 'practical effect' in Community law.

90. As we know, because of the Court's concern to ensure that Community law is effective, it prefers, when a provision of Community law is open to different interpretations, to give priority to the interpretation which is best able to preserve that practical effect.<sup>46</sup> However, this case-law applies, by definition, where the provision in question 'is open to different interpretations'.<sup>47</sup> Therefore it cannot be applied to a provision which, as in this case, has all the requisite characteristics of clarity and precision.

91. In my opinion, this reasoning concerning purposive interpretation and the practical effect of Community law must also be followed where, as in the present case, the wording of the provision is not consistent with the purpose of the directive of which it forms part.

92. As we know, because of Article 3(2)(a) of the Directive, the provisions of the Directive, in particular those which confer a right of cancellation, do not apply to contracts for the purchase of immovable property. I have also shown that the purpose of the Directive, namely the protection of consumers, requires a different interpretation which would make it possible for the cancellation of the secured credit agreement to produce an effect, by one means or another, on the

<sup>44</sup> — See, for example, Case C-104/95 *Kontogeorgas* [1996] ECR I-6643, paragraphs 25 to 27; Case C-275/97 *DE + ES Bauunternehmung* [1999] ECR I-5331, paragraphs 31 and 32; and Case C-206/99 *SONAE* [2001] ECR I-4679, paragraphs 22 to 26.

<sup>45</sup> — Case C-74/98 *DAT-SCHAUB* [1999] ECR I-8759, paragraph 31. For a further example, see Case C-335/95 *Picard* [1996] ECR I-5625, paragraphs 18 to 20, where, after citing a provision of a Community regulation, the Court concluded that the regulation in question 'unambiguously lays down' the principle of Community law which supported its reasoning. Finally, in Case C-172/89 *Vandemoortele v Commission* [1990] ECR I-4677, paragraph 13, the Court found that the rules in question were not open to interpretation and that the conditions for imposing the penalty provided for by the disputed rules were sufficiently clear to leave no room for any other interpretation.

<sup>46</sup> — See, for example, Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829, paragraph 19; Case C-434/97 *Commission v France* [2000] ECR I-1129, paragraph 21; Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157, paragraph 41; and Case C-403/99 *Italy v Commission* [2001] ECR I-6883, paragraph 28.

<sup>47</sup> — See *Schilling and Nehrung*, cited above, paragraph 24.



validity of the property purchase contract. Consequently there is a degree of conflict between the wording of the Directive and its purpose.

93. However, as I showed in the *Schilling and Nehring* case, cited above,<sup>48</sup> a conflict of that kind must be resolved in the light of the principle of legal certainty. This is a fundamental principle of the Community legal order<sup>49</sup> and it requires Community legislation to be clear and its application foreseeable for all interested parties.<sup>50</sup>

94. The only possible solution in this case therefore is to adopt the interpretation imposed by the actual wording of the provision, to the detriment of the purpose of the directive of which it forms part. It would be incompatible with the requirements of legal certainty to seek a purposive interpretation or to apply the concept of practical effect in order to impart to a Community provision a meaning which it manifestly cannot have, on the ground that the wording does not contribute to achieving the purpose of the directive of which it forms part.

95. In view of these considerations, I think a purposive interpretation of the Directive, just like its practical effect, do not permit a requirement that the cancellation of the secured credit agreement should produce an effect, in one way or another, on the validity of the property purchase contract.

96. Any other approach would amount to holding that, in spite of Article 3(2)(a), the Directive requires the Member States to apply the provisions concerning the right of cancellation to contracts for the purchase of immovable property.

97. I therefore propose that the Court's reply to the second question should be that, in the case of a single financial transaction which comprises a contract for the purchase of immovable property and a secured credit agreement for the purpose of financing the purchase of an immovable property, Article 95(3) EC and the Directive do not require the cancellation of the secured credit agreement to entail also the cancellation of the property purchase contract.

*C — The effects of cancellation on the credit agreement*

98. The last two questions from the national court also concern the interpretation of Article 95(3) EC and the Directive.

48 — Points 31 to 33 of my Opinion.

49 — See, in particular, Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 57, and Case C-177/96 *Banque Indosuez and Others* [1997] ECR I-5659, paragraph 27.

50 — Case C-325/91 *France v Commission* [1993] ECR I-3283, paragraph 26.

99. The Landgericht Bochum asks whether, in the case of a single financial transaction comprising a contract for the purchase of immovable property and a secured credit agreement, Article 95(3) EC and Article 5(2) of the Directive preclude a national provision which, in the event of cancellation of the credit agreement, requires the consumer to repay the loan immediately, with interest, although the amount of the loan was paid by the lender, on the consumer's instructions, directly to the vendor of the immovable property.

100. Leaving aside the approach which I suggest in points 40 to 48 of this Opinion, it seems to me that in any case the last two questions from the national court raise a problem of admissibility.

101. As the Court is aware, it has consistently been held that, in the framework of the procedure laid down in Article 234 EC, it is for the Court of Justice to examine the conditions in which a case has been referred to it by the national court. The spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not

to deliver advisory opinions on general or hypothetical questions.<sup>51</sup>

102. The Court also considers that, to be able to give an interpretation of Community law which is helpful, it is essential for national courts to explain why they consider that a reply to their questions is necessary to enable them to give judgment.<sup>52</sup>

103. In the present case, I think the national court has not clearly set out the reasons underlying its last two questions.

104. On reading the order for reference, it seems that these two questions are intended only to draw the Court's attention to the consequences which would flow from the cancellation of the secured credit agreement if the Court were to find that cancellation did not affect the validity of the property purchase contract. It is therefore not certain that the national court is enquiring as to the legality of those consequences as such. In any case, at no time does the national court state the reasons why the consequences may be contrary to Community law.

51 — See the judgments cited in footnote 18.

52 — See, in particular, Joined Cases 98/85, 162/85 and 258/85 *Bertini and Others* [1986] ECR 1885, paragraph 6, and also *Foglia*, paragraph 17, *Lourenço Dias*, paragraph 19, *Der Weduwe*, paragraphs 37 to 39, and *Gasser*, paragraph 24.

105. In reality, the reasons seem to emerge only after reading the order for reference in another preliminary ruling case, namely Case C-229/04 *Crailsheimer Volksbank*.<sup>53</sup>

106. In that case, the Hanseatisches Oberlandesgericht (Hanseatic Higher Regional Court) in Bremen (Germany) has before it several disputes similar to that in the main proceedings here. In addition to a question concerning the elements of doorstep selling within the meaning of the Directive, the said court explains that it has taken up and formulated in greater detail the last two questions referred by the Landgericht Bochum.

107. Accordingly, with regard to the obligation for immediate repayment of the loan, the Hanseatisches Oberlandesgericht observes that such obligation is also likely to deter a consumer from exercising his right of cancellation. In so far as he would be required to repay the entire loan immediately, instead of the instalment payments which he was able to make under the credit agreement, the fulfilment of the obligation in question could lead to the consumer's bankruptcy.

108. Likewise, regarding the obligation to pay interest, the said court observes that such an obligation could deter the consumer from exercising his right of cancellation. The interest could amount to a considerable sum, particularly where cancellation takes place a long time after the conclusion of the contract, and therefore it could constitute a penalty imposed on the consumer for exercising his right of cancellation. However, in the *Travel Vac* judgment cited above, the Court held that the Directive precluded a contract requiring the consumer to pay a fixed sum as compensation merely on the ground of exercising his right of cancellation.

109. I may add that, in the present case, the omission on the part of the Landgericht Bochum appears to have had a direct effect on the right of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice.

110. It appears from the file that the various interveners, with the exception of the Bank and the German Government,<sup>54</sup> understood

53 — This case was brought before the Court on 2 June 2004, i.e. a few days before the hearing on 15 June 2004 in the present case. However, for translation reasons, I was unable to see the relevant order for reference until the end of June 2004.

54 — The interveners in the present proceedings are Mr and Mrs Schulte, the Bank, the Federal Republic of Germany, the Italian Republic, the French Republic and the Commission.

the last three questions from the national court as relating only to the effects of the cancellation of the secured credit agreement on the property purchase contract. Consequently they examined those questions together, without submitting specific observations on the third and fourth questions.

111. In the circumstances, I do not think the Court has all the necessary information to determine those two questions with full knowledge of the facts.

112. I therefore propose that the Court rule them inadmissible.

## VII — Conclusion

113. On the basis of the foregoing reasoning, I propose that the Court rule as follows:

The reference for a preliminary ruling referred by the Landgericht Bochum (Germany) by decision of 29 July 2003 is inadmissible.

114. In the alternative, should the Court not concur in this conclusion, I propose that the Court reply as follows to the first two questions from the said court:

(1) Article 3(2)(a) of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises

must be interpreted as meaning that the said directive does not apply to a contract for the purchase of immovable property, even where the contract forms part of a single financial transaction which includes, in addition to the said contract, a secured credit agreement for the sole purpose of financing the purchase of a property, joining a scheme for pooling rental income and two 'building savings' contracts.

- (2) In the case of a single financial transaction which comprises a contract for the purchase of immovable property and a secured credit agreement for the purpose of financing the purchase of an immovable property, Article 95(3) EC and Directive 85/577/EEC do not preclude a national provision which provides that the exercise of the right of cancellation conferred by Article 5 of the said directive entails only the cancellation of the secured credit agreement and not that of the property purchase contract.