

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 28 January 2010¹

I – Introduction

1. This reference for a preliminary ruling has been submitted by the Bundesgerichtshof (Federal Court of Justice) (Germany) by decision of 1 October 2008 and seeks an interpretation of Article 6(1), second sentence, and Article 6(2) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.²

2. The reference arises from a dispute between the Verbraucherzentrale Nordrhein-Westfalen eV ('the applicant in the main proceedings' or 'the applicant') and Heinrich Heine GmbH, a trading company, ('the defendant in the main proceedings' or 'the defendant'), in which the applicant seeks an injunction restraining the defendant from charging consumers the cost of delivering the goods in the event of withdrawal from a distance contract.

¹ — Original language: French.

² — OJ 1997 L 144, p. 19.

II – Legal context

A – Community law

3. Recital 14 in the preamble to Directive 97/7 reads as follows:

'Whereas the consumer is not able actually to see the product or ascertain the nature of the service provided before concluding the contract; whereas provision should be made, unless otherwise specified in this Directive, for a right of withdrawal from the contract; whereas, if this right is to be more than formal, the costs, if any, borne by the consumer when exercising the right of withdrawal must be limited to the direct costs for returning the goods; whereas this right of withdrawal shall be without prejudice to the consumer's rights under national laws, with particular regard to the receipt of damaged products and services or of products and services not corresponding to the description given in the offer of

such products or services; whereas it is for the Member States to determine the other conditions and arrangements following exercise of the right of withdrawal'

returning the goods. Such reimbursement must be carried out as soon as possible and in any case within 30 days.'

4. Article 6(1) and (2) of that directive, entitled 'Right of withdrawal,' provides:

5. Article 14 of Directive 97/7, entitled 'Minimal clause,' states that:

'1. For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.

'Member States may introduce or maintain, in the area covered by this Directive, more stringent provisions compatible with the Treaty, to ensure a higher level of consumer protection. Such provisions shall, where appropriate, include a ban, in the general interest, on the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts, with due regard for the Treaty.'

...

B – National law

2. Where the right of withdrawal has been exercised by the consumer pursuant to this Article, the supplier shall be obliged to reimburse the sums paid by the consumer free of charge. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of

6. Paragraph 312d of the German Civil Code (Bürgerliches Gesetzbuch; 'BGB'), entitled 'Right of withdrawal and return in

respect of distance contacts,' provides as follows:

a statutory right of termination, then, if termination occurs, any services received shall be returned, and the benefits derived from such services surrendered.

'1. In respect of a distance contract a consumer has a right of withdrawal under Paragraph 355. In the case of contracts for the supply of goods, the consumer may be granted a right of return under Paragraph 356 instead of the right of withdrawal.

2. The debtor shall pay compensation for value, in lieu of restitution or surrender, where:

2. In derogation from the first sentence of Paragraph 355(2), the withdrawal period shall not commence before the duties to provide information in accordance with Paragraph 312c(2) have been fulfilled; in the case of the supply of goods not before the date on which they are received by the recipient; in the case of recurrent supplies of goods of the same kind not before the date on which the first instalment is received by the recipient; and in the case of services not before the date on which the contract is concluded.'

(1) restitution or surrender is excluded by virtue of the nature of what has been obtained;

(2) he has used up, transferred, encumbered, processed or transformed the object received;

(3) the object received has deteriorated or has been destroyed, any deterioration resulting from the proper use of the object for its intended purposes being disregarded.

7. Paragraph 346(1) to (3) of the BGB, entitled 'Effects of termination of the contract,' is worded as follows:

'1. If one party to a contract has reserved the right to terminate the contract or if he has

If the contract specifies consideration, such consideration shall be taken as a basis for calculation of the compensation for value; if compensation is to be provided for the benefit deriving from use of a loan, evidence

may be adduced to show that the value of such benefit was lower.

8. Paragraph 347(2) of the BGB, entitled 'Benefits and expenditure after termination,' states:

3. No obligation to pay compensation for value shall arise:

(1) if the defect which gives the right to termination became apparent only during the processing or transformation of the object;

'If the obligor returns the object or gives compensation for the value or if his duty to compensate for value under Paragraph 346(3) no 1 or 2 is excluded, he must be reimbursed for his necessary outlays. Other expenses are to be reimbursed to the extent that the obligee is enriched by them.'

(2) in so far as the creditor is responsible for the deterioration or destruction, or in so far as the damage would also have occurred in his hands;

9. Paragraph 355 of the BGB, entitled 'Right of withdrawal in respect of consumer contracts,' is worded as follows:

(3) if, in the case of a statutory right of termination, the deterioration or destruction has occurred in the hands of the person entitled, even though he has taken the care that he customarily exercises in relation to his own affairs.

'1. If a consumer is granted a statutory right of withdrawal under this provision, he shall no longer be bound by his declaration of intention to conclude the contract if he has withdrawn from it in good time. The withdrawal does not have to be reasoned and must be declared to the seller in writing or by returning the item within two weeks; the withdrawal period shall be deemed to be observed in the case of dispatch in good time.'

Any remaining enrichment must be surrendered.'

2. The period shall commence when the consumer has been informed in writing by a clearly formulated notice of his right of withdrawal which makes clear to him his rights in accordance with the requirements of the means of communication used and which also states the name and address of the person to whom withdrawal is to be declared and refers to the beginning of the period and the rules in the second sentence of paragraph 1. If notice is given after the contract has been concluded, the period shall be one month, in derogation from the second sentence of paragraph 1. If the contract is to be concluded in writing, the period shall not begin to run until the consumer has also been provided with a contract document, his written application or a copy of the contract document or of the application. If the time at which the period commences is disputed, the seller shall bear the burden of proof.

3. The right of withdrawal shall expire at the latest six months after the conclusion of the contract. In the case of the supply of goods the period shall not commence before the date on which they are received by the recipient. In derogation from the first sentence, the right of withdrawal shall not expire if the consumer is not given due notice of his right of withdrawal, and in the case of distance contracts concerning the provision of financial services it shall also not expire if the seller has not duly complied with his duties to provide information in accordance with Paragraph 312c(2)(1).'

10. Paragraph 356 of the BGB, entitled 'Right of return in consumer contracts', states:

'1. The right of revocation under Paragraph 355 may, to the extent expressly permissible by statute, where the contract is entered into on the basis of a sales prospectus, be replaced in the contract by an unlimited right of return. The requirement is that

- (1) a clearly drafted instruction on the right of return is included in the sales prospectus,
- (2) the consumer was able to obtain detailed knowledge of the sales prospectus in the absence of the entrepreneur, and
- (3) the consumer is granted the right of return in text form.

...'

11. Paragraph 357 of the BGB, entitled 'Legal consequences of withdrawal and return', provides:

pay compensation in respect of deterioration in the goods as a result of their proper use if he has been informed in writing of this legal consequence and of a means of avoiding it at the latest when the contract is concluded. This shall not apply if the deterioration is due solely to testing of the item. Point 3 of the first sentence of Paragraph 346(3) shall not apply if the consumer has been given due notice of his right of withdrawal or if he has become aware of it in some other way.

'1. Unless otherwise provided, the provisions on statutory termination shall apply mutatis mutandis to the right of withdrawal and return. Paragraph 286(3) shall apply mutatis mutandis to the obligation to reimburse payments under that provision; the period laid down therein shall commence with the declaration of withdrawal or return by the consumer. In this connection the period shall commence, with regard to an obligation to reimburse on the part of the consumer, when that declaration is made and, with regard to an obligation to reimburse on the part of the seller, when that declaration is received.

4. The above provisions shall be exhaustive as regards the rights of the parties.'

12. Paragraph 448(1) of the BGB, entitled 'Costs of delivery and comparable costs', is worded as follows:

...

3. In derogation from point 3 of the first sentence of Paragraph 346(2), the consumer shall

'The seller bears the costs of delivery of the thing, the buyer the costs of acceptance and of shipping the thing to a place other than the place of performance.'

III – The main proceedings, the question referred and the procedure before the Court

13. The defendant in the main proceedings is a mail-order company. Its general conditions of sale provide that the consumer is to pay a flat-rate charge of EUR 4,95 for delivery, which the supplier will not refund in the event of withdrawal from the contract.
14. The applicant in the main proceedings is a consumer association, duly constituted in accordance with German law. It brought an action against the defendant in the main proceedings for an injunction to restrain it from charging consumers the cost of delivering the goods in the event of withdrawal.
15. The first instance court granted that injunction.
16. The appeal brought against that judgment by the defendant in the main proceedings was dismissed by the Oberlandesgericht (Higher Regional Court) Karlsruhe.
17. An appeal on a point of law ('Revision') was then brought before the Bundesgerichtshof, which finds that the German legislation does not formally confer upon the consumer the right to reimbursement of the cost of delivery of the goods ordered in the event of withdrawal.
18. However, if Directive 97/7 were interpreted as precluding the charging of the delivery cost to consumers in the event of withdrawal, Paragraphs 312d(1), 357(1), first sentence, and 346(1) of the BGB would have to be construed in a manner consistent with that directive as meaning that the supplier must reimburse the consumer for the cost of delivery of the goods.
19. Even though certain German academic lawyers support an interpretation of Directive 97/7 favourable to consumers, the referring court considers that it is not in a position to determine with the requisite certainty whether the directive must be interpreted in that way.
20. In that regard the referring court sets out a number of arguments of certain legal writers who take the opposing view.

21. First, the phrase ‘because of the exercise of his right of withdrawal’ in the English version of Article 6(1), first subparagraph, second sentence, and Article 6(2), second sentence, of Directive 97/7, which provide that ‘the only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods’, could suggest that those provisions relate only to the costs incurred as a result of exercising the right of withdrawal, excluding delivery costs which have already been incurred at the date of withdrawal. The other language versions of Directive 97/7 support that interpretation.

22. Second, Article 6(2), first sentence, of Directive 97/7 could be interpreted as meaning that, in the event of withdrawal, it does not prevent the supplier from raising counterclaims for compensation for the value of goods used by the consumer which, because of their nature, cannot be returned. Therefore, it would be consistent with Article 6 to acknowledge that delivery is a service provided by the supplier for which the consumer should refund a replacement value equal to the delivery cost and that the supplier’s obligation of reimbursement is reduced accordingly.

23. Third, it is not certain that the aim of consumer protection expressed in recital 14 in the preamble to Directive 97/7 also requires the reimbursement of the delivery cost. When making an ordinary purchase, the consumer has to meet the cost of travelling to the shop, not to mention the fact that he has also had to spend time travelling.

24. The Bundesgerichtshof therefore decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Are the provisions of Article 6(1), [first subparagraph], [second] sentence, and Article 6(2) of Directive 97/7/EC ... to be interpreted as precluding national legislation which allows the costs of delivering the goods to be charged to the consumer even where he has withdrawn from the contract?’

25. In accordance with Article 23 of the Statute of the Court of Justice, the applicant in the main proceedings, the German, Spanish, Austrian and Portuguese Governments

and the Commission of the European Communities submitted written observations. Those parties were also heard at the hearing which took place on 29 October 2009, with the exception of the Spanish, Austrian and Portuguese Governments, which were not represented.

IV – Assessment

26. In essence, the question from the referring court is whether the provisions of Article 6(1), first subparagraph, second sentence, and Article 6(2) of Directive 97/7 are to be interpreted as precluding national legislation which requires the cost of delivering the goods to be charged to consumers where they exercise their right of withdrawal in distance contracts.

27. First of all, it must be observed that distance contracts are characterised by two elements. The first decisive element is that the two contracting parties – the supplier and the consumer – are not physically and simultaneously present together when distance contracts are prepared and concluded. The second characteristic element is that those transactions are carried out under an

organised distance sales or service-provision scheme run by the supplier, who makes exclusive use of distance communication techniques.³

28. In that connection it should be noted that, for a contract to fall within the scope of Directive 97/7, those two decisive elements must be present when the contract is concluded.⁴ However, performance of such a contract inevitably requires that the goods be sent to the consumer, particularly in the case of a mail order, as in the present case. This must be taken into account, where relevant, when determining who is to meet the delivery costs in the event of withdrawal.

29. For that purpose, it is necessary to decide whether delivery costs are ‘costs’ within the meaning of Article 6(1), first subparagraph, second sentence, and Article 6(2) of Directive 97/7. The question, therefore, is whether ‘costs’ is to be interpreted broadly, as maintained by the applicant in the main

³ — See recital 9 in the preamble to, and Article 2(1) and (4) of, Directive 97/7.

⁴ — See, in that regard, Bernardeau, L., ‘La directive communautaire 97/7 en matière de contrats à distance’, *Cahiers de droit européen*, Nos. 1-2, Brussels, 2000, p. 122 et seq.

proceedings, the Spanish, Austrian and Portuguese Governments and the Commission, or strictly, as advocated by the German Government. The answer to that question entails not only a literal and systematic interpretation of the provisions of that directive, but also some discussion of its purpose.

30. First of all, it has consistently been held that the need for uniform application of Community law requires that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous interpretation throughout the European Union and that interpretation must take into account the context of the provision and the purpose of the legislation in question.⁵

31. In using the word ‘cost’ in Article 6(1) and (2) of Directive 97/7, the Community legislature did not use it with reference to the

law of the Member States. However, it must be said that the directive contains no express definition either of ‘costs’ or of ‘delivery costs.’⁶

32. With regard to the context of the provisions in question, Article 6(1), first subparagraph, first sentence of Directive 97/7, confers upon the consumer a broad and unconditional right of withdrawal by providing that he may withdraw ‘without penalty and without giving any reason.’ Article 6(1), first subparagraph, second sentence, confirms the idea that exercise of the right of withdrawal is not in principle to have negative consequences for the consumer by stating that the only charge that may be made to the consumer because of the exercise of that right is the direct cost of returning the goods. The words ‘only charge’ require strict interpretation and make that exception unique.

33. Article 6(2), first sentence, of Directive 97/7 lays down, for its part, the obligation

5 — See, *inter alia*, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11, and Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43.

6 — The term ‘delivery costs’ appears only in Article 4(1)(d) of Directive 97/7. That article sets out the consumer’s right to information on costs prior to the conclusion of a distance contract.

on the part of the supplier to reimburse 'the sums paid' by the consumer 'free of charge' if the latter withdraws. Thus, by establishing the principle of 'full refund' of any amount paid by the consumer to the supplier, without the latter being able to keep or charge the consumer any costs whatsoever, the above-mentioned provision confirms the principle already stated in Article 6(1) that exercise of the right of withdrawal is not in principle to entail any penalty or financial charge for the consumer.

34. Therefore, the term 'sums paid' in Article 6(2) includes not only the purchase price of the goods or the charge for the service provided, but also amounts paid by the consumer to the supplier in connection with the conclusion or performance of the distance contract, including delivery costs.

35. With regard to the German Government's observations to the effect that only the price of the goods or the service, provided by the consumer as consideration for the primary obligation of the supplier, is covered by the term 'sums paid', it must be noted that the term is clearly used in the plural in

Article 6(2), first sentence, of Directive 97/7.⁷ The argument that the plural is used because the price of goods can be paid not only in a single amount but also in several instalments is not persuasive because it overlooks the fact that, even if there are several payments, they are of the same legal nature and each one falls within the concept of 'price'.

36. A systematic interpretation of that directive also corroborates the broad scope of the term 'sums paid'. It must be observed, in that regard, that the directive expressly uses the word 'price' in several provisions: among others, in relation to the obligation to provide information (Article 4(1)(c)), the exceptions concerning the right of withdrawal (Article 6(3), second indent) and in relation to the effects of withdrawal from the distance contract on the credit agreement (Article 6(4), first subparagraph, first and second indents). By contrast, in Article 6(2), first sentence, of Directive 97/7 the Community legislature does not repeat the word 'price', but uses the term 'sums paid', which is undeniably broader.

7 — The German ('geleisteten Zahlungen'), French ('sommes versées'), Spanish ('sumas abonadas') and Italian ('somme versate') versions of Directive 97/7 also use the term in the plural.

37. Consequently, there is no justification for the view that ‘sums paid’ means only the price of the goods or the service, which would inevitably exclude an obligation to repay the other contractual costs paid by the consumer to the supplier in connection with a distance contract.

38. Article 6(2), second sentence, of Directive 97/7 must be interpreted in the light of that finding and the principle of repayment in full and free of charge in the first sentence of that article. The second sentence lays down the only exception to the application of that principle in stating that the ‘only charge’ that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.

39. Furthermore, the use of the terms ‘free of charge’ in the first sentence of Article 6(2) and ‘only charge’ in the second sentence thereof also implies a broad interpretation of ‘costs’ and, therefore, supports the argument that the Community legislature intended to regulate the legal and financial consequences of withdrawal with regard to all the

costs connected with the conclusion or performance of a distance contract.

40. With regard to the term ‘because of’ in Article 6(1), first subparagraph, second sentence, and in Article 6(2), second sentence, of Directive 97/7, which state that ‘the only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods’, the German Government submits that the term reflects the idea that Article 6 regulates only some of the potential costs, in particular the costs which have a causal connection with the exercise of the right of withdrawal. Therefore, the Community legislature had no intention of regulating all the contractual costs, but only those arising from withdrawal.

41. On that point, it must be observed that there is considerable divergence between the different language versions of those two sentences. Although the German, English and French versions use terms which reflect the idea of a causal link inherent in the term

‘because of’,⁸ nevertheless, neither the Spanish nor the Italian version does so. They refer merely to a consumer *who exercises*⁹ his right of withdrawal.¹⁰

42. In the light of this, it is necessary to follow the settled case-law which states that, in the case of divergence between the different language versions of a Community provision, the provision in question must be interpreted by reference to the purpose of the rules of which it forms a part.¹¹

43. In that regard, we may start with recital 14 in the preamble to Directive 97/7, which

states that ‘the costs, if any, borne by the consumer *when exercising* the right of withdrawal must be limited to the direct costs for returning the goods.’¹² The fact that the words ‘when exercising’ are used in the same language versions of Directive 97/7 where ‘because of’ is used in Article 6 thereof is significant. Referring likewise to recital 14, the Court, in *Messner*, affirmed that the prohibition of imposing on consumers charges other than those resulting directly from the return of the goods, laid down in Article 6 of Directive 97/7, serves to ensure that the right of withdrawal ‘is to be more than formal’¹³ since, without such a prohibition, the consumer could be dissuaded from exercising that right.¹⁴

44. However, if the aim of Article 6 and of Directive 97/7 is not to discourage consumers

8 — The French (‘en raison de’), English (‘because of’) and German (‘infolge’) versions use the same term.

9 — Italics added.

10 — In the Spanish version, neither Article 6(1), second sentence, of Directive 97/7 (‘El único gasto que podría imputarse al consumidor es el coste directo de la devolución de las mercancías al proveedor), nor Article 6(2), second subparagraph, second sentence, the wording of which differs slightly from that of Article 6(1) (‘Únicamente podrá imputarse al consumidor que ejerza el derecho de rescisión el coste directo de la devolución de las mercancías) refer to that causal link. They speak only of a consumer *who exercises* his right of withdrawal. The Italian version contains the same sentence in both paragraphs (‘Le uniche spese eventualmente a carico del consumatore dovute all’esercizio del suo diritto di recesso sono le spese dirette di spedizione dei beni al mittente’) without referring to a causal link.

11 — Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 14.

12 — Comparison of the different language versions does not reveal the divergences between them. The German (‘müssen die Kosten, die, wenn überhaupt, vom Verbraucher im Fall der Ausübung des Widerrufsrechts getragen werden, auf die unmittelbaren Kosten der Rücksendung der Waren begrenzt werden’), English (‘the costs, if any, borne by the consumer when exercising the right of withdrawal must be limited to the direct costs for returning the goods’), Spanish (‘los costes en que, en su caso, incurra el consumidor cuando lo ejercite deben limitarse a los costes directos de la devolución de la mercancía’) and Italian (‘che è necessario limitare ai costi diretti di spedizione dei beni al mittente gli oneri – qualora ve ne siano – derivanti al consumatore dall’esercizio del diritto di recesso’) versions of recital 14 do not use the term ‘because of’, but all refer merely to the exercise of the right of withdrawal.

13 — Case C-489/07 *Messner* [2009] ECR I-7315, paragraph 19.

14 — *Ibid.*

from exercising their right of withdrawal, the directive cannot be construed as meaning that it authorises the Member States to permit the consumer to be required pay the delivery costs in the event of withdrawal. That would undoubtedly be a negative pecuniary consequence likely to discourage the consumer from exercising the right of withdrawal, and not only where goods of low value are purchased and the delivery cost could be a significant part of the amount paid by the consumer.

has various options from which to choose, namely, taking the goods away with him, thus avoiding delivery costs, or entrusting that task to a firm of his choice, at the best price. In the case of a distance contract, by contrast, (a) the supplier decides on the conditions and arrangements for delivery, (b) the contract is concluded subject to withdrawal, and (c) the consumer chooses the method of returning the goods.

45. Furthermore, as the Court observed in *Messner*, the right of withdrawal is intended to offset the disadvantage for the consumer resulting from a distance contract by granting him an appropriate period for reflection during which he can examine and test the goods acquired.¹⁵

47. In so far as distance contracts are concerned, Directive 97/7 aims to achieve a balance in sharing the costs by making it possible for the Member States to charge the consumer the direct cost of returning the goods, that is to say, to require him to bear the financial consequences of his choice, because if he chooses a very costly means of return which is disproportionate to the value of the goods, it would not be fair to charge the supplier the cost of returning them because he has no power to influence the consumer's decision on the means of delivery.

46. In the case of a 'conventional' contract of sale, the consumer (a) can examine the goods purchased, (b) decide immediately to conclude or not to conclude the contract, and (c) if he concludes the contract,

48. Charging the delivery costs to the supplier in the event of withdrawal is consistent with the same idea of fairly sharing the costs because, if the goods are sent to the

¹⁵ — Paragraph 20.

consumer, the supplier is free to choose the method of delivery, either by dispatching the goods himself or by using a subcontractor or specialised carrier.

49. Charging the supplier with the delivery cost in the event of the consumer's withdrawal can also be explained in economic terms. Normally, in the case of a distance contract, the supplier has no need to keep a shop or business premises and therefore saves on the costs which that involves. Thus the financial burden which the charging of delivery costs represents for the supplier in the event of withdrawal (which, incidentally, does not occur in every contract concluded) is counterbalanced by the savings which the supplier makes by avoiding the costs connected with managing a shop.

50. For all the reasons given above, the balance in the sharing of the risks and burdens in the case of a distance contract where the consumer withdraws, which is provided for by Directive 97/7 in favour of the consumer, would be impaired if, in addition to the direct cost of return which the Member State may impose on the consumer, he also had to pay the cost of delivering the goods.

51. Conversely, the German Government's view cannot be shared that charging the supplier the delivery cost in the event of withdrawal would be a complete remodelling of the contractual relationship, giving rise to unacceptable interference in the relationship between the parties.

52. That position is not convincing because it does not take into account the fact that Directive 97/7 regulates the charging of costs only where the consumer exercises the right of withdrawal. The fact that, in the event of withdrawal, the supplier has to refund the delivery cost paid by the consumer does not affect in any way the question of who pays that cost where the contract is performed and the Member States and businesses remain free to regulate penalty provisions.

53. Likewise I am not persuaded by the German Government's additional argument in support of its proposition, first, that Directive 97/7, by permitting the Member States to provide for the consumer to be charged the delivery cost, aims to create for the consumer a situation corresponding to that of a consumer who goes to a shop to buy goods and has to pay the cost of travel to that shop

and, second, that it would not be fair for the supplier to have to meet the cost of delivery in the event of withdrawal as it would not be acceptable to require the seller to meet the buyer's travel expenses if the buyer finds that the goods displayed in the shop do not meet his expectations and finally decides not to buy.

correspond more to the costs of access to the distance communication system such as, for example, the cost of establishing an internet connection. That access also has the purpose of establishing contact between the supplier and the consumer. The cost of doing so is undeniably borne by the latter.

54. The argument that delivery costs are equivalent to travel costs must be dismissed on the basis of both legal and functional considerations.

55. First, whereas the costs of travel to the shop are, from the legal viewpoint, expenses connected with the preparation and conclusion of the contract, delivery costs always arise at the stage of performing the contract.

56. Second, the consumer's purpose in travelling is to contact the supplier and the travel costs are borne by the consumer. Consequently, at the functional level travel costs

57. With regard to the legal consequences of withdrawal and, in particular, the reciprocal refund obligation mentioned by the referring court and the German Government, the case-law laid down in *Schulte*¹⁶ might appear relevant to the present case. In that judgment the Court, with reference to the obligation to return goods in their original condition, stated that Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises¹⁷ does not preclude national legislation which provides for an obligation on the consumer, in the event of cancellation of a secured credit agreement, not only to repay the amounts received under the contract but also to pay the lender interest at the market rate.¹⁸

16 — Case C-350/03 *Schulte* [2005] ECR I-9215.

17 — OJ 1985 L 372, p. 31.

18 — *Schulte*, paragraph 93.

58. There are three reasons why that case-law cannot be applied to the present case in relation to the refund of delivery costs following withdrawal from a distance contract.

59. First, the substantive scope of Directive 85/577 differs from that of Directive 97/7, which is relevant in the present case, since the two directives relate to two kinds of contract which differ in nature and purpose, one being loan agreements and the other distance contracts.

60. Secondly, the facts of the case in the main proceedings differ from those in *Schulte*, where the issue was the repayment of a financial benefit, namely the interest which the consumer had received on a capital sum, whereas the issue in the present case is not the repayment of such a benefit received by the consumer but, on the contrary, the repayment of sums paid by the consumer to the supplier.

61. Third, Article 6 of Directive 97/7 expresses an approach which differs from the

idea of the mere obligation of repayment laid down in Article 5(2) of Directive 85/577.¹⁹ That provision gives the consumer greater protection because of the disadvantageous situation arising from the characteristics of distance contracts since it provides for the consumer's right, in the event of withdrawal, to the repayment in full and without charge of sums paid to the supplier, that is to say, a right going beyond the mere return of the goods in their original condition.

62. Finally, the German Government contends that, as Directive 97/7 is a minimum harmonisation directive, the Member States retain the power of regulation in certain areas, such as the consequences of withdrawal.

63. On that point, it must be observed that, although Directive 97/7 at present requires minimum harmonisation regarding distance contracts, Article 14 thereof nevertheless provides that the Member States may introduce or maintain more stringent provisions with the sole object of ensuring a higher level

¹⁹ — Under Article 5(2) of Directive 85/577 'the giving of the notice shall have the effect of releasing the consumer from any obligations under the cancelled contract.'

of consumer protection. However, a national rule that leaves the buyer to bear the delivery cost if he withdraws, thus depriving him of a full refund of the sums paid to the supplier, cannot be described as a provision that aims to ensure a higher level of consumer protection than that provided for by the Directive 97/7.

That argument comes up against the fact that Article 6 of Directive 97/7 lays down provisions concerning the refund of costs connected with a distance contract and, consequently, a rule concerning the charging of costs, including delivery costs, cannot be described as one of the 'other' conditions or arrangements following exercise of the right of withdrawal, which are not regulated by the directive.

64. Furthermore, the German Government's next argument appears equally unconvincing, namely that recital 14 in the preamble to Directive 97/7, in stating that 'it is for the Member States to determine the other conditions and arrangements following exercise of the right of withdrawal,' leaves it to the discretion of the Member States to regulate the question of meeting the cost of delivery.

65. In the light of the above, I am of the opinion that Article 6(1), first subparagraph, second sentence, and Article 6(2) of Directive 97/7 must be interpreted as precluding national legislation which, in the context of a distance contract, requires the cost of delivering the goods to be charged to the consumer after he exercises his right of withdrawal.

V – Conclusion

66. In the light of all of the above findings, I propose that the Court's answer to the question referred by the Bundesgerichtshof should be that:

Article 6(1), first subparagraph, second sentence, and Article 6(2) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the