



Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 28 March 2019¹

Case C-143/18

**Antonio Romano,
Lidia Romano**

v

**DSL Bank — eine Niederlassung der DB Privat- und Firmenkundenbank AG, DSL Bank — ein
Geschäftsbereich der Deutsche Postbank AG**

(Request for a preliminary ruling
from the Landgericht Bonn (Regional Court, Bonn, Germany))

(Reference for a preliminary ruling — Consumer protection — Directive 2002/65/EC — Distance consumer credit contracts — Harmonisation of national legislation — Right of withdrawal — Exercise of the right of withdrawal after the contract has been fully performed by both parties at the consumer's express request — Communication of information on the consumer's right of withdrawal — Concept of the consumer for the purposes of the obligations to provide information and the right of withdrawal — Repayment of the sums received by the supplier)

1. In the context of the distance marketing of financial services, and in the case of mortgage loans in particular, if, after a contract has been fully performed, the consumer exercises his right of withdrawal on the ground that the information provided by the supplier regarding the right of withdrawal, although consistent with the requirements of EU law, was not consistent with applicable national law as consistently interpreted, is such withdrawal valid?
2. In other words, can the alleged insufficiency of the information regarding the right of withdrawal under applicable national law, which in fact affords the consumer greater protection than EU law, give rise to a 'perpetual' right of withdrawal for the consumer?
3. In this Opinion I shall first analyse Directive 2002/65/EC, which seeks full harmonisation in the field of the distance marketing of consumer financial services, and then illustrate the reasons for which, as regards the right of withdrawal, national legislation may not derogate from the provisions laid down in that directive, even where the derogation would be to the benefit of the consumer.

¹ Original language: Italian.

I. Legal framework

A. EU law

4. Pursuant to Article 3 of Directive 2002/65,² headed ‘Information to the consumer prior to the conclusion of the distance contract’:

‘1. In good time before the consumer is bound by any distance contract or offer, he shall be provided with the following information concerning:

...

(3) the distance contract

- (a) the existence or absence of a right of withdrawal in accordance with Article 6 and, where the right of withdrawal exists, its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay on the basis of Article 7(1), as well as the consequences of non-exercise of that right;

...’

5. Article 4 of Directive 2002/65, which is headed ‘Additional information requirements’, provides in paragraph 2 thereof:

‘Pending further harmonisation, Member States may maintain or introduce more stringent provisions on prior information requirements when the provisions are in conformity with Community law.’

6. Article 5 of Directive 2002/65, headed ‘Communication of the contractual terms and conditions and of the prior information’, provides in paragraph 1 thereof:

‘The supplier shall communicate to the consumer all the contractual terms and conditions and the information referred to in Article 3(1) and Article 4 on paper or on another durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer.’

7. Article 6 of Directive 2002/65, headed ‘Right of withdrawal’, provides:

‘1. ...

The period for withdrawal shall begin:

– ...

- from the day on which the consumer receives the contractual terms and conditions and the information in accordance with Article 5(1) or (2), if that is later than the date referred to in the first indent.

2. The right of withdrawal shall not apply to:

...

² Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16).

(c) contracts whose performance has been fully completed by both parties at the consumer's express request before the consumer exercises his right of withdrawal.

3. Member States may provide that the right of withdrawal shall not apply to:

(a) any credit intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or projected building, or for the purpose of renovating or improving a building, or

(b) any credit secured either by mortgage on immovable property or by a right related to immovable property,

...

6. If the consumer exercises his right of withdrawal he shall, before the expiry of the relevant deadline, notify this following the practical instructions given to him in accordance with Article 3(1)(3)(d) by means which can be proved in accordance with national law. The deadline shall be deemed to have been observed if the notification, if it is on paper or on another durable medium available and accessible to the recipient, is dispatched before the deadline expires.

...'

8. Article 7 of Directive 2002/65, which is headed 'Payment of the service provided before withdrawal' states as follows:

'1. When the consumer exercises his right of withdrawal under Article 6(1) he may only be required to pay, without any undue delay, for the service actually provided by the supplier in accordance with the contract. The performance of the contract may only begin after the consumer has given his approval. ...

...

4. The supplier shall, without any undue delay and no later than within 30 calendar days, return to the consumer any sums he has received from him in accordance with the distance contract, except for the amount referred to in paragraph 1. This period shall begin from the day on which the supplier receives the notification of withdrawal.

...'

B. German law

9. Paragraph 312b of the Bürgerliches Gesetzbuch (the German Civil Code), ('the BGB'), headed 'Distance contracts', in the version applicable at the relevant time, provides:

'(1) Distance contracts are contracts for the supply of goods or services, including financial services, concluded between a seller or supplier and a consumer exclusively by the use of means of distance communication, except where the contract is concluded under an organised distance sales or service-provision scheme. Financial services within the meaning of the first sentence are any service of a banking, credit, insurance, personal pension, investment or payment nature.'

10. Paragraph 312d of the BGB, headed 'Right of withdrawal and right of repayment in the case of distance contracts', in the version applicable at the relevant time, provides:

'(1) In the case of a distance contract the consumer has a right of withdrawal under Paragraph 355. ...

(2) Notwithstanding the first sentence of Paragraph 355(2), the withdrawal period does not begin before the information requirements under Paragraph 312c(2) have been fulfilled by the seller or supplier ... and, in the case of services, not before the day on which the contract is concluded.

(3) In the case of services, the right of withdrawal is also extinguished in the following cases:

1. In the case of financial services, where performance of the contract has been fully completed by both parties at the consumer's express request before the consumer exercises his right of withdrawal,

...

5. In addition, there is no right of withdrawal in the case of distance contracts in respect of which the consumer already has, on the basis of Paragraph 495 and Paragraphs 499 to 507, a right of withdrawal or right of repayment under Paragraph 355 or Paragraph 356. In the case of such contracts, the second subparagraph applies *mutatis mutandis*.

6. In the case of distance contracts in relation to financial services, notwithstanding Paragraph 357(1), the consumer must pay compensation for the value of the service provided in accordance with the provisions governing termination on grounds of non-performance only if he has been informed of this legal effect before he accepts the contract and if he has expressly agreed to the supplier beginning performance of the service before the end of the withdrawal period.'

11. Under Paragraph 495 of the BGB, which is headed 'Right of withdrawal':

'(1) In the case of consumer loan contracts, the borrower has a right of withdrawal under Paragraph 355.'

12. Paragraph 355 of the BGB, headed 'Right of withdrawal in the case of consumer contracts', in the version applicable at the relevant time, provides:

'(1) Where 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. ...

...

(3) The right of withdrawal shall be extinguished at the latest 6 months after the contract is concluded. In the case of the supply of goods the period shall not commence before the date on which they are received by the recipient. Notwithstanding the first sentence, the right of withdrawal shall not be extinguished if the consumer has not been duly informed of his right of withdrawal; in the case of distance contracts in relation to financial services, in addition, the right of withdrawal shall not be extinguished if the supplier has not properly fulfilled his notification obligations under Paragraph 312c(2)(1).'

II. The facts, the main proceedings and the questions referred for a preliminary ruling

13. In October 2007, two consumers concluded with the credit institution DSL Bank, which is a commercial division of Deutsche Postbank AG, a contract for a housing loan in order to finance the purchase of the property which they occupied.

14. The contract, which was structured as an annuity loan, stipulated a fixed rate of interest until 31 December 2017. It also stipulated that the borrower should make an initial repayment of 2.00% and, following that, monthly instalments of EUR 548.53 in interest and capital repayments. Repayment was to begin on 30 November 2007 with the payment of the first instalment. Moreover, the granting of the loan was contingent on the creation of a mortgage as security over the property.

15. The contract was concluded in the following manner: DSL Bank sent the consumers a written, pre-formulated 'loan application', together with a notice on the right of withdrawal, a summary of the terms and conditions of the loan, the financing terms and 'information and instructions for the consumer relating to the housing loan' ('the instructions').

16. The notice on the right of withdrawal informed the consumers, *inter alia*, that 'the right of withdrawal will be extinguished early if performance of the contract has been fully completed and the borrower has expressly agreed to this'.

17. The consumers signed the loan application, the notice on the right of withdrawal and the confirmation of receipt of the instructions and then sent DSL Bank signed copies of those documents. DSL Bank then granted the loan application.

18. The consumers then provided the agreed security. At the request of the consumers, DSL Bank disbursed the loan and the consumers made the agreed payments.

19. By letter of 8 June 2016, the consumers gave notice of their intention to withdraw from the loan contract on the ground that the notice on the right of withdrawal was not consistent with German law.

20. DSL Bank refused to acknowledge that the withdrawal was effective, whereupon the consumers brought an action before the Landgericht Bonn (Regional Court, Bonn, Germany), seeking a declaration that, further to their withdrawal from the loan contract, DSL Bank could no longer claim any rights under that loan agreement. They also seek the reimbursement by DSL Bank of the sums they had paid up to the time of withdrawal, together with compensation for the benefit of the use thereof.

21. The referring court considers that the notice on the right of withdrawal which the borrowers were given is based on Paragraph 312d(3)(1) of the BGB, which transposes Article 6(2)(c) of Directive 2002/65. However, according to the case-law of the Bundesgerichtshof (Federal Court of Justice, Germany), that provision does not apply to consumer loans, including distance contracts. In the case of such contracts, the consumer has a right of withdrawal governed not by Paragraph 312d(3)(1) of the BGB, but by Paragraph 355(3) of the BGB, read in conjunction with Paragraph 495(1) of the BGB, which provides that the right of withdrawal is not extinguished merely because performance of the contract has been fully completed by both parties at the express request of the consumer before the consumer exercises his right of withdrawal.

22. In that context, since the decision in the main proceedings depends on the interpretation of the provisions of Directive 2002/65, the Landgericht Bonn (Regional Court, Bonn) stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 6(2)(c) of Directive 2002/65/EC to be interpreted as precluding national legislation or practice, such as that at issue in the main proceedings, which does not provide that the right of withdrawal is no longer applicable in the case of distance loan agreements where performance of the contract has been fully completed by both parties at the consumer's express request before the consumer exercises his right of withdrawal?

- (2) Are Article 4(2), Article 5(1), the second indent of the second subparagraph of Article 6(1) and Article 6(6) of Directive 2002/65/EC to be interpreted as meaning that, for the purpose of determining whether the information required by national law pursuant to Article 5(1) and Article 3(1)(3)(a) of Directive 2002/65/EC has been duly disclosed to the consumer and for determining the exercise of the right of withdrawal by the consumer pursuant to national law, the reference consumer is the average, reasonably well informed and reasonably observant and circumspect consumer, having regard to all the relevant facts and all the circumstances surrounding the conclusion of the contract?
- (3) In the event that Questions 1 and 2 are answered in the negative:

Is Article 7(4) of Directive 2002/65/EC to be interpreted as precluding national legislation which provides that, after notice of withdrawal from a distance consumer loan agreement has been given, the supplier must also pay to the consumer, in addition to the sum he has received from the consumer in accordance with the agreement, compensation for the benefit of the use of that sum?’

III. Legal analysis

A. Directive 2002/65: full harmonisation, free movement of financial services and consumer protection

23. Directive 2002/65 is part of a comprehensive framework conceived by the EU legislature to complete an integrated market in financial services and their distance marketing. In particular, it supplements Directive 97/7/EC on the protection of consumers in respect of distance contracts³ now repealed and replaced by Directive 2011/83/EU⁴ which excluded financial services from its scope.

24. In that context, the process of harmonising national laws is instrumental in the removal of barriers to freedom to provide financial services and in ensuring a high level of consumer protection in so far as concerns the conclusion of distance contracts relating to financial services.

25. Directive 2002/65 therefore aims to ensure a high level of consumer protection for the creation of an integrated European market for financial services.⁵

26. It is one of the directives which, in the early 2000s, gave expression to the EU legislature’s intention to move away from a minimum level of harmonisation and towards full harmonisation of the rules on consumer protection.

27. The need to move towards full harmonisation arose from the fact that the minimum harmonisation provision, which permitted the Member States to provide in the own national legal systems for a higher level of consumer protection than that provided for by EU legislation, had led to the fragmentation of the rules which applied in the various national legal systems.

3 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 (OJ 1997 L 144, p. 19).

4 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64).

5 COM(96) 209 final, Green Paper on Financial Services: Meeting Consumers’ Expectations; COM(97) 309 final, Financial Services: Enhancing Consumer Confidence; COM(2001) 66 final, Communication from the Commission to the Council and the European Parliament: Electronic Commerce and Financial Services; COM(2007) 226 final, Green Paper on Retail Financial Services in the Single Market.

28. That fragmentation, on the one hand, discouraged undertakings from operating across borders, something which often entailed additional expenditure in order to acquire the necessary legal skills to ensure compliance with a multiplicity of national legal systems, and, on the other hand, led to a loss of confidence among consumers, who did not know what protection they could expect to receive in the various Member States.

29. The Court of Justice itself has had occasion to point out — albeit with regard to Directive 2005/29⁶ and Directive 2008/48,⁷ which are part of the same legislative policy framework — that full harmonisation in a number of key areas is ‘necessary in order to ensure that all consumers in the European Union enjoy a high and equivalent level of protection of their interests and to facilitate the emergence of a well-functioning internal market in consumer credit’.⁸

30. Given that policy decision, in the case of a fully harmonising directive, no Member State may introduce derogations from EU legislation, not even where they are to the benefit of the consumer, unless that is expressly permitted by the directive itself.⁹

31. In so far as Directive 2002/65 is concerned, there are numerous factors, systematic, teleological and literal, which lead me to regard that directive as fully harmonising, in the sense I have outlined above.

32. Recital 12¹⁰ in fact emphasises that conflicting or different consumer protection rules could impede the functioning of the internal market and competition between firms. It is therefore an objective of the directive to introduce common rules in the distance marketing sector.

33. As stated in recital 13,¹¹ in the areas which the directive harmonises, the Member States may not introduce different provisions. Only where it is specifically so provided may the Member States derogate from the rules laid down in the directive.

34. An example of the point made in recital 13 is the provision in Article 4(2), which permits the Member States to introduce or maintain more stringent provisions on prior information than those of the directive, provided they are in conformity with EU law.

35. In addition, Article 1¹² clearly states that the object of the directive is to ‘approximate the laws, regulations and administrative provisions of the Member States’.

6 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ 2005 L 149, p. 22).

7 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66).

8 Judgment of 27 March 2014, *LCL Le Crédit Lyonnais*, C-565/12, EU:C:2014:190, paragraph 42. See, to the same effect, judgments of 18 December 2014, *CA Consumer Finance*, C-449/13, EU:C:2014:2464, paragraph 21, and of 23 April 2009, *VTB-VAB and Galatea*, C-261/07 and C-299/07, EU:C:2009:244, paragraph 51.

9 This is what is known as *targeted harmonisation*, namely harmonisation that, albeit complete, does permit the Member States to adopt provisions derogating from EU legislation, where that is expressly provided for in the source legislation.

10 Recital 12 of Directive 2002/65 states that ‘the adoption by the Member States of conflicting or different consumer protection rules governing the distance marketing of consumer financial services could impede the functioning of the internal market and competition between firms in the market. It is therefore necessary to enact common rules at Community level in this area, consistent with no reduction in overall consumer protection in the Member States.’

11 Recital 13 of Directive 2002/65 states that ‘A high level of consumer protection should be guaranteed by this directive, with a view to ensuring the free movement of financial services. Member States should not be able to adopt provisions other than those laid down in this directive in the fields it harmonises, unless otherwise specifically indicated in it.’

12 Article 1(1) provides: ‘The object of this directive is to approximate the laws, regulations and administrative provisions of the Member States concerning the distance marketing of consumer financial services.’

36. Lastly, the intention to bring about complete harmonisation in the distance marketing of financial services sector may also be inferred from the preparatory work for the directive. Indeed, as is apparent from the case file, the extent of harmonisation was a topic of discussion at several stages of the legislative process.

37. From as early on as the original Commission proposal in fact, the need was clear for the Member States not to adopt different provisions from those laid down in the directive in the areas harmonised by the directive. This was to ensure the effectiveness of the legislation in preserving a high level of consumer protection and at the same time securing the free movement of financial services.¹³

38. That said, it is clear not only from a literal interpretation, but also and especially from a teleological interpretation, that in accordance with the aim of the directive, any derogation from its provisions is permitted only where the Member States are expressly allowed that right.

39. Furthermore, in the event that they do introduce or maintain derogating rules, the Member States are required to follow a procedure set out in the directive itself,¹⁴ one which enables the European Commission to communicate information on the national provisions to consumers and suppliers, so as to safeguard the directive's harmonisation objectives.

40. It is clear from the above observations that the free movement of financial services presupposes complete harmonisation, so that inequalities between Member States can be avoided, especially in sectors such as distance marketing, which has an inherent cross-border aspect.

41. However, measures adopted to consolidate the single market must not undermine consumer protection. On the contrary, they must be instrumental in achieving a high level of protection for consumers acting on the market, as is indicated in recital 1.¹⁵

42. These common rules, in fact, balancing the need to consolidate the single market against the need to pave the way for a high level of consumer protection, seek to increase the confidence of consumers, who will be more inclined to conclude distance contracts.¹⁶

B. The first question

43. By the first question referred for a preliminary ruling, the Court is asked essentially the following question of interpretation: do the rules governing obligations regarding pre-contractual information and the right of withdrawal contained in Directive 2002/65 preclude national legislation under which, in the event that the consumer has not been adequately informed about the national rules governing the right of withdrawal, it is possible to withdraw at any time, even where the contract has been completely performed by both parties at the consumer's express request?

44. Given what I have said above about the fully harmonising nature of Directive 2002/65, that question can immediately be answered in the affirmative.

45. For the sake of completeness, however, I shall analyse, albeit briefly, the various associated legal issues.

13 COM(98) 468 final, Proposal for a Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 1998 C 385, p. 10, recital 9).

14 Article 4 of Directive 2002/65.

15 Recital 1 of Directive 2002/65 states: 'It is important, in the context of achieving the aims of the single market, to adopt measures designed to consolidate progressively this market and those measures must contribute to attaining a high level of consumer protection, in accordance with Articles 95 and 153 of the Treaty.'

16 See recital 3 of Directive 2002/65, which states that, '... in order to safeguard freedom of choice, which is an essential consumer right, a high degree of consumer protection is required in order to enhance consumer confidence in distance selling'.

46. In particular, it may be observed that effect is given to consumer protection in the directive, on the one hand, by the imposition of certain obligations on the supplier to provide information, even at the pre-contractual stage, and, on the other hand, by the conferral on the consumer of the right to withdraw.

47. The right to be adequately informed and the right of withdrawal, albeit closely connected, are nevertheless structured differently and are governed by different rules in Directive 2002/65.

1. The obligations to provide information laid down in Directive 2002/65

48. The obligation to provide prior information plays a central role in the general scheme of the directive. As the Court has previously held with regard to consumer protection in the context of contracts negotiated away from business premises, it is the prerequisite for making the consumer, as the weaker party, fully aware of his rights. The obligation to provide information thus acts as an essential guarantee of the effective exercise of the consumer's rights, including his right to withdraw, and for that reason is necessary in order to ensure the effectiveness of the European Union's consumer protection legislation.¹⁷

49. Indeed, recital 23¹⁸ states that the optimum protection of the consumer requires that he should be duly informed of the provisions of the directive and that he should have a right of withdrawal.

50. In addition, in a situation such as that at issue in the main proceedings, the consumer must be informed that the right to withdraw will not apply if he expressly requests that the contract be performed.¹⁹

51. Similarly, as part of the prior information which the consumer must be given before concluding a distance contract, he must be informed, in accordance with Article 3 of the directive, of the existence or absence of a right of withdrawal.

52. Lastly, Article 4 of the directive allows the Member States to maintain or introduce more stringent rules on prior information requirements, provided that they are in conformity with EU law and that they are first communicated to the Commission.

53. It would appear obvious that the more stringent rules which the Member States may introduce may only create additional requirements in so far as prior information is concerned.

54. It is not evident from the case file that the Federal Republic of Germany informed the Commission of any wish to avail itself of this possibility of derogation and, in any event, it is not apparent from the legislation in force at the relevant time that any additional requirements regarding prior information over and above those laid down in the directive had been introduced.

2. The right of withdrawal

55. The right of withdrawal, like the obligation to provide prior information, is a central pillar of consumer protection in the European Union. It is structured as a right of the consumer to a period of reflection.

¹⁷ Judgment of 17 December 2009, *Martín Martín*, C-227/08, EU:C:2009:792, paragraphs 26 and 27.

¹⁸ Recital 23 of Directive 2002/65 states: 'With a view to optimum protection of the consumer, it is important that the consumer is adequately informed of the provisions of this directive and of any codes of conduct existing in this area and that he has a right of withdrawal.'

¹⁹ See recital 24 of Directive 2002/65, which states that, 'when the right of withdrawal does not apply because the consumer has expressly requested the performance of a contract, the supplier should inform the consumer of this fact'.

56. The reason for the generalised introduction of this right in consumer contracts is the desire of the EU legislature to put an end to the imbalance in contractual relations with sellers and suppliers and to offer the consumer the possibility of undoing the contractual bond within a given period of time for subjective reflection.

57. The right of withdrawal governed by Directive 2002/65 is a unilateral right for the protection of the consumer, who may withdraw within a period of 14 days, without penalty and without having to give the reason for his decision.

58. The only situation in which the right of withdrawal is extinguished before the end of that period is, as indicated in Article 6(2)(c) of Directive 2002/65, where the contract has been fully performed by both parties at the consumer's express request before the consumer exercises his right of withdrawal.

59. The reason for that rule lies in the fact that there is no proper ground for withdrawal once both parties have fulfilled their obligations and have thus given full effect to their wish to enter into the contract. In such a case, it is desirable to prevent the consumer — who has already demonstrated and confirmed his wish to enter into the contract — being able to derive an undue benefit from changing his mind after the period of reflection so as to obtain the cancellation of a service from which he has already benefitted.

60. However, in order to prevent the possible abuse of that rule by sellers or suppliers, they are placed under an obligation to inform the consumer that the right of withdrawal will cease to apply should the consumer expressly request the complete performance of the contract, even if the period for exercising the right of withdrawal has not yet expired.

61. Moreover, by way of a departure from the previous rules governing distance contracts,²⁰ Directive 2002/65 lays down a new obligation to provide the consumer with prior information about the existence or absence of a right of withdrawal,²¹ as well as practical instructions for exercising that right, where it exists.²²

62. Article 6(3) lists a number of specific cases, listed exhaustively, in which the Member States may, if they inform the Commission, make use of the possibility of providing 'that the right of withdrawal shall not apply'. That possibility of derogation, which relates to cases in which the right of withdrawal may be excluded, rather than to any additional situations in which the right may be exercised, is not relevant in the present case. In any event, the case file reveals no communication from the Federal Republic of Germany to the Commission concerning this particular matter.

63. Thus, Directive 2002/65 allows the Member States no leeway for introducing rules governing the right of withdrawal which derogate from those which the directive itself lays down, precisely for the reasons which I mentioned above in connection with the EU's legislative policy of harmonising the matter completely.

64. What I have said thus far is sufficient to enable the first question referred for a preliminary ruling to be answered in the affirmative.

65. Nevertheless, I think it useful to make a few brief observations about the fact that, in the case in the main proceedings, there is an overlap of the substantive conditions to which the consumer's right to withdraw from a distance consumer credit contract is subject and the content of the seller's and supplier's obligations to provide prior information.

²⁰ 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 (OJ 1997 L 144, p. 19).

²¹ Article 3(1)(3)(a) of Directive 2002/65.

²² Article 3(1)(3)(d) of Directive 2002/65.

66. From what I have said so far it is apparent that, since Directive 2002/65 is fully harmonising, the proper information, as a matter of EU law on the subject of the right of withdrawal, should be that which the case file shows the consumer to have been given and which, in implementation of the directive, German law sets out with reference, generally, to financial services.

67. Nevertheless, the referring court points out that there is a provision of German law, one that was already in force before Directive 2002/65 was implemented²³ and that was still in force when the parties in the main proceedings concluded their contract, pursuant to which, according to the settled interpretation of the Bundesgerichtshof (Federal Court of Justice), the right of withdrawal in respect of consumer credit contracts, including distance contracts, is governed differently, the consumer being given a ‘perpetual’ right of withdrawal if the notice on withdrawal which he receives is not in the proper form.

68. Directive 2002/65 does not stipulate any specific consequences of incomplete fulfilment of the obligation to provide information. It merely provides, in Article 6(1), that the period for withdrawal by the consumer is to begin on the day on which the consumer receives the contractual terms and conditions and the prior information, if that is later than the day on which the distance contract is concluded.

69. Next, Article 11²⁴ provides that the Member States may provide for appropriate sanctions in the event of the supplier’s failure to comply with ‘national provisions adopted pursuant to this directive’ and that those sanctions, which must be effective, proportional and dissuasive, may include a right for the consumer to ‘cancel the contract at any time, free of charge and without penalty’.

70. In the present case, it is apparent from the case file that the information regarding the right of withdrawal was communicated by the supplier to the consumer in good time and in the proper manner, in so far as Directive 2002/65 is concerned and in so far as concerns the provisions of national law ‘adopted pursuant to’ the directive.

71. It would not, therefore, appear to be reasonable to regard the provision of national law in question as a ‘sanction’ within the meaning of Article 11 of Directive 2002/65.

72. The fact that the national legislature laid down in its legal system a set of rules governing the right of withdrawal which applies only to consumer credit contracts, and, on the other hand, implemented the provisions of Directive 2002/65 on the right of withdrawal in so far as concerns other financial services contracts, reveals a failure to coordinate national rules with EU law,²⁵ inasmuch as, although affording the consumer more favourable conditions, those national rules are not consistent with the directive’s aim of complete harmonisation.

73. Indeed, by providing that the rules transposing the directive, and Article 6(2)(c) thereof in particular, do not apply to consumer credit contracts, national law, as interpreted by the Bundesgerichtshof (Federal Court of Justice), has kept in force rules which conflict with EU law in two respects: first, the right of withdrawal is not governed in the same way as provided for under Article 6 of Directive 2002/65; secondly, a concept of ‘financial service’ is introduced that is inconsistent with and different from the concept defined in Article 2(b) of the directive, along with differentiated rules on the right of withdrawal depending on the type of financial service and the type of contract in which that right is included.

23 The third sentence of Paragraph 355(3) of the BGB.

24 Article 11 of Directive 2002/65, which is headed ‘Sanctions’, provides: ‘Member States shall provide for appropriate sanctions in the event of the supplier’s failure to comply with national provisions adopted pursuant to this directive. They may provide for this purpose in particular that the consumer may cancel the contract at any time, free of charge and without penalty. These sanctions must be effective, proportional and dissuasive.’

25 Complete and correct transposition of the directive must take account of the harmonisation objective pursued by its provisions. Therefore, even pre-existing national rules must necessarily be consistent with the transposing legislation.

74. Under Directive 2002/65, ‘financial service’ means ‘any service of a banking, credit, insurance, personal pension, investment or payment nature’. Recital 14 states that the financial services to which the directive applies are all financial services liable to be provided at a distance.²⁶

75. Nevertheless, it remains for the national court to consider whether, in the particular case at hand, the consumers were informed by the supplier in such a way as to enable them to take a prudent and reasonable decision and, thus, whether they took an informed decision to perform the contract.

C. The second question

76. By its second question, the referring court asks whether the model of the average, reasonably well informed and reasonably observant and circumspect consumer is the only reference consumer to be taken into consideration in assessing the ease with which the prior information and the procedure for exercising the consumer’s right of withdrawal provided for by the national legislation transposing Directive 2002/65 can be understood.

77. Indeed, it is apparent from the case file that, for the period of time relevant to the present case, there was a difference between the concept of the average consumer according to the Court of Justice and the definition of the average consumer under national legislation.

78. As indicated above, the objective of the directive is to ensure a high level of protection for consumers, who must be adequately informed of the provisions of the directive,²⁷ including information on the existence or absence of a right of withdrawal.²⁸

79. The definition of ‘consumer’ in Article 2(d) of Directive 2002/65²⁹ is identical to that given in Directive 2005/29³⁰ and Directive 93/13,³¹ on which the Court has previously ruled, holding that the ‘average consumer’ is taken to be a reasonably well informed and reasonably observant and circumspect consumer.³²

80. Although this is the first time that the Court has been asked to provide an interpretation of the concept of consumer for the purposes of Directive 2002/65, there is nothing in that directive to suggest that the concept should be understood differently from the way in which the Court has interpreted it in relation to the other consumer protection directives I have just mentioned.

81. In the absence of indications to the contrary and provisions enabling derogation, it is to that concept of the consumer that reference must be made also for the purposes of Directive 2002/65 and the national legislation implementing that directive.

²⁶ Recital 14 of Directive 2002/65 states: ‘This Directive covers all financial services liable to be provided at a distance. However, certain financial services are governed by specific provisions of Community legislation which continue to apply to those financial services. However, principles governing the distance marketing of such services should be laid down.’

²⁷ See recital 23 of Directive 2002/65.

²⁸ Article 3(1)(3)(a) and (d) of Directive 2002/65.

²⁹ Article 2(d) of Directive 2002/65 defines ‘consumer’ as ‘any natural person who, in distance contracts covered by this directive, is acting for purposes which are outside his trade, business or profession’.

³⁰ Article 2(a) of Directive 2005/29 defines ‘consumer’ as ‘any natural person who, in commercial practices covered by this directive, is acting for purposes which are outside his trade, business, craft or profession’.

³¹ Article 2(b) of Directive 93/13 defines ‘consumer’ as ‘any natural person who, in contracts covered by this directive, is acting for purposes which are outside his trade, business or profession’.

³² Judgments of 20 September 2017, *Andriuc and Others*, C-186/16, EU:C:2017:703, paragraph 47; of 8 February 2017, *Carrefour Hypermarkets*, C-562/15, EU:C:2017:95, paragraph 31; of 25 July 2018, *Dyson*, C-632/16, EU:C:2018:599, paragraph 56; of 13 September 2018, *Wind Tre and Vodafone Italia*, C-54/17 and C-55/17, EU:C:2018:710, paragraph 51; and of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 78.

82. Indeed, the objective of the complete harmonisation of national provisions called for by Directive 2002/65 points in favour of the necessary adoption of a model of consumer that is common to all Member States.³³

83. It is for the national court, when considering all the circumstances of the case before it, to ascertain whether, prior to the conclusion of the distance contract, the consumers were given all the prior information called for by the directive. In carrying out that assessment, it will also have to ascertain whether that information was clear and intelligible,³⁴ such as to enable the average consumer, as defined above, to assess all the essential elements of the contract and, as I have said, to take a prudent and reasonable decision.

D. The third question

84. In light of the considerations I have set out regarding the first and second questions referred for a preliminary ruling, and the affirmative answer that I propose should be given to those questions, I think it unnecessary to answer the third question.

85. I shall therefore confine myself to making a few brief observations, in case the Court should not follow my suggestion.

86. By its third question, the referring court asks whether Article 7(4) of Directive 2002/65 precludes national legislation which provides that, as a result of the consumer expressing his intention to withdraw from a distance consumer loan contract, the supplier must, in addition to returning the capital paid, pay the consumer compensation for the benefit of the use of that sum.

87. Article 7(4) of the directive requires the supplier, following the lawful exercise of the right of withdrawal, to return to the consumer 'any sums he has received from him in accordance with the distance contract'. That provision governs exhaustively the consequences of exercise of the right of withdrawal, and leaves the Member States with no leeway to introduce other rules.

88. Therefore, in light of what I have said about the harmonisation objective of the directive, and in the absence of indications to the contrary, it is not possible for the Member States to lay down provisions more favourable to the consumer concerning what he may be due in the event that he exercises his right of withdrawal, or to go so far as to require the payment of compensation for any alleged benefits obtained from the borrower.

89. Moreover, as the Commission too has observed, limiting the repayment due from the supplier to the sums he has received in accordance with the distance contract appears reasonable, given the brief period of time allowed for exercising the right of withdrawal (14 days, extended to 30 days in the case of distance contracts relating to life insurance covered by Directive 90/619/CE and personal pension schemes). Indeed, in such a context it would appear unreasonable to conclude that the borrower obtains a specific benefit within such a brief period of time.

³³ As the Court made clear, with reference to the concept of consumer as defined by Directive 2005/29, in its judgment of 14 January 2010, *Plus Warenhandelsgesellschaft*, C-304/08, EU:C:2010:12, paragraph 41.

³⁴ Judgment of 20 September 2017, *Andriuc and Others*, C-186/16, EU:C:2017:703, paragraphs 44, 45, 47 and 48.

IV. Conclusion

90. In the light of the foregoing considerations, I suggest that the Court should answer the questions referred for a preliminary ruling by the Landgericht Bonn (Regional Court, Bonn, Germany) as follows:

- (1) Article 6(2)(c) of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC is to be interpreted as precluding national legislation, as interpreted in the case-law, which does not provide for the right of withdrawal to be inapplicable in the case of distance loan contracts where performance of the contract has been fully completed by both parties at the consumer's express request before the consumer exercises his right of withdrawal.
- (2) Article 4(2), Article 5(1), the second indent of the second subparagraph of Article 6(1) and Article 6(6) of Directive 2002/65 are to be interpreted as meaning that, for the purpose of determining whether the information required by national law pursuant to Article 5(1) and Article 3(1)(3)(a) of Directive 2002/65 has been duly disclosed to the consumer and whether the consumer has duly exercised the right of withdrawal, the reference consumer is the average, reasonably well informed and reasonably observant and circumspect consumer, having regard to all the relevant facts and all the circumstances surrounding the conclusion of the contract.