



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

4 June 2020*

(Reference for a preliminary ruling — Consumer protection — Directive 2002/65/EC — Distance loan agreement — Right of withdrawal — Consequences — Article 7(4) — Return of the services received — Payment of compensation for benefit of use — Supplier's obligation — Precluded)

In Case C-301/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Bonn (Regional Court, Bonn, Germany), made by decision of 17 April 2018, received at the Court on 4 May 2018, in the proceedings

Thomas Leonhard

v

DSL-Bank — a branch of DB Privat- und Firmenkundenbank AG,

THE COURT (Sixth Chamber),

composed of M. Safjan (Rapporteur), President of the Chamber, L. Bay Larsen and N. Jääskinen, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Leonhard, by C. Köhler, Rechtsanwältin,
- DSL-Bank — a branch of DB Privat- und Firmenkundenbank AG, by A. Menkel, Rechtsanwalt,
- the German Government, represented initially by T. Henze, M. Hellmann and E. Lankenau, and subsequently by M. Hellmann, E. Lankenau and J. Möller, acting as Agents,
- the European Commission, by F. Erlbacher and C. Valero, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 7(4) 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 (OJ 2002 L 271, p. 16).
- 2 The request has been made in connection with a dispute between Mr Thomas Leonhard and DSL-Bank — a branch of DB Privat- und Firmenkundenbank AG ('DSL-Bank') concerning the exercise, by Mr Leonhard, of his right to withdraw from a loan agreement concluded between those two parties.

Legal context

EU law

- 3 Recitals 1, 3, 13 and 14 of Directive 2002/65 read as follows:

'(1) 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 [EC].

...

(3) ... 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.

...

(13) 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.

(14) 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.'

- 4 Article 1 of the directive, headed 'Object and scope', provides, in paragraph 1 thereof:

'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.'

- 5 Article 2 of the directive, headed 'Definitions', provides:

'For the purposes of this Directive:

(a) "distance contract" means any contract concerning financial services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;

- (b) “financial service” means any service of a banking, credit, insurance, personal pension, investment or payment nature;
- (c) “supplier” means any natural or legal person, public or private, who, acting in his commercial or professional capacity, is the contractual provider of services subject to distance contracts;
- (d) “consumer” means any natural person who, in distance contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;

...’

- 6 Article 3 of the directive, headed ‘Information to the consumer prior to the conclusion of the distance contract’, states, in paragraph 1 thereof:

‘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;

...’

- 7 According to Article 6 of Directive 2002/65, which is headed ‘Right of withdrawal’:

‘1. The Member States shall ensure that the consumer shall have a period of 14 calendar days to withdraw from the contract without penalty and without giving any reason. ...

The period for withdrawal shall begin:

- either from the day of the conclusion of the distance contract ... or
- 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:

...

- (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 the directive, which is headed 'Payment of the service provided before withdrawal', provides:

'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. ...

...

3. The supplier may not require the consumer to pay any amount on the basis of paragraph 1 unless he can prove that the consumer was duly informed about the amount payable, in conformity with Article 3(1)(3)(a). However, in no case may he require such payment if he has commenced the performance of the contract before the expiry of the withdrawal period provided for in Article 6(1) without the consumer's prior request.

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.

5. The consumer shall return to the supplier any sums and/or property he has received from the supplier without any undue delay and no later than within 30 calendar days. ...'

German law

9 Paragraph 312b of the Bürgerliches Gesetzbuch (German Civil Code), in the version applicable to the dispute in the main proceedings ('the BGB'), provides, in subparagraph 1 thereof:

"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 not concluded under an organised distance sales or service-provision scheme. "Financial services" within the meaning of the first sentence are any services of a banking, credit, insurance, personal pension, investment or payment nature.'

10 Paragraph 312d of the BGB 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 Paragraph 346 of the BGB provides as follows:

'1. If one contractual party has contractually reserved the right to terminate the contract or if he has a statutory right of termination, then, if termination occurs, any services received shall be returned, and the benefits derived from such services surrendered.

2. In lieu of restitution or surrender, the debtor must provide compensation for value to the extent that

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

If consideration is specified in the contract, this is to be taken as a basis when calculating the compensation for value; if compensation for value for the benefit of use of a loan is to be paid, evidence may be adduced that the value of the benefit of use was in fact less.'

12 Paragraph 355 of the BGB provides, in subparagraph 3 thereof:

'The right of withdrawal shall be extinguished at the latest six 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).'

13 Paragraph 495 of the BGB provides, in subparagraph 1 thereof:

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

14 The Verordnung über Informations- und Nachweispflichten nach bürgerlichem Recht (Regulation on information and evidence obligations under civil law), in the version applicable to the main proceedings, lays down the information obligations that a seller or supplier must comply with when concluding, inter alia, distance contracts with consumers, and sets out the information obligations incumbent on credit institutions vis-à-vis borrowers.

The dispute in the main proceedings and the question referred for a preliminary ruling

15 During November 2005, Mr Leonhard concluded, in his capacity as a consumer, two contracts with the credit institution DSL-Bank for loans to finance the acquisition of two apartments ('the contested contracts').

16 The contested contracts were concluded in the following manner.

17 On 10 November 2005, DSL-Bank sent Mr Leonhard two pre-formulated 'loan applications' containing information on the right of withdrawal. As is apparent from the order for reference, that information did not set out the wording of the German legislation in force at the time and, therefore, did not give rise to the irrebuttable presumption of lawfulness that would have existed if that information had included the model wording set out in the annex to the Regulation on information and evidence obligations under civil law, in the version applicable to the dispute in the main proceedings.

18 Mr Leonhard signed those documents on 11 November 2005 and returned them to DSL-Bank. Mr Leonhard then provided the agreed security and, in particular, granted a land charge over the immovable property at issue. At his request, DSL-Bank paid out the loan.

19 After having paid interest on the loan each month, Mr Leonhard gave notice to DSL-Bank, by letter of 14 November 2015, that he was withdrawing from the contested contracts. In support of that notification, he argued that the information on the right of withdrawal that had been provided to him during the conclusion of those contracts did not comply with national legislation. Regarding the future payments of interest that he intended to make, Mr Leonhard stated that those payments could not be viewed as an acknowledgement of his obligations arising from the contested contracts and that he reserved the right to request repayment from DSL-Bank of them.

20 DSL-Bank refused to accept that Mr Leonhard had properly withdrawn from the contested contracts, whereupon the latter brought an action before the Landgericht Bonn (Regional Court, Bonn, Germany) seeking a judgment declaring that he had properly withdrawn from those contracts and ordering DSL-Bank to pay compensation for the benefit of use in respect of the interest that Mr Leonhard had paid to DSL-Bank prior to his withdrawal.

21 According to the referring court, the contested contracts must be considered to be 'distance contracts' within the meaning of Paragraph 312b of the BGB, since, according to national case-law, the provisions concerning the right of withdrawal in distance contracts also apply in principle to contracts for loans to finance the purchase of immovable property.

22 The referring court takes the view that, in so far as the information on the right of withdrawal contained in the documents referred to in paragraph 17 above was not in conformity with national legislation, Mr Leonhard should be regarded as having properly withdrawn from the contested contracts.

23 As regards the consequences of that withdrawal, the referring court notes that, in accordance with Paragraph 346(1) and point 1 of the first sentence of Paragraph 346(2) of the BGB, the borrower is required to repay to the lender the principal that was lent and the benefits derived from that principal, the amount of which, under the second sentence of Paragraph 346(2) of the BGB, is in

principle equal to the interest provided for in the agreement concluded between the parties. The lender is required to return to the borrower not only the sums received but also the benefits derived from those sums.

- 24 That court adds that, under Paragraph 312d(6) of the BGB, in the case of distance contracts in relation to financial services, the consumer must pay compensation for the value of the service provided 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. At the same time, that court takes the view that it is possible to interpret national legislation as meaning that the consumer is still entitled to compensation for the benefit of use in accordance with point 1 of the first sentence of Paragraph 346(2) of the BGB. In that case, the consumer-borrower would not only be reimbursed the principal that he or she has repaid and the interest that he or she has paid to the lender, but would also be entitled to compensation for the benefit of use.
- 25 However, according to the referring court, Article 7 of Directive 2002/65 precludes the borrower from claiming such compensation from the lender, as that directive fully harmonises the relevant Member State legislation in that regard.
- 26 In those circumstances, the Landgericht Bonn (Regional Court, Bonn) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 7(4) of Directive [2002/65] 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?’

Procedure before the Court

- 27 By decision of the President of the Court of 4 December 2018, the present case was stayed pending delivery of the judgment of 11 September 2019, *Romano* (C-143/18, EU:C:2019:701).
- 28 The Court Registry served that judgment on the referring court.
- 29 By letter of 25 September 2019, received at the Court on 1 October 2019, the referring court, in response to a question put by the Court, informed the Court that it was maintaining its request for a preliminary ruling in so far as, in the judgment of 11 September 2019, *Romano* (C-143/18, EU:C:2019:701), the Court had not answered the third question referred for a preliminary ruling, which is identical to the single question referred in the present case.

Consideration of the question referred

- 30 By its question, the referring court asks, in essence, whether Article 7(4) of Directive 2002/65 must be interpreted as meaning that, where a consumer exercises his or her right to withdraw from a distance loan agreement concluded with a supplier, that consumer has the right to receive from that supplier, subject to certain sums which the consumer himself or herself is required to pay to the supplier under the conditions laid down in Article 7(1) and (3) of that directive, the principal repaid and the interest paid under that agreement, but does not have the right to receive compensation for the benefit of use of that principal and that interest.

- 31 As a preliminary point, the referring court notes that, according to the national legislation referred to in paragraph 24 above, a consumer-borrower who has withdrawn from the agreement with the supplier is entitled to receive not only the principal repaid and the interest paid to that lender, but also compensation for benefit of use.
- 32 In that regard, it should be recalled that, as is apparent from Article 7(4) of Directive 2002/65, where a consumer decides to exercise his or her right to withdraw from a distance loan agreement, the supplier is required to return to him or her any sums which that supplier has received from that consumer in accordance with that agreement, except for the amount referred to in Article 7(1) of that directive, namely the amount received for any financial service actually supplied, subject to the conditions laid down in Article 7(3) of that directive.
- 33 The wording of Article 7(4) of Directive 2002/65 is unequivocal and imposes an obligation on the supplier to repay to the consumer all sums ‘received from him’, in accordance with the distance contract, and only those sums.
- 34 Where the consumer repays to the supplier, in performance of the loan agreement, the principal plus interest, the return to the consumer of any sums the supplier has received referred to in Article 7(4) of Directive 2002/65 must include both the sums repaid by that consumer as principal and those paid as interest on the loan.
- 35 Neither Article 7(4) of Directive 2002/65 nor any other provision of that directive imposes an obligation, in the event of withdrawal by the consumer from the contract with his or her supplier, in accordance with which the latter is required to pay to that consumer, in addition to the principal repaid and the interest paid by the consumer, compensation for the benefit of use of the sums received by the supplier in performance of that contract.
- 36 In that regard, it must be recalled that, in accordance with Article 1(1) of Directive 2002/65, read in the light of recital 13 thereof, in principle, the directive is fully harmonising with regard to the matters it governs. Indeed, as that recital states, the Member States should not be able to adopt provisions other than those laid down in the directive in the fields it harmonises, unless otherwise specifically indicated in it (judgment of 11 September 2019, *Romano*, C-143/18, EU:C:2019:701, paragraph 34).
- 37 In the light of all the foregoing considerations, the answer to the question referred is that Article 7(4) of Directive 2002/65 must be interpreted as meaning that, where a consumer exercises his or her right to withdraw from a distance loan agreement concluded with a supplier, that consumer has the right to receive from that supplier, subject to certain sums which the consumer himself or herself is required to pay to the supplier under the conditions laid down in Article 7(1) and (3) of that directive, the principal repaid and the interest paid under that agreement, but does not have the right to receive compensation for the benefit of use of that principal and that interest.

Costs

- 38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

Article 7(4) 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 must be

interpreted as meaning that, where a consumer exercises his or her right to withdraw from a distance loan agreement concluded with a supplier, that consumer has the right to receive from that supplier, subject to certain sums which the consumer himself or herself is required to pay to the supplier under the conditions laid down in Article 7(1) and (3) of that directive, the principal repaid and the interest paid under that agreement, but does not have the right to receive compensation for the benefit of use of that principal and that interest.

[Signatures]