



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

18 June 2020*

(Reference for a preliminary ruling — Consumer protection — Distance marketing of financial services — Directive 2002/65/EC — Article 1 — Scope — Contracts concerning financial services consisting of an initial agreement followed by successive operations — Application of Directive 2002/65/EC to the first agreement alone — Article 2(a) — Concept of ‘contract concerning financial services’ — Amendment to a loan agreement altering the interest rate initially set)

In Case C-639/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Kiel (Regional Court of Kiel, Germany), made by decision of 7 September 2018, received at the Court on 12 October 2018, in the proceedings

KH

v

Sparkasse Südholstein,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta, Vice-President of the Court, M. Safjan (Rapporteur), L. Bay Larsen and C. Toader, Judges,

Advocate General: E. Sharpston,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 4 September 2019,

after considering the observations submitted on behalf of:

- KH, by C. Rugen, Rechtsanwalt,
- Sparkasse Südholstein, by F. van Alen, Rechtsanwalt,
- the German Government, by J. Möller, M. Hellmann, E. Lankenau and T. Henze, acting as Agents,
- the European Commission, by B.-R. Killmann and C. Valero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 March 2020,

* Language of the case: German.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 2(a) 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 proceedings between KH and the Sparkasse Südholstein concerning KH's right of withdrawal in relation to amendments to loan agreements altering the initially set interest rates.

Legal context

European Union law

- 3 Recitals 1, 3, 13 and 16 to 18 of Directive 2002/65 state:
 - (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.
 - ...
 - (16) A single contract involving successive operations or separate operations of the same nature performed over time may be subject to different legal treatment in the different Member States, but it is important that this Directive be applied in the same way in all the Member States. To that end, it is appropriate that this Directive should be considered to apply to the first of a series of successive operations or separate operations of the same nature performed over time which may be considered as forming a whole, irrespective of whether that operation or series of operations is the subject of a single contract or several successive contracts.
 - (17) An “initial service agreement” may be considered to be for example the opening of a bank account, acquiring a credit card, concluding a portfolio management contract, and “operations” may be considered to be for example the deposit or withdrawal of funds to or from the bank account, payment by credit card, transactions made within the framework of a portfolio management contract. Adding new elements to an initial service agreement, such as a possibility to use an electronic payment instrument together with one's existing bank account, does not

constitute an “operation” but an additional contract to which this Directive applies. The subscription to new units of the same collective investment fund is considered to be one of “successive operations of the same nature”.

(18) By covering a service-provision scheme organised by the financial services provider, this Directive aims to exclude from its scope services provided on a strictly occasional basis and outside a commercial structure dedicated to the conclusion of distance contracts.’

4 Article 1 of that directive, headed ‘Object and scope’, provides:

‘1. 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.

2. In the case of contracts for financial services comprising an initial service agreement followed by successive operations or a series of separate operations of the same nature performed over time, the provisions of this Directive shall apply only to the initial agreement.

In case there is no initial service agreement but the successive operations or the separate operations of the same nature performed over time are performed between the same contractual parties, Articles 3 and 4 apply only when the first operation is performed. Where, however, no operation of the same nature is performed for more than one year, the next operation will be deemed to be the first in a new series of operations and, accordingly, Articles 3 and 4 shall apply.’

5 Article 2 of that 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 that directive, headed ‘Information to the consumer prior to the conclusion of the distance contract’, is worded as follows:

‘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;

...

2. The information referred to in paragraph 1, the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors.

...'

7 Article 6 of Directive 2002/65, headed 'Right of withdrawal', states:

'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, except in respect of the said life assurance, where the time limit will begin from the time when the consumer is informed that the distance contract has been concluded, 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.

...

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 ...

...'

German law

8 Paragraph 312b(1) of the Bürgerliches Gesetzbuch (Civil Code), in the version in force at the material time in the main proceedings ('the BGB'), is worded as follows:

'Distance contracts are contracts for the supply of goods or services, including financial services, concluded between a trader and a consumer exclusively by the use of means of distance communication, 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 services of a banking, insurance, personal pension, investment or payment nature.'

9 Paragraph 312d of the BGB grants to the consumer who has entered into a distance contract a right of withdrawal, and states, in essence, that the period for withdrawal does not start to run until the obligations to notify the consumer of that right have been met and, in the case of a supply of services, not until the contract has been concluded.

10 Paragraph 495(1) of the BGB provides:

‘In the case of a consumer credit agreement, the borrower has a right of withdrawal ...’

11 The content of Paragraphs 312b and 312d of the BGB was amended by the Gesetz zur Umsetzung der Verbraucherrechtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung (the Law transposing the consumers’ directive and amending the law on estate agencies) of 20 September 2013 (BGBl. 2013 I, p. 3642). Paragraph 229(32) of the Einführungsgesetz zum Bürgerlichen Gesetzbuch (the Introductory Law to the Civil Code) provides, however, that the amendments thus made to the BGB are not applicable to agreements concluded before 13 June 2014. It is stated moreover in Paragraph 229(32) that a consumer’s right of withdrawal does not expire with respect to contracts for financial services for as long as the consumer, in relation to a distance contract concluded before 13 June 2014, has not been notified of his right of withdrawal or has not been notified in a way that satisfies the legal requirements in force on the date when the contract was concluded.

12 Paragraph 495(1) of the BGB, in the version applicable from 1 August 2002 until 12 June 2014, provides:

‘In the case of consumer loan agreements, the borrower has a right of withdrawal under Paragraph 355.’

13 In the version applicable at the material time, Paragraph 355(3) of the BGB provided:

‘The right of withdrawal shall expire 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 expire 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 expire if the supplier has not properly fulfilled his notification obligations under Paragraph 312c(2)(1).’

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

14 On 1 July 1994, 17 July 1994 and 4 November 1999, the banking institution which was the predecessor of Sparkasse Südholstein concluded three loan agreements with KH. The first agreement, for a sum of 114 000 Deutschmarks (DEM) (approximately EUR 57 000) and at an interest rate of 6.95%, related to financing the purchase of immovable property and was secured by a mortgage on the property. The second agreement, for a sum of 112 000 DEM (approximately EUR 56 000) and at an interest rate of 5.7%, also related to financing the purchase of immovable property and was secured by a mortgage on the property. As regards the third agreement, for a sum of 30 000 DEM (approximately EUR 15 000) and at an interest rate of 6.6%, that agreement related to financing the purchase of consumer goods.

15 The contract terms in those agreements stipulated that either party was entitled to request, after a certain period, an adjustment of the interest rate initially agreed and that, failing agreement, the lending institution could set a variable interest rate comparable to that applied to loans of that type.

- 16 In accordance with those contract terms, the parties agreed, in the course of the years 2008 to 2010, and using exclusively means of distance communication, amendments to the three contracts, relating to the setting of new annual rates of interest. At the time when these amendments were agreed, Sparkasse Südholstein did not inform KH that she had a right of withdrawal.
- 17 By a communication of 2 September 2015, received by Sparkasse Südholstein on 8 September 2015, KH gave notice that she intended to withdraw from the agreed amendments. KH stated that those amendments each constituted a distance contract, and claimed that, since she had not been informed of her right of withdrawal, it remained open to her to withdraw, pursuant to Paragraph 495(1) of the BGB or, in the alternative, Paragraph 312d(1) of the BGB.
- 18 KH brought an action before the Landgericht Kiel (Regional Court of Kiel, Germany) seeking a declaration that the effect of withdrawal from the amendments to the second and third agreements was to extinguish any agreement between the parties on the interest rate agreed by those amendments, and an order that Sparkasse Südholstein should repay to her the interest and redemption payments made since the conclusion of the amendment agreements, reimburse the account administration fees paid, and award compensation.
- 19 Sparkasse Südholstein contended that the action should be dismissed and claimed that KH has no right to withdraw from the agreed amendments. In the view of Sparkasse Südholstein, apart from the fact that the initial contracts had not been concluded using means of distance communication, the amendments, which did not relate to other financial services, could not be the subject of a separate withdrawal. In the alternative, if the withdrawals made by KH were to be valid, the sole consequence would be the annulment of the amendments, and not the annulment of the initial agreements, and those agreements would continue to exist with variable interest rates in accordance with the contractual provisions.
- 20 The referring court states that the outcome of the main proceedings depends on whether the agreed amendments are to be regarded, first, as having been concluded under an organised distance sales or service-provision scheme run by the supplier, within the meaning of Article 2(a) of Directive 2002/65, and, second, as being capable of categorisation as ‘contracts concerning financial services’, also referred to by Article 2(a). In particular, the referring court states that an answer to the second question is required in order to be able, if necessary, to apply to the main proceedings Paragraph 312b(1), and Paragraph 312d(1) and (2), of the BGB, and adds that, according to the intention of the German legislature, the concept of ‘contracts for the supply of services, including financial services’, referred to in the first sentence of Paragraph 312b(1) of the BGB, must be interpreted in a way that is compatible with Directive 2002/65.
- 21 In those circumstances, the Landgericht Kiel (Regional Court of Kiel) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Within the meaning of Article 2(a) of Directive 2002/65, is a contract concluded “under an organised distance sales or service-provision scheme run by the supplier”, by means of which an existing loan agreement is amended solely with regard to the interest rate agreed (follow-up interest agreement), where a branch bank concludes loan agreements for the purpose of financing an immovable property secured by mortgage only at its commercial premises, but in ongoing business dealings concludes contracts to amend loan agreements that have already been agreed in some cases also by making exclusive use of means of distance communication?
- (2) Does a “contract concerning financial services” within the meaning of Article 2(a) of Directive 2002/65 include the amendment of an existing loan agreement if the amendment solely concerns the agreed interest rate (follow-up interest agreement), without extending the term of the loan or altering the amount of the loan?’

Consideration of the questions referred

The second question

- 22 By its second question, which should be examined first, the referring court seeks, in essence, to ascertain whether Article 2(a) of Directive 2002/65 must be interpreted as meaning that an amendment to a loan agreement can be categorised as a ‘contract concerning financial services’, within the meaning of that provision, where the amendment does no more than alter the interest rate initially agreed, but does not extend the term of the loan or alter its amount, and where the original clauses of the loan agreement provided for the agreement of such an amendment or, failing such agreement, for the application of a variable rate of interest.
- 23 First, it must be observed that, as stated by the Advocate General in point 45 of her Opinion, Directive 2002/65 is intended, in principle, to bring about full harmonisation of the matters that it governs and its terms must, consequently, be given an interpretation that is common to all Member States (see, to that effect, judgment of 11 September 2019, *Romano*, C-143/18, EU:C:2019:701, paragraphs 34 and 55).
- 24 In accordance with the Court’s settled case-law, it follows from the requirement for the uniform application of EU law and from the principle of equality that the terms of a provision of EU law which does not contain any express reference to the law of the Member States for the purpose of determining its meaning and scope must be given an autonomous and uniform interpretation throughout the European Union, and that interpretation must take into account not only the wording of that provision but also its context and the objective pursued by the legislation in question (judgment of 23 May 2019, *WB*, C-658/17, EU:C:2019:444, paragraph 50 and the case-law cited).
- 25 As regards the wording of the concept of ‘contract concerning financial services’, in Article 2(a) of Directive 2002/65, it must be observed that the reference made therein to ‘financial services’ constitutes the distinctive element of that concept, since it serves to identify a specific category of contracts.
- 26 Article 2(b) of that directive defines the concept of ‘financial service’ as meaning any service of a banking, credit, insurance, personal pension, investment or payment nature.
- 27 As regards, more specifically, a credit agreement, the Court has already had occasion to make clear that the characteristic obligation of such an agreement is the actual granting of the sum loaned, while the borrower’s obligation to repay that sum is merely a consequence of the performance of the service by the lender (judgment of 15 June 2017, *Kareda*, C-249/16, EU:C:2017:472, paragraph 41).
- 28 As regards, next, the context of Article 2(a) of Directive 2002/65, it must be observed that, as correctly stated both by the referring court and by the Advocate General, in point 41 of her Opinion, in the case of contracts for financial services consisting of an ‘initial service agreement’ followed by other operations, the provisions of that directive apply, in accordance with the first subparagraph of Article 1(2) of that directive, only to the initial service agreement. The second sentence of recital 17 of that directive states, in that regard, that adding new elements to an initial agreement does not constitute an ‘operation’ but rather an additional agreement to which that directive applies.
- 29 Having regard to the examples of ‘operations’ also given in recital 17, it must be held that the setting, by means of an agreed amendment, of a new rate of interest, in implementation of a renegotiation clause in the initial contract, which imposes, failing agreement, a back-up clause establishing a variable rate of interest, constitutes neither an ‘operation’ within the meaning of the first subparagraph of Article 1(2) of Directive 2002/65, nor the addition of elements to the initial agreement.

- 30 Accordingly, it follows from both a literal and a systematic interpretation of Article 2(a) of Directive 2002/65 that a ‘contract concerning financial services’ must be held to be a contract that provides for the supply of such services. That condition is not met in a situation where, as in the main proceedings, the only purpose of the agreed amendment concerned is to adjust the rate of interest payable in consideration of a service previously agreed.
- 31 That interpretation is confirmed by the analysis of other provisions of Directive 2002/65 which indicate that that directive covers, in principle, agreements which pertain to the characteristic obligation to be met by the service provider. Accordingly, Article 3 of that directive provides that the consumer must, in particular, be fully informed of the identity of the supplier or the main characteristics of the financial service, including the existence or absence of a right of withdrawal. In the case of an amendment that relates solely to the rate of interest, any further notification to the consumer on these matters serves no purpose.
- 32 As regards, last, the aims of Directive 2002/65, it is clear that, in accordance with recitals 3 and 13 of that directive, its objective is to ensure a high degree of consumer protection in order to enhance consumer confidence in distance selling and to ensure the free movement of financial services.
- 33 Such an objective does not necessarily require that, in circumstances where, in accordance with an initial term of a loan agreement, an agreed amendment to that agreement sets a new rate of interest, that amendment must be categorised as a new contract concerning financial services.
- 34 In the light of the foregoing, the answer to the second question is that Article 2(a) of Directive 2002/65 must be interpreted as meaning that an agreed amendment to a loan agreement cannot be categorised as a ‘contract concerning financial services’, within the meaning of that provision, where the amendment does no more than alter the originally agreed rate of interest, but does not extend the term of the loan or alter its amount, and where the original clauses of the loan agreement provided for the agreement of such an amendment or, failing such agreement, the application of a variable interest rate.

The first question

- 35 Given the answer to the second question, there is no need to answer the first question.

Costs

- 36 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 (First Chamber) hereby rules:

Article 2(a) 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 an agreed amendment to a loan agreement cannot be categorised as a ‘contract concerning financial services’, within the meaning of that provision, where the amendment does no more than alter the originally agreed rate of interest, but does not extend the term of the loan or alter its amount, and where the original clauses of the loan agreement provided for the agreement of such an amendment or, failing such agreement, the application of a variable interest rate.

[Signatures]