

JUDGMENT OF THE COURT (Sixth Chamber)
13 December 2001 *

In Case C-481/99,

REFERENCE to the Court under Article 234 EC by the Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Georg Heininger and Helga Heininger

and

Bayerische Hypo- und Vereinsbank AG,

on the interpretation of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31), and Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48) as amended by Council Directive 90/88/EEC of 22 February 1990 (OJ 1990 L 61, p. 14),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of F. Macken, President of the Chamber, C. Gulmann (Rapporteur),
J.P. Puissochet, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,
Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

- Mr and Mrs Heininger, by R. Nirk and N.J. Gross, Rechtsanwälte,

- Bayerische Hypo- und Vereinsbank AG, by H.J. Niemayer and W. Berg,
Rechtsanwälte,

- the German Government, by W.D. Plessing and A. Dittrich, acting as Agents,

- the Spanish Government, by S. Ortiz Vaamonde, acting as Agent,

- the French Government, by K. Rispal-Bellanger and R. Loosli-Surrans,
acting as Agents,

- the Italian Government, by U. Leanza, acting as Agent, and D. Del Gaizo, avvocato dello Stato,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the Commission of the European Communities, by J. Sack, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr and Mrs Heining, Bayerische Hypo- und Vereinsbank AG, the Spanish and Italian Governments and the Commission at the hearing on 22 February 2001,

after hearing the Opinion of the Advocate General at the sitting on 12 July 2001,

gives the following

Judgment

1. By order of 29 November 1999, received at the Court on 20 December 1999, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31, 'the doorstep-selling directive'), and Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48) as amended by Council Directive 90/88/EEC of 22 February 1990 (OJ 1990 L 61, p. 14, 'the consumer credit directive').

- 2 Those questions arose in the course of proceedings between Mr and Mrs Heininger and the Bayerische Hypo- und Vereinsbank AG ('the bank') concerning the cancellation of a credit agreement secured by means of a charge on immovable property.

Community law

- 3 Article 1(1) of the doorstep-selling directive provides:

'This Directive shall apply to contracts under which a trader supplies goods or services to a consumer and which are concluded:

— during an excursion organized by the trader away from his business premises,

or

— during a visit by a trader:

(i) to the consumer's home or to that of another consumer;

...

where the visit does not take place at the express request of the consumer'.

4 Article 3(2)(a) of that directive provides:

'This Directive shall not apply to:

(a) contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property.

....'

5 Article 4 of the same directive provides:

‘In the case of transactions within the scope of Article 1, traders shall be required to give consumers written notice of their right of cancellation within the period laid down in Article 5, together with the name and address of a person against whom that right may be exercised.

...

Member States shall ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to in this Article is not supplied.’

6 Under Article 5(1) of that directive, the consumer ‘shall have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law.’

7 Article 8 of the Directive provides that '[t]his Directive shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers.'

8 Article 1(1) and 2(c) of the consumer credit directive provides:

'1. This Directive applies to credit agreements.

2. For the purpose of this Directive:

(c) "credit agreement" means an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation.

....'

9 Article 2 of the same directive provides:

‘1. This Directive shall not apply to:

(a) credit agreements or agreements promising to grant credit:

— intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or projected building,

...

...

3. The provisions of Article 1(a) and of Articles 4 to 12 shall not apply to credit agreements or agreements promising to grant credit, secured by mortgage on immovable property, in so far as these are not already excluded from the Directive under paragraph 1(a) of this Article.

...’

- 10 Article 15 of the same directive provides that '[t]his Directive shall not preclude Member States from retaining or adopting more stringent provisions to protect consumers consistent with their obligations under the Treaty.'

National law

- 11 Paragraph 1 of the Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften (Law on the cancellation of doorstep transactions and analogous transactions) of 16 January 1986 (BGBl. I, p. 122, 'the HWiG') provides for a right of cancellation by the consumer, the effect of which is that a transaction entered into away from the trader's business premises takes effect only if the customer does not give written notice revoking his declaration of intent within a period of one week. Under Paragraph 2(1) of the HWiG, time does not start to run for that purpose until the customer receives a notice in writing containing certain information complying with the substantive requirements specified by that law. If that notice is not given, the consumer's right of cancellation will not lapse until one month after both parties have performed their obligations under the agreement in full.
- 12 Paragraph 5(2) of the HWiG establishes an exception to the scope of that law by providing that where a transaction within the meaning of Paragraph 1(1) also falls within the scope of the Gesetz über Verbraucherkredite, zur Änderung der Zivilprozessordnung und anderer Gesetze (Consumer credit law amending the German Code of Civil Procedure and other laws) of 17 December 1990 (BGBl. I, p. 2840, 'VerbrKrG'), only the provisions of the latter are to apply.

13 Paragraph 1 of the VerbrKrG defines the scope of that law as follows:

‘(1) This law applies to credit agreements and intermediate credit agreements between a party acting in the course of a trade or profession who grants credit (the creditor) or engages in credit arrangement or referral (the credit intermediary) and a natural person, unless, under the terms of the agreement, the credit is intended for a business already being carried on by that person (the consumer).

(2) A credit agreement is an agreement whereby a creditor, for valuable consideration, grants or promises to grant credit in the form of a loan, deferred payment or other financial accommodation.

...’

14 Paragraph 3(2) of the VerbrKrG, in setting out the exceptions to the scope of that law, provides as follows:

‘Nor shall...

...

2. The fourth sentence of subparagraph 1(b) of Paragraph 4(1), and Paragraphs 7, 9 and 11 to 13 apply to credit agreements in which credit is subject to the

giving of security by way of a charge on immovable property, and is granted on usual terms for credits secured by a charge on immovable property and the intermediate financing of the same...'

- 15 Paragraph 7 of the VerbrKrG, which provides for a right of cancellation by the consumer, is worded as follows:

'(1) The declaration by the consumer of his intent to conclude a credit agreement shall take effect only if the consumer does not revoke it in writing within a period of one week.

(2) That time-limit shall be deemed to be observed if a notice of revocation is sent within the aforesaid period. Time will not begin to run for that purpose until the consumer receives a printed notice, to be separately countersigned by him, informing him of the provision contained in the first sentence of this subparagraph, of his right of cancellation, of the loss of that right pursuant to subparagraph (3), and of the name and address of the person to whom the notice of revocation must be sent. If the consumer is not informed as required by the second sentence of this subparagraph, the right of cancellation shall not expire until both parties have performed their obligations under the agreement in full, but not later than one year after the consumer's declaration of his intent to conclude the credit agreement.'

The main action and the questions referred for a preliminary ruling

- 16 By a contract dated 28 April 1993 and 7 May 1993 ('the loan agreement'), Mr and Mrs Heiningen took out a loan in the sum of DM 150 000 from the bank in order to finance the purchase of a flat. The loan was secured by means of a 'Grundschuld' (charge on the property) in the same amount.

- 17 By an action brought in January 1998, Mr and Mrs Heininger revoked their declaration of intent to enter into the loan agreement, pursuant to Paragraph 1 of the HWiG. They claimed that, on several occasions, an estate agent known to them and acting on a self-employed basis as agent for the bank, called uninvited at their home, and there induced them to purchase the flat in question and to enter into the loan agreement. They maintained that he did not inform them of their right of cancellation.
- 18 Mr and Mrs Heininger sought an order that the bank reimburse to them the sums paid by way of capital and interest and refund to them the costs they incurred in connection with the execution of the loan agreement, the total sum claimed being DM 118 443.81. They further sought a declaration that no rights accrued to the bank under the loan agreement.
- 19 On 26 May 1998, the Landgericht München (Munich Regional Court)(Federal Republic of Germany) dismissed Mr and Mrs Heininger's application. On 1 February 1999, the Oberlandesgericht München (Munich Higher Regional Court) dismissed their appeal against that judgment. Mr and Mrs Heininger then brought an appeal on points of law ('Revision') before the Bundesgerichtshof.
- 20 In its order for reference the Bundesgerichtshof states that it is essential, for the purpose of deciding the case in the main proceedings, to ascertain whether a right of cancellation under Paragraph 1 of the HWiG is excluded on the ground that the VerbrKrG, which applies to secured-credit agreements, takes precedence over the rules of the HWiG. The answer to that question turns on the point whether secured-credit agreements also fall within the scope of the doorstep-selling directive, and whether that directive, so far as the right of cancellation provided in Article 5 thereof is concerned, is to be held to take precedence over the consumer credit directive.
- 21 The Bundesgerichtshof considers, first, that Mr and Mrs Heininger have no right of cancellation under Paragraph 7 of the VerbrKrG since, under Paragraph 3(2)(2) of that law, Paragraph 7 does not apply to secured-credit agreements.

Second, it considers that a right of cancellation under Paragraph 1 of the HWiG is, in principle, excluded since Paragraph 5(2) of that law provides that where a transaction within the meaning of Paragraph 1(1) of the HWiG falls within the scope of the VerbrKrG, as is the case in the main action, only the provisions of the latter law are to apply.

22 The Bundesgerichtshof takes the view that Community law on consumer protection does not demand a different interpretation of Paragraph 5(2) of the HWiG but, since the matter is not free from doubt, it asks the Court of Justice to rule on this point.

23 If, by virtue of the doorstep-selling directive, it had to be accepted that Mr and Mrs Heininger have a right of cancellation, the decision on the case in the main proceedings would turn, according to the Bundesgerichtshof, on the question whether that right of cancellation lapses on the expiry of a period of one year from the date on which the consumer declared his intent to enter into the secured-credit agreement, in accordance with an application by analogy with the third sentence of Paragraph 7(2) of the VerbrKrG, or if the provisions of the HWiG apply which, in accordance with Article 5(1) of the doorstep-selling directive, do not impose any temporal limitation on the right of cancellation if the required information is not provided.

24 In those circumstances, the Bundesgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises ... also cover agreements for the grant of credit secured on immovable property (Paragraph 3(2)(2) of the VerbrKrG) and, as far as the

right of cancellation provided for in Article 5 is concerned, does it take precedence over Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit...?

(2) If the Court answers Question 1 in the affirmative:

Is the national legislature precluded by the doorstep-selling directive from applying the time-limit for exercising the right of cancellation provided for in the third sentence of Paragraph 7(2) of the VerbrKrG also in cases where the subject of the doorstep transaction is credit secured by immovable property within the meaning of Paragraph 3(2)(2) of the VerbrKrG, and the information required under Article 4 of that directive was not given?

The first question

25 With regard to the observations of the bank to the effect that the present case does not fall within the scope of the doorstep-selling directive as defined in Article 1 of that directive, it should be noted, as a preliminary point, that the Bundesgerichtshof's first question to the Court starts from the premiss that the secured-credit agreement between Mr and Mrs Heiningner and the bank was entered into in the circumstances referred to in Article 1 of that Directive.

26 On the basis of that premiss a reply should therefore be given to the first question. By that question the referring court is essentially asking whether the doorstep-selling directive must be interpreted as applying to a secured-credit agreement such as that in point in the present case, with the result that a consumer who has

entered into an agreement of that type in one of the cases specified in Article 1 has the right to cancel that agreement, as provided for in Article 5.

- 27 In that respect, it should first be pointed out that the doorstep-selling directive is, in accordance with Article 1 thereof, applicable in principle to any contract falling within one of the cases specified in that article and in particular in the case of a visit by the trader to the consumer's home. Furthermore, the fourth and fifth recitals to the preamble to that directive state as follows:

‘...the special feature of contracts concluded away from the business premises of the trader is that, as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared and is caught unawares;...the consumer is often unable to compare the quality and price of the offer with other offers;...this surprise element generally exists not only in contracts made at the doorstep but also in other forms of contract concluded by the trader away from his business premises;

...the consumer should be given a right of cancellation over a period of at least seven days in order to enable him to assess the obligations arising under the contract.’

- 28 It should next be observed that Article 3 of the doorstep-selling directive exhaustively lists a number of types of contract to which the directive does not apply.

- 29 The question which arises in the main proceedings is whether a secured-credit agreement of the type entered into by the parties in this case is covered by Article 3(2)(a) of the doorstep-selling directive, which excludes from the scope of that directive ‘contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property.’
- 30 Whilst Mr and Mrs Heininger, the French, Italian and Austrian Governments and the Commission contend that the provision referred to in the preceding paragraph does not apply to secured-credit agreements, the bank and the German and Spanish Governments contend that a secured-credit agreement is, in substance, a contract concerning rights relating to immovable property since it creates a right *in rem* in the immovable property which constitutes the security for the loan.
- 31 So far as that point is concerned, it should first be observed that it is settled case-law that derogations from Community rules for the protection of consumers must be interpreted strictly (see, *inter alia*, Case C-203/99 *Veedfald* [2001] ECR I-3569, paragraph 15).
- 32 Second, whilst a secured-credit agreement of the type in question in the main proceedings is linked to a right relating to immovable property, in that the loan must be secured by a charge on immovable property, that feature is not sufficient for the agreement to be regarded as concerning a right relating to immovable property for the purposes of Article 3(2)(a) of the doorstep-selling directive.
- 33 Both for consumers, whom the doorstep-selling directive is designed to protect, and for lenders, the subject-matter of a credit agreement such as that in point in the present case is a grant of funds which is linked to a corresponding obligation of repayment together with interest.

- 34 The fact that the credit agreement is secured by a charge on immovable property does not render any less necessary the protection which is accorded to the consumer who has entered into such an agreement away from the trader's business premises.
- 35 It may be added that although a credit agreement such as that in point in the present case accordingly falls within the scope of the doorstep-selling directive, the effects of a cancellation of that agreement in accordance with the directive on the contract for the purchase of the immovable property and on the provision of security in the form of a charge on it fall to be governed by national law.
- 36 Finally, it is necessary to consider the question whether the consumer credit directive, adopted after the doorstep-selling directive, limited the scope of the latter directive as regards secured-credit agreements.
- 37 According to the German Government, the consumer credit directive takes precedence over the doorstep-selling directive in accordance with the principle *lex specialis derogat legi generali*. The fact that, in contrast to the doorstep-selling directive, the consumer credit directive merely recommends the introduction of a right of cancellation in respect of credit agreements, without imposing one, shows that in respect of secured-credit agreements, the consumer credit directive is a more specific Community law measure. The consumer credit directive thus takes account of the fact that the introduction of a right of cancellation may give rise to problems in respect of certain credit agreements and, in particular, secured-credit agreements.
- 38 It is sufficient to observe, as regards those submissions, that the doorstep-selling directive is, as pointed out earlier, designed to protect consumers against the risks arising from the conclusion of contracts away from the trader's premises and,

second, that that protection is assured by the introduction of a right of cancellation.

39 Neither the preamble to nor the provisions of the consumer credit directive contain anything to show that the Community legislature intended, in adopting it, to limit the scope of the doorstep-selling directive in order to exclude secured-credit agreements from the specific protection provided by that directive.

40 The answer to the first question must therefore be that the doorstep-selling directive must be interpreted as applying to a secured-credit agreement such as that in point in the main proceedings, with the result that the right of cancellation provided for in Article 5 of that directive is available to a consumer who has entered into a contract of that type in one of the cases specified in Article 1.

The second question

41 By its second question the referring court is essentially asking whether the doorstep-selling directive precludes the national legislature from prescribing a period of one year from the conclusion of the contract for the exercise of the right of cancellation provided for in Article 5 of that directive, where the consumer has not received the information required under Article 4.

42 Mr and Mrs Heininger, the French Government and the Commission submit that, where no information is given concerning the right of cancellation, the doorstep-selling directive imposes no time-limit on the exercise of that right. Article 5 of that directive precludes a national measure which limits to one year, from the conclusion of the contract the period within which a consumer who has not been

notified of the right of cancellation may exercise it. The minimum time-limit of seven days laid down by that provision for cancellation must be calculated from the moment when the consumer was informed in writing of that right.

- 43 The bank and the German, Italian and Austrian Governments claim that, since Article 4 of the doorstep-selling directive requires the Member States to ensure that their national law lays down appropriate consumer protection measures in cases where the consumer has not been informed of his right of cancellation, the national legislature is at liberty to limit to one year the period within which the right of cancellation provided for in Article 5 of that directive may be exercised. Furthermore, even if that directive did not expressly impose a temporal limitation on the right of cancellation, the principle of legal certainty requires that a time-limit be set for the exercise of that right.
- 44 In that regard, it should first be observed that the first paragraph of Article 4 of the doorstep-selling directive provides that 'traders shall be required to give consumers written notice of their right of cancellation within the period laid down in Article 5' and that the third paragraph of Article 4 of the same directive provides that 'Member States shall ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to in this Article is not supplied'. Article 5(1) of the directive provides that '[t]he consumer shall have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law'.
- 45 It should next be pointed out that the doorstep-selling directive thus expressly provides that the minimum period of seven days prescribed for cancellation must be calculated 'from receipt by the consumer of the notice' concerning his right of cancellation, and that it is on the trader that the obligation falls to provide that information. Those provisions are explained by the fact that if the consumer is not aware of the existence of the right of cancellation, he will not be able to exercise that right.

- 46 Having regard to the wording and purpose of Article 5 of the doorstep-selling directive, it is not possible to construe the third paragraph of Article 4 as enabling the national legislature to provide that the consumer's right of cancellation must in any event be exercised within a period of one year, even if the trader has not notified the consumer of the existence of that right.
- 47 Finally, as regards the argument that it is essential, for reasons of legal certainty, to restrict the period within which the right of cancellation may be exercised, such reasons cannot prevail since they imply a limitation of the rights expressly conferred on consumers by the doorstep-selling directive in order to protect them against the risks arising from the fact that the credit institutions have chosen to enter into agreements away from their business premises. If those institutions choose such methods in order to market their services, they can easily safeguard both the interests of consumers and their own requirements as to legal certainty by complying with their duty to supply consumers with information.
- 48 In the light of those considerations the answer to the second question must be that the doorstep-selling directive precludes the national legislature from imposing a time-limit of one year from the conclusion of the contract within which the right of cancellation provided for in Article 5 of that directive may be exercised, where the consumer has not received the information specified in Article 4.

Temporal effects of the present judgment

- 49 In its observations the bank referred to the possibility that is open to the Court, should it find that the German legislation in issue in the main proceedings is incompatible with Community law, to limit the temporal effects of the present judgment.

- 50 In support of that application, the bank contended, *inter alia*, that the application of the right of cancellation provided for in the doorstep-selling directive to secured-credit agreements creates a significant financial risk for the credit institutions.
- 51 It should be borne in mind that the interpretation given by the Court to a provision of Community law clarifies and defines its meaning and scope only as it should have been understood and applied from the time of its entry into force (Case C-35/97 *Commission v France* [1998] ECR I-5325, paragraph 46).
- 52 It is settled case-law, that the Court may exceptionally, having regard to the general principle of legal certainty inherent in the Community legal order and the serious difficulties which its judgment may create as regards the past for legal relations established in good faith, find it necessary to limit the possibility for interested parties, relying on the Court's interpretation of a provision, to call in question those legal relations. The Court was concerned to establish that the two essential criteria were fulfilled for deciding to impose such a limitation, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties (see, to that effect, Case C-128/93 *Fisscher* [1994] ECR I-4583, paragraph 18).
- 53 In that regard, it is sufficient to observe that the bank has put forward no specific evidence in support of its contention that the present judgment may, unless its temporal effects are limited, have serious financial consequences for those credit institutions which have entered into secured-credit agreements in the circumstances specified in Article 1 of the doorstep-selling directive.
- 54 It is therefore not appropriate to limit the temporal effects of the present judgment.

Costs

- 55 The costs incurred by the German, Spanish, French, Italian and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber)

in answer to the questions referred to it by the Bundesgerichtshof by order of 29 November 1999, hereby rules:

1. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises is to be interpreted as applying to a secured-credit agreement such as that in point in the main proceedings, with the result that the right of cancellation provided for in Article 5 of that directive is available to a consumer who has entered into a contract of that type in one of the cases specified in Article 1.

2. Directive 85/577 precludes the national legislature from imposing a time-limit of one year from the conclusion of the contract within which the right of cancellation provided for in Article 5 of that directive may be exercised, where the consumer has not received the information specified in Article 4.

Macken

Gulmann

Puissochet

Skouris

Cunha Rodrigues

Delivered in open court in Luxembourg on 13 December 2001.

R. Grass

F. Macken

Registrar

President of the Sixth Chamber