

Intended closure of Complaint No 2003/4297

1. On 7.11.2003 the Commission acknowledged receipt of complaint No 2003/4297, of which it had received over one hundred copies, in the Official Journal of the European Union C 268 page 28 as well as on the internet (http://europa.eu.int/comm/secretariat_general/sgl/receipt). The complaint relates to the transposition in Germany of Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, particularly in the area of secured credit agreements.
2. It concerns groups of cases where credit agreements concluded by consumers had as their sole purpose the financing certain investments involving the acquisition of immovable property. In those cases consumers were typically contacted at their home by representatives of investment schemes, advertising the tax benefits of the investment. The relevant credit contracts were thus usually concluded in a doorstep-selling situation and secured by a charge on the property which was to be acquired by the consumer. In many of these cases, which occurred predominantly in the decade following German reunification, consumers were not informed by the bank granting the loan on their right of withdrawal under the German rules transposing Directive 85/577/EEC, and the value of the property acquired by the consumers often corresponded only to a fraction of the value they were made to expect at the time of purchase.
3. In its judgment of 13 December 2001 in Case C-481/99 *Heininger*, the European Court of Justice established that Directive 85/577/EEC, including the consumer's right of cancellation/withdrawal, applies also to credit agreements secured by a charge on immovable property and that it precludes Member States 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 the Directive may be exercised. As a consequence, the *Bundesgerichtshof* (BGH) adapted its case law and many consumers, therefore, had the possibility to withdraw from secured credit agreements many years after the contracts had been concluded.
4. Consumers were then, however, confronted with the consequence that the bank appeared to be entitled under German law to request the immediate return of the amount which it had paid to the seller of the property on behalf of the consumer, plus interests at the market rate¹, whereas it would have been in the consumers' interests to consider that the two contracts formed an economic unit and that consumers were, therefore, entitled to return the real property to the bank instead of the loan plus interests. In other cases where consumers did not meet their monthly repayment obligations and where, as a consequence, the bank terminated the agreement and demanded immediate repayment of the loan, consumers were equally precluded from invoking the linked character of the two contracts.
5. In this connection it is important to point out that, unlike Directive 87/107/EEC on consumer credit, Directive 85/577/EEC and the German transposition applicable to doorstep selling contracts concluded before 2002, do not contain a provision on ancillary or linked contracts under which the two contracts would have to be considered as a single economic unit. At the same time, § 5 (2) of the

¹ Under § 3 HausTWG/HWiG and subsequently § 346 BGB

HausTWG/HWiG provided that more specific pieces of legislation such as the *Verbraucherkreditgesetz* (VerbrKrG), which is the German transposition of Directive 87/107/EEC on consumer credit, have priority. § 3 (2) No 2 VerbrKrG, in turn, excludes the application of § 9 VerbrKrG, regulating the question of linked agreements which are regarded as a single economic unit, in relation to credit agreements which are secured by way of a charge on immovable property.

6. This meant that even in cases where the loan agreement and the property purchasing agreements were linked in such a way that the sole purpose of the credit agreement was to finance the acquisition of the immovable property and where the amount of the loan taken out by the consumer was paid directly to the seller of the property, the consumer appeared to be precluded from invoking the linked character of both contracts following withdrawal or cancellation of the credit agreement. These rules were later integrated into the German Civil Code (BGB)². It is these rules and their negative consequences for consumers which are at the centre of complaint no. 2003/4297.
7. The relevant provisions have in the meantime been amended by the German legislator³, as a consequence of the judgment of the Court of Justice in *Heininger* and the subsequent changes in the case law of the BGH. Amongst other things, the German legislator, introduced a provision⁴ establishing the - albeit rather narrow - conditions under which a credit contract and a linked real property purchasing agreement are to be considered as a single economic unit.
8. Complaint no 2003/4297 is confined to the legislation which applied to contracts concluded before 1.1.2002 or 1.8.2002⁵, as well as its interpretation and application by the German courts, in particular the BGH. The complaint does not relate to the German legislation as it currently stands. It does, however, criticise the fact that the new rules do not apply to credit agreements concluded before 2002.
9. In its judgements of 25 October 2005 in Cases C-350/03 *Schulte*, handed down in relation to a request for a preliminary ruling submitted by the LG Bochum, and C-229/04 *Crailsheimer Volksbank*, in relation to a request for a preliminary ruling submitted by the OLG Bremen, the Court of Justice clarified several questions related to issues raised in complaint no. 2003/4297.
10. The Court ruled that Article 3(2)(a) of Directive 85/577/EEC must be interpreted as excluding from the scope of the Directive contracts for the sale of immovable

² Schuldrechtsmodernisierungsgesetz vom 26.11.2001 (BGBl. I S. 3138); see, in particular, § 491 (3) No 1 BGB, which contains the exception for credit agreements secured by immovable property and which applies to contracts concluded before 1.8.2002.

³ OLGVertrÄndG vom 23.07.2002 (BGBl. I S. 2850)

⁴ § 358 (3) third sentence BGB

⁵ Under Article 229 § 5 first sentence EGBGB, legal relationships under the law of obligations arising before 1 January 2002 are governed by inter alia the Civil Code, the Consumer Credit Act and the Statute on the Cancellation of Doorstep Sales and Similar Transactions as they stood until that date. According to Article 229 § 8 Abs. 1 S. 1 EGBGB, the previous rules under which the rules on the economic unity of linked contracts contained in the HausTWG and § 3 Abs. 2 Nr. 2 VerbrKrG apply to contracts which were concluded before 1.8.2002.

property even where they are merely a component of an investment scheme financed by a loan and where the negotiations prior to the conclusion of both contracts were held in a doorstep-selling situation⁶. It also confirmed its ruling in *Heininger* by reiterating that the effects of a cancellation of a secured credit agreement 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 law⁷.

11. This means that, while the Directive does not preclude national law from providing, where the two contracts form a single economic unit, that the cancellation of the secured credit agreement has an effect on the validity of the contract for sale of the immovable property, *it does not require* such an effect in cases such as the one described by the referring court⁸.
12. Accordingly, even where the loan serves solely to finance the purchase of immovable property and is paid directly to the seller, the Court ruled that the Directive does not preclude a requirement that the consumer repay the amount of the loan⁹. The Court further held that, in the event of cancellation of a secured credit agreement, the Directive does not preclude an obligation on the consumer to repay to the lender immediately the amount he borrowed and to pay, in addition, interest at the market rate¹⁰. As a consequence, Directive 85/577/EEC does not preclude national rules which limit the effect of cancellation of the loan agreement to the avoidance of that agreement, even in the case of investment schemes in which the loan would not have been granted at all without the acquisition of the immovable property.
13. In both cases the Court did, however, make the following statement at the end of the enacting terms in relation to cases where the bank failed to inform the consumer of his right of cancellation: "*However, in a situation where, if the Bank had complied with its obligation to inform the consumer of his right of cancellation, the consumer would have been able to avoid exposure to the risks inherent in investments such as those at issue in the main proceedings, Article 4 of Directive 85/577 requires Member States to ensure that their legislation protects consumers who have been unable to avoid exposure to such risks, by adopting suitable measures to allow them to avoid bearing the consequences of the materialisation of those risks*¹¹."
14. It follows from the rulings of the Court of Justice of 25 October 2005 that several of the aspects of the German legislation as it applied before 2002 and which the

⁶ Judgment in Case C-350/03, enacting term no 1 and paragraph 81 first indent.

⁷ Judgment in Case C-350/03 paragraph 79

⁸ Judgment in Case C-350/03, paragraph 80; see also enacting term no 2.

⁹ Judgment in Case C-350/03, enacting term no 3 first indent and paragraph 86; judgment in Case C-229/04, enacting term no 2 first indent

¹⁰ Judgment in Case C-350/03, enacting term no 3 second and third indent, as well as paragraphs 89 and 93; judgment in Case C-229/04, enacting term no 2 second and third indent

¹¹ Enacting term no 3, second paragraph, of the judgment in Case C-350/03; enacting term no 2, second paragraph, of the judgment in Case C—229/04

complainants consider to be incompatible with Directive 85/577/EEC cannot be considered to be infringements under Community law as it currently stands (See Points 10-12 above).

15. The Commission's services are aware that there is controversy in Germany on the precise conclusions which are to be drawn from the final statement in the enacting terms of these judgments and which instruments under German civil law are best suited to give adequate protection to consumers who were not informed on their right of withdrawal under Directive 85/577/EC in different groups of cases. The BGH has in the meantime issued a number of rulings on different types of cases, including its judgments of 16 May (BGH XI ZR 6/04) and 19 September 2006 (BGH XI ZR 204/04) and has adapted its case law to a certain extent as a consequence of the rulings of the Court of Justice.
16. Irrespective of the precise conclusions which one may draw from the final statement of the operative part of the Court's judgments of 25 October 2005 (Cases C-350/03 *Schulte* and C-229/04 *Crailsheimer Volksbank*) in relation to particular groups of cases, the Commission's services do not see any possibility to successfully lodge infringement proceedings under Article 226 EC against Germany on the basis of the complaint, given that the relevant provisions were replaced at the end of 2001.
17. As the Court of Justice has stated on several occasions¹² it is the object of infringement proceedings under Article 226 EC to obtain from the relevant Member State that it changes its behaviour, i.e. terminates an infringement, and not to state in abstract the infringement of the Treaty by a given Member State which occurred in the past. In accordance with the case law of the Court of Justice, legal action under Article 226 EC can only be successful if an infringement has not been terminated within the time-limit fixed in the reasoned opinion¹³.
18. Infringements are typically terminated by way of an amendment of a Member State's existing legislation or its administrative practice. The provisions which are criticised in the complaint have already been replaced and it is, therefore, impossible to lodge infringement proceedings with the aim of obtaining amendments to this legislation. Moreover, it would not be possible to ask Germany, as requested by the complainants, to apply these changes retroactively, on the basis of Article 226 EC. The retroactive application of legislation may, incidentally, also give rise to legal problems.
19. It is the role of the national courts, when hearing cases between individuals and applying the relevant national rules which were in force until 2002, to consider the whole body of national law and to interpret it, so far as possible, in such a way that consumers are protected in such cases where they would have been able to avoid exposure to the risks inherent in the investments if the bank had informed them on their right of cancellation. The Court of Justice emphasised this role and

¹² See, for instance, the Court's judgments of 14 June 2001 in Case C-276/99, ECR I-8055, in particular paragraphs 24 and 25, or of 31 March 1992 in Case C-362/90, ECR I-2353, in particular, paragraphs 9 and 10.

¹³ Judgment of 10 April 2003 in Cases C-20/01 and C-28/01 *Commission v. Germany*, ECR I-3609, paragraph 32

responsibility of the national courts in paragraphs 71 and 102 of its judgment in Case 350/03¹⁴.

20. Such questions cannot suitably be addressed in infringement proceedings under Article 226 EC and the Commission's services do not see any possibility to intervene in relation to cases which have been judged or are still being judged by the German courts under the German rules applying to contracts concluded before 2002.
21. As a consequence, the Commission's services consider that it is not possible to open infringement proceedings under Article 226 EC on the basis of Complaint No 2003/4297 and intend to propose to the Commission to close this case at one of its forthcoming meetings.
22. Should the complainants have any additional information proving an infringement of Community law, they are invited to send it to the Commission within four weeks from the publication of this announcement. Such information would have to be addressed to :

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Directorate-General for Health and Consumers
Unit A2
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¹⁴ In paragraph 71 the Court stated: *"However, when hearing a case between individuals, the national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive (see Pfeiffer and Others, cited above, paragraph 120)."* In paragraph 102 the Court went on to say that *"... the national courts are required to interpret national legislation, so far as possible, in order to achieve the outcome described in paragraph 101 of this judgment."*