



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 12 March 2020¹

Case C-639/18

KH
v
Sparkasse Südholstein

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

(Directive 2002/65/EC — Consumer protection — Financial services — Distance marketing —
Consumer credit contract — Subsequent interest rate agreement — Organised distance
service-provision scheme)

1. This reference for a preliminary ruling from the Landgericht Kiel (Regional Court, Kiel, Germany) requires the Court to interpret for the first time Article 2(a) of Directive 2002/65² and the concept of ‘distance contract’. Within that context, is a subsequent interest rate agreement amending a loan contract only with regard to the interest rate a ‘contract’ to which the provisions of Directive 2002/65 apply? And what are the criteria for determining whether a contract concluded without the simultaneous physical presence of the supplier and the consumer is a ‘distance contract’ within the meaning of Article 2(a) of that Directive?

EU law

TFEU

2. Article 12 TFEU provides that ‘consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities’.

The Charter of Fundamental Rights of the European Union

3. Article 38 of the Charter of Fundamental Rights of the European Union (‘the Charter’)³ provides that EU policies ‘shall ensure a high level of consumer protection’.

¹ Original language: English.

² Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16). Certain provisions of that directive have been amended since its adoption (the latest consolidated version is that of 2018) but the provisions that are relevant in the present case have remained unchanged.

³ OJ 2007 C 303, p. 1.

Directive 97/7

4. Directive 97/7 on the protection of consumers in respect of distance contracts was the first measure to approximate the laws, regulations and administrative provisions of the Member States concerning distance contracts in general between consumers and suppliers.⁴

5. Article 2(1) defines a ‘distance contract’ as ‘any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded’.

6. The original version of Article 3(1), first indent was replaced by Article 18 of Directive 2002/65 so as to state expressly that contracts relating to financial services to which Directive 2002/65 applies are excluded from the scope of Directive 97/7.

Directive 2002/65

7. The following statements are made in the recitals of Directive 2002/65. ‘Within the framework of the internal market, it is in the interest of consumers to have access without discrimination to the widest possible range of financial services available [...]. 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’.⁵ ‘A high level of consumer protection should be guaranteed by this Directive, with a view to ensuring the free movement of financial services’.⁶ ‘This Directive covers all financial services liable to be provided at a distance.’⁷ ‘Contracts negotiated at a distance involve the use of means of distance communication which are used as part of a distance sales or service-provision scheme not involving the simultaneous presence of the supplier and the consumer. The constant development of those means of communication requires principles to be defined that are valid even for those means which are not yet in widespread use. Therefore, distance contracts are those the offer, negotiation and conclusion of which are carried out at a distance.’⁸ ‘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.’⁹ ‘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

4 See Article 1 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 (OJ 1997 L 144, p. 19). That Directive was repealed and replaced by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64).

5 Recital 3.

6 Recital 13.

7 Recital 14.

8 Recital 15.

9 Recital 16.

of “successive operations of the same nature”.¹⁰ ‘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.’¹¹ ‘The use of means of distance communications should not lead to an unwarranted restriction on the information provided to the client. In the interests of transparency this Directive lays down the requirements needed to ensure that an appropriate level of information is provided to the consumer both before and after conclusion of the contract.’¹² ‘With a view to optimum protection of the consumer, it is important that the consumer is adequately informed of the provisions of this Directive and of any codes of conduct existing in this area and that he has a right of withdrawal.’¹³

8. Article 1 provides that:

‘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.’

9. Article 2(a) defines ‘distance contract’ as meaning ‘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’.

10. Article 2(b) defines ‘financial service’ as meaning ‘any service of a banking, credit, insurance, personal pension, investment or payment nature’.

11. Article 2(e) defines ‘means of distance communication’ as referring to ‘any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the distance marketing of a service between those parties’.

12. Article 3 provides that:

‘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

¹⁰ Recital 17.

¹¹ Recital 18.

¹² Recital 21.

¹³ Recital 23.

- (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.

...'

13. In accordance with Article 6:

'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.

...

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.'

14. Article 11 provides that:

‘Member States shall provide for appropriate sanctions in the event of the supplier’s failure to comply with national provisions adopted pursuant to this Directive.

They may provide for this purpose in particular that the consumer may cancel the contract at any time, free of charge and without penalty.

These sanctions must be effective, proportional and dissuasive.’

15. Article 18 replaces Article 3(1), first indent of Directive 97/7, and provides that the latter directive does not apply to contracts ‘relating to any financial service to which Directive 2002/65 ... applies’.

National law

16. Paragraph 312b(1) of the Bürgerliches Gesetzbuch (Civil Code, ‘the BGB’), in the version in force from 8 December 2004 to 22 February 2011, provides that ‘distance contracts are contracts for the supply of goods or the rendering of 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 service of a banking, credit, insurance, personal pension, investment or payment nature.’

17. Paragraph 312d(1) and (2) of the BGB, in the version in force from 8 December 2004 to 10 June 2010, reads:

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

(2) In derogation from the first sentence of Paragraph 355(2), the withdrawal period shall not commence before the duties to provide information in accordance with Paragraph 312c(2) have been fulfilled; ... in the case of services not before the date on which the contract is concluded.’

18. Paragraph 312d(1) and (2) BGB, in the version in force from 11 June 2010 to 3 August 2011, provides that:

‘(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(3), the withdrawal period does not begin before the information requirements under Article 246, paragraph 2 in conjunction with Paragraph 1(1) and (2) of the Einführungsgesetz zum Bürgerlichen Gesetzbuche [Introductory Law to the Civil Code] have been fulfilled’

19. Paragraph 495 of the BGB, in the version in force from 1 August 2002 to 12 June 2014, provides that ‘in the case of a loan contract concluded by a consumer, the borrower has a right of withdrawal in accordance with Paragraph 355.’

Facts, procedure and the questions referred

20. Sparkasse Südholstein is a regional bank with branches. It concludes loan agreements for the purpose of financing immovable property secured by mortgage: that is done only inside its branches. In some individual cases, in the context of ongoing contractual relationships, additions or amendments to such contracts are made by means of distance communication. It is undisputed that by the beginning of 2008, Sparkasse Südholstein had already concluded contracts making exclusive use of means of distance communication in a number of cases.

21. The proceedings before the national court concern three loan agreements which KH concluded as a consumer with Sparkasse Südholstein:

- On 1 July 1994 KH made a loan agreement in the amount of 114 000 German marks (DEM) (approximately EUR 58 000, ‘the first loan’) with the legal predecessor of Sparkasse Südholstein to finance the purchase of an immovable property. That loan was to be repaid on 30 December 2017. Interest to service the loan was payable at a rate of 6.95% p.a., fixed for an initial term of 10 years. At the earliest six weeks before 30 May 2004, either party could request negotiations to adjust the interest rate with effect from 1 June 2004. Failing agreement, ‘variable terms’, as specified by Sparkasse Südholstein in each case for loans of this kind (that is, a variable interest rate), would apply as from 1 June 2004. A mortgage securing that loan was also agreed.

On 25 May 2004, by way of an amendment agreement, the parties agreed upon an interest rate of 5.03% p.a. as from 1 June 2004 for a further period of 10 years.

In October 2010,¹⁴ the parties concluded a further interest rate agreement, making exclusive use of means of distance communication, under which an interest rate of 4.01% was to be applied to the loan from 1 June 2014 for the remaining contractual term. KH was not informed of any right of withdrawal.

Between June 2014 and November 2017, KH paid EUR 8 180.76 to Sparkasse Südholstein under that contract. KH repaid the loan in full on 29 December 2017 by making a payment of EUR 58 287.27.

- On 17 July 1994 KH made a further loan agreement in the amount of DEM 112 000 (approximately EUR 57 000, ‘the second loan’) with the legal predecessor of Sparkasse Südholstein for the purpose of financing an immovable property. Interest to service the loan was payable at a rate of 5.7% p.a., fixed at an initial term of five years. At the earliest six weeks before 30 May 1999, either party could request negotiations to adjust the interest rate with effect from 1 June 1999. Failing agreement, ‘variable terms’ as specified by Sparkasse Südholstein in each case for loans of this kind (that is, a variable interest rate) would apply as from 1 June 1999. A mortgage securing that loan was also agreed.

In 1999, by way of an amendment agreement, the parties agreed upon an interest rate of 4.89% p.a. with effect from 1 June 1999 for a period of 10 years.

On 15 April 2009, the parties, making exclusive use of means of distance communication, agreed upon an interest rate of 5.16% p.a. as from 1 June 2009 for a further period of 10 years. KH was not informed of any right of withdrawal.

Between June 2009 and February 2018, KH paid a total of EUR 18 243.75 to Sparkasse Südholstein under that contract. Additionally, KH paid Sparkasse Südholstein an account administration fee of EUR 12 on 30 November 2009.

¹⁴ This date is based on the information provided by the referring court. I note here that it seems to me to be earlier than the 10 years provided for under the 25 May 2004 amendment agreement.

- On 4 November 1999, the legal predecessor of Sparkasse Südholstein granted KH a loan in the amount of DEM 30 000 (approximately EUR 15 000, ‘the third loan’). According to the contract, the loan was supposed to be used for an ‘equity holding’, but it was agreed that it would in fact be used as a personal loan. Interest was payable on the loan at a rate of 6.6% p.a., fixed at an initial term of 10 years. At the earliest six weeks before 30 November 2008, either party could request negotiations to adjust the interest rate with effect from 1 December 2008. Failing agreement, ‘variable terms’ as specified by Sparkasse Südholstein in each case for loans of this kind (that is, a variable interest rate) would apply as from 1 December 2008. A mortgage securing that loan was also agreed.

At the end of 2008, the parties concluded a follow-up interest agreement, making exclusive use of means of distance communication, under which an interest rate of 4.87% was to be applied to the loan from 1 December 2008 for 10 years. Sparkasse Südholstein did not inform KH of any right of withdrawal.

Between December 2008 and February 2018, KH paid a total of EUR 8 328.33 to Sparkasse Südholstein under that contract.

22. On 2 September 2015, KH withdrew from the three subsequent interest rate agreements concluded in 2008, 2009 and 2010. He did so on the basis that those interest rate agreements involved distance selling, and that Sparkasse Südholstein was running an organised distance sales scheme. KH claimed therefore to have a right of withdrawal arising from Paragraph 495(1) BGB (version in force at the material time) or, secondarily, arising from the first sentence of Paragraph 312d(1) BGB (in the version in force at the material time).

23. KH thereupon brought the present proceedings before the Landgericht Kiel (Regional Court, Kiel, Germany), ‘the referring court’, seeking repayment of the interest and redemption payments made since the conclusion of the amendment agreements from which he had withdrawn, reimbursement of the account administration fee paid and compensation for the uses made thereof by the defendant.

24. More specifically, KH requests the referring court to: (1) order Sparkasse Südholstein to pay him EUR 37 285.38 plus interest; (2) declare that, owing to his withdrawal of 2 September 2015, an agreement concerning a fixed interest rate no longer exists in relation to the second and third loans; (3) declare that, owing to his withdrawal of 2 September 2015, he is no longer obliged to pay monthly instalments on the second and third loan and (4) declare that Sparkasse Südholstein is obliged to reimburse to him all payments made between the day after the oral hearing and the time at which the judgment becomes final on the second and third loans plus interest, from the time of receipt of his original payments into the loan account.

25. Sparkasse Südholstein claims that KH had no right of withdrawal and asks the referring court to dismiss the action.

26. The referring court observes that the existence of a right of withdrawal turns on how Article 2(a) of Directive 2002/65 is to be interpreted. For the right of withdrawal provided in Paragraphs 312b(1) and 312d(1) and (2) of the BGB, transposing Directive 2002/65, to apply to the present cases, the transactions in question would need to be covered by the concept of a contract ‘concluded under an organised distance sales or service-provision scheme’ (Paragraph 312b(1) of the BGB) read in accordance with that Directive. That concept has received diverging interpretation in national case-law and academic literature. The explanatory memorandum accompanying the draft national legislation explains that transactions concluded with occasional and rather haphazard use of means of distance communication are intended to be excluded from the scope of those provisions. However, Sparkasse Südholstein is equipped (in terms of staffing and resources) to conclude amendment and supplementary agreements with existing customers by distance selling on a regular basis.

27. Further, the concept of a contract for ‘the rendering of services, including financial services’ (Paragraph 312b(1) of the BGB) also has to be interpreted in accordance with Directive 2002/65. In that respect, the Oberlandesgericht Frankfurt (Higher Regional Court, Frankfurt, Germany) had previously ruled that ‘amending the terms of a credit that had already been granted does not constitute a (new, independent) service provided by the bank. Instead, it is part of the original granting of credit. The existence of a distance contract always presupposes the delivery of a product or the provision of a service by the trader, such that it is not sufficient if, under the agreement reached only a consumer performs a service characteristic of the contract’. However, the referring court takes the view that contracts amending loan terms are included within the scope of Directive 2002/65.

28. Against that background, the referring court seeks a preliminary ruling on the following questions:

- ‘1. Within the meaning of Article 2(a) of Directive 2002/65/EC, 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), if 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/EC exist if an existing loan agreement is amended solely with regard to the agreed interest rate (follow-up interest agreement), without extending the term of the loan or altering the amount of the loan?’

29. Written observations were submitted by KH, Sparkasse Südholstein, the German Government and the European Commission. At the hearing on 4 September 2019 those parties presented oral argument.

Assessment

Admissibility

30. Sparkasse Südholstein submits that the first preliminary question is inadmissible because it does not concern the interpretation of EU law, which is sufficiently clear, but its application to the facts of the present case. It also argues that the correct application of the provisions of EU law covered by the two preliminary questions to the present case is obvious. Furthermore, the facts presented by the referring court are not sufficient to enable the Court to answer the first preliminary question.

31. The Court has no jurisdiction under Article 267 TFEU to rule upon the application of EU law to specific cases.¹⁵ The procedure for referring questions for a preliminary ruling under Article 267 TFEU establishes ‘a relationship of close cooperation between the national courts and the Court of Justice, based on the assignment to each of different functions, and constitutes an instrument by means of which the Court provides the national courts with the criteria for the interpretation of [EU] law which they require in order to dispose of disputes which they are called upon to resolve’. ‘It is one of the essential characteristics of the system of judicial cooperation established under Article 234 EC that the Court replies in rather abstract and general terms to a question on the interpretation of [EU] law referred to it, while it is for the referring court to give a ruling in the dispute before it, taking into account the Court’s reply’.¹⁶

¹⁵ Judgment of 18 December 1986, *VAG France*, 10/86, EU:C:1986:502, paragraph 7.

¹⁶ Judgment of 4 February 2010, *Genc*, C-14/09, EU:C:2010:57, paragraphs 30 and 31.

32. According to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.¹⁷

33. It is apparent from the reference for a preliminary ruling that the referring court seeks guidance from this Court on the interpretation of Article 2(a) of Directive 2002/65. The referring court explains that that guidance is necessary in order to apply national law, interpreted in the light of the directive, to the case before it. I add that — contrary to Sparkasse Südholstein's submission — I do not consider that the answer to the questions of the referring court is 'obvious', still less that it is unnecessary for this Court to assist the national court by interpreting the relevant EU law provisions.

34. So far as the submission concerning the alleged shortcomings in the factual presentation of the case is concerned, it is settled case-law that the Court may reject a reference for a preliminary ruling submitted by a national court where the Court does not have before it the factual and legal material necessary to give a useful answer to the questions submitted to it.¹⁸ However, it seems to me that the order for reference suffices as a presentation of the factual circumstances on which the preliminary questions are based and enables the Court to give a useful answer to those questions.

35. I therefore conclude that the questions referred are admissible.

The questions referred

Preliminary observations

36. Directive 2002/65 is part of a comprehensive framework put in place by the EU legislature to complete an integrated market in financial services and their distance marketing. In particular, it complements Directive 97/7 on the protection of consumers in respect of distance contracts involving the provision of financial services.

37. The concept of 'financial services' was not defined in Directive 97/7.¹⁹ It is, however, defined in Article 2(b) of Directive 2002/65 as services of 'a banking, credit, insurance, personal pension, investment or payment nature'.

38. That definition is formulated broadly and covers a wide range of products.²⁰ It is clear from the explanatory memorandum accompanying the amended proposal that that was the intention of the EU legislature: the proposal explains that 'the definition of financial services has been simplified by comparison with the initial proposal; all references to existing directives have been removed, in order to ensure that all financial services liable to be offered to a consumer are covered and to avoid the persistence of gaps, which would have been the case with the earlier definition'.²¹ It is also apparent

¹⁷ Judgment of 19 December 2019, *Junqueras Vies*, C-502/19, EU:C:2019:1115, paragraph 55 and the case-law cited.

¹⁸ Judgment of 16 February 2012, *Varzim Sol*, C-25/11, EU:C:2012:94, paragraph 29.

¹⁹ Annex II of Directive 97/7, deleted by virtue of Article 18 of Directive 2002/65, included a non-exhaustive list of financial services: investment services, insurance and reinsurance operations, banking services and operations relating to dealings in futures or options.

²⁰ Haentjens, M. and de Gioia-Carabellese, P., *European Banking and Financial Law*, Routledge, London and New York, 2015, p. 64.

²¹ Amended proposal for a European Parliament and Council Directive concerning the distance marketing of consumer financial services and amending Directives 97/7/EC and 98/27/EC, COM 99 0385 final (OJ 2000 C 177E, p. 21) ('the amended proposal for a directive').

from the very wording of Article 2(b) of Directive 2002/65 that services concerning ‘credit’, such as a loan, are financial services.²² By the same token, such services are excluded from the scope of Directive 97/7. It follows that KH is incorrect in asserting that Directive 97/7 might apply in the present case.

39. I turn now to the questions referred. It seems to me to be more logical to deal with them in reverse order.

Question 2

40. By its second question, the referring court asks whether the concept of a ‘contract concerning financial services’, within the meaning of Article 2(a) of Directive 2002/65, includes an agreement amending an existing loan agreement with regard to the interest rate, without extending the term of the loan or modifying its amount.

41. In essence, as the referring court explains in its order for reference, that question arises because Article 1(2) of Directive 2002/65 states that, where a contract for financial services comprises an initial service agreement followed by successive operations or a series of separate operations of the same nature performed over time, the provisions of the directive apply only to the initial agreement.

42. Does the conclusion of a subsequent interest rate agreement trigger for the supplier (the lender) the obligations laid down in Directive 2000/65? Or is it exempted therefore by virtue of Article 1(2)?

43. Sparkasse Südholstein and the German Government submit that the provisions of Directive 2002/65 do not apply to a subsequent interest rate agreement. Such an agreement only concerns the main obligation of the consumer under a loan agreement and not the other aspects of the contract. An interest rate agreement cannot therefore be regarded as an autonomous contract.

44. The Commission and KH argue that the subsequent interest rate agreement is a ‘contract concerning financial services’ to which Directive 2002/65 applies.

45. Directive 2002/65 is intended to bring about full harmonisation of national legislations and its terms must therefore be given an interpretation that is common to all Member States.²³ According to the Court’s settled case-law, it follows from the need for a uniform application of EU law that, where a provision thereof makes no reference to the law of the Member States with regard to a particular concept, that concept must be given an autonomous and uniform interpretation throughout the European Union which must take into account the context of the provision and the objective pursued by the legislation in question.²⁴

46. Uniform interpretation in the context of distance marketing of financial services permits divergences between Member States to be avoided. That is especially important in a sector with an inherent cross-border aspect. However, measures adopted to consolidate the single market must not undermine consumer protection. On the contrary, they must — as the first recital to Directive 2002/65 indicates — be instrumental in achieving a high level of protection for consumers acting on the market. Those common rules balance the need to consolidate the single market against the need for a high level of consumer protection, thus seeking to increase the confidence of consumers, who

²² See also Opinion of Advocate General Bot in *Kareda*, C-249/16, EU:C:2017:305, point 41.

²³ Judgment of 11 September 2019, *Romano*, C-143/18, EU:C:2019:701, paragraphs 34 and 55.

²⁴ Judgment of 7 September 2017, *Schottelius*, C-247/16, EU:C:2017:638, paragraph 31.

will then be more inclined to conclude distance contracts.²⁵ The purpose of Directive 2002/65 is to afford consumers extensive protection by giving them a number of rights in relation to distance contracts, since the use of means of distance communication should not lead to a reduction in the information provided to the consumer.²⁶

47. Article 2(a) defines the term ‘distance contract’ as ‘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’. Recital 14 explains that the directive covers ‘all financial services’ liable to be provided at a distance.

48. Those texts suggest that the concept of a ‘distance contract’ to which the provisions of Directive 2002/65 apply is to be construed broadly, as Article 2(a) refers to ‘*any* contract’ and recital 14 to ‘*all* financial services’. That approach is also consistent with the protective aim of the directive, which is to guarantee a high level of consumer protection.

49. Recital 16 further explains that when drafting Directive 2002/65, the EU legislature was aware of the fact that a single contract involving successive operations or separate operations of the same nature performed over time might be subject to different legal treatment in the different Member States. The recitals of the directive provide some guidance as to how those concepts are to be construed.

50. Thus, the recitals explain that the directive should 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’.²⁷ The concept of an ‘initial service agreement’ is further explained by giving some examples, such as ‘the opening of a bank account, acquiring a credit card’ or ‘concluding a portfolio management contract’, whilst ‘the deposit or withdrawal of funds to or from the bank account, payment by credit card’ and ‘transactions made within the framework of a portfolio management contract’ are considered to be ‘operations’. However, ‘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’.²⁸

51. It follows that the key element for a ‘contract’ to exist within the meaning of Article 2(a) is that there should be an agreement between the parties, that is to say a meeting of minds. The Directive provides some guidance, in recital 15, as to what the constituent elements of a ‘contract’ are, namely offer, negotiation and conclusion. Although definitions of a ‘contract’ and an ‘agreement’ may differ under national law, it appears that what is required for the purposes for Directive 2002/65 is an offer and an acceptance leading to a meeting of minds. An ‘agreement’ falling within the scope of the directive is defined by contrasting it with an ‘operation’. An ‘operation’ is an act *executing* an existing agreement *without adding elements for which a new meeting of minds would be required*. In the context of a loan contract, an ‘operation’ would thus cover individual transactions such as payments reducing the total amount owed.²⁹

²⁵ See Opinion of Advocate General Pitruzzella in *Romano*, C-143/18, EU:C:2019:273, points 41 and 42.

²⁶ Recital 12 explains that the adoption of common rules in that area should be ‘consistent with no reduction in overall consumer protection’. See also, to that effect and by analogy, judgment of 5 July 2012, *Content Services*, C-49/11, EU:C:2012:419, paragraph 36, a judgment concerning Directive 97/7.

²⁷ Recital 16.

²⁸ Recital 17.

²⁹ See Linaritis, I., ‘The access to financial services through the Internet: in light of Directives 2002/65/EC, 2000/31/EC, 1999/93/EC’ (in Greek), Sakkoulas, Athens, Thessaloniki, 2005, p. 119.

52. In the context of a loan agreement, the ‘characteristic obligation’ is the actual granting of the sum loaned, whilst the borrower’s obligation to repay that sum is a consequence of the performance of that service by the lender.³⁰ The lender offers an amount of money available as a loan. Besides the amount borrowed, the other key elements of the agreement required in order to reach an agreement are the structure and the duration of the repayment period and the interest rate. A key question for the potential borrower is whether to opt for a fixed or a variable interest rate. A very risk-averse consumer would be more prone to opt for a fixed interest rate, whilst a less risk-averse consumer might opt for a variable interest rate. Where the consumer opts for a fixed interest rate, it is sometimes agreed that after a certain period of time the interest rate will be renegotiated between the parties. That was the case in the main proceedings. As the referring court explains and Sparkasse Südholstein confirmed in its written observations, the three loan agreements included a similar clause, providing that 6 to 2 weeks before the expiry of the period for which the interest rate was fixed, each party might ask to renegotiate the interest rate. If, after that period, no agreement had been reached regarding an adjustment, a variable interest rate, as specified by Sparkasse Südholstein for the type of loan in question, was to apply to that loan.

53. It appears that the interest rate was renegotiated between the parties on the basis of a new proposal by the bank. If no agreement was reached, the initial contract terms did not remain unaltered. They changed substantially. Specifically, the interest rate changed from fixed rate to variable rate. The new agreement was thus not a mere ‘operation’ whose elements were covered by the previous agreement, but a new agreement on the interest rates, requiring a new meeting of minds. One of the parties took the initiative to start the negotiations and possible interest rates were discussed. The parties could agree on a new fixed interest rate or move over to a variable interest rate. That second possibility operated as an agreement by default.

54. Contrary to what Sparkasse Südholstein and the German Government submit, the fact that other elements of the loan, such as the amount of money and the duration were not modified by the subsequent agreement on interest rates does not mean that that agreement was a mere ‘operation’, to which the detailed provisions of Directive 2002/65 did not apply. Such an interpretation would limit excessively the scope of a directive that was designed to cover ‘any contract’ concerning financial services (Article 2(a)). Nothing in Directive 2002/65 indicates that in order for its provisions to apply, an amending agreement has to modify all or most of the elements of the earlier contract. Where a key element of the agreement covered by the initial contract expires and is renegotiated, and after a new agreement (or an agreement by default) is reached new terms apply, the consumer should benefit from all the information necessary to give his consent, as provided for by Directive 2002/65.

55. Sparkasse Südholstein and the German Government also argue that in a contractual relationship the initial loan agreement and the subsequent amendments modifying the interest rate should be considered as a whole, forming one contract. Sparkasse Südholstein refers in that regard to an order of the Bundesgerichtshof (Federal Court of Justice, Germany) of 15 January 2019 in which that court held that in cases of ‘Unechte Abschnittsfinanzierung’³¹ an interest rate agreement is not a separate contract but a part of the loan contract. Thus, the consumer only has a right of withdrawal in respect of the initial loan contract and not the subsequent interest rate agreements.

56. That ruling was, as I understand it, based purely on considerations of national law. However, as I have explained above (at point 45), Directive 2002/65 proceeds to a full harmonisation of national legislations and its terms must be given an interpretation that is common to all Member States.³² The fact that a particular national legal system classifies a subsequent interest rate agreement as a part of the initial loan agreement therefore has no impact on the interpretation of the concept of a ‘distance contract’ under Article 2(a) of Directive 2002/65 and the ‘operations’ to which the provisions of the

30 Judgment of 15 June 2017, *Kareda*, C-249/16, EU:C:2017:472, paragraph 41.

31 Literally, the phrase approximates to ‘non-genuine subdivision of the payment schedule’.

32 Judgment of 11 September 2019, *Romano*, C-143/18, EU:C:2019:701, paragraphs 34 and 55.

Directive do not apply by virtue of Article 1(2) thereof. The Directive expressly excludes from the application of its provisions only certain ‘operations’; and an interest rate agreement concluded upon expiry of the initial agreement on interest rates is, for the reasons that I have given,³³ a new ‘contract concerning financial services’.

57. I therefore conclude that the concept of ‘contract concerning financial services’ within the meaning of Article 2(a) of Directive 2002/65 must be interpreted as including a subsequent interest rate agreement that neither extends the term nor modifies the amount of the loan. Such an agreement is not an ‘operation’ within the meaning of Article 1(2) of Directive 2002/65 and the provisions of that Directive therefore apply to it.

Question 1

58. By its first question the referring court asks in essence whether, in a situation where a bank concludes certain types of loan contracts only at its commercial premises, but sometimes subsequently concludes contracts to amend loan agreements by making exclusive use of means of distance communication, there is an ‘organised distance sales or service-provision scheme run by the supplier’ within the meaning of Article 2(a) of Directive 2002/65.

59. The definition of ‘distance contract’ in Article 2(a) of Directive 2002/65 is modelled on that contained in Article 2(a) of Directive 97/7.³⁴ It is characterised by two key elements. The first element is that the two contracting parties — the supplier and the consumer — are not physically and simultaneously present together when distance contracts are prepared and concluded. The second element is that those transactions are carried out under an organised distance sales or service-provision scheme run by the supplier, who makes exclusive use of distance communication techniques.³⁵

60. Regarding the first element, it is important to note that the definition of ‘distance contract’ only requires the exclusive use of a means of distance communication for the purposes of the contract. ‘Means of distance communication’ are defined in Article 2(e) of Directive 2002/65 as being ‘any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the distance marketing of a service between those parties’. That definition is broad and includes any means of communicating without the simultaneous physical presence of the two parties, such as telephones, emails, post, fax, etc. All the stages necessary for the conclusion of the contract have to be carried out by the exclusive use of a means of distance communication.³⁶ I agree with the approach advocated by academic writers that the fact that, prior to the time of contracting, there has been some face to face contact between the supplier and the consumer for purposes *other* than the offer, negotiation and conclusion of the contract should not of itself prevent the contract from qualifying as a distance contract.³⁷

61. The referring court states that the interest rate agreements amending the initial arrangements at issue in the main proceedings were concluded making exclusive use of means of distance communication. That element does not seem to be in dispute between the parties.

³³ See points 47 to 53 above.

³⁴ See the explanatory memorandum accompanying the amended proposal for a directive.

³⁵ See Recitals 15 and 18 and Article 2(a) and (e) of Directive 2002/65. See also, by analogy, Opinion of Advocate General Mengozzi in *Handelsgesellschaft Heinrich Heine*, C-511/08, EU:C:2010:48, point 27.

³⁶ See, to that effect, Article 2(e) of Directive 2002/65. See also Yonge, W., ‘The distance marketing of consumer financial services directive’, *Journal of Financial Services Marketing*, vol. 8, 2003, p. 80.

³⁷ Fisher, J., Bewsey, J., Waters, M., Ovey, E., *The Law of Investor Protection*, Sweet & Maxwell, London, 2nd ed., 2003, p. 247.

62. What is in dispute is whether Sparkasse Südholstein operated an ‘organised distance sales or service-provision scheme’. That phrase is not further defined in the Directive. Recital 18 provides some guidance inasmuch as it explains that the purpose of that requirement is to exclude from the scope of the directive ‘services provided on a strictly occasional basis and outside a commercial structure dedicated to the conclusion of distance contracts’.³⁸

63. It is for the referring court to make the necessary finding of fact as to the exact methods used by Sparkasse Südholstein in order to conclude agreements amending interest rates. This Court is, however, competent to provide guidance as to how to interpret an ‘organised distance sales or service-provision scheme run by the supplier’ within the meaning of Directive 2002/65.

64. It follows from the very wording of Article 2(a) that such a scheme must fulfil certain criteria. First, it must be ‘organised’. That means that the supplier must be prepared, in terms of its commercial structure, including staffing and resources, to conclude contracts without the simultaneous physical presence of the supplier and the consumer. Second, it must be ‘run by’ the supplier. It is the supplier who sets the framework in order to propose to the consumer the conclusion of distance contracts. Third, its use must be ‘exclusive’ for the purpose of the contract in question ‘up to and including the time at which the contract is concluded’. It must therefore cover all stages of the contract as envisaged by Directive 2002/65, namely the offer, the negotiation and the conclusion of the contract. Fourth, it must not be ‘strictly occasional’. The conclusion of a contract for financial services without the simultaneous physical presence of the parties should not occur ‘exceptionally’, ‘rarely’ or ‘irregularly’. Rather, it must be a relatively normal possibility or option when concluding contracts. Recital 18 links that fourth element with the first element set out in this point, namely the existence of an ‘organised scheme’ in terms of commercial structure, staffing and resources. It is difficult to imagine that once a supplier has gone to the trouble of setting up a structure allowing the conclusion of distance contracts, it will only make use of that structure ‘strictly occasionally’.

65. To my mind, if the system has been conceived so that everything can take place at distance, there is an organised distance service-provision scheme.³⁹ It would be wrong to require that the conclusion of distance contracts must be ‘frequent’ or ‘systematic’, or that it must be the standard rule for the majority of contracts, or of contracts of a certain type, concluded by the supplier. Such an interpretation is inconsistent with the wording of Directive 2002/65, which does not refer to a certain degree of ‘frequency’ but to a behaviour that is not ‘*strictly* occasional’ (emphasis added). It would also run counter to the protective aim of the Directive, since it would limit its scope beyond what is expressly provided by its wording. For the same reasons I reject Sparkasse Südholstein’s argument that the supplier should ‘give the impression’, for instance via its Internet site, that it operates a general system of distance selling. The criterion proposed by the German government that there should be a ‘strategic choice’ by the supplier to create a structure for the conclusion of distance contracts seems to me likewise to be irrelevant. Directive 2002/65 does not consider the subjective view of the supplier but the objective reality: is the supplier in fact running an ‘organised distance sales or service-provision scheme’?

66. It is for the referring court to verify the facts on the basis of those criteria and determine whether there was, in the present case, an ‘organised distance sales or service-provision scheme’. The information submitted by the referring court indicates that Sparkasse Südholstein was equipped in terms of both staffing and resources to conclude amendment and supplementary agreements with existing customers by distance selling on a regular basis. As Sparkasse Südholstein itself explained at the hearing, when the client is not based close to the bank, it is more convenient to the customer to conclude a distance contract. That means that the conclusion of subsequent interest rate agreements

³⁸ See also the explanatory memorandum accompanying the amended proposal for a directive.

³⁹ See also, to that effect, Van Huffel, M., ‘La Directive 2002/65/CE du 23 septembre 2002 concernant la commercialisation à distance des services financiers auprès des consommateurs’, *Euredia*, vol. 3, 2003, p. 363.

at a distance is a possibility every time an agreement of that type is envisaged. Whether that is what actually happens might turn on practical considerations. It is therefore plausible, in my view, that Sparkasse Südholstein runs an organised service provision-scheme for the purposes of concluding subsequent interest-rate agreements.

67. The fact that Sparkasse Südholstein concludes certain types of loan contracts exclusively at its commercial premises or that the initial loan contracts with KH were concluded with the simultaneous physical presence of the parties does not alter that conclusion. Directive 2002/65 does not require, when an overall commercial relationship exists between the supplier and the consumer, that the entire relationship be conducted at a distance. Where there is a sequence of discrete ‘contracts’, such as the initial loan contracts and the subsequent interest rate agreements in the present case, it is apparent from the wording of Article 2(a) (according to which the supplier must make exclusive use of means of distance communication ‘for the purpose of *that* contract’ (emphasis added)) that it is the *specific contract in question* that must be concluded at a ‘distance’ in order for the provisions of Directive 2002/65 to apply.

68. I therefore conclude that there is an ‘organised distance sales or service-provision scheme run by the supplier’ within the meaning of Article 2(a) of Directive 2002/65 where a supplier, in order to conclude a subsequent interest rate agreement, makes exclusive use of means of distance communication, where the use of those means is exclusive and not strictly occasional but forms part of a framework set by that supplier, in terms of its commercial structure, including staffing and resources, allowing it to conclude contracts without the simultaneous physical presence of the parties. It is for the national court, as sole judge of fact, to determine if those elements are present in a particular case.

Conclusion

69. In the light of the foregoing considerations, I suggest that the Court should answer the questions posed by the Landgericht Kiel (Regional Court, Kiel, Germany) as follows:

- The concept of ‘contract concerning financial services’ within the meaning of Article 2(a) of Directive 2002/65 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 including a subsequent interest rate agreement that neither extends the term nor modifies the amount of the loan. Such an agreement is not an ‘operation’ within the meaning of Article 1(2) of Directive 2002/65 and the provisions of that Directive therefore apply to it.
- There is an ‘organised distance sales or service-provision scheme run by the supplier’ within the meaning of Article 2(a) of Directive 2002/65 where a supplier, in order to conclude a subsequent interest rate agreement makes exclusive use of means of distance communication, where the use of those means is exclusive and not strictly occasional but forms part of a framework set by that supplier, in terms of its commercial structure, including staffing and resources, allowing it to conclude contracts without the simultaneous physical presence of the parties. It is for the national court, as sole judge of fact, to determine if those elements are present in a particular case.