OPINION OF ADVOCATE GENERAL JACOBS
delivered on 20 March 1997 *

1. The issue in this case, which comes by way of a reference from the Bundesgerichtshof (Federal Court of Justice), is essentially whether a guarantee given to a financial institution by an individual who is not acting in the course of his trade or profession, in order to secure a loan by that institution to a third party acting in the course of his trade or profession, falls within the scope of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises ('the Directive'). [1]

The facts

2. The defendant's father ran a building firm in respect of which the plaintiff bank granted a current account overdraft facility. The defendant's parents were visited by an employee of the bank; in the course of that visit, the defendant gave a written guarantee of up to DM 100 000 of his parents' obligations to the bank. The defendant was not informed of any right to cancel the guarantee. The bank subsequently called in loans granted to the defendant's parents, totalling more than DM 1.6 million, and claimed DM 50 000 from the defendant under the guarantee.

3. The defendant sought to renounce the guarantee in accordance with the German Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften of 16 January 1986 (Law on the cancellation of 'doorstep' transactions and analogous transactions; 'the 1986 Law'). The issue was litigated and reached the Bundesgerichtshof, which referred the following question to the Court for a preliminary ruling:

'Where a contract of suretyship is concluded under German law between a financial institution and a natural person who is not acting in that connection in the course of his trade or profession, in order to secure a claim by the financial institution against a third party in respect of a loan, is it covered by the words "contracts under which a trader supplies goods or services to a consumer" (Article 1(1) of Council Directive 85/577/EEC of 20 December 1985

* Original language: English.

1 — OJ 1985 L 372, p. 31.

to protect the consumer in respect of contracts negotiated away from business premises)?'

4. The domestic law issue appears to be whether a guarantee constitutes a contract for the supply of goods or services concluded for valuable consideration within the meaning of the 1986 Law; the order for reference sets out arguments either way, which appear to turn on the concept of consideration in national law. Moreover there appears to be a divergence of view between the Ninth and the Eleventh Chambers of the Bundesgerichtshof as to whether consideration is in fact necessary in order to bring a contract within the scope of the 1986 Law. It appears in any event that, if the guarantee falls within the Law, the defendant is entitled to renounce it.

5. The 1986 Law appears to have been intended to implement the Directive. If guarantees such as that at issue in the main proceedings fall within the concept 'contracts under which a trader supplies goods or services to a consumer' within the meaning of Article 1(1) of the Directive, the 1986 Law should be construed so that the guarantee falls within it. [2]

2 — Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891.

6. Written observations were submitted by the defendant, the Belgian, Finnish, French and German Governments and the Commission, all of whom with the exception of the Belgian Government were also represented at the hearing.

The Directive

7. The thrust of the Directive is to ensure that, in respect of transactions to which it applies, the consumer has, and is notified of, a 'cooling-off' period of at least seven days during which he can withdraw from the contract. [3]

8. The Directive was adopted under Article 100 of the Treaty. The preamble states as follows:

'[First recital] Whereas it is a common form of commercial practice in the Member States for the conclusion of a contract or a unilateral engagement between a trader and consumer to be made away from the business premises of the trader, and whereas such contracts and engagements are the subject of

3 — Articles 4 and 5.

legislation which differs from one Member State to another;

...

[Seventh recital] Whereas the freedom of Member States to maintain or introduce a total or partial prohibition on the conclusion of contracts away from business premises, inasmuch as they consider this to be in the interest of consumers, must not be affected ...'.

...

[Third recital] Whereas the preliminary programme of the European Economic Community for a consumer protection and information policy provides *inter alia*, under paragraphs 24 and 25, that appropriate measures be taken to protect consumers against unfair commercial practices in respect of doorstep selling; whereas the second programme of the European Economic Community for a consumer protection and information policy confirmed that the action and priorities defined in the preliminary programme would be pursued;

9. Article 1 provides as follows:

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

[Fourth recital] Whereas 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 or which he does not expect; whereas the consumer is often unable to compare the quality and price of the offer with other offers; whereas 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;

— 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;

(ii) to the consumer's place of work;

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

2. This Directive shall also apply to contracts for the supply of goods or services other than those concerning which the consumer requested the visit of the trader, provided that when he requested the visit the consumer did not know, or could not reasonably have known, that the supply of those other goods or services formed part of the trader's commercial or professional activities.

3. This Directive shall also apply to contracts in respect of which an offer was made by the consumer under conditions similar to those described in paragraph 1 or paragraph 2 although the consumer was not bound by that offer before its acceptance by the trader.

4. This Directive shall also apply to offers made contractually by the consumer under conditions similar to those described in paragraph 1 or paragraph 2 where the consumer is bound by his offer.'

10. 'Consumer' is defined as 'a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession'. 'Trader' is defined as 'a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader'. [4]

11. 'Contract' is nowhere defined.

12. It may be noted at the outset that, on the assumption that the guarantee was not concluded at the home of the defendant and on the basis that the defendant's parents were not 'consumers' in the context of the transaction at issue, the guarantee would in any event not fall within Article 1(1) of the Directive, since it was not concluded during a visit by a trader to a consumer's home or the consumer's place of work or during an

4 — Article 2.

excursion organized by the trader away from his business premises. The wording of Article 1(1) appears surprisingly restrictive in the light of the preamble to the Directive, which suggests that the essential element determining application of the Directive is that the contract in question was concluded away from the trader's business premises. [5] In its earlier ruling on the Directive in *Faccini Dori*, [6] the Court was not called upon to address that issue, although it was not obvious from the order for reference in that case that the facts fell within Article 1(1); [7] the Court restricted itself to pointing out to the national court the need to verify whether the contract was concluded in the circumstances described by the Directive. [8] In this case, the national court has phrased its question in such a way that it is in any event both possible and appropriate for the Court to provide an answer.

13. The transaction at issue in this case is a guarantee (or contract of suretyship; the terms are interchangeable) under which the defendant, acting for purposes outside his trade or profession, undertook to the plaintiff bank, acting in its commercial capacity, to stand surety for the loan provided by that bank to the defendant's parents, also acting in their commercial capacity. The referring court has asked whether a guarantee such as that described above is a contract within the scope of the Directive.

14. The Belgian, Finnish, French and German Governments all argue that the guarantee is not within the Directive. There are three distinct, albeit overlapping, lines of argument to that effect. First, it is argued generally that the guarantee is not a contract for the purposes of the Directive because the consumer receives no consideration, or, in other words to the same effect, because the guarantee is not a synallagmatic contract — namely a bilateral agreement involving mutual and reciprocal obligations or duties — but a unilateral undertaking from the point of view of the guarantor. Secondly, it is argued in more specific terms that the guarantee is not a contract as defined by Article 1(1) because no goods or services are supplied by the trader party to the consumer party. Thirdly, it is argued that the guarantor cannot be correctly described as a consumer.

15. The defendant and the Commission argue on the contrary that the guarantee is a contract, both on the general basis that all contracts between a trader and a consumer (including unilateral undertakings given by a consumer to a trader) are covered and in

5 — See the first, fourth and seventh recitals in the preamble, set out in paragraph 8 above. Article 1(1) of the Commission's original proposal for a Council Directive to protect the consumer in respect of contracts which have been negotiated away from business premises (OJ 1977 C 22, p. 6) provided that the Directive applied to contracts 'negotiations for which have been initiated away from business premises.'

6 — Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325.

7 — See paragraph 3 of the judgment and paragraph 3 of the Opinion of Advocate General Lenz.

8 — Paragraph 14 of the judgment; see also paragraph 26 of the Opinion of Advocate General Lenz.

more specific terms because contracts made between a trader who supplies goods or services and a consumer are covered.

16. In keeping with the Court's approach to the interpretation of Community legislation, I will consider in turn the terms, the scheme and the objectives of the Directive with a view to determining whether a guarantee of the type at issue falls within its scope.

The terms of the Directive

17. The English version of the Directive suggests that there is no scope for it to apply to a transaction such as the guarantee at issue in the main proceedings, since the transaction is not a contract 'under which a trader supplies goods or services to a consumer' within the meaning of Article 1(1). Most of the other language versions, however, are framed in wider terms, more or less to the same effect as the French: 'contrats conclus entre un commerçant fournissant des biens ou des services et un consommateur'. On a literal reading of those versions, it is not necessary in order for the Directive to apply that the goods or services in question are supplied under the contract at issue: it suffices that one of the parties is a supplier of goods or services. While it may be thought that the linguistic distinction is slight and that the majority version may well have been intended to have the same meaning and effect as the minority, the distinction may be crucial in this case: the guarantee at issue was concluded between a trader who supplies goods or services, namely the plaintiff bank, and a consumer, namely the defendant, and on a literal reading of the majority version it appears to be irrelevant whether the goods or services were supplied to the other party to the contract at issue under that contract or to another party in the context of a separate transaction. I will accordingly assume that it is not conclusive that the contract at issue does not fall within the literal wording of the English version of Article 1(1).

18. In my view, notwithstanding the literal terms of the majority version of Article 1(1) the Directive applies solely to contracts under which a trader supplies goods or services to a consumer.

19. As the Belgian Government submits, even if the wording (in the French version) of Article 1(1) is broad, the provision should be read in the light of the remainder of that article. It is apparent from Article 1 as a whole — in particular in my view Article 1(2) — that the contracts covered are those under which a trader supplies goods or services to a consumer.

20. The Commission suggests that the reason for the reference to 'goods or services' in Article 1(1) is simply to make clear that the Directive is not restricted to traders supplying goods. At the hearing, the Commission invoked the terms of Article 1 of the original proposal, [9] which referred simply to 'contracts between a consumer and a trader, and unilateral engagements by a consumer towards a trader ...'. It argued that the addition of the reference to 'goods or services' was intended to show that all types of contract were covered by the Directive. It would however be perverse for the legislature to seek to broaden the meaning of an already general, unqualified noun ('contracts') by adding a qualification limiting the subject-matter of the contract to goods and services. Far from broadening the scope of the concept, in my view the ultimate addition to Article 1(1) of the reference to goods or services is surely designed to delineate unequivocally its scope.

21. Moreover, the Commission's assertion that the original proposal for the Directive was not restricted to contracts for the supply of goods and services is not consistent with the scheme and tenor of that proposal. While I do not wish to dwell on the details of a draft long since superseded by the final version, I will, since the Commission has invoked the document in support of its view, refer to two provisions in the proposal which to my mind demonstrate unequivocally that it was intended to apply only to synallagmatic contracts for the supply of goods or services to a consumer.

22. Article 3(2) provided that the contract (referred to as a 'doorstep contract') was to contain *inter alia*:

'— a description of the goods or service forming the subject matter of the contract,

— a time limit of delivery of the goods or supply of services,

— the price,

— the terms of payment

...'.

9 — Cited in note 5.

23. Moreover, the proposal included as an Annex a model form for the exercise by the consumer of his right of cancellation. That form was as follows:

'I hereby declare that I am cancelling the contract

for .....

(description of the goods or services)

amounting to .....

(price)

signed .....

(date)

Name .....

Address .....

Date .....'

24. I accordingly cannot accept the Commission's contention that the proposal was intended to cover a wider category of transactions than synallagmatic contracts for the supply of goods or services.

25. At the hearing, the Commission put forward a further argument based on the wording of the Directive: it referred to Article 3(2)(a), which provides that the Directive does not apply to, *inter alia*, 'contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property'. The Commission states that the last phrase refers to, for example, guarantees, and concludes that guarantees must therefore be generally covered by the Directive since otherwise there would be no need for this specific exclusion. However, it is not obvious to me that 'other rights' necessarily encompasses guarantees: the examples given by the Commission in the Explanatory Memorandum [10] to the original proposal of such other rights are 'applications for or transfers of a mortgage, the granting of easements of right of way'. [11]

10 — COM(76) 544 final; 12 January 1977.

11 — Commentary on Article 2(d).

The scheme of the Directive

26. As the French Government points out, if a guarantee were covered by the Directive so that the guarantor had the option of withdrawing from it within a specified period, it would be necessary to provide for the fate of the principal contract during that period: that there is no provision in the Directive to that effect supports the view that the Directive was not intended to extend to such transactions. It is interesting to note that the Commission's original proposal for the Directive specifically prohibited the trader from requiring the consumer to provide any surety for payment of the contract price before the expiration of the cooling-off period: [12] that provision was 'intended to prevent as far as possible the creation of a *fait accompli* before the expiry of the cooling-off period'. [13] It was not included in the final version of the Directive, which leaves the legal effects of renunciation to national law. [14]

27. The Belgian Government argues that a guarantee cannot be regarded as falling within the concept of 'contract' in Article 1(1) of the Directive: it is a non-synallagmatic contract where only one of the parties, the guarantor, gives an undertaking to the other. In my view, that argument has some force; moreover I do not accept the Commission's assertion that the reference to unilateral undertakings in the preamble to the Directive means that guarantees are covered. The Commission referred at the hearing to the first recital in the preamble to the Directive, which states:

'Whereas it is a common form of commercial practice in the Member States for the conclusion of a contract or a unilateral engagement between a trader and consumer to be made away from the business premises of the trader ...'.

The Commission asked what consequences could be drawn from that reference in the preamble other than that the Directive covers unilateral engagements such as the guarantee at issue.

28. The answer to that question is in my view to be found in the legislative history of the Directive and in particular the Commission's own commentary on the original proposal for the Directive. In that proposal, Article 1(1) stated that the Directive applied to 'contracts between a consumer and a trader, and unilateral engagements by a consumer towards a trader ...'. The wording

12 — Article 9.
13 — Explanatory Memorandum.
14 — Article 7.

was changed between the Amended Proposal in January 1978 [15] and the final text.

29. As the German Government points out, 'unilateral engagement' in this context was probably intended to refer to the making of an offer by the consumer in circumstances where the offer becomes binding either on being made or on acceptance by the trader. That interpretation accords with the Explanatory Memorandum to the original proposal, [16] in which the Commission stated:

'The Directive also applies where the consumer engages himself unilaterally without any corresponding obligations of the trader, for instance when ordering a[n] electrical appliance or when binding himself unilaterally to acquire goods or to accept services. Even though a contract has not yet been concluded in these cases, protection of the consumer is necessary, as the unilateral engagement may already affect his interests.'

30. Without express provision, a consumer who made an offer away from the trader's business premises would not benefit from the Directive even though he would in effect have done what the Directive seeks to prevent, namely bound himself to a transaction away from the trader's business premises with no 'cooling-off' period. The extension of the Directive to such circumstances was originally achieved by the express reference in Article 1(1) to unilateral engagements. In the final text, the same result is achieved by Article 1(3) and 1(4), and it is presumably for that reason that the reference to unilateral engagements in Article 1(1) was dropped. That interpretation is consistent with the retention of the reference to unilateral engagements in the preamble.

31. It may be concluded therefore that the Directive is intended to apply to unilateral engagements of the type mentioned, but not necessarily to all unilateral engagements.

32. Finally, the Belgian, Finnish and German Governments argue that the defendant was not a 'consumer' for the purposes of the Directive, submitting that the notion of 'consumer' encompasses the concept of recipient of the goods or services supplied under the transaction in question. To my mind, there is some force in that argument. The guarantee is clearly severable from the principal transaction (namely the extension of credit), and in the context of the guarantee it is the guarantor who is the supplier of services and the bank which is the recipient. The German Government concludes that the Directive is

15 — Amendment to the proposal for a Council Directive to protect the consumer in respect of contracts which have been negotiated away from business premises, OJ 1978 C 127, p. 6.

16 — Cited in note 10, commentary on Article 1.

accordingly inapplicable, since the consumer is the supplier. I prefer to turn the analysis round and emphasize the difficulty of identifying the guarantor as a consumer in any real sense.

The objectives of the Directive

33. Various parties refer to the objectives of the Directive in support of their view as to whether the Directive applies to guarantees of the type at issue in the main proceedings.

34. The defendant refers to the Directive's objective of consumer protection: in his view, the Directive seeks to establish as extensive consumer protection as possible.

35. The Commission refers to the third and fourth recitals in the preamble, set out above, [17] and to the Explanatory Memorandum to the original proposal for the Directive [18] in which it is indicated that the proposed directive was intended to have as wide a scope as possible. [19]

36. The German Government argues that the aim of the Directive is not to give general protection to individuals against any type of transaction which they undertake without forethought but rather to protect them as consumers against particular and specified types of contract. In the case of a guarantee there is no question of the satisfaction of the guarantor's personal needs as envisaged by the Directive: a guarantor knows that he is not signing a consumer contract. That argument applies *a fortiori* where, as here, the credit transaction in respect of which the guarantee is given is for both parties a commercial transaction and the guarantee is as to the economic situation of one of the trading parties. In those circumstances, the guarantor is not entitled to the rights granted to consumers acting in a purely private capacity.

37. The Belgian Government submits that the Directive's objective of protection, achieved by conferring on the consumer a right of withdrawal, is targeted at the dangers arising out of the particular form of selling consisting in direct marketing (restricting the consumer's freedom of choice, lack of initiation by the consumer, no possibility of comparing price or quality). The dangers threatening a guarantor, on the other hand, arise not from the trader but rather from the principal debtor.

17 — See paragraph 8.

18 — Cited in note 10.

19 — Commentary on Article 1.

38. In my view, the legislative history and context of the Directive support the governments' view that it was not intended to extend to guarantees of the type at issue in the main proceedings.

39. It is of course incontrovertible that the Directive seeks to protect consumers. It does not however follow from that proposition that all consumers are protected in all circumstances by the Directive: like other directives with consumer protection as their aim, the Directive applies to certain transactions only. [20]

40. The third recital in the preamble, set out above and invoked by the Commission in support of its argument for a wide construction, refers to the Community's preliminary and secondary programmes for a consumer protection and information policy. Those two programmes indicate that the intention was (in the words of the preliminary programme) to protect purchasers of goods or services against the abuse of power by the seller, in particular against high-pressure selling methods, [21] and (in the words of the second programme) to protect purchasers of goods or services against unfair sales practices and high-pressure selling methods. [22]

41. Admittedly, it is stated in the Explanatory Memorandum to the original proposal for the Directive that the 'need for protecting the consumer is not limited to any specific type of contract for instance contracts for the supply of goods, but extends to all contracts which are initiated by a trader away from business premises'. [23] That statement however must be seen in its context: the Explanatory Memorandum opens with the proposition 'Where contracts for goods or services are initiated away from business premises of a trader the consumer generally needs special protection.' Examples are given of 'certain types of contracts ... [where] a particular consumer protection might be required': 'especially insurance contracts, consumer credit contracts, contracts relating to the sale of shares, investment funds, etc. or contracts on distance education'. [24] All those contracts are bipartite, synallagmatic contracts for the provision of goods or services by a trader to a consumer. The same may be said of all the other examples given in the Explanatory Memorandum of transac-

20 — See for example Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ 1984 L 250, p. 17; 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; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95, p. 29; and most recently the proposed directive of the European Parliament and of the Council on the protection of consumers in respect of contracts negotiated at a distance.

21 — Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ 1975 C 92, p. 1, paragraph 19(i) of the Annex.

22 — Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ 1981 C 133, p. 1, paragraph 28(1) of the Annex.

23 — Paragraph I.2.

24 — Paragraph I.3.

tions to which the proposed directive applies or would in the absence of specific exemption apply, namely an order for an electrical appliance, a unilateral undertaking to acquire goods or to accept services, contracts relating to the installation of a heating system, the maintenance of a heating oil tank, the repair of a roof, and small doorstep sales such as milk and bread.

42. I am accordingly not persuaded that the Directive, which in my view aims to protect the consumer party to contracts for the supply of goods or services negotiated away from business premises, extends to the protection of a guarantor in the circumstances of the main proceedings.

43. I would however emphasize that it does not follow from that conclusion that Member States may not protect a guarantor in such circumstances as a matter of national law. Article 8 of the Directive permits Member States to adopt or maintain more favourable provisions to protect consumers in the field which it covers. It would not therefore be contrary to the Directive for the national court in this case to find that as a matter of German law the guarantee is within the 1986 Law. Moreover, if it is correct — as is suggested in certain of the observations made to the Court — that the defendant was wholly uninformed of the nature of the commitment into which he was entering, and which he was even pressurized into signing, it may well be that other national law remedies are available in the spheres of misrepresentation or undue influence.

Conclusion

44. Accordingly the question referred by the Bundesgerichtshof should in my opinion be answered as follows:

A guarantee given to a financial institution by an individual who is not acting in the course of his trade or profession, in order to secure a loan by that institution to a third party, is not within the scope of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.