JUDGMENT OF THE COURT (First Chamber)

15 April 2010 *

In Case C-215/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 5 May 2008, received at the Court on 22 May 2008, in the proceedings

E. Friz GmbH

v

Carsten von der Heyden,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, acting as President of the First Chamber, E. Levits, A. Borg Barthet, M. Ilešič and J.-J. Kasel, Judges,

* Language of the case: German.

Advocate General: V. Trstenjak,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 18 June 2009,

after considering the observations submitted on behalf of:

— Mr von der Heyden, by N. Gross, Rechtsanwalt,

— the German Government, by M. Lumma, J. Kemper and S. Unzeitig, acting as Agents,

— the Commission of the European Communities, by W. Wils and H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2009

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 1(1) and 5(2) of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31, 'the Directive').

2 That reference was submitted in the course of proceedings between the company E. Friz GmbH ('Friz') and Mr von der Heyden following the cancellation by the latter of his membership of a closed-end real property fund managed by Friz.

Legal context

The European Union legislation

3 The fourth and fifth recitals in the preamble to the Directive state:

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

4 Article 1(1) of the Directive provides:

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

…

— during a visit by a trader:

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

…

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

5 Article 2 of the Directive provides:

'For the purposes of this Directive:

…

— "trader" means 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.'

6 Under Article 3(2) of the Directive:

'This Directive shall not apply to:

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

Contracts for the supply of goods and for their incorporation in immovable property or contracts for repairing immovable property shall fall within the scope of this Directive;

…'

7 Article 4 of the Directive is worded as follows:

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

Such notice shall be dated and shall state particulars enabling the contract to be identified. It shall be given to the consumer:

(a) in the case of Article 1(1), at the time of conclusion of the contract;

…

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

8 Article 5 of the Directive provides:

'1. The consumer shall have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law. It shall be sufficient if the notice is dispatched before the end of such period.

2. The giving of the notice shall have the effect of releasing the consumer from any obligations under the cancelled contract.'

9 Article 7 of the Directive states:

'If the consumer exercises his right of renunciation, the legal effects of such renunciation shall be governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received.'

National legislation

10 The Directive was transposed into German law by the Law on the cancellation of doorstep transactions and analogous transactions (Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften) of 16 January 1986 (BGBl. 1986 I, p. 122).

11 In the version of that law applicable at the material time (the 'HWiG'), Paragraph 1(1) of the HWiG provided:

'Where the customer was induced to make a declaration of intention to conclude a contract for a service for valuable consideration:

1. by oral negotiations at his place of work or in his private home,

…

that declaration of intention takes effect only if the customer does not give written notice cancelling it within a period of one week.'

12 Paragraph 3(1) of the HWiG provides:

'In the event of cancellation, each contracting party shall return to the other whatever it has received. Damage to or loss of the object or any other matter preventing the return of the object shall not preclude cancellation. If the customer is liable for the damage, loss or other matter preventing return, he shall pay the difference in value or the value of the object to the other contracting party.'

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

13 On 23 July 1991, following a doorstep transaction conducted with a representative of Roland Steuerberatungs GmbH ('the Roland company'), Mr von der Heyden entered a closed-end real property fund as a partner in exchange for a capital investment of DEM 384 044. The object of that fund, established in the form of a civil-law partnership and composed of 46 partners, was the repair, modernisation and management of a property in Berlin. At the time of Mr von der Heyden's entry, that fund was managed by the Roland company.

14 On 6 August 2002, Mr von der Heyden terminated without notice his participation in that partnership and, pursuant to Article 3 of the HWiG, cancelled his membership of it.

15 Friz, as manager of that real property fund, claimed from Mr von der Heyden payment, on account of the negative severance balance, of a sum of EUR 16 319, corresponding to the difference between the value of the initial investment paid by that latter at the date he entered that partnership and his share of the losses which had been incurred by that partnership at the date that membership was cancelled.

16 Although the court of first instance allowed that claim, the appellate court dismissed it on appeal by Mr von der Heyden. The appeal court took the view that the exercise of the right of cancellation granted to a partner could not create for that partner an obligation to pay the partnership concerned. Such a requirement would infringe the provisions of the Directive according to which, following the consumer's exercise of his right of cancellation, he should not be subject to any more obligations under the cancelled contract and what had been received in performance of the contract had to be restored.

17 Friz then brought an appeal on a point of law against that decision before the Bundesgerichtshof (Federal Court of Justice). In its order for reference, that court takes the view that, in accordance with the national case-law, where a partner who has joined a partnership following a doorstep transaction cancels his membership of a real estate fund, the effect of that cancellation is not completely to release the consumer from all his contractual obligations (*ex tunc* effects), but the consequence is that that partner is bound by the obligations entered into until he declared the cancellation (*ex nunc* effects).

18 According to that case-law, the exercise of the right of cancellation by a consumer does not result in 'the restoration of the *status quo ante*', as required, by contrast, by Article 5(2) of the Directive as interpreted by the Court (see, inter alia, Case C-350/03 *Schulte* [2005] ECR I-9215, paragraphs 88 and 92).

19 Those were the circumstances in which, taking the view that the outcome of the proceedings before it is dependent on the interpretation of Articles 1(1) and 5(2) of the Directive, the Bundesgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must … Article 1(1) of [the] Directive … be interpreted as meaning that it applies to a consumer's entry into a partnership, commercial partnership, association or

cooperative if the principal purpose of joining is not to become a member of the partnership, association or cooperative but – as frequently applies in particular in relation to participation in a closed-end real property fund – participation as a member is simply another means of capital investment or of obtaining services which are typically the object of reciprocal contracts?

2. Must Article 5(2) of [the] Directive … be interpreted as meaning that it precludes a legal effect under national (judge-made) law within the meaning of Article 7 of the Directive which states that, where a consumer becomes a member following a doorstep transaction, the consequence is that, if the membership is cancelled, the consumer cancelling the membership has a claim against the partnership, association or cooperative, calculated at the time that the cancellation takes effect, to his severance balance, that is, a sum corresponding to the value of his interest in the partnership, association or cooperative at the time of retirement from membership, with the (possible) effect that, as a result of the economic development of the partnership, association or cooperative, he either gets back less than the value of his capital contribution or even finds himself exposed to payment obligations which, because the severance balance is negative, go beyond the loss of the capital contribution paid?'

On the questions referred

Preliminary observations

20 It must be observed at the outset, as it was by Mr von der Heyden and the German Government, that, while the case in the main proceedings concerns the situation of a consumer's membership of a closed-end real property fund established in the form of a partnership, the questions asked by the referring court also cover other types

of partnership and associations, such as commercial partnerships, associations and cooperatives.

21 In this regard, it must be noted that, although in the light of the division of responsibilities in the preliminary ruling procedure, it is for the referring court alone to determine the subject-matter of the questions it proposes to refer to the Court, the latter has stated that, in exceptional circumstances, it can check the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction.

22 That is the case, inter alia, where it is quite obvious that the ruling sought by a national court on the interpretation of a Union law bears no relation to the actual facts of the main action or its purpose or where the problem submitted to the Court is hypothetical (see, to that effect, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case C-466/04 *Acereda Herrera* [2006] ECR I-5341, paragraph 48; and Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 53).

23 In the present case, it must be stated that the questions referred by the national court are hypothetical in so far as they also refer to a consumer's membership of a commercial partnership, an association and a cooperative.

24 The Court therefore has jurisdiction to rule on the present reference for a preliminary ruling only in so far as it concerns the situation at issue in the case in the main proceedings, namely a consumer's membership of a closed-end real property fund established in the form of a partnership.

The first question

25 By its first question, the referring court asks, in essence, whether the Directive applies to a contract, such as that at issue in the main proceedings, concerning a consumer's entry into a closed-end real property fund established in the form of a partnership and creating a contractual relationship between the consumer and the manager of that fund when, according to that court, the principal purpose of joining is not to become a member of that partnership, but is a means of capital investment.

26 In order to answer that question, it must be recalled that, under the second indent of Article 1(1) of the Directive, the latter directive applies, inter alia, to contracts concluded during a visit by a trader to the consumer's home where the visit does not take place at the express request of the consumer.

27 Article 2 of the Directive states that the term 'trader' for the purposes of that directive means a natural or legal person who acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader.

28 In the case in the main proceedings, it is apparent from the file submitted to the Court that Mr von der Heyden's declaration of membership of the real property fund at issue, managed at the time the contract was concluded by the Roland company in its commercial or professional capacity, was made by that consumer during a door-step-selling visit to his home. Entry to the fund was granted in exchange for a capital investment of DEM 384 044 transferred by Mr von der Heyden to a bank account held by that company.

29 It is also apparent from the file that that doorstep-selling visit was made by a representative of the Roland company, acting expressly as manager of the real property fund and earning a commission from that fund for every contract concluded with a new partner.

30 Accordingly, it must be held that a consumer's entry into a closed-end real property fund established in the form of a partnership, in circumstances such as those described by the referring court, is within one of the objective situations referred to in Article 1 of the Directive and falls, therefore, within the scope of that directive.

31 That conclusion cannot be called into question by the arguments of the German Government that, since the object of the real property fund was the repair, modernisation and management of a property, the declaration of membership of that fund was a contract concerning 'other rights relating to immovable property' within the meaning of Article 3(2)(a) of the Directive, a contract which, on that ground, did not fall within the scope of that directive.

32 In this connection, it should first be observed that it is settled case-law that derogations from the rules of European Union law for the protection of consumers must be interpreted strictly (see, inter alia, Case C-481/99 *Heininger* [2001] ECR I-9945, paragraph 31).

33 Therefore, it is sufficient to observe, from the evidence in the file, that the contract signed by Mr von der Heyden clearly does not concern any rights relating to immovable property, namely those which are the subject of the derogation provided for in Article 3(2)(a) of the Directive, but only entry into a real property fund by means of the acquisition of holdings in a partnership in exchange for a capital investment.

34 Accordingly, the answer to the first question is that the Directive applies to a contract, concluded in circumstances such as those at issue in the main proceedings, concerning a consumer's entry to a closed-end real property fund established in the form of a partnership when the principal purpose of joining is not to become a member of that partnership, but is a means of capital investment.

The second question

35 By its second question, the referring court essentially asks whether Article 5(2) of the Directive precludes a national judge-made law according to which, in the event of cancellation of membership of a closed-end real property fund established in the form of a partnership, entered into following a doorstep transaction, the consumer has a claim against that partnership, to his severance balance, calculated on the basis of the value of his interest at the date of his retirement from membership, and may therefore get back less than the value of his capital contribution or have to participate in the losses of that fund.

36 In order to answer that question, it must first be recalled that, under Article 5(1) of the Directive, the consumer has the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from the date on which the trader gave him written notice of the existence of such a right and of the procedure for its exercise.

37 Secondly, Article 5(2) of the Directive provides that notification by the consumer of the renunciation of the effects of his undertaking has the effect of releasing him from any obligations under the cancelled contract.

38 It follows that, if the consumer has been properly informed of his right of renunciation, he may be released from his contractual obligations by exercising his right of renunciation within the period provided for in Article 5(1) of the Directive, in accordance with the procedure laid down by national law.

39 On the other hand, as the Court has already held, where he did not receive that information, that period of not less than seven days does not start to run, so that the consumer can exercise his right of renunciation under Article 5(1) of the Directive at any time (see, to that effect, *Heininger*, paragraph 45).

40 In the present case, the referring court asked its question referring specifically to Article 5(2) of the Directive, and thus to the hypothesis that notification of the renunciation was made by the consumer in accordance with the procedure set out in paragraph 1 of that article.

41 In that context, the Bundesgerichtshof seeks to ascertain to what extent a national judge-made law, such as that at issue in the main proceedings, can restrict the legal effects of the exercise of the right of renunciation provided for in Article 5(1).

42 In this connection, as set out in Article 7 of the Directive, the legal effects of the exercise of the right of renunciation by the consumer are governed by national laws.

43 It also follows from the case-law that, while the consequences of any such renunciation fall within the scope of national law, the Member States must nevertheless exercise their power in that regard in accordance with European Union law and, in

particular, with the rules of the Directive interpreted in the light of its objective and in such a way as to ensure that it is fully effective. In the same way, when hearing a case between individuals, the national courts are required to interpret the whole body of rules of national law 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 it (see, in particular, to that effect, *Schulte*, paragraphs 69, 71 and 102).

44 Nevertheless, as the Court has already specified, while there is no doubt that the aim of the Directive is to protect consumers, that does not imply that that protection is absolute. Thus, both the general structure of the Directive and the wording of several of its provisions indicate that such protection is subject to certain limits (see Case C-412/06 *Hamilton* [2008] ECR I-2383, paragraphs 39 and 40).

45 As regards the consequences of the exercise of the right of renunciation in particular, the Court has indeed accepted that notification of the cancellation has the effect, both for the consumer and for the trader, of the restoration of the *status quo ante* (see, to that effect, *Schulte*, paragraph 88). However, the fact remains that there is nothing in the Directive to preclude the consumer, in certain specific cases, from having obligations to the trader and, depending on the circumstances, from having to bear certain consequences resulting from the exercise of his right of cancellation (see, to that effect, *Schulte*, paragraph 93).

46 It is necessary to ascertain in the light of those considerations whether the Directive does not preclude a national rule that the consumer who cancels his membership of a closed-end real property fund established in the form of a partnership is the owner of a right in respect of that partnership calculated according to the value of his interest at the date of his retirement from membership of it.

47 That seems to be the case as regards the national rule at issue in the main proceedings.

48 As the Bundesgerichtshof observed in its decision for reference, that rule is intended to ensure, in accordance with the general principles of civil law, a satisfactory balance and a fair division of the risks among the various interested parties.

49 Specifically, first, such a rule offers the consumer cancelling his membership of a closed-end real property fund established in the form of a partnership the opportunity to recover his holding, while taking on a proportion of the risks inherent to any capital investment of the type at issue in the main proceedings. Secondly, it also enables the other partners or third party creditors, in circumstances such as those of the main proceedings, not to have to bear the financial consequences of the cancellation of that membership, which moreover occurred following the signature of a contract to which they were not party.

50 Having regard to the foregoing considerations, the answer to the second question is therefore that Article 5(2) of the Directive does not preclude, in circumstances such as those of the main proceedings, a national law according to which, in the event of cancellation of membership of a closed-end real property fund established in the form of a partnership, entered into following a doorstep transaction, the consumer has a claim against that partnership, to his severance balance, calculated on the basis of the value of his interest at the date of his retirement from membership of that fund, and may therefore get back less than the value of his capital contribution or have to participate in the losses of that fund.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises applies to a contract, concluded in circumstances such as those at issue in the main proceedings, concerning a consumer's entry to a closed-end real property fund established in the form of a partnership when the principal purpose of joining is not to become a member of that partnership, but is a means of capital investment.**

2. **Article 5(2) of the Directive does not preclude, in circumstances such as those of the main proceedings, a national law according to which, in the event of cancellation of membership of a closed-end real property fund established in the form of a partnership, entered into following a doorstep transaction, the consumer has a claim against that partnership, to his severance balance, calculated on the basis of the value of his interest at the date of his retirement from membership of that fund, and may therefore get back less than the value of his capital contribution or have to participate in the losses of that fund.**

[Signatures]