OPINION OF ADVOCATE GENERAL LÉGER
delivered on 28 October 1999 *

1. This request for a preliminary ruling concerns 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 [1] (hereinafter 'Directive 87/102' or 'the Directive'). [2]

The Landgericht Potsdam (Potsdam Regional Court), Germany, wishes to know whether the Directive is applicable to a contract of guarantee concluded by a 'consumer' if it serves to secure the repayment of credit granted to a third party by a commercial establishment.

I — The legal framework

Directive 87/102

2. Directive 87/102 guarantees consumers within the Member States a minimum standard of protection in the area of consumer credit.

3. Article 1 of the Directive provides:

'1. This Directive applies to credit agreements.

2. For the purpose of this Directive:

(a) "consumer" means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession;

(b) "creditor" means a natural or legal person who grants credit in the course of his trade, business or profession, or a group of such persons;

(c) "credit agreement" means an agreement whereby a creditor grants or promises to grant to a consumer a

* Original language: French.

1 — OJ 1987 L 42, p. 48.

2 — Directive 87/102 has been amended twice, by Council Directive 90/88/EEC of 22 February 1990 (OJ 1990 L 61, p. 14), and by Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 17). Unless otherwise stated, the terms 'Directive 87/102' or 'Directive' are used to refer to Directive 87/102, as amended by the two texts cited above.

credit in the form of a deferred payment, a loan or other similar financial accommodation.

...

(d) "total cost of credit to the consumer" means all the costs, including interest and other charges, which the consumer has to pay for the credit;

(e) "annual percentage rate of charge" means the total cost of the credit to the consumer, expressed as an annual percentage of the amount of the credit granted and calculated in accordance with [the provisions of the Directive].'

4. Under Article 2 of the Directive 87/102:

'1. This Directive shall not apply to:

...

(b) hiring agreements except where these provide that the title will pass ultimately to the hirer;

...

(f) credit agreements involving amounts less than 200 ECU or more than 20 000 ECU;

...'

5. Under Article 4 of Directive 87/102:

'1. Credit agreements shall be made in writing. The consumer shall receive a copy of the written agreement.

2. The written agreement shall include:

(a) a statement of the annual percentage rate of charge;

(b) a statement of the conditions under which the annual percentage rate of charge may be amended.

...

(c) a statement of the amount, number and frequency or dates of the payments which the consumer must make to repay the credit, as well as of the payments for interest and other charges; the total amount of these payments should also be indicated where possible;

(d) a statement of the [costs connected with the credit] which were not included in the calculation of the annual percentage rate of charge but which have to be paid by the consumer in given circumstances, together with a statement identifying such circumstances ...

3. The written agreement shall further include the other essential terms of the contract.

By way of illustration, Annex [I] to this directive contains a list of terms which Member States may require to be included in the written agreement as being essential.'

6. Under Annex I of Directive 87/102, the list of 'other essential terms of the contract' includes:

'1. [In the case of] credit agreements for financing the supply of particular goods and services:

(i) a description of goods or services covered by the agreement;

(ii) the cash price and the price payable under the credit agreement;

(iii) the amount of the deposit, if any, the number and amount of instalments and the dates on which they fall due ...

(iv) an indication that the consumer will be entitled, as provided in Article 8 [of the Directive], to a reduction if he repays [the credit] early;

(v) who owns the goods (if ownership does not pass immediately to the consumer) and terms on which the consumer becomes owner of them;

(vi) a description of the security required, if any;

(vii) the cooling-off period, if any;

(viii) an indication of the insurance(s) required, if any, and, when the choice of the insurer is not left to the consumer, an indication of the cost thereof;

(ix) the obligation to the consumer to save a certain amount of money which must be placed in a special account.

...'

7. Article 15 of Directive 87/102 states:

'[T]his Directive shall not preclude Member States from retaining or adopting more stringent provisions to protect consumers consistent with their obligations under the Treaty.'

National legislation

8. The Federal Republic of Germany transposed the Directive into national law by the Verbraucherkreditgesetz of 17 December 1990 [3] (Consumer Credit Law, hereinafter 'the VerbrKrG').

9. Under Paragraph 1, the VerbrKrG applies to credit agreements concluded '... between a person who grants credit in the exercise of his trade or profession (creditor) ... and a natural person unless the credit is ... for a commercial or independent professional activity in which that person is already engaged (consumer)'. [4]

The German legislation thus protects not only natural persons who apply for credit with a view to financing the establishment of a future commercial or independent professional activity, but also natural persons who apply for credit for private purposes. On the other hand, it does not cover natural persons who apply for credit with a view to financing an existing trade or independent professional activity.

3 — BGBl. I, p. 2840.

4 — Paragraph 1(2) of the VerbrKrG defines a 'credit agreement' as '... an agreement whereby a creditor grants or promises to grant to a consumer for consideration a credit in the form of a loan, a deferral of payment, or other similar financial accommodation.'

10. Paragraph 7 of the VerbrKrG gives the consumer the right to cancel the credit agreement within a specified period of time. [5] The time-limit is set at one week starting from the day when the consumer has been properly informed of his right to cancellation. If the consumer has not received such information, he may exercise his right to cancellation throughout the duration of the credit agreement, but at the latest, within a year of concluding the credit agreement.

II — The facts and the main proceedings

11. On 8 December 1993, the firm Berliner Kindl Brauerei AG (hereinafter 'the Brewery') granted Mr Diesterbeck (otherwise referred to as 'the principal debtor') a loan of DEM 32 000 as well as the lease of a property of the value of DEM 58 523. The purpose of concluding these agreements was to enable the principal debtor to finance the opening of a restaurant.

12. By a declaration in writing dated 20 December 1993, Mr Siepert gave a guarantee in respect of the obligations of Mr Diesterbeck to the Brewery up to a maximum amount of DEM 90 00. It is common ground that this declaration was not made in connection with any trade or profession engaged in by Mr Siepert. [6] Furthermore, he was not informed of his right to cancel the declaration of guarantee. [7]

13. In June 1994 Mr Siepert withdrew his consent. At a meeting with an employee of the Brewery, he made it clear that he no longer wished to act as guarantor for Mr Diesterbeck and withdrew his declaration of guarantee. [8]

5 — Paragraph 7 of the VerbrKrG is worded as follows:
'1. A declaration by a consumer of his intention to conclude a credit agreement is only effective if he does not cancel it in writing within one week.
2. In order to comply with this time-limit it shall be sufficient to send notice of cancellation within the relevant period. The time-limit shall not begin to run until the consumer has received under separate cover a clearly printed notice for signature informing him of the provisions of subparagraph 1, his right of withdrawal and stating the name and address of the person to whom notice of cancellation should be sent. If the consumer is not given such notice as is required by subparagraph 2, the right of cancellation shall not be extinguished until both parties have fully performed their obligations, subject to a maximum of one year from the time when the consumer declared his intention to conclude the credit agreement.'

6 — Point I.1 of the order for reference.

7 — Point I.2 of the order for reference.

8 — The Brewery categorically denied this point of fact in its written observations (points 1 and 2). It maintains that Mr Siepert never actually cancelled his declarations of guarantee, even orally. On this matter it must be remembered that the procedure under Article 177 of the EC Treaty (now Article 234 EC) is based on a clear separation of functions between national courts and the European Court of Justice and that any procedures to determine or establish the truth of the facts of the case is the exclusive responsibility of the national court (see in particular the judgments in Case 13/68 *Salgoil* [1968] ECR p. 453, 459-461; Case 104/77 *Oehlschläger* [1978] ECR 791, paragraph 4; Case C-235/95 *Dumon and Froment* [1998] ECR I-4531, paragraph 25, and Cases C-175/98 and C-177/98 *Lirussi and Bizarro* [1999], I-6881, paragraph 37). Only this Court may make a ruling on the interpretation or validity of a Community provision on the basis of the facts outlined by the national court (see in particular the judgments in *Oehlschläger*, cited above, paragraph 4 in Case C-30/93 *AC-ACTEL Electronics Vertriebs* [1994] ECR I-2305, paragraph 16 and in Case C-352/95 *Phytheron International* [1997] ECR I-1729, paragraph 11). In the reference for preliminary ruling (point I.2) the Landgericht Potsdam stated that: 'At a meeting at the end of June 1994 the defendant [Mr Siepert] informed one of the plaintiff's [the Brewery's] employees that he did not wish to give any guarantee whatsoever and that he was revoking his declarations in this regard'. The national court also dismissed an argument by the brewery that an oral cancellation of the declarations of guarantee on the part of Mr Siepert was not valid under national law (point III.1 of the order for reference). In these circumstances, neither I — any more than the Court — may question the facts of the case without encroaching upon the duties of the national courts with responsibility for deciding the dispute in the main action.

14. As Mr Diesterbeck failed to discharge his obligations, the Brewery decided to terminate the loan agreement and to commence legal proceedings to recover the debt. It thus obtained an order that the principal debtor should pay it the sum of DEM 28 952.43.

15. The Brewery also sued Mr Siepert for payment of this sum under the contract of guarantee.

16. On 8 December 1997 the Landgericht Potsdam, in a judgment in default, ordered Mr Siepert to pay that sum.

17. Mr Siepert, however, applied to have that judgment set aside. He claims that he validly cancelled the contract of guarantee within the period of one year prescribed in Paragraph 7 of the VerbrKrG.

18. In its order for reference, the Landgericht Potsdam notes that the loan agreement concluded between the Brewery and the principal debtor falls within the scope of the VerbrKrG. That court, however, is not clear as to whether the provisions of the German legislation can be applied to the contract of guarantee concluded by Mr Siepert.

III — Question referred for a preliminary ruling

19. As the Landgericht Potsdam considered it necessary to establish the scope of Directive 87/102 in order to rule on this point, it decided to stay proceedings and submit the following question to this Court:

'Does a contract of guarantee concluded by a natural person not acting in the course of a trade or profession fall within the scope of 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) if it serves to secure the repayment of a debt which the principal debtor did *not* incur in the course of a trade or profession already being pursued by him?'

IV — Jurisdiction of the Court

20. At the hearing the Brewery disputed the admissibility of the order for reference.

21. It maintains that, quite apart from the question referred, Directive 87/102 is not applicable to the main proceedings.

Firstly, the Brewery claims that the Directive defines a 'consumer' as a natural person acting for purposes outside his trade or profession. Therefore it cannot apply to an individual who, as in this case, is applying for credit with a view to financing the establishment of a commercial activity. This type of 'consumer' is protected only by the German legislation in question.

Secondly, it claims that the Directive does not apply to credit agreements where the sum concerned is greater than ECU 20 000. The loan taken out by the principal debtor exceeds this limit as it concerns a total sum of DEM 90 523, or ECU 46 903.[9] Nevertheless, it says, the agreements in question fall within the scope of the VerbrKrG. The German legislation sets a higher limit than does the Directive for credit intended to finance the establishment of a trade or profession, namely DEM 100 000.

Thirdly the Brewery maintains that the Directive does not give the consumer the right to cancel the credit agreement. Therefore, even assuming that the protection afforded by the Directive extends to a guarantee, Mr Siepert cannot in any event rely on Community law in order to cancel his declaration of guarantee. Only Paragraph 7 of the VerbrKrG affords him that possibility.

The Brewery concludes by stating that the main proceedings do not fall within the ambit of the Directive, but solely within the provisions of the VerbrKrG.

22. The Brewery's arguments raise at first sight an issue analogous to that which gave rise to the line of case-law beginning with the decision in *Dzodzi*.[10] The Brewery is essentially questioning whether the Court has jurisdiction under Article 177 of the Treaty to interpret Directive 87/102 when the main proceedings do not fall within the scope of the Directive.

23. Under that line of case-law, 'the Court ... [holds] that it has jurisdiction to give preliminary rulings on questions concerning Community provisions in situations where the facts of the cases being

9 — On the date when the agreement was signed between the Brewery and the principal debtor, 8 December 1993, the rate of exchange between the ecu and the DEM was ECU 1 to DEM 1.93002.

10 — In connection with this case-law, dating back to 1985, see the judgments in Case 166/84 *Thomasdünger* [1985] ECR 3001; Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763; Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003; case C-384/89 *Tomatis et Fulchiron* [1991] ECR I-127; Case C-88/91 *Federconsorzi* [1992] ECR I-4035; Case C-73/89 *Fournier* [1992] ECR I-5621; Case C-346/93 *Kleinwort Benson* [1995] ECR I-615; Case C-28/95 *Leur-Bloem* [1997] ECR I-4161; Case C-130/95 *Giloy* ECR I-4291 and Case C-247/97 *Schoonbroodt* [1998] ECR I-8095.

considered by the national courts [are] outside the scope of Community law but where those provisions [have] been rendered applicable by domestic law ...' [11]

The Court has also ruled that: '[T]he Court of Justice has jurisdiction under Article 177 of the Treaty to interpret Community law where the situation in question is not governed directly by Community law but the national legislature, in transposing the provisions of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that it has aligned its domestic legislation with Community law.' [12]

24. However, I do not consider this line of case-law to be relevant in this instance. [13]

25. It [14] applies to instances where the authorities of a Member State have, *on their own initiative* and *unilaterally*, extended the scope of Community law to situations which *Community law was not intended to govern.*

Thus, in the *Gmurzynska-Bscher* case, [15] the German legislature referred to the Common Customs Tariff Nomenclature — applicable to imports from third countries — to determine the rate of a national tax applicable to the importation of goods from another Member State.

Similarly, in the *Dzodzi* case, [16] Belgian law extended the benefit of certain Community rights — in particular the right of residence — to foreign spouses of Belgian nationals even where a Belgian national had never exercised his right to freedom of movement within the Community.

In the *Leur-Bloem* case [17] likewise, the Netherlands legislature had extended the

11 — Judgment in *Schoonbroodt*, cited above, paragraph 14.

12 — Judgment in *Leur-Bloem* case, cited above, point 1 of the operative part.

13 — The *Dzodzi* case aroused much discussion amongst those with an interest in Community law. Amongst the opinions of the Advocates General, see the Opinion of Advocate General Darmon in the *Dzodzi* and *Gmurzynska-Bscher* cases cited above; the Opinion of Advocate General Tesauro in the *Kleinwort Benson* case cited above, and the Opinion of Advocate General Jacobs in the *Leur-Bloem* and *Giloy* cases cited above. See in particular in related works of reference Rodière P., 'Sur les effets directifs du droit (social) communautaire', *Revue trimestrielle de droit européen*, 1991, p. 565 to 586; Martin D., 'Du bon usage de l'article 177 du Traité de Rome', *Revue de jurisprudence de Liège, Mons et Bruxelles*, 1991, p. 189 to 191; Simon D., note sous les arrêts Dzodzi and Gmurzynska-Bscher, cited above, *Journal du droit international*, 1991, p. 455 to 457, and Bravo-Ferrer Delgado M. and La Casta Munoa N., note sous les arrêts Dzodzi et Gmurzynska-Bscher, cited above, *Common Market Law Review*, 1992, p. 152 to 159.

14 — With the exception of the *Federconsorzi* and *Fournier* judgments mentioned above which occupy a special position in the Court's case-law (on this point see the Opinions of Advocate General Jacobs in the *Fournier* case cited above, points 17 to 20 and the *Leur-Bloem* and *Giloy* cases cited above, point 77).

15 — Cited above.

16 — Cited above.

17 — Cited above.

system of Directive 90/434/EEC [18] — applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States — to 'internal' merger operations between Netherlands companies.

26. However, the present case differs fundamentally from the above cases.

Directive 87/102 provides for a minimum standard of harmonisation. It explicitly authorises Member States to retain or adopt more stringent provisions for the protection of consumers.

Accordingly, by extending the application of the Directive to persons and situations not expressly covered by it, the German authorities have not acted autonomously or unilaterally, but in pursuance of the Directive itself and in a manner entirely consistent with the intentions of the Community legislature. The 'extension' of the scope of the Directive effected by the German authorities accordingly finds a basis in Community law.

Furthermore, this extension clearly took place within the limits of the area the Directive was intended to cover, that is consumer credit. [19]

27. In these circumstances I consider that the credit agreements concluded by the parties to the main proceedings fall within the scope of Directive 87/102 and, more specifically, Article 15 which contains the provision allowing wider protection than the minimum prescribed.

28. I would therefore propose that the Court should declare it has jurisdiction to give a preliminary ruling on the question referred to it.

V — Reply to the question referred for a preliminary ruling

29. The national court is essentially asking whether the Directive can be applied to a contract of guarantee concluded by a natural person which secures the repayment of credit granted to a third party by a commercial establishment.

18 — Council Directive of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1).

19 — On this matter, see arguments expounded by Advocate General Jacobs in his Opinions in the *Leur-Bloem* and *Giloy* cases, cited above, point 80.

30. The question is not entirely unfamiliar to the Court. In the *Dietzinger* case,[20] a similar question was referred to it on Council Directive 85/577/EEC on consumer protection in the context of 'doorstep selling'.[21] The Court held that Directive 85/577 does apply to contracts of guarantee concluded by a consumer away from the premises of a financial institution when guaranteeing repayment of a debt contracted by another consumer under a contract governed by that directive.[22]

31. The Court is therefore being asked whether Directive 87/102 may be interpreted in the same way as Directive 85/577.

32. To reply to this question, in accordance with methods of interpretation accepted by the Court,[23] the wording, scheme and objectives of Directive 87/102 must be examined.

20 — Case C-45/96 [1998] ECR I-1199, hereinafter 'the *Dietzinger* judgment').

21 — 1 —Council Directive of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, p. 31).

22 — Judgment in *Dietzinger*, paragraph 17 to 22.

23 — On methods of interpretation of the Court of Justice, see in particular Mertens de Wilmars J., 'Réflexions sur les méthodes d'interprétation de la Cour de justice des Communautés européennes', *Cahiers de droit européen*, 1986, p. 5 to 20; Fennelly N., 'Legal interpretation at the European Court of Justice', *Fordham international law journal*, 1997, p. 656 to 679, and Murray J., 'Observations on the Interpretative Process of the Court of Justice', *Community law in practice. Including facets of consumer protection law*, 1997, p. 41 to 61.

Wording of Directive 87/102

33. Directive 87/102 explicitly defines its scope.

34. According to Article 1, it applies to 'credit agreements', or an agreement 'whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation'.

35. As so defined, the concept of a 'credit agreement' does not cover a guarantee.

36. A guarantee constitutes a personal security. More precisely, what is concerned is an agreement by which a person makes a commitment to the creditor, in the form of a guarantee, to discharge the obligation of the principal debtor should the latter have failed to do so himself.[24] Therefore a guarantee represents neither 'a loan', nor 'a deferred payment', nor 'other similar financial accommodation' within the meaning of the Directive.

24 — See Cornu G., *Vocabulaire juridique*, Presses universitaires de France, Paris, 1987, p. 125.

37. Furthermore, in so far as the guarantee commitment does not entail any *quid pro quo* on the part of the creditor or the principal debtor, the guarantee also constitutes a unilateral contract.

38. Admittedly, in the *Dietzinger* judgment the Court held that the unilateral nature of such a contract could not be permitted to exclude a guarantee from the scope of Directive 85/577. The Court stated that 'nothing in the wording of the directive requires that the *person concluding the contract* under which goods or services are to be supplied be the person to whom they are supplied'. [25]

39. However, Directive 87/102 contains a series of provisions which indicate that its scope is strictly limited to synallagmatic agreements.

Thus, within the framework of the definition of 'credit agreement', the words 'a creditor grants or promises to grant to a consumer a credit' already make it clear that the contractual relations governed by the Directive are bilateral relations.

Likewise, Article 1(2)(d) of the Directive provides that 'the total cost of credit to the consumer' means 'all the costs ... which *the consumer has to pay for the credit*'. [26]

Article 4(2)(c) of the Directive provides that 'the written agreement shall include ... a statement of the amount, number and frequency ... of the payments which *the consumer must make to repay the credit as well as of the payments for interest*'. [27]

A further example is furnished by Article 8 of the Directive which provides that 'The consumer shall be entitled to discharge his *obligations under a credit agreement* before the time fixed by the agreement'. [28]

40. It is clear from the wording of these provisions that the agreements governed by Directive 87/102 are characterised by the existence of reciprocal obligations between the parties concerned. On this point, I do not consider that the *Dietzinger* judgment can be transposed to this case.

41. The provisions also make it possible to define more closely the concept of 'consu-

25 — Point 19 (my italics). In his Opinion in the *Dietzinger* case, Advocate General Jacobs had however stated: 'It is apparent from Article 1 as a whole [of Directive 85/577] ... that the contracts covered are those under which a trader supplies goods or services to a consumer' (point 19).

26 — My italics.

27 — My italics.

28 — My italics.

mer' which appears in Article 1 of the Directive.

Directive 87/102 appears to adopt a very broad definition of the term 'consumer'. It covers 'a natural person ... acting for purposes which can be regarded as outside his trade or profession.' At first sight, a natural person who accepts to provide a guarantee on the obligations of a third party outside his profession can therefore be regarded as 'a consumer' within the meaning of the Directive.

However, the provisions cited above [29] considerably reduce the scope of this definition. Their wording indicates very clearly that, in the context of the Directive, the consumer is the principal debtor. Whenever the Community legislature refers to 'the consumer', it confers rights or obligations on him which are specifically stated as those which fall to the *beneficiary* or *recipient* of the credit. The legislature therefore takes the view that the term 'consumer' within the meaning of Directive 87/102 should be understood as the person to whom the credit is granted.

The *travaux preparatoires* confirms this interpretation. In its proposal for a directive, the Commission had suggested defining a credit agreement as 'an agreement whereby a creditor grants a consumer credit ... and *under which the consumer repays the credit*, including any interest and charges ...' [30]

42. In so far as the guarantor is not party to the credit agreement, he cannot be considered as a 'consumer' under Directive 87/102.

43. It must therefore be considered, that, on a literal interpretation, Directive 87/102 cannot be applied to a contract of guarantee.

Scheme of Directive 87/102

44. In their written observations, the French Government [31] and the Commission [32] stressed that guarantees were not expressly excluded from the scope of Directive 87/102. In particular, they point out that it does not appear in Article 2 of the Directive which sets out different types of agreement and situations to which the

29 — Article 1(2)(a) and (d), Article 4(2)(c), and Article 8 of Directive 87/102.

30 — Article 1(2)(c) of amendments to the proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1984 C 183, p. 4, my italics).

31 — Point 4.1 of its observations.

32 — Point 6 of its observations.

directive is not applicable. The Commission concludes from this that the Community has not adopted any specific stance — favourable or unfavourable — with regard to guarantees.

45. I find it difficult to concur with the Commission on this point.

46. Directive 87/102 contains a number of references to real securities and personal securities.

Article 2(3), for example, provides '[certain] provisions [of the directive] shall not apply to credit agreements or agreements promising to grant credit, secured by *mortgage* on immovable property ...'. [33]

Similarly, Annex 1 to the Directive cites 'a description of the *security* required if any' [34] as one of the essential conditions governing a credit agreement which Member States may require to be notified in writing.

33 — My italics.

34 — Points 1(vi) and 4(ii) (my italics).

47. The proposals for a directive presented by the Commission to the Council also contained like references.

In its initial proposal, the Commission, for instance, had suggested that a credit agreement 'shall contain the essential contractual conditions and at least the following particulars ... details of the *security* required if any'. [35]

Similarly, the amended proposal for a directive provided that '[T]he written agreement shall contain at least ... an indication of the *security* required if any.' [36]

48. These references, taken together, show that, during the drafting of the directive, the Community legislature was aware of the existence of real securities and personal securities. In particular, it was conscious that the granting of credit is frequently subject to the condition that the consumer guarantee in one form or another the repayment of his debt. That being so, the

35 — Article 6(2)(a)(vii) of the proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1979 C 80, p. 4, my italics).

36 — Article 6(2)(a)(vii) of the amendments to the proposal for a Directive, cited above (my italics).

fact that the Directive contains no provision defining the status or treatment of the 'guarantees required' demonstrates the wish of the legislature not to include guarantees within the scope of the Directive.

49. Moreover, several Community institutions have adopted positions which bear out the intentions of the legislature still more clearly.

In 1995 and in 1997, the Commission presented two reports on the operation of Directive 87/102 and how Member States had transposed it into national law.[37]

In its two reports it notes that: 'Although Directive 87/102 does not deal with sureties, several Member States have taken measures [with respect to these]. The Commission proposes to extend to sureties certain of the obligations in regard to information laid down in the Directive.'[38]

The European Parliament, in its turn, has made a statement on the first Commission report in a resolution of 11 March 1997. On this matter, it 'points out that account needs to be taken of factual differences in comparison with [the] borrower *when extending* certain commitments laid down in Directive 87/102/EEC *to guarantors and sureties* ...'.[39]

50. As the Brewery has rightly pointed out, the Commission and the Parliament consider, in the documents cited above, whether *de lege ferenda* the provisions of the Directive must be extended to personal securities. It follows *de lege lata* that guarantees are excluded from the scope of the Directive.

51. As regards the other provisions of Directive 87/102, I intend to consider their function in the light of the objectives which they pursue.

37 — Commission Report of 11.05.95 on the operation of Directive 87/102 [COM(95) 117 final] and Commission Report of 24.09.97 on the operation of Directive 87/102 - COM(95) 117 final of 11.05.95. Summary report of reactions and comments [COM(97) 465 final].

38 — Report of 11 May 1995, cited above, point 345 (my italics). In its report of 24 September 1997, cited above, the Commission confirmed that:

39 — European Parliament Resolution of 11.03.97 on the Commission report on the operation of Directive 87/102 [COM(95)0117 - C4-0185/95] (OJ C 115, p. 27, point 16, my italics).

Objectives of Directive 87/102

52. Directive 87/102 pursues a general objective of consumer protection. [40] Its preamble provides:

'Whereas the programmes of the European Economic Community for a consumer protection and information policy provide, *inter alia*, that the consumer should be protected against unfair credit terms and that a harmonisation of the general conditions governing consumer credit should be undertaken as a priority; [sixth recital]

Whereas differences of law and practice result in unequal consumer protection in the field of consumer credit from one Member State to another' [seventh recital].

53. More specifically, Directive 87/102 aims to provide adequate information to the consumer on the cost and conditions of the credit. [41] Its ninth recital states:

'Whereas the consumer should receive adequate information on the conditions and cost of credit and on his obligations; whereas this information should include, *inter alia*, the annual percentage rate of charge for credit, or, failing that, the total amount that the consumer must pay for credit; whereas, pending a decision on a Community method or methods of calculating the annual percentage rate of charge, Member States should be able to retain existing methods or practices for calculating this rate, or failing that, should establish provisions for indicating the total cost of the credit to the consumer.' [42]

54. Most of the provisions of the Directive are designed therefore to enable the consumer to be precisely aware of the cost of the credit as well as any additional cost items.

Article 3 of the Directive provides that any advertisement, or any offer which is displayed at business premises, in which a

40 — Directive 87/102 also pursues a second objective, 'the establishment of a common market in consumer credit' (fifth recital). For this purpose it intends to remove distortion of competition between grantors of credit in the Community (second recital) as well as obstacles to the free movement of goods and services obtainable by consumers on credit (fourth recital).

41 — Directive 87/102 also provides for the adoption of certain requirements which are to apply to all forms of credit (10th recital).

42 — Directives 90/88 and 98/7 amended Directive 87/102 with a view to introducing a single method of calculating the annual percentage rate across the whole of the European Community.

person is offered credit in which any figures relating to the cost of the credit are mentioned — such as the rate of interest — shall mention the 'annual percentage rate of charge'. [43]

Similarly, Article 4 of the Directive requires that credit agreements be made in writing. In the written agreement, the consumer is to be informed of the amount, number and frequency of the payments which he must make to repay the credit. The agreement must also include a statement of the cost items which were not included in the calculation of the annual percentage rate but which have to be paid by the consumer. The written agreement must also contain the 'other essential terms of the contract.' Annex I to the Directive lists as examples of these terms, *inter alia*, the amount of the credit limit; the terms of repayment of the credit; the cash price and the price payable under the credit agreement; the amount of the deposit, if any, the number and amount of instalments and the dates on which they fall due; the cost of any insurance required to guarantee repayment of the credit, etc.

Obligations of this kind in regard to information are further to be found in Article 6 of the Directive. The first paragraph of the article provides that, 'where there is an agreement between a credit institution ... and a consumer for the granting of credit in the form of an advance on a current account ... the consumer shall be informed at the time or before the agreement is concluded ... of the credit limit if any [as well as] the annual rate of interest and the charges applicable ...'. Paragraph 2 provides: 'Furthermore, during the period of the agreement, the consumer shall be informed of any change in the annual rate of interest or in the relevant charges at the time it occurs.'

55. All these provisions are intended to inform consumers on the exact nature of their obligations. They aim, in particular, to make them aware of the exact amount which they are obliged to pay or repay under the credit agreement.

56. It follows that the Directive seeks in particular to enable consumers concluding and performing credit agreements to be fully aware of what is involved. It is also intended to protect them from certain risks inherent in consumer credit, such as any abusive practices by professional providers of credit, financial commitments undertaken without due reflection or what might be termed 'illusory purchasing power'.

57. A teleological interpretation of the Directive confirms therefore that the text is essentially aimed at protecting the recipients of credit.

43 — Directive 87/102 defines the 'annual percentage rate of charge' as 'the total cost of credit to the consumer, expressed as an annual percentage of the amount of the credit granted and calculated in accordance with Article 1a' [Article 1(2)(e)].

58. Some of the participants in these proceedings [44] have however claimed that Directive 87/102 was intended to afford the highest level of protection for consumers.

They maintain that the protection provided by the Directive should be extended to a guarantor when he gives a guarantee on a private basis, outside of his trade or profession. In the area of consumer credit, a guarantor is in a 'weak' position comparable to that of the borrower. He is often a friend or relative of the debtor who makes a commitment under emotional pressure. The need to protect the guarantor is all the greater as he agrees to be answerable for the repayment of the credit without this commitment giving rise to any reciprocal agreement on the part of the creditor or the principal debtor.

59. I am broadly sympathetic to the concerns expressed by those parties. However, quite apart from the fact that Directive 87/102 is not intended to apply to personal securities, it would seem that the extension they advocate is not such as to ensure appropriate protection for guarantors.

60. The risks to which personal sureties are exposed are of a different nature to those which characterise consumer credit. They arise essentially from insolvency on the part of the principal debtor as well as ignorance about the guarantee system.

61. Accordingly, appropriate protection of personal guarantors implies that they should be informed of matters other than the terms and amount of the credit. As the German [45] and Finnish [46] Governments have rightly pointed out, this information should relate in particular to the solvency of the debtor, the legal regime in the matter of guarantees (general framework, subsidiary guarantee, joint and several guarantees, etc.) and on the precise conditions under which the guarantor can be obliged to repay the credit. It might also be thought useful, where the borrower has taken out insurance to guarantee repayment of his debt, to inform the guarantor of any legal remedies available to him against the insurer.

62. From this point of view, the duties in regard to information laid down in Directive 87/102 do not therefore seem well adapted to the needs of personal guarantors who on a private basis commit themselves to repayment of consumer credit.

44 — See, *inter alia*, the observations by the Commission (point 7); M. Siepert's observations (point III.6), and the arguments expounded by the French Government during the oral procedure.

45 — Points 15 and 18 of its observations.

46 — Point 9 of its observations.

63. Several participants in these proceedings [47] also maintained that guarantees are closely bound up with credit agreements. They pointed out that in the *Dietzinger* judgment the Court based itself on the existence of this link in order to reach the conclusion that a guarantee could fall within the scope of Directive 85/577.

In fact, in the *Dietzinger* judgment, the Court held that 'the grant of a credit facility is indeed the provision of a service, the contract of guarantee being merely ancillary to the principal contract, of which in practice it is usually a precondition.' [48]

The Court held that: 'In view of the close link between a credit agreement and a guarantee securing its performance and the fact that the person guaranteeing repayment of a debt may either assume joint and several liability for payment of the debt or be the guarantor of its repayment, it cannot be excluded that the furnishing of a guarantee falls within the scope of the directive [85/77].' [49]

64. The furnishing of a guarantee is in fact closely connected to a credit agreement in two respects.

Firstly, on a financial level, credit organisations and financial establishments frequently agree to grant credit only if the recipient of the credit is able to guarantee repayment of his debt by means of a real security or personal security.

From a legal point of view, however, the furnishing of a guarantee constitutes a contract ancillary to the principal contract, in this case the credit agreement. The option for the creditor to take action against the guarantor depends therefore on the existence and the extent of the principal debt which the guarantor is securing.

65. I am not, however, convinced by the reasons for which the Court inferred from the existence of this close connection such that the furnishing of a guarantee could be considered to fall within the scope of Directive 85/577.

The grounds of the *Dietzinger* judgment on this point are, moreover, laconic. They are confined to outlining some of the characteristics of a guarantee — the fact that it is closely linked to the credit agreement and that the 'guarantor' may either assume joint and several liability for payment of the debt or be the guarantor of its repayment — in order to establish, almost automatically, the principle that a contract of guarantee may fall within the scope of Directive 85/577.

47 — See the observations of the Spanish Government (point 8); the observations of the French Government (point 4.2); the observations of the Commission (point III.1), and the observations of M. Siepert (point III.4).

48 — Point 18.

49 — *Dietzinger* judgment, point 20.

It is true that the reference to the ancillary nature of the guarantee shows that the *Dietzinger* judgment involved a very particular application of the maxim *accessorium sequitur principale.* [50] The Court held that where a credit agreement falls within the scope of Directive 85/577, the contract of guarantee should be tied to the outcome of the principal contract.

66. This, however, seems to me insufficient to justify in this instance bringing the guarantee within the scope of Directive 87/102. [51] It is clear from the wording, scheme and objectives of Directive 87/102 that that directive cannot apply to a contract of guarantee concluded for the purpose of guaranteeing repayment of consumer credit.

67. As Advocate General Jacobs rightly pointed out in his Opinion in the *Dietzinger* case:

'It is of course incontrovertible that the Directive [85/577] seeks to protect consumers. It does not however follow from that proposition that all consumers are protected in all circumstances by the Directive [85/577]: like other directives with consumer protection as their aim, the Directive [85/577] applies to certain transactions only ...' [52]

68. In the present case, Directive 87/102 applies to credit agreements. I do not believe it can be applied to contracts of guarantee.

69. In conclusion, I would — as Advocate General Jacobs did in his Opinion cited above [53] — draw the attention of the national court to the fact that my finding does not rule out the possibility of interpreting the VerbrKrG differently. Paragraph 15 of Directive 87/102 authorises Member States to retain or adopt more stringent provisions to protect consumers consistent with their obligations under the Treaty. Therefore, nothing in Community law would prevent the Landgericht Potsdam from concluding that, under *German law*, a contract of guarantee may fall within the scope of the *VerbrKrg*.

50 — This interpretation is confirmed by paragraph 22 of the *Dietzinger* judgment where the Court held: '... it is apparent from the wording of Article 1 of Directive 85/577 and from the ancillary nature of guarantees that the directive [85/577] covers only a guarantee ancillary to a contract whereby, in the context of "doorstep selling", a consumer assumes obligations towards the trader with a view to obtaining goods or services from him.'

51 — On the subject of Directive 85/577 see the arguments expounded by Advocate General Jacobs in his Opinion in the *Dietzinger* case.

52 — Point 39.

53 — Point 43.

Conclusion

70. On the basis of the foregoing consideration, I would propose that the Court rule as follows:

A contract of guarantee concluded by a natural person not acting in the course of his trade or profession and serving to secure repayment of a debt granted by a creditor to a third party does not fall within the scope of Council Directive 87/102/EEC of 22 December 1986 for the approximation of laws, regulations and administrative provisions of the Member States concerning consumer credit.