OPINION OF ADVOCATE GENERAL LÉGER delivered on 2 June 2005 [1]

1. Following the judgments in *Heininger* [2] and *Schulte*, [3] this reference for a preliminary ruling again concerns the interpretation of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (doorstep selling), [4] within the specific context of property investments made in Germany by private individuals during the 1990s.

2. In *Heininger*, the question before the Court was whether the Directive applied to a secured credit agreement, that is to say, a loan agreement entered into in order to finance the purchase of immovable property. The Court answered this question in the affirmative and concluded that the right of cancellation provided for in Article 5 of the Directive was available to a consumer who had entered into an agreement of that kind in a doorstep-selling situation. The Court also ruled that the period allowed for exercising the right of cancellation did not begin to run until the trader had given the consumer notice of his right to cancel the contract, as required by Article 4 of the Directive.

3. In *Schulte*, the question was whether a secured credit agreement and a contract for the purchase of immovable property can fall within the scope of the Directive when they form part of a single economic unit. Although the Court has not yet handed down its judgment, I have proposed, in my Opinion delivered on 28 September 2004, [5] that this question be answered in the negative. I recalled that the Directive expressly excludes from its scope contracts relating to the sale of immovable property and that, in this particular case, the main purpose of the financial transaction was to purchase an immovable property.

4. *Schulte* also relates to the consequences of the cancellation of the credit agreement. The question is whether, under Community law, the cancellation of the secured credit agree-

1 — Original language: French.

2 — Case C-481/99 [2001] ECR I-9945.

3 — C-350/03, pending before the Court.

4 — OJ 1985 L 372, p. 31 (hereinafter the 'Directive').

5 — Points 52 to 68.

ment can or should entail the cancellation of the property purchase contract. In this connection, I pointed out that, in so far as contracts relating to the sale of immovable property are excluded from the scope of the Directive, it is not possible to require, on the basis of the Directive, that the cancellation of the credit agreement should produce an effect, in one way or another, on the validity of the property purchase contract. [6]

5. The present case therefore relates to the consequences of cancellation not on the property purchase contract but on the credit agreement itself. The Hanseatisches Oberlandesgericht (Hanseatic Higher Regional Court) in Bremen (Germany) asks whether national law may, in the event of cancellation of the credit agreement, require the consumer immediately to repay the amount of the loan, with interest, when that loan has, on the instructions of the consumer, been paid directly by the bank to the vendor of the immovable property. [7]

I — Community law

6. The Directive aims to give consumers in the Member States a minimum degree of protection in relation to doorstep selling.

7. Article 1(1) states:

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

— during an excursion organised 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.'

6 — Ibid., points 74 to 97.

7 — This question was previously raised in *Schulte*. However, I considered it inadmissible since, in my view, the referring court had not sufficiently explained the underlying reasons (see my Opinion in *Schulte*, points 101 to 112).

8. On the other hand, under Article 3(2)(a), the Directive does not apply to 'contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property'.

9. Article 4 of the Directive states that the trader must inform the consumer of his right to cancel the contract within the period laid down in Article 5.

10. 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. ...

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

11. With regard to the consequences of cancellation, Article 7 of the Directive states that:

'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.'

II — National law

12. In Germany, the Directive was transposed into national law by the Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften (Law on the cancellation of doorstep transactions and analogous transactions) of 16 January 1986. [8]

13. Paragraph 3(1) of that law provides that 'in the event of cancellation, each contracting party shall return to the other whatever it has received'.

8 — BGBl. I, p. 122 (hereinafter the 'HWiG').

14. In addition, the German legislature transposed 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 [9] by enacting the Verbraucherkreditgesetz (Law on consumer credit) of 17 December 1990. [10] Paragraph 9 of this law provides that:

'1. A purchase agreement constitutes a transaction linked with the credit agreement if the credit serves to finance the purchase price and both agreements are to be regarded as a single economic unit. In particular, a single economic unit shall be presumed where the lender relies on the seller's cooperation in the preparation or conclusion of the credit agreement.

2. The consumer's declaration of intention to conclude the linked purchase agreement shall be valid only if the consumer does not revoke ... his declaration of intention to conclude the credit agreement.

The notice concerning the right of cancellation ... must state that, in the event of cancellation, the purchase agreement linked with the credit agreement will not be valid either ... . If the net amount of the credit has already been paid to the seller, the lender shall, in relation to the consumer and with regard to the legal effects of cancellation, be subrogated to the seller's rights and obligations arising from the purchase agreement ... .'

15. Paragraph 3(2), point 2, of the VerbrKrG states that certain provisions of that law, in particular Paragraph 9, do not apply to 'credit agreements in which credit is subject to the giving of security by way of a charge on immovable property and is granted on the usual terms for credits secured by a charge on immovable property and the intermediate financing of the same'.

III — The main proceedings and the questions referred for a preliminary ruling

16. At the beginning of the 1990s, a property development company purchased land at Steinenbronn, near Stuttgart (Germany), on which it built a 188-apartment hotel complex. The aim was to offer customers, especially businessmen, several weeks of self-catering accommodation on the fringe of the city of Stuttgart at prices which, because of reduced labour costs, would be lower than those asked by comparable hotels. It was intended that these apartments should be purchased by private individuals who would benefit from certain tax advantages.

9 — OJ 1987 L 42, p. 48.

10 — BGBl. I, p. 2840 (hereinafter the 'VerbrKrG').

17. To sell the apartments, the property company worked in collaboration with two institutions: a cooperative bank, the Crailsheimer Volksbank eG (hereinafter the 'Bank'), which was responsible for arranging loans for the private individuals concerned, and a marketing company, which itself relied on self-employed agents, including one referred to as 'W'.

18. In the three main actions, the tactics employed by the agent W were exactly the same: he called uninvited at the homes of the individuals concerned, described to them the savings that could be made by purchasing an apartment under advantageous tax arrangements, then invited them to sign a secured credit agreement with the Bank. It turned out that the incomes of those approached were often insufficient to cover the monthly repayments, but the intermediary assured them that the tax advantages of the package would offset the repayment difficulties. Thus, in the course of 1992, several secured credit agreements were concluded with the Bank.

19. Very soon, the hotel began to lose money. The various companies involved in building and operating the hotel went bankrupt and the investors, who were counting on the income from renting their apartments, were no longer able to repay the loan. It also emerged that there was no possibility of managing the apartments privately or individually. [11]

20. The Bank therefore decided to bring proceedings against the investors before the German courts and, in particular, the referring court. For their part, the investors decided to cancel their credit agreement on the grounds that it had been concluded in a doorstep-selling situation within the meaning of the Directive and the Bank had failed to notify them of their right to cancel the contract at the time it was concluded.

21. Three of those actions having been brought before it, the Hanseatisches Oberlandesgericht in Bremen considered that the cases turned on the interpretation of Community law and decided to submit the following four questions to the Court for a preliminary ruling:

'(1) Is it compatible with Article 1(1) of Directive 85/577/EEC for the rights of consumers, in particular their right of cancellation, to be made subject not only to the existence of a doorstep-selling situation as referred to in Article 1(1) of the Directive but also to additional criteria for responsibility, such as

11 — See order for reference (pp. 4 and 5).

a trader's deliberate use of a third party in the conclusion of the agreement or a trader's negligence in respect of the third party's conduct in connection with the doorstep selling?

(2) Is it compatible with Article 5(2) of Directive 85/577/EEC for a mortgage borrower, who not only concluded the loan agreement in a doorstep-selling situation but also arranged, in that situation, for the loan to be paid into an account which, in practice, is no longer at his disposal, to have to pay back the loan to the lender if the agreement is cancelled?

(3) Is it compatible with Article 5(2) of Directive 85/577/EEC for the mortgage borrower, if he is required to pay back the loan following cancellation, to have to do so not on the instalment repayment dates laid down in the agreement but immediately in a one-off sum?

(4) Is it compatible with Article 5(2) of Directive 85/577/EEC for the mortgage borrower, if he is also required to pay back the loan following cancellation, to have to pay interest on it at the normal market rate?'

IV — The subject-matter of the questions referred

22. The order for reference of the Hanseatisches Oberlandesgericht in Bremen contains two categories of questions.

23. The first relates to the cancellation conditions and specifically to whether the application of the Directive, and in particular the right of cancellation provided for in Article 5, can be made subject to conditions other than the mere existence of a doorstep-selling situation within the meaning of Article 1(1) of the Directive. [12]

24. The second relates to the effects of cancellation and specifically to whether, in the case of a single economic unit comprising, as in the present instance, a secured credit agreement and a contract for the purchase of immovable property, a national provision can require the consumer, in the event of cancellation of the credit agreement, immediately to repay the amount of the loan, with interest at the market rate, despite the fact that this amount was paid, on the instructions of the consumer, directly by the lending institution to the vendor of the immovable property. [13]

12 — First question referred for a preliminary ruling.

13 — Second, third and fourth questions referred for a preliminary ruling.

25. I shall examine these questions in turn.

V — The cancellation conditions (first question)

26. By its first question, the referring court asks, more specifically, whether Articles 1 and 2 of the Directive should be interpreted as meaning that, when a third party intervenes in the negotiation or in the conclusion of a contract in the name or on behalf of the trader, the application of the Directive can be made subject not only to the condition that the contract has been concluded in one of the objective situations envisaged in Article 1 (1) of the Directive but also to other, subjective conditions, and in particular the condition that the trader was or should have been aware of the conduct of the third party.

27. In the order for reference, the Hanseatisches Oberlandesgericht in Bremen explains that, in Germany, there is controversy as to the precise conditions under which the right of cancellation established by the Directive may be exercised.

28. In fact, in the light of settled case-law, the Bundesgerichtshof (Federal Court of Justice, Germany) considers that the right of cancellation provided for by the Directive can only be exercised if the situation is one of doorstep selling within the meaning of the Directive *and* if the trader can be 'held accountable' for that doorstep-selling situation. Hence, when, as in the present case, a contract has been concluded through the agency of a third party, the consumer can only assert his right of cancellation if it is established that the trader was aware or, at least, should have been aware of the conduct of the third party.

29. The referring court, like other German courts, considers that this condition of accountability is inconsistent with the Directive. It adds that, if it were applied to the present case, the defendants in the main proceedings would be unable to take advantage of their right of cancellation, since the intermediary W was the last link in a chain of several independent companies and was therefore completely unknown to the Bank.

30. The Hanseatisches Oberlandesgericht in Bremen therefore found it necessary to ask the Court whether the disputed condition was contrary to the Directive.

31. In my opinion, the judgment of 22 April 1999 in *Travel Vac* [14] should enable the Court to give a short answer to this question.

14 — C-423/97 [1999] ECR I-2195.

32. In that judgment, the Court concerned itself precisely with the conditions of exercise of the right of cancellation under Article 5 of the Directive. More particularly, it was asked whether it was sufficient, in order for a consumer to be able to exercise his right of renunciation, for the contract to have been concluded in circumstances such as those described in Article 1 of that directive, or whether it was also necessary to demonstrate the existence of other circumstances, such as the fact that the consumer had been influenced or manipulated by the trader.

33. Basing itself on the objective of the Directive, the Court answered this question in the negative.

34. In substance, it found that the Directive accorded a right of renunciation to the consumer specifically to protect him against the element of surprise inherent in doorstep selling. In fact, it follows from the preamble to the Directive [15] that 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 totally unprepared. Thus, the consumer is often unable to compare the trader's offer with other offers and hence unable to assess all the implications of his acts.

35. The Court therefore considered that, in order for the consumer to have the right of renunciation provided for by the Directive, it was sufficient for him 'to be in one of the situations described in Article 1' of the Directive and that 'specific conduct or an intention to manipulate on the part of the trader are not, however, required'. [16]

36. I therefore consider that the condition of accountability laid down by German law is inconsistent with the case-law of the Court.

37. Accordingly, I propose that the Court's reply should be that, where a third party intervenes in the negotiation or in the conclusion of a contract in the name or on behalf of the trader, the application of the Directive cannot be made subject to conditions other than those provided for in Article 1 of the Directive and, in particular, to the condition that the trader was, or should have been, aware of the conduct of the third party.

15 — Fourth recital.

16 — Paragraph 43.

VI — The effects of cancellation

38. The second, third and fourth questions referred for a preliminary ruling concern the effects of cancellation of the credit agreement.

39. In that connection, it should be recalled that, according to Article 7 of the Directive, '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 the goods received'.

40. It should also be noted that, under the terms of the first paragraph of Article 10 EC, Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EC Treaty or resulting from action taken by the institutions of the European Community. Such action includes directives which, according to Article 249(3) EC, are binding, as to the result to be achieved, upon each Member State to which they are addressed. This entails, for each of the Member States to which a directive is addressed, the obligation to adopt, within the framework of its national legal system, all the measures necessary to ensure the directive is fully effective, in accordance with the objective it pursues. [17]

17 — See, in particular, Case C-336/97 *Commission* v *Italy* [1999] ECR I-3771, paragraph 19; Case C-97/00 *Commission* v *France* [2001] ECR I-2053, paragraph 9; Case C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraph 15; and Case C-324/01 *Commission* v *Belgium* [2002] ECR I-11197, paragraph 18.

41. In the present case, the Hanseatisches Oberlandesgericht in Bremen considers that the measures adopted by the German authorities and, in particular, the case-law of the Bundesgerichtshof do not make it possible to ensure that the Directive is fully effective. According to the court, these measures are such as to deter the borrower from exercising his right of cancellation and are therefore inconsistent with the objective of consumer protection pursued by the Directive.

42. It considers that this is true of the repayment obligation imposed upon the consumer (point A below), the requirement of immediate repayment (point B below), and the obligation to pay interest at the market rate (point C below).

A — *The obligation to repay (second question)*

43. By its second question, the Hanseatisches Oberlandesgericht in Bremen seeks to know whether, in the case of a single financial transaction comprising a secured credit agreement and a contract for the purchase of immovable property, a national provision requiring the consumer, in the event of cancellation of the credit agreement, to repay the amount of the loan to the lending institution, despite the fact that this amount was paid, on the instructions of the consumer, directly by that lending institution to the vendor of the immovable property, is consistent with Articles 5 and 7 of the Directive.

44. The national court points out that, under Paragraph 3(1) of the HWiG, the consumer is obliged, in the event of the cancellation of a contract, to return to the other contracting party whatever he has received under that contract. It adds that, on the basis of this provision, the Bundesgerichtshof has concluded that, in a case such as the present, the borrower is obliged to repay the amount of the loan to the lending institution, even if that amount has been paid directly to a third party, in this case the property development company.

45. The national court considers that this obligation is incompatible with the effectiveness of the Directive. According to the court, its effect is to continue imposing on the consumer the obligations of the credit agreement, despite the fact that, since the loan was paid to a third party, the consumer never actually had the 'right of free disposal' over the amount of the loan. [18]

46. It seems to me that this question posed by the national court rests on a faulty premiss. In fact, in this particular case, it is wrong to say that the consumer did not have the amount of the loan at his disposal.

47. According to the case-file, [19] the loan sum was paid directly to the property development company by the Bank on the instructions of the borrower: the loan agreements signed by the defendants in the main proceedings expressly provide for the Bank to pay the net amount of the loan to the property development company in order to finance the purchase of the apartment in the hotel complex. In legal terms, therefore, the consumer freely chose to allocate the amount of the loan to the purchase of the apartment, and the Bank merely carried out his instructions in that regard.

48. In the light of those facts, it is hard to see how the consumer's obligation to repay could be incompatible with the effectiveness of the Directive.

49. In my opinion, this could only be so if the consumer had not received any consideration for his payment. In that case, the recipient of the payment would have been unjustly enriched and it might then fairly be asked whether such an outcome was not incompatible with the effectiveness of the Directive. However, in this particular case, it is common ground that the borrower received consideration for his payment, since he became the owner of an apartment in the hotel complex.

50. In reality, the problem in the main proceedings appears to arise not from the fact that payment was made directly to a

18 — Order for reference (pp. 13 and 14).

19 — Idem.

third party but rather from the fact that, in order to be able to repay the loan to the Bank, the consumers would have to resell their apartment, which, it seems, is proving difficult.

51. According to the information provided by the national court, [20] the apartment has lost much of its value. Moreover, it appears that the Bundesgerichtshof refuses to consider that the credit agreement and the contract to purchase the immovable property formed a 'single economic unit' within the meaning of Paragraph 9 of the VerbrKrG, which would have made it possible to accept that the cancellation of the credit agreement automatically triggered the cancellation of the purchase contract. [21]

52. However, as I pointed out in my Opinion in *Schulte*, the Directive does not contain any provision that could usefully be invoked in that respect.

53. On the one hand, Article 3(2)(a) of the Directive expressly excludes from its scope contracts for the sale of immovable property and thus the Directive cannot apply to a contract for the sale of immovable property, even if that contract forms part of a single financial transaction. [22] On the other hand, it is clear that, if the Directive excludes from its scope contracts for the sale of immovable property, it cannot require the cancellation of the secured credit agreement to entail, in one way or another, the annulment of the property purchase contract. [23]

54. In these circumstances, I believe that the repayment obligation at issue is not incompatible with the effectiveness of the Directive. I therefore suggest that the Court's reply to the second question should be that, in the case of a single financial transaction comprising a secured credit agreement and a contract for the purchase of immovable property, Articles 5 and 7 of the Directive do not preclude a national provision requiring the consumer, in the event of cancellation of the credit agreement, to reimburse the amount of the loan to the lending institution where, on the instructions of the borrower, this amount has been paid by that institution directly to the vendor of the immovable property.

B — *The obligation to repay immediately (third question)*

55. By its third question, the Hanseatisches Oberlandesgericht in Bremen seeks to deter-

20 — Order for reference (pp. 4 and 5).

21 — For further details, see my Opinion in *Schulte* (points 27 to 36).

22 — Ibid., points 51 to 68.

23 — Ibid., points 74 to 97.

mine whether Articles 5 and 7 of the Directive preclude a national provision requiring the consumer, in the event of the cancellation of a credit agreement, to make immediate repayment to the lending institution of the amounts received under that agreement.

56. The referring court explains that, according to the case-law of the Bundesgerichtshof, a consumer who cancels his credit agreement is required to repay the loan, no longer in instalments, as stipulated in the agreement, but immediately and all at once.

57. The referring court considers that this obligation is incompatible with the effectiveness of the Directive since it entails the immediate payment of a considerable sum, sometimes in excess of EUR 50 000, and would generally lead to the consumer's bankruptcy. The obligation to repay the loan immediately would thus have the effect of placing the consumer in a less favourable position than if he had continued to implement the credit agreement and pay the monthly instalments as agreed. In this respect, the obligation would be such as to deter the consumer from exercising his right of cancellation and would thus deprive the Directive of its practical effect.

58. For my part, I do not share the views of the national court.

59. Article 5(2) of the Directive plainly states that giving notice of cancellation 'shall have the effect of releasing the consumer from any obligations under the cancelled contract'.

60. It is clear, however, that the consumer's obligations, namely, the repayment of the capital and interest, can only be annulled if the status quo is restored. Otherwise the borrower would be unjustly enriched and for unscrupulous consumers the Directive would quickly become a means of unfairly enriching themselves. The obligation immediately to repay the sums received under the credit agreement therefore appears to be the logical consequence of the cancellation of that agreement. In this connection, moreover, it will be recalled that Article 7 of the Directive cites as a first example of the legal effects of renunciation — which must be governed by national law — the 'reimbursement' of payments for goods or services provided, together with the 'return' of goods received.

61. This repayment requirement also features in certain other Community texts, such as the proposed directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member

States concerning credit for consumers. [24] This provides for the consumer to have a period of 14 calendar days to withdraw his acceptance of the credit agreement. It stipulates, however, that exercise of this right of withdrawal obliges the consumer *'simultaneously* to return to the creditor the sums of money ... that he has received by virtue of the credit agreement'. [25]

62. Accordingly, I consider the obligation at issue not to be incompatible with the effectiveness of the Directive.

63. I therefore propose that the Court's reply to the third question should be that Articles 5 and 7 of the Directive do not preclude a national provision requiring that, in the event of the cancellation of a credit agreement, the consumer make immediate repayment to the lending institution of the amounts received under the agreement.

C — *Payment of interest at the market rate (fourth question)*

64. In its fourth and last question, the Hanseatisches Oberlandesgericht in Bremen asks whether a national provision which, in the event of the cancellation of a credit agreement, requires the consumer to repay to the lending institution not only the amounts received under the agreement but also interest on those amounts, calculated at the market rate, is inconsistent with Articles 5 and 7 of the Directive.

65. The referring court explains that, according to the case-law of the Bundesgerichtshof, a consumer who cancels his credit agreement must pay the lending institution interest, calculated at the market rate, on the amounts received under the agreement.

66. The referring court considers this obligation to be incompatible with the effectiveness of the Directive. It explains that the interest may amount to a considerable sum, especially where, as in the present case, cancellation occurs long after the conclusion of the agreement. The obligation to pay interest could therefore be regarded as a penalty imposed on the consumer for exercising his right of cancellation. The national court points out that in its judgment in *Travel Vac*, cited above, the Court held that the Directive precludes the inclusion in a contract of a clause imposing payment by the consumer of a lump sum for damage for the sole reason that the consumer has exercised his right of renunciation.

67. The referring court, and some German academic writers, therefore consider that the

24 — COM(2002) 443 final of 11 September 2002 (OJ 2002 C 331 E, p. 200).

25 — Article 11(3) (emphasis added).

obligation to pay interest is such as to deter the consumer from exercising his right of cancellation and thus deprives the Directive of its practical effect.

68. First of all, it should be pointed out that the solution reached in *Travel Vac* cannot be applied in this particular case.

69. In that judgment the measure at issue was a contractual clause requiring the payment of a lump sum for damage caused to the trader by the consumer by reason of his having exercised his right of renunciation. In fact, the Court held that the Directive precluded the payment of such damages since it would be tantamount to imposing a penalty on the consumer for exercising his right of renunciation. [26] It considered this effect to be contrary to the protective purpose of the Directive, which was precisely to prevent the consumer from undertaking financial obligations for which he is not prepared. [27]

70. In the present case, the consumer's obligation to pay is of a fundamentally different nature. It is not intended to compensate for the damage suffered by the lending institution as a result of the cancellation of the contract. The intention is simply to take into account the income generated by the money disbursed by the lending institution during the period when it was at the consumer's disposal. [28] Thus, the payment obligation at issue in the present proceedings cannot be compared with that examined in *Travel Vac*.

71. That having been said, I consider that the Directive does not generally preclude a national provision requiring the payment of statutory interest in the event of cancellation of a credit agreement.

72. Since cancellation has the effect of making the agreement void from the outset, it seems that the status quo that existed before the conclusion of the agreement should be restored. The borrower being deemed never to have benefited from the loan, it is only reasonable that he should repay not only the sums received under the agreement but also interest, that is to say, the income that these sums would have generated if they had remained at the disposal of the lending institution.

73. This is the approach adopted by various Community instruments and, in particular, by the proposal for a Directive, COM(2002) 443 final, which provides that, in the event of recourse to the right of withdrawal, '[t]he

26 — Paragraph 58

27 — Idem.

28 — Order for reference (p. 17).

consumer shall pay interest due for the period during which credit was drawn'. [29] It is justified by the need to stem abuse and speculation on the part of consumers where the credit agreement involves larger amounts. [30]

74. In these circumstances, I consider that generally an obligation to pay statutory interest, such as that at issue in this case, is not inconsistent with the Directive.

75. However, it seems to me that this solution cannot be applied in this particular case.

76. In the present proceedings, a considerable period of time is known to have elapsed between the conclusion of the credit agreement and its cancellation. In fact, the agreements concluded in 1992 were not cancelled by the defendants in the main action until six years later, in 1998. [31] Moreover, it is not disputed that this delay in the cancellation of the credit agreements was solely due to the fact that the Bank had failed to notify the consumer of his right of cancellation. [32]

77. As I explained in my Opinion in *Heininger*, [33] the Directive places a 'special responsibility' on the trader. Article 4 requires him to give the consumer notice of his right to cancel the agreement, while Article 5 adds that the period allowed for exercising this right of cancellation begins to run only 'from receipt by the consumer of [this] notice'. The effectiveness of the right of renunciation guaranteed by the Directive thus depends entirely on the diligence of the trader in fulfilling his obligation under the Directive.

78. It is therefore my view that the Bank cannot require the payment of default interest if it has not fulfilled its own obligations. In so far as the interest demanded from the consumer is solely attributable to the fact that the Bank has failed to fulfil its obligation under Article 4 of the Directive, the disputed payment obligation cannot be enforced. As the Court ruled in *Heininger*, if the credit institutions choose to enter into agreements away from their business premises to market their services, 'they can easily safeguard both the interests of consumers and their own requirements as to legal certainty by complying with their duty to supply consumers with information'. [34]

29 — Article 11(3).

30 — See Explanatory Memorandum, Article 11 (p. 213).

31 — Order for reference (pp. 5 to 8).

32 — See, in particular, the written observations of the Bank (paragraph 4).

33 — Points 60 to 62.

34 — Paragraph 47.

79. I therefore propose that the Court's answer to the last question referred for a preliminary ruling should be that the application of a national provision requiring the consumer, in the event of cancellation of a credit agreement, to pay interest, calculated at the market rate, on the amounts received under that agreement is precluded by Articles 5 and 7 of the Directive if the trader has not given the consumer the notice required by Article 4 of the Directive of his right to cancel the agreement within the period prescribed.

VII — Conclusion

80. On the basis of these various considerations, I therefore propose that the Court answer the questions posed by the Hanseatisches Oberlandesgericht in Bremen as follows:

(1) Articles 1 and 2 of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises should be interpreted as meaning that where a third party intervenes in the negotiation or in the conclusion of a contract in the name or on behalf of the trader, the application of the Directive cannot be made subject to conditions other than those provided for in Article 1 of the Directive and, in particular, to the condition that the trader was, or should have been, aware of the conduct of the third party.

(2) In the case of a single financial transaction comprising a secured credit agreement and a contract for the purchase of immovable property, Articles 5 and 7 of Directive 85/577 do not preclude a national provision requiring the consumer, in the event of cancellation of the credit agreement, to reimburse the amount of the loan to the lending institution where, on the instructions of the borrower, this amount has been paid by that institution directly to the vendor of the immovable property.

(3) Articles 5 and 7 of Directive 85/577 do not preclude a national provision requiring that, in the event of the cancellation of a credit agreement, the consumer make immediate repayment to the lending institution of the amounts received under the agreement.

(4) The application of a national provision requiring the consumer, in the event of cancellation of a credit agreement, to pay interest, calculated at the market rate, on the amounts received under that agreement is precluded by Articles 5 and 7 of Directive 85/577 if the trader has not given the consumer the notice required by Article 4 of the Directive of his right to cancel the agreement within the period prescribed.