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Press and Information

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Opinion of Advocate General Léger in Case C-350/03

Elisabeth and Wolfgang Schulte v Deutsche Bausparkasse Badenia AG

ACCORDING TO ADVOCATE GENERAL LÉGER, CONSUMERS CANNOT RELY ON THE DIRECTIVE ON DOOR-STEP SELLING TO CANCEL CONTRACTS FOR THE SALE OF IMMOVABLE PROPERTY

The Advocate General points out that the directive expressly states that it does not apply to contracts for the sale of immovable property and that the Court of Justice cannot therefore decide otherwise.

Background to the case

This case follows the ruling by the Court of Justice in Case C-481/99 *Heininger*¹, in which the Court held that the right of cancellation provided for by the directive on doorstep-selling² applies to secured-credit agreements. It also held that consumers who have not been informed of their right of cancellation do not lose that right, and explained that the consequences of the cancellation of such an agreement on the contract for the sale of immovable property are governed by national law.

The Schultes, a married couple, were approached in Germany in 1992 by a company providing property and financial services, which offered them an investment model for the acquisition of credit-financed immovable property. The property concerned was an old apartment in a residential building, built as social housing, which had been renovated. For tax reasons, the apartment had to be used by third parties and its acquisition had to be wholly financed by the loan. After taking out the loan, secured by means of a property charge, the Schultes and the owner of the building signed the contract of sale before a notary. The property charge was then established by way of another notarial act. The Schultes also joined a pooling system for rental receipts. On their instruction, the lender directly transferred the net value of the loan to the vendor of the apartment.

¹ [2001] ECR I-9945; Press Release No 66/01.

² 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, referred to as "the directive").

The Schultes having failed to meet their obligations, the lender demanded immediate repayment of the loan and then instituted enforcement proceedings. In 2002, on the basis of the ruling in *Heininger*, the Schultes cancelled the loan agreement on the ground that it had been concluded in a door-step selling situation. They then brought an action to oppose enforcement before the Landgericht Bochum, which has now stayed proceedings and referred a number of questions to the Court of Justice for a preliminary ruling.

The questions referred to the Court of Justice

By way of introduction, the Landgericht Bochum states that, even after the ruling in *Heininger*, the Bundesgerichtshof has held that contracts for the provision of secured credit and for the sale of immovable property financed by that credit are not linked contracts forming a single economic transaction. Were they considered as such, cancellation of the loan agreement would result in avoidance of the contract for the sale of the immovable property. By contrast, the consequence of the interpretation applied by the Bundesgerichtshof is that where a loan agreement is cancelled, the consumer is required immediately to repay the loan, plus interest.

The Landgericht Bochum asks the Court whether the Bundesgerichtshof's interpretation is compatible with Community law. It has thus referred three questions seeking to ascertain (1) whether the directive, which does not apply to contracts for the sale of immovable property, may nevertheless apply to such a contract where it forms part of a comprehensive financial transaction which also includes a secured-credit agreement; (2) whether cancellation of the secured-credit agreement can give rise to the cancellation of the contract for the sale of immovable property, and (3) whether the consumer protection provided under Community law precludes consumers from being required immediately to repay the loan, plus interest, when a secured-credit agreement is cancelled.

The Opinion of the Advocate General

Today, Advocate General Léger has delivered his Opinion in this case. First of all, he takes the view that the order for reference from the Landgericht Bochum is inadmissible as it raises only hypothetical issues, since the Landgericht has not yet settled the question whether the loan agreement was concluded in a door-step selling situation.

However, in the alternative, the Advocate General gives an opinion on the substance of the case.

As regards the first question, he notes that the directive on door-step selling expressly states that it does not apply to contracts for the sale of immovable property and that that remains true where such a contract forms part of a comprehensive financial transaction such as the one at issue in this case.

As regards the second question, the Advocate General accepts that adequate consumer protection would require that cancellation of the loan agreement also affect the validity of the contract for the purchase of immovable property. However, he recalls that the directive is absolutely clear and unequivocal as to the fact that it does not apply to contracts for the sale of immovable property. The Court cannot therefore hold that the directive applies to that type of contract without offending against the fundamental principle of legal certainty.

Finally, the Advocate General proposes that the Court declare the Landgericht Bochum's question regarding the obligation to repay the loan inadmissible since the Landgericht has not explained why such an obligation could be contrary to Community law.

Reminder: The Opinion of the Advocate General does not bind the Court of Justice. The task of the Advocate General is to propose to the Court, in complete independence, a legal solution to the case in question. The Court will now begin its deliberations in this case and the judgment will be delivered at a later date.

Unofficial document for media use which does not bind the Court of Justice.

Languages available: English, French, German

The full text of the Opinion can be found on the internet

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

In principle it will be available from midday CET on the day of delivery.

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