

**Case C-336/20**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

24 July 2020

**Referring court:**

Landgericht Ravensburg (Germany)

**Date of the decision to refer:**

7 July 2020

**Applicant:**

QY

**Defendant:**

Bank 11 für Privatkunden und Handel GmbH

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**Subject matter of the main proceedings**

Consumer credit agreement – Mandatory information – Directive 2008/48/EC – Right of withdrawal – Notice regarding the possibility of an out-of-court dispute resolution procedure – Forfeiture of the right of withdrawal – International law – Right of the single judge to request a preliminary ruling

**Subject matter and legal basis of the reference**

Interpretation of EU law, Article 267 TFEU

**Questions referred**

1. Statutory presumption in accordance with Article 247(6), second paragraph, third sentence, and Article 247(12), first paragraph, third sentence, of the Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Law to the German Civil Code, ‘the EGBGB’)

- (a) Inasmuch as they state that contract terms which conflict with the requirements of Article 10(2)(p) of Directive 2008/48/EC satisfy the requirements of Article 247(6), second paragraph, first and second sentences, of the EGBGB, and the requirements laid down in Article 247(12), first paragraph, second sentence, point 2(b), of the EGBGB, are Article 247(6), second paragraph, third sentence, and Article 247(12), first paragraph, third sentence, of the EGBGB incompatible with Article 10(2)(p) and Article 14(1) of Directive 2008/48/EC?

If so:

- (b) Does it follow from EU law, in particular from Article 10(2)(p) and Article 14(1) of Directive 2008/48/EC, that, inasmuch as they state that contract terms which conflict with the requirements of Article 10(2)(p) of Directive 2008/48/EC satisfy the requirements of Article 247(6), second paragraph, first and second sentences, of the EGBGB, and the requirements laid down in Article 247(12), first paragraph, second sentence, point 2(b), of the EGBGB, Article 247(6), second paragraph, third sentence, and Article 247(12), first paragraph, third sentence, of the EGBGB must be disapplied?

If the answer to Question 1(b) is in the negative:

2. Mandatory information required under Article 10(2) of Directive 2008/48/EC
- (a) Is Article 10(2)(a) of Directive 2008/48/EC to be interpreted as meaning that, as regards the type of credit, if the credit agreement is a linked credit agreement, information must be provided to that effect?

If not:

- (b) Is Article 10(2)(l) of Directive 2008/48/EC to be interpreted as meaning that the interest rate applicable in the case of late payments as applicable at the time of the conclusion of the credit agreement must be specified as an absolute number or, at the very least, that the current reference interest rate (in this case, the base rate in accordance with Paragraph 247 of the Bürgerliches Gesetzbuch (German Civil Code, ‘the BGB’)), from which the interest rate applicable in the case of late payments is obtained by adding a premium (in this case, a premium of five percentage points in accordance with Paragraph 288(1), second sentence, of the BGB), must be specified as an absolute number?

If not:

- (c) Is Article 10(2)(t) of Directive 2008/48/EC to be interpreted as meaning that the essential formal requirements for a complaint and/or

redress in the out-of-court complaint and/or redress procedure must be specified in the text of the credit agreement?

If any of the above Questions 2(a) to (c) is answered in the affirmative:

- (d) Is Article 14(1), second sentence, point (b), of Directive 2008/48/EC to be interpreted as meaning that the period of withdrawal does not begin until the information required under Article 10(2) of Directive 2008/48/EC has been provided fully and correctly, regardless of whether a missing or incorrect item of information is capable of affecting the consumer's ability to assess the scope of his obligation?

If the above Question 1(a) and/or one of Questions 2(a) to (c) is answered in the affirmative:

- 3. Forfeiture of the right of withdrawal in accordance with Article 14(1), first sentence, of Directive 2008/48/EC:

- (a) Is the right of withdrawal in accordance with Article 14(1), first sentence, of Directive 2008/48/EC subject to forfeiture?

If so:

- (b) Is forfeiture a time limit on the right of withdrawal which must be regulated by an act of parliament?

If not:

- (c) Does a plea of forfeiture depend, from a subjective standpoint, on the consumer knowing that his right of withdrawal continued to exist or, at least, on his ignorance being ascribed to gross negligence?

If not:

- (d) Does the creditor's facility to provide the consumer subsequently with the information required under Article 14(1), second sentence, point (b), of Directive 2008/48/EC and thus trigger the period of withdrawal preclude the application of the rules of forfeiture in good faith?

If not:

- (e) Is this compatible with the established principles by which the German courts are bound under the Grundgesetz (Basic Law) and, if so, how are German legal practitioners to resolve a conflict between the binding prescripts of international law and the prescripts of the Court of Justice of the European Union?

Irrespective of the answers to Questions 1 to 3 above:

4. Right of the single judge to request a preliminary ruling pursuant to Article 267(2) TFEU

Inasmuch as it also refers to orders for reference in accordance with the second paragraph of Article 267 TFEU, is Paragraph 348a(2), point 1, of the Zivilprozessordnung (German Code of Civil Procedure) incompatible with the right conferred on the national courts to request a preliminary ruling pursuant to the second paragraph of Article 267 TFEU and must it therefore be disapplied to orders for reference?

**Provisions of EU law cited**

Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC ('Directive 2008/48'), in particular Article 10(2)(a), (b), (l), (p) and (t)

**Provisions of national law cited**

Grundgesetz (Basic Law, 'the GG'), in particular Article 25

Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Law to the German Civil Code, 'the EGBGB'), Article 247(3), (6), (7) and (12)

Bürgerliches Gesetzbuch (German Civil Code, 'the BGB'), in particular Paragraphs 242, 247, 288, 314, 355, 356b, 357, 357a, 358, 491a, 492 and 495

Zivilprozessordnung (German Code of civil procedure, 'the ZPO'), in particular Paragraph 348a(2), point 1

**Brief summary of the facts and procedure**

- 1 On 1 September 2016, the applicant concluded a loan agreement with the defendant for the sum of EUR 21 716.33, the major portion of which was earmarked for the purpose of purchasing a car from a car dealership for private use. The defendant prepared and concluded the loan agreement with the vendor's assistance. In particular, the vendor acted as the defendant's loan broker and used the agreement forms provided by the defendant. According to the loan agreement, the purchase price was EUR 23 521 and the purchase price of EUR 20 521 remaining following deduction of a deposit of EUR 3 000 and a one-off payment of EUR 1 195.33 for payment protection insurance was to be financed from the loan.
- 2 It was agreed in the loan agreement that the loan would be repaid in 47 equal monthly instalments, followed by a final instalment of EUR 12 522.60 payable on

15 January 2020. The loan was disbursed to the applicant in September 2016 and he duly paid the agreed instalments.

- 3 The agreement contains the following information on withdrawal from the loan agreement: ‘The borrower may withdraw his contractual declaration, without giving reasons, within 14 days. The period begins after conclusion of the agreement, but not before the borrower has received all the mandatory information referred to in Paragraph 492(2) of the BGB (for example, information concerning the type of loan, information relating to the net loan amount, information concerning the contractual term).’ The applicant withdrew from the loan agreement by a declaration of intent emailed on 22 August 2019.
- 4 The applicant is of the opinion that the withdrawal is effective, as the period of withdrawal had not begun due to ambiguous information concerning withdrawal and missing mandatory information. The applicant is therefore demanding repayment by the defendant of the loan instalments paid to date and of the deposit paid to the vendor, plus the instalments paid following withdrawal, to be repaid within 7 days of the return of the vehicle purchased.
- 5 The defendant considers the action to be unfounded, since it duly provided the applicant with all the information concerning withdrawal and with all the mandatory information. It contends that it used the template provided for by law for the information concerning withdrawal and that the clause of the contract concerning withdrawal therefore met statutory requirements, meaning that withdrawal was time-barred. In the alternative, the defendant argues that incorrect mandatory information and missing information are not one and the same and that the period of withdrawal is triggered even in the case of incorrect mandatory information, having said which it considers the plea of incorrect information to be an abuse of right. The defendant also invokes the plea of forfeiture, as approximately three years had passed at the time of withdrawal.

#### **Brief summary of the basis for the reference**

- 6 The success of the action hinges on whether withdrawal from the loan agreement was effective and whether the creditor can possibly invoke the plea of forfeiture or the plea of abuse of the right of withdrawal.
- 7 The applicant’s declaration of withdrawal is valid only if the two-week period of withdrawal regulated in Paragraph 355(2), first sentence, of the BGB had not expired when notice of withdrawal was given. According to Paragraph 356b(2), first sentence, of the BGB, the period of withdrawal does not commence if the mandatory information required under Paragraph 492(2) of the BGB and Article 247(6) to (13) of the EGBGB is not included in full in the credit agreement. In that case, the period according to Paragraph 356b(2), second sentence, of the BGB only begins on subsequent provision of the mandatory information. Incomplete mandatory information in this case is to be assumed in particular where the information concerning withdrawal was not provided

adequately or at least one of the items of information required by law in the credit agreement was incomplete or was incorrect.

- 8 Even if the mutual contractual obligations had largely already been fulfilled at the time of withdrawal, withdrawal was still permissible in principle, since German law does not provide for extinction of the right of withdrawal for consumer credit agreements.
- 9 The referring court states the following with regard to the individual questions referred:
  - 10 Questions 1(a) and (b): The Court ruled in its recent judgment of 26 March 2020 in *Kreissparkasse Saarlouis* (C-66/19, EU:C:2020:242) that Article 10(2)(p) of Directive 2008/48 must be interpreted as meaning that the information to be specified, in a clear and concise manner, in a credit agreement in accordance with that provision includes information on how the period of withdrawal, provided for in the second subparagraph of Article 14(1) of that Directive, is to be calculated, and that it precludes a credit agreement from making reference, as regards the information referred to in Article 10 of that Directive, to a national provision which itself refers to other legislative provisions of the Member State in question. In light of that judgment, the referring court is of the opinion that the information concerning withdrawal contained in the loan agreement in this case contains an inadmissible reference within the meaning of that judgment. Therefore, the question arises as to whether it follows from that judgment that the information concerning withdrawal must be regarded as inadequate and thus that the period of withdrawal has not begun due to inadequate information. If that is the case, the withdrawal by the applicant would have to be regarded as effective.
  - 11 Article 247(6), second paragraph, third sentence, of the EGBGB and Article 247(12), first paragraph, third sentence, of the EGBGB, which applies additionally to linked agreements, stipulate that a clearly formulated highlighted contract clause in keeping with the template in Annex 7 to Article 247(6), second paragraph, and Article 247(12), first paragraph, of the EGBGB satisfies the requirements of Article 247(6), second paragraph, first and second sentences, and of Article 247(12), first paragraph, second sentence, point 2(b), of the EGBGB (so-called statutory presumption). The withdrawal information in this case complies with the template. In other words, the withdrawal information must be regarded as error-free under national law.
  - 12 However, it is debatable whether the aforesaid judgment of the Court precludes that opinion. The Bundesgerichtshof (Federal Court of Justice, ‘the BGH’) held that it was prevented from adopting and thus following that case-law, because it could not interpret Article 247(6), second paragraph, third sentence, of the EGBGB in conformity with EU law contrary to the express instruction of the legislature. The BGH holds that the unambiguous wording, the spirit and purpose of the rule and its legislative history precluded interpretation in keeping with the Directive.

- 13 However, the referring court has doubts as to whether that opinion is compatible with EU law. It notes that a national court which is unable to interpret national legislation in keeping with EU law may be required in certain cases to disapply a national provision, as EU law takes precedence. The referring court also finds, however, that the case-law of the Court does not clarify the principles governing such precedence conclusively, as the Court has so far left that question to one side with regard to Directive 2008/48 (see the judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraphs 76 to 79).
- 14 The referring court is of the opinion that the precedence of Directive 2008/48 is suggested by its sixth recital, according to which the Directive is intended to remove barriers to an efficient internal market. That objective is enshrined in primary law in Article 114 TFEU. Moreover, the Court has consistently held that Directive 2008/48 is intended to guarantee a high level of consumer protection (judgment of 11 September 2019, *Lexitor*, C-383/18, EU:C:2019:702, paragraph 29). That objective is enshrined in primary law in Articles 12 and 169 TFEU. The facility to derogate from the standard laid down by the Directive in key aspects such as information for consumers concerning withdrawal would conflict with those objectives.
- 15 The referring court is also of the opinion that the detailed provisions on the information to be provided to the consumer on conclusion of the agreement in Articles 10 and 14 of Directive 2008/48, from which, according to Article 22(1) of the Directive, the Member States are not allowed to diverge, suggests that the Directive takes precedence. If the German legislature deliberately designed Article 247(6), second paragraph, third sentence, and Article 247(12), first paragraph, third sentence, of the EGBGB to diverge from those provisions, that would deliberately undermine the key aspect of Directive 2008/48. Where the national legislature deliberately circumvents a directive, it is necessary, as with any infringement of the general principles of EU law, for the directive to produce a direct effect such that the divergent national provision is disapplied.
- 16 Questions 2(a) to 2(c): The findings of the referring court on these questions are essentially the same as the findings on Questions 1, 3(a) and 6 in the request for a preliminary ruling in Case C-187/20.
- 17 Question 2(d): It is debatable whether any item of information required under Article 10 of Directive 2008/48 but not provided adequately stays the start of the period of withdrawal or whether that applies to missing, but not to incorrect information.
- 18 The answer to the question depends on how Article 14(1) of Directive 2008/48, which states that the period of withdrawal begins once the consumer has received the information in accordance with Article 10 of the Directive, is to be understood. The referring court is inclined to believe that incorrect information is tantamount to missing information, as the consumer must be informed in a clear and concise manner on conclusion of the credit agreement (recital 31 of Directive

2008/48) and the Directive is intended to guarantee a high level of consumer protection (judgment of 11 September 2019, *Lexitor*, C-383/18, EU:C:2019:702, paragraph 29).

- 19 The referring court considers that it would be wrong to assume that the inaccuracy of the information must be capable of deterring the consumer from exercising his right of withdrawal as, based on its wording, Directive 2008/48 contains no such restriction. The purpose of the Directive, that the consumer must be informed in a clear and concise manner on conclusion of the agreement, clearly suggests that the right of withdrawal under Article 14(1) of the Directive applies until such time as the information referred to in Article 14(1), second sentence, point (b), and Article 10 of Directive 2008/48 has subsequently been provided. That strict interpretation is necessary in order to effectively ensure that the consumer is actually informed in the prescribed manner.
- 20 Questions 3(a) to 3(e) on forfeiture: The referring court explains that forfeiture under German law is treated as a case of the inadmissible exercise of a right by reason of inconsistent conduct and that the breach lies in the unwarranted delay in exercising the right. Forfeiture presupposes that the entitled party has a right which he fails to exercise for a long period of time, even though he was able in fact to do so, and that the obligated party was entitled to assume and act on the basis that the entitled party would not exercise his right. If the entitled party then exercises his right nonetheless, that act infringes Paragraph 242 of the BGB (good faith) on the grounds of the inconsistency between the entitled party's present and previous conduct.
- 21 However, the referring court has doubts as to whether those forfeiture rules can be applied to the consumer's right of withdrawal from a consumer credit agreement (Question 3(a)). According to Article 14(1), second sentence, points (a) and (b), of Directive 2008/48, the 14-day period of withdrawal begins either on conclusion of the agreement or on the day on which the consumer receives the information in accordance with Article 10 of the Directive, whichever is the later. That suggests that withdrawal is not time limited if the consumer does not receive the information in accordance with Article 10 of Directive 2008/48. Moreover, it follows from Article 14(1), second sentence, point (b), of the Directive that the creditor is able to trigger the period of withdrawal at any time by providing the information in accordance with Article 10 of the Directive. That suggests that the period in which the right of withdrawal can be exercised has been regulated definitively and that there is no latitude to limit the right of withdrawal in time by relying on a plea of forfeiture.
- 22 If forfeiture of the right of withdrawal is admissible under EU law, the question arises (Question 3(b)) as to whether, as a time limit on the right of withdrawal, forfeiture requires regulation by law. The referring court holds that it is inadmissible for a national court to overlook a clear prescription in a specific act of secondary law and its transposition by relying on a plea of good faith. Forfeiture is based in German law on the general provision of Paragraph 242 of

the BGB. However, that paragraph does not lay down any specific constituent elements for forfeiture and is shaped rather case by case, by case-law. This legal basis is intransparent, as the essential conditions for forfeiture are not fixed and are have not been adjudicated consistently in case-law. There is therefore a danger of undermining the facility deliberately provided by the German legislature to enforce the right of withdrawal with no limitation in time through extensive application of Paragraph 242 of the BGB. The referring court is therefore of the opinion that forfeiture of the consumer's right of withdrawal within the scope of Directive 2008/48 cannot be based on case-law and must be based on an act of parliament regulating the essential conditions of forfeiture.

- 23 Furthermore, it is necessary to clarify the preconditions which apply under EU law, from a subjective standpoint, to the plea of forfeiture (Question 3(c)). The findings of the referring court on these questions essentially overlap with the findings on Question 7 in the request for a preliminary ruling in Case C-187/20 and on Question 4 in the request for a preliminary ruling in Case C-155/20.
- 24 If the answer to Question 3(c) is in the negative, the question arises for the referring court as to whether the creditor's facility to provide the consumer subsequently with the information required under Article 14(1), second sentence, point (b), of Directive 2008/48 and thus trigger the period of withdrawal precludes the application of the rules of forfeiture in good faith? For the referring court, in the case of the inadequate provision of mandatory information in accordance with Article 10(2) of the Directive, the plea of forfeiture is out of the question from the outset, since, according to the settled case-law of the Court, the obligated party cannot validly rely on reasons of legal certainty in order to redress a situation caused by his own failure to comply with the requirement, under European Union law, to communicate information relating to the right of the entitled party to cancel or withdraw from the contract (judgments of 19 December 2013, *Endress*, C-209/12, EU:C:2013:864, paragraph 30, and of 13 December 2001, *Heiniger*, C-481/99, EU:C:2001:684, paragraph 47).
- 25 If the answer to Question 3(d) is in the negative, it is necessary to examine whether that is compatible with the principles by which the German courts are bound under the Basic Law and, if so, how German legal practitioners are to resolve a conflict between the binding prescripts of international law and the prescripts of EU law (Question 3(e)).
- 26 Forfeiture is one of the general principles of international law. Those general principles form part of federal law and, according to Article 25(2) of the Basic Law, they take precedence over legislation. They are therefore binding on a German court.
- 27 The possibility of forfeiture is recognised in international law. However, it is common ground in literature on international law that the party entitled to exercise the right must be aware of his right. A right cannot be forfeited merely because no action was taken. Consequently, a German court could only find that a consumer's

right of withdrawal had been forfeited if the entitled party knew that he still had a right of withdrawal or was ignorant of that right due to gross negligence.

28 Thus, if the principles applicable under EU law to forfeiture of the consumer's right of withdrawal from a consumer credit agreement diverged from binding international prescripts, the Court should have clarified within the scope of Directive 2008/48 the legal requirements by which the national court has to be guided in such a conflict of rules.

29 The referring court summarises the relevance of Questions 3(a) to 3(e) to the outcome of the litigation pending before it as follows: if forfeiture of the right of withdrawal in accordance with Article 14(1), first sentence, of Directive 2008/48/EC

- is excluded from the outset,
- or must, in any event, be established by act of parliament,
- or must, at the very least, presuppose ignorance due to gross negligence,
- or is, in any event, precluded by the failure to provide information subsequently,
- or is, in any event, incompatible with binding prescripts of international law, provided at the very least that the entitled party is not ignorant due to gross negligence,

the defendant cannot rely upon a plea of forfeiture in this case.

30 Question 4: This question concerns the right of the single judge to whom the case is allocated by the chamber to request a preliminary ruling by the Court. That right is disputed under national law.

31 The referring court refers to two orders of the BGH in which it complained that the single judge had failed to ask the chamber to decide if it should take over the case before appealing to the Court. The BGH regarded this as a procedural error on the part of the single judge and an infringement of the principle of jurisdiction in accordance with Article 101(1), second sentence, of the Basic Law.

32 However, by its judgment of 13 December 2018, *Rittinger and Others*, C-492/17, EU:C:2018:1019, paragraphs 30 et seq., the Court noted that a request for a preliminary ruling from a single judge is admissible under EU law, regardless of whether it complies with national procedural rules. However, the Court did not answer the question of whether a national rule restricting the right to request a preliminary ruling must be disapplied.

33 The referring court is of the opinion, in light of the mandatory provision of Article 267(2) TFEU, that the single judge cannot be obliged to refer the case to

the chamber so that it can decide if it should take it over in accordance with Paragraph 348a(2), point 1, of the ZPO, if it wishes to make an order for reference and therefore asks the Court for clarification.

- 34 This reference for a preliminary ruling notwithstanding, the referring court reserves the right to refer any questions that arise in the case before it to the Bundesverfassungsgericht (Federal Constitutional Court). It has doubts, in particular, as to the constitutionality of Article 247(6), second paragraph, third sentence, and Article 247(12), first paragraph, third sentence, of the EGBGB and as to the constitutionality and compliance with international law of the forfeiture rules applicable to the right of withdrawal, at least as interpreted by the Supreme Court in its case-law on consumer credit law.
- 35 Lastly, the referring court notes that the questions referred by it for a preliminary ruling by its orders of 7 January 2020, 5 March 2020 and 31 March 2020, which are the subject matter of cases C-33/20, C-155/20 and C-187/20 pending before the Court, overlap in part with Questions 2(a) to (c) and 3(c) and (d) in this request for a preliminary ruling and therefore suggests joinder of cases.

WORKING DOCUMENT