

Case C-33/20

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:

23 January 2020

Referring court:

Landgericht Ravensburg (Germany)

Date of the decision to refer:

7 January 2020

Applicant:

UK

Defendant:

Volkswagen Bank GmbH

Subject matter of the main proceedings

Credit agreements for consumers — Right of withdrawal — Mandatory information — Directive 2008/48/EC

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Is Article 10(2)(1) of 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 to be interpreted as meaning that the credit agreement

a) must specify the interest rate applicable in the case of late payments as applicable at the time of the conclusion of the credit agreement as an absolute

number or, at the very least, the current reference interest rate (in this case the base rate in accordance with Paragraph 247 of the Bürgerliches Gesetzbuch (Civil Code)), from which the interest rate applicable in the case of late payments is obtained by adding a premium (in this case of five percentage points in accordance with Paragraph 288(1), second sentence, of the BGB), as an absolute number; and

b) must explain the specific arrangements for adjustment of the interest rate applicable in the case of late payments or, at the very least, must reference the national standards from which such arrangements follow (Paragraph 247 and Paragraph 288(1), second sentence, of the BGB)?

2. Is Article 10(2)(r) of Directive 2008/48/EC to be interpreted as meaning that the credit agreement must specify a particular method that the consumer can understand for calculating the compensation payable in the event of early repayment of the loan, so that the consumer can calculate at least approximately the compensation payable in the event of early termination?

3. Is Article 10(2)(s) of Directive 2008/48 to be interpreted as meaning that the credit agreement

a) must also specify the parties' rights of termination of the credit agreement regulated under national law, including in particular the borrower's right of termination with good cause under Paragraph 314 of the BGB, in the case of fixed-term loan agreements; and

b) must indicate the time limit for and form of the declaration of termination prescribed for the purpose of exercising the right of termination for all rights of termination of the parties to the credit agreement?

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'), Article 10

Provisions of national law cited

Einführungsgesetz zum Bürgerlichen Gesetzbuche (Law on the Introduction of the Civil Code, 'the EGBGB'), Article 247(3), (6) and (7)

Bürgerliches Gesetzbuch (Civil Code, 'the BGB'), especially Paragraphs 247, 288, 314, 355, 356b, 357, 357a, 358, 492 and 495

Brief summary of the facts and procedure

- 1 On 19 December 2015, the applicant concluded a loan agreement for the net sum of EUR 10 671.63 for the purpose of purchasing a VW Passat model 2.0 TDI for private use.
- 2 The vendor of the vehicle was a car dealership in Sindelfingen. The purchase price was EUR 15 200. The applicant paid the vendor a deposit of EUR 5 000 and financed the balance of EUR 10 200 plus a one-off payment of EUR 471.63 to insure the balance (giving a total of EUR 10 671.63) from the aforesaid loan.
- 3 The defendant prepared and concluded the loan agreement with the vendor's assistance, that is the vendor acted as the defendant's loan broker, using the agreement forms supplied by the defendant. It was agreed in the loan agreement that the applicant would repay the loan in 48 equal monthly instalments starting on 15 February 2016, followed by a final instalment payable on 16 February 2020.
- 4 The applicant duly paid the agreed instalments. However, by letter of 22 January 2019, he withdrew his declaration of intention to conclude the loan agreement. The defendant rejected that withdrawal.
- 5 The applicant is of the opinion that, following withdrawal on 22 January 2019, the loan agreement switched to a repayment obligation. He is seeking judgment finding that his obligation to pay the defendant the loan instalments lapsed on 22 January 2019. He is also seeking repayment by the defendant of the instalments paid to it to date and of the deposit paid to the vendor, both in exchange for the return of the vehicle purchased.
- 6 The defendant holds that the declaration of withdrawal was late and that withdrawal is therefore invalid. It claims that the credit agreement has not been terminated and continues to apply and, therefore, that the application should be dismissed.

Brief summary of the basis for the reference

- 7 The outcome of the case depends on the answer to the questions concerning the interpretation of Article 10(2)(l), (r) and (s) of Directive 2008/48.

If withdrawal from the loan agreement was valid, the applicant would no longer be bound by the loan agreement in accordance with Paragraphs 495(1) and 355(1) of the BGB and would not owe any further instalments. Paragraph 495(1) of the BGB states that the borrower has a right of withdrawal in accordance with Paragraph 355 of the BGB in the case of a consumer loan agreement. Paragraph 355(1) of the BGB states that the consumer and the undertaking cease to be bound by their declaration of intention to conclude the agreement if the consumer withdrew his declaration of intention in time.

- 8 Moreover, according to the first subparagraph of Paragraph 357a of the BGB (legal consequences of withdrawal from agreements for financial services), the applicant could demand repayment of the instalments paid to the defendant so far. According to that provision, the payments received must be refunded within no more than 30 days.
- 9 If withdrawal from the loan agreement was valid, the applicant is also no longer bound by the purchase contract in accordance with Paragraph 358(2) of the BGB. That provision states that, if the consumer has effectively withdrawn his declaration of intention to enter into a consumer loan agreement, he also ceases to be bound by his declaration of intention to enter into a contract linked to that consumer loan agreement for the supply of goods. The purchase contract and the loan agreement are linked contracts within the meaning of Paragraph 358(3) of the BGB.
- 10 The applicant could then demand, in accordance with Paragraph 358(4), first sentence, and Paragraph 357(1) of the BGB, that the defendant also refund the deposit paid to the vendor as, according to Paragraph 358(4), fifth sentence, of the BGB, the contract financed should be reversed solely between the borrower and the lender. Paragraph 358(4), first sentence, of the BGB refers *inter alia* to Paragraph 357(1) in connection with the reversal of a linked contract. That paragraph regulates the legal consequences of withdrawal from agreements other than agreements for financial services and provides for the payments received to be refunded within no more than 14 days.
- 11 The applicant's declaration of withdrawal is only valid if the two-week period for withdrawal regulated in Paragraph 355(2), first sentence, of the BGB had not expired when withdrawal was declared on 22 January 2019. According to Paragraph 356b(2), first sentence, of the BGB, the period for withdrawal does not, however, 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, Paragraph 356b(2), first sentence, states that the period only commences on subsequent provision of the mandatory information.
- 12 Incomplete mandatory information in this case would have to be assumed in particular if at least one of the mandatory items of information required under Article 10(2)(l), (r) or (s) of Directive 2008/48 (or under the corresponding national provisions, that is Article 247(6)(1) No 1 and Article 247(3)(1) No 11 of the EGBGB, Article 247(6)(1) No 5 of the EGBGB and Article 247(7)(1) No 3 of the EGBGB) is not included in the credit agreement as required by law.

Questions 1.a) and 1.b)

- 13 According to the national rule in Article 247(6)(1) No 1 and Article 247(3)(1) No 11 of the EGBGB, the interest rate applicable in the case of late payments and

the arrangements for any adjustment to it must be stated in a clear and comprehensible manner.

- 14 In this case, the loan agreement contains the following information on this:

‘If the agreement is terminated, we shall charge you the statutory interest rate applicable in the case of late payments. The annual interest rate applicable in the case of late payments is five percentage points above the base rate.’
- 15 National case-law and commentaries differ on the question of how specific the information in the agreement required by Article 247(6)(1) No 1 and Article 247(3)(1) No 11 of the EGBGB must be. It is broadly argued that it is sufficient to reproduce the statutory rule in Paragraph 288(1), second sentence, of the BGB, that the interest rate applicable in the case of late payments is five percentage points above the base rate. Others argue that the interest rate applicable in the case of late payments must be stated as an absolute number and that the arrangements for adjustment of the interest rate applicable in the case of late payments must be explained.
- 16 The interpretation of the national law depends on how the requirement laid down in Article 10(2)(1) of Directive 2008/48 regulating this matter, that ‘the interest rate applicable in the case of late payments as applicable at the time of the conclusion of the credit agreement and the arrangements for its adjustment’ must be specified in a clear and concise manner in the credit agreement, is to be understood.
- 17 The fact that the content of the statutory rule on the interest rate applicable in the case of late payments in national law (in this instance Paragraph 288(1), second sentence, of the BGB) is included in the agreement might be considered sufficient for the purposes of that provision of the Directive.
- 18 However, Article 10(2)(1) of Directive 2008/48 might be understood differently. The additional words ‘as applicable at the time of the conclusion of the credit agreement’ in the Directive, which do not appear in the national rule, and the need for clarity and conciseness might suggest that the current interest rate applicable in the case of late payments must be specified as accurately as possible, that is as an absolute number, or that the current base rate applicable in accordance with Paragraph 247 of the BGB should at least be stated as an absolute number from which the consumer can calculate the current interest rate applicable in the case of late payments by simply adding five percentage points.
- 19 The clarity and conciseness required by the Directive might also mean that the arrangements for adjustment of the interest rate applicable in the case of late payments must be explained by stating that the interest rate applicable in the case of late payments under national law in accordance with Paragraphs 247 and 288(1) of the BGB is five percentage points above the base rate announced twice a year by the Deutsche Bundesbank or that, at the very least, reference must be

made both to Paragraph 288(1), second sentence, of the BGB and Paragraph 247 of the BGB, from which provisions such arrangements follow.

- 20 Judgment in this case depends on the answers to those questions. If the answer to Questions 1.a) and 1.b) is in the affirmative, the mandatory information prescribed in Article 247(6)(1) No 1 and Article 247(3)(1) No 11 of the EGBGB has not been provided in full in this case and the applicant's declaration of withdrawal was made in time and is valid.
- 21 That is because the credit agreement does not specify the interest rate applicable in the case of late payments or, at the very least, the current reference interest rate (base rate in accordance with Paragraph 247 of the BGB) as an absolute number. Nor does it explain the arrangements for adjustment of the interest rate applicable in the case of late payments.

Question 2

- 22 According to the national rule in Article 247(7)(1) No 3 of the EGBGB, credit agreements for consumers must specify in a clear and comprehensible manner:

‘The preconditions to and method of calculation of a claim to compensation in the event of early repayment, inasmuch as the lender intends to enforce that claim in the event of early repayment of the loan by the borrower.’

- 23 In this case, the loan agreement contains the following information on this:

‘a) The consumer may discharge his obligations under this agreement early in full or in part. ...

b) ...

c) The bank may demand reasonable compensation in the event of early repayment for losses connected directly with the early repayment. The bank shall calculate the losses in accordance with the basic actuarial terms prescribed by the Bundesgerichtshof (Federal Court of Justice). Those terms take particular account of:

- any intervening change in interest rates;
- the loan repayments originally agreed;
- the loss of earnings by the bank;
- the administration costs linked to early repayment (processing fee); and
- the risk and administration costs saved as a result of early repayment.

If it is higher, the compensation for early repayment calculated thus shall be reduced to the lower of the following two amounts:

- one percent or, if the period between early and agreed repayment is less than one year, 0.5 percent of the amount repaid early;
- the debit interest that the borrower would have paid in the period between early and agreed repayment.’

- 24 Thus, it follows from the above terms of the loan agreement that the defendant intended to claim compensation for early repayment in the event of early repayment. Therefore, it should have provided the mandatory information required under Article 247(7) No 3 of the EGBGB. Judgment in this case therefore depends on whether the information on the preconditions to and method of calculation of the claim to compensation for early repayment required in the agreement was provided in full.
- 25 National case-law and commentaries differ in their interpretation of the requirements of Article 247(7) No 3 of the EGBGB in terms of mandatory information.
- 26 It is broadly argued that it is sufficient if the lender roughly outlines the main parameters used to calculate the compensation for early repayment. According to the case-law of the Federal Court of Justice, the calculation method is provided in a sufficiently transparent and concise manner if certain parameters are stated (namely the intervening change in the interest rate, the loan repayments originally agreed, the loss of earnings by the bank, the risk and administration costs saved as a result of early repayment and the administration costs linked to early repayment).
- 27 The opposing view is that a particular method for calculating the claim to compensation for early repayment which the consumer can understand must be specified in the agreement so that a consumer of average education can estimate, at least roughly, the amount of the compensation payable in the event of early repayment from the information in the agreement. According to that view, simply stating the factors to be taken into account in the calculation does not suffice for the mandatory information, as the borrower does not know how much each individual factor accounts for and an average consumer cannot establish how these factors stand in relation to each other.
- 28 The interpretation of the national law therefore depends on how the requirement laid down in Article 10(2)(r) of Directive 2008/48 regulating this matter, that the ‘information concerning the creditor’s right to compensation and the way in which that compensation will be determined’ must be specified in a clear and concise manner, is to be understood.
- 29 It is possible that it should be interpreted as meaning that the method for calculating the compensation payable can be explained by reference to the

principles of case-law and the factors to be taken into account, without specifying a particular calculation method.

- 30 However, Article 10(2)(r) of Directive 2008/48 might be interpreted differently. For example, the wording that the information must be specified in a clear and concise manner might also be interpreted as meaning that a specific calculation method must be stipulated that a consumer can understand. Recital 39 of Directive 2008/48, which states that the calculation of the compensation due to the [creditor] should be transparent and comprehensible to consumers already at the pre-contractual stage and in any case during the performance of the credit agreement and that, in addition, it should be easy for creditors to apply, and supervisory control of the compensation by the responsible authorities should be facilitated, might point in that direction.
- 31 Judgment in this case depends on the answers to that question. If the answer to Question 2 is in the affirmative, the mandatory information prescribed in Article 247(7) No 3 of the EGBGB has not been duly provided in this case and the applicant's declaration of withdrawal was made in time and is valid.

Questions 3.a) and 3.b)

- 32 According to the national rule in Article 247(6)(1) No 5 of the EGBGB, 'the procedure that must be complied with to terminate the agreement' must be stated in a clear and comprehensible manner.
- 33 In this case, the preconditions to the lender's right of termination with good cause are set out in the loan agreement. However, the agreement does not specify the procedure for termination by the lender or, in particular, that notice of termination under the national rule in Paragraph 492(5) of the BGB must be given on a durable medium. Nor does it specify the applicable period of notice for termination by the bank, for example by including the words 'without notice' or specifying a period of notice.
- 34 The borrower's right under national law to terminate a continuing obligation with good cause in accordance with Paragraph 314 of the BGB, which therefore also applies to this limited-term loan agreement, is not mentioned anywhere in the loan agreement. Nor is the procedure for termination by the borrower specified (especially in terms of form and time limit).
- 35 Opinions differ on the mandatory information required under Article 247(6)(1) No 5 of the EGBGB. That applies first of all to the question of whether it is even necessary to mention that limited-term loan agreements can be terminated with good cause in accordance with Paragraph 314 of the BGB.
- 36 One view is that limited-term loan agreements need only mention the borrower's standard right of termination regulated in Article 13(1) of Directive 2008/48, but not the borrower's extraordinary right of termination regulated in national law

under Paragraph 314 of the BGB. Reference is made in support of that view to recital 33 of Directive 2008/48 and to the systematic connection. Another view goes further, considering that Article 247(6)(1) No 5 of the EGBGB should be interpreted, in keeping with the Directive, as meaning that information is only needed on the rights of termination regulated and fully harmonised under the Directive and that rights of termination regulated solely under national law need not be included as mandatory information. This view is justified in part by the objective of having comparable agreements and standard information in all the Member States.

- 37 The opposing view is that the bank must also inform borrowers of their extraordinary right of termination under national law in accordance with Paragraph 314 of the BGB, at least in the case of fixed-term agreements.
- 38 In terms of the scope of the mandatory information required under Article 247(6)(1) No 5 of the EGBGB, the need to inform the consumer of the form and time limit applicable to rights of termination regulated solely under national law is disputed.
- 39 The narrow view described above, that national rights of termination may not or need not be included in the mandatory information required under Article 247(6)(1) No 5 of the EGBGB, therefore considers *a fortiori* that information on the formal requirements for exercising rights of termination regulated under national law can be dispensed with.
- 40 The opposing view is that consumers must be advised of the form in which and the time limit by which the parties to the credit agreement must exercise their rights of termination and that that includes, in particular, information that notice of termination by the lender in accordance with Paragraph 492(5) of the BGB must be given on a durable medium. That view is based on the wording of Article 10(2)(s) of Directive 2008/48, the objective of safeguarding an adequate level of consumer protection and the fact that Article 10 of Directive 2008/48 does not differentiate between the lender's and the borrower's rights of termination.
- 41 The interpretation of the national law therefore depends on how the requirement laid down in Article 10(2)(s) of Directive 2008/48 regulating this matter, that 'the procedure to be followed in exercising the right of termination of the credit agreement' must be specified in a clear and concise manner, is to be understood.
- 42 Article 10(2)(s) of Directive 2008/48 might, in the light of the objective of full harmonisation referred to in recital 9 of Directive 2008/48, be interpreted as meaning that, although the legislature wished to continue to allow nationally regulated rights of termination, the consumer need only be informed of the rights of termination regulated in the Directive itself. This is perhaps corroborated in particular by the objective referred to in recital 8 of Directive 2008/48 of facilitating 'the free movement of credit offers [...] under optimum conditions for [...] those who offer credit'.

- 43 However, a different conclusion might be possible. The objective of offering ‘a sufficient degree of consumer protection’, also highlighted in recital 8 of Directive 2008/48, might suggest that information must also be provided on rights of termination regulated under national law and the formal preconditions to those rights. That view might be corroborated by recital 24 of Directive 2008/48, which states that the consumer needs to be given ‘comprehensive’ information before he concludes the agreement, and by recital 31 of Directive 2008/48, which states that the credit agreement should contain all necessary information on the consumer’s rights and obligations under the credit agreement in a clear and concise manner.
- 44 Judgment in this case depends on the answers to those questions. If the answer to either Question 3.a) or Question 3.b) is in the affirmative, the mandatory information prescribed in Article 247(6)(1) No 5 has not been duly provided in this case and the applicant’s declaration of withdrawal was made in time and is valid.