

**Case C-187/20**

**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:**

28 April 2020

**Referring court:**

Landgericht Ravensburg (Germany)

**Date of the decision to refer:**

31 March 2020

**Applicants:**

JL

DT

**Defendants:**

BMW Bank GmbH

Volkswagen Bank 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 — Abuse of rights

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

Interpretation of EU law, Article 267 TFEU

## Questions referred

1. Is Article 10(2)(a) 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 ('Directive 2008/48/EC') to be interpreted as meaning that, with regard to the type of credit, it may be necessary to specify that it is a linked credit agreement and/or that it is a fixed-term credit agreement?
2. Is Article 10(2)(d) of Directive 2008/48/EC to be interpreted as meaning that, with regard to the conditions governing the drawdown of the credit in the case of linked credit agreements for financing the purchase of an item, it is necessary to specify, in the event that the credit amount is disbursed to the seller, that the borrower is released from his liability to pay the purchase price to the extent of the amount disbursed and that the seller must hand over the purchased item to him if the purchase price has been paid in full?
3. Is Article 10(2)(l) of Directive 2008/48/EC 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; '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), 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)?
4. (a) 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?
  - (b) (if Question (a) above is answered in the affirmative):

Do Article 10(2)(r) and the second sentence of Article 14(1) of Directive 2008/48/EC preclude national legislation pursuant to which, in the case of incomplete information within the meaning of Article 10(2)(r) of that directive, the period for withdrawal nevertheless commences on conclusion of the agreement and only the creditor's right to compensation for early repayment of the credit is lost?

5. Is Article 10(2)(s) of Directive 2008/48/EC to be interpreted as meaning
  - (a) that the credit agreement must also specify the rights of termination of the parties to 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 that express reference must be made to the paragraph in which that right of termination is regulated?
  - (b) (if Question (a) above is answered in the negative):

that it does not preclude national legislation which stipulates the designation of a national special right of termination as mandatory information within the meaning of Article 10(2)(s) of Directive 2008/48/EC?
  - (c) that the credit agreement 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?
6. 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 credit agreement? Is it insufficient in this respect if reference is made to rules of procedure, which can be accessed on the internet, for out-of-court complaint and/or redress procedures?
7. In the case of a consumer credit agreement, is the creditor precluded from invoking the plea of forfeiture in respect of the exercise of the right of withdrawal of the consumer pursuant to the first sentence of Article 14(1) of Directive 2008/48/EC
  - (a) if some of the mandatory information required under Article 10(2) of Directive 2008/48/EC has been neither properly included in the credit agreement nor subsequently duly provided and the period of withdrawal pursuant to Article 14(1) of Directive 2008/48/EC has therefore not begun?

- (b) (if Question (a) above is answered in the negative):

if the forfeiture is decisively based on the lapse of time since conclusion of the agreement and/or on the complete fulfilment of the agreement by both parties and/or on the creditor's disposal of the recovered loan amount or the return of the loan security and/or (in the case of a purchase agreement linked with the credit agreement) on the use or sale of the financed object by the consumer, but the consumer had no knowledge of the continued existence of his right of withdrawal in the relevant period and when the relevant circumstances arose and is also not responsible for that lack of knowledge, and the creditor could also not assume that the consumer has such knowledge?

8. In the case of a consumer credit agreement, is the creditor precluded from invoking the plea of abuse of rights in respect of the exercise of the right of withdrawal of the consumer in accordance with the first sentence of Article 14(1) of Directive 2008/48/EC

- (a) if some of the mandatory information required under Article 10(2) of Directive 2008/48/EC has been neither properly included in the credit agreement nor subsequently duly provided and the period of withdrawal pursuant to Article 14(1) of Directive 2008/48/EC has therefore not begun?

- (b) (if Question (a) above is answered in the negative):

if the abuse of rights is decisively based on the lapse of time since conclusion of the agreement and/or on the complete fulfilment of the agreement by both parties and/or on the creditor's disposal of the recovered loan amount or the return of the loan security and/or (in the case of a purchase agreement linked with the credit agreement) on the use or sale of the financed object by the consumer, but the consumer had no knowledge of the continued existence of his right of withdrawal in the relevant period and when the relevant circumstances arose and is also not responsible for that lack of knowledge, and the creditor could also not assume that the consumer has such knowledge?

### **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), (d), (l), (r), (s) and (t)

### **Provisions of national law cited**

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

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

### **Brief summary of the facts and procedure**

- 1 The request for a preliminary ruling in Case C-187/20 is based on two sets of joined proceedings.
- 2 In the *JL v BMW Bank* case, the applicant concluded a loan agreement with BMW Bank for a net loan amount of EUR 24 401.84 for the purpose of purchasing a motor vehicle for private use. The agreement does not specify the precise nature of the loan. The Standard European Consumer Credit Information, which is annexed to the agreement and has become an integral part of the contractual document, states only the following with regard to the type of credit: ‘Instalment loan with equal monthly instalments and a fixed interest rate’. With regard to the disbursement of the loan amount, the ‘Important Information’ section of the agreement informs the borrower that the loan is disbursed at the time of delivery of the vehicle to the vendor.
- 3 The loan agreement contains the following information on the interest rate applicable in the case of late payments: ‘If the borrower ... defaults on payments, default interest shall be charged at a rate of five percentage points above the relevant base rate per year. The base rate is determined on 7 January and 7 July of each year and is published in the *Bundesanzeiger* (Federal Gazette) by the Deutsche Bundesbank.’
- 4 The loan agreement states the following with regard to possible compensation for early repayment: ‘The bank may demand reasonable compensation in the event of early repayment ... for losses connected directly with the early repayment in accordance with Paragraph 502 of the BGB. The loss shall be calculated in accordance with the basic actuarial terms prescribed by the Bundesgerichtshof (Federal Court of Justice), which take particular account of any intervening change in interest rates, the loan repayments originally agreed, the loss of profit by the bank, the risk and administration costs saved as a result of early repayment and the administration costs linked to early repayment (processing fee).’
- 5 With regard to a possible early termination of the loan agreement, it is true that the terms of the loan state that the borrower’s right of termination with good cause remains unaffected. However, there is no reference to the relevant provision, namely Paragraph 314 of the BGB, nor is it stated that a termination pursuant to Paragraph 314(3) of the BGB must take place within a reasonable period of time.

- 6 With regard to the possibility of an ombudsman procedure, the loan agreement states that it is possible for matters to be referred to the Ombudsmann der privaten Banken (Private Banks' Ombudsman) for the purpose of resolving disputes with the bank. Detailed arrangements are set out in the 'Verfahrensordnung für die Schlichtung von Kundenbeschwerden im deutschen Bankgewerbe' (Rules of procedure for the settlement of customer complaints in the German banking industry), which are available on request or can be viewed on the website of the Bundesverband der Deutschen Banken e. V. (Association of German Banks), [www.bdb.de](http://www.bdb.de). The complaint must be submitted in writing to the customer complaints office at the Association of German Banks.
- 7 The purchase price of the vehicle was EUR 23 500. The applicant paid to the vendor (a car dealership) a deposit of EUR 1 000 and financed the balance of EUR 22 500 and the three one-off payments totalling EUR 1 901.84 to insure the aforesaid loan. The defendant prepared and concluded the loan agreement with the assistance of the vendor in its capacity as a loan broker. It was further agreed in the loan agreement that the applicant would repay the loan of EUR 25 814.98 (net loan amount of EUR 24 401.84 plus interest of EUR 1 413.14) in 47 equal monthly instalments of EUR 309.25 starting on 5 May 2017, followed by a final instalment of EUR 11 280 payable on 5 April 2021. By letter of 13 June 2019, the applicant withdrew his declaration of intention to conclude the loan agreement.
- 8 The applicant is of the opinion that the withdrawal is effective, as the period for withdrawal had not begun due to erroneous mandatory information. The applicant is seeking a judgment finding that, owing to the withdrawal, he has owed neither interest nor redemption payments since 13 June 2019 on the basis of the loan agreement of 4 May 2017.
- 9 The defendant considers the action to be unfounded, since it duly provided the applicant with all mandatory information and the withdrawal is time-barred. The defendant also invokes the pleas of forfeiture and abuse of the right of withdrawal.
- 10 The facts in the *DT v Volkswagen Bank* case essentially correspond to those in the first-mentioned case. The precise nature of the loan is not defined in this case either. However, the following notice can be found on p. 1 of the loan agreement: 'The agreement shall also be subject to the terms of the loan set forth ...' In the Standard European Consumer Credit Information received by the applicant, the following is stated in relation to the type of loan: 'Annuity loan with a statutory right of return (equal monthly instalments and increased final instalment)'. Regarding the disbursement of the loan amount, the credit agreement contains the information that the loan is to be disbursed to the vendor.
- 11 The loan agreement contains the following information on the interest rate applicable in the case of late payments: '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 relevant base rate.' In addition, the 'Standard European

Consumer Credit Information’ provided to the applicant states the following: ‘The annual interest rate applicable in the case of late payments is five percentage points above the relevant base rate. The base rate is determined by the Deutsche Bundesbank and is set on 1 January and 7 July of each year.’

- 12 With regard to possible compensation for early repayment, the loan agreement contains, inter alia, the following information: ‘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 loss in accordance with the basic actuarial terms prescribed by the Bundesgerichtshof (Federal Court of Justice), which take particular account of any intervening change in interest rates, the loan repayments originally agreed, the loss of profit 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.’
- 13 The borrower’s right under national law to terminate a continuing obligation with good cause in accordance with Paragraph 314 of the BGB is not referred to at any point in the loan agreement. Nor is the procedure for termination by the borrower specified (especially in terms of form and time limit). However, the conditions under which the lender has a right of termination with good cause are explained, but not in terms of form and time limit.
- 14 With regard to the possibility of an ombudsman procedure, it is also stated in this case that the bank participates in the dispute-resolution procedure of the ‘Ombudsmann der privaten Banken’ consumer conciliation body ([www.bankenombudsmann.de](http://www.bankenombudsmann.de)). Detailed arrangements are set out in the ‘Verfahrensordnung für die Schlichtung von Kundenbeschwerden im deutschen Bankgewerbe’ (Rules of procedure for the settlement of customer complaints in the German banking industry), which are available on request or can be accessed online at [www.bankenverband.de](http://www.bankenverband.de). The complaint must be submitted in text form (for example, letter, fax, email) to the customer complaints office at the Association of German Banks.
- 15 In the present case, the loan was to be repaid by 1 April 2020. The withdrawal was declared by letter of 12 January 2019.
- 16 The applicant is of the opinion that the withdrawal is effective, as the period for withdrawal had not begun due to erroneous mandatory information. The applicant requests that, after return of the purchased vehicle, the defendant repay to him the 43 loan instalments paid up until the date of the hearing, giving a total of EUR 17 012.95. Furthermore, the applicant seeks a declaratory judgment to the effect that he owes neither interest nor redemption payments under the loan agreement. In addition, the applicant seeks reimbursement of his out-of-court lawyers’ fees.
- 17 In the alternative, the defendant invokes its right of retention arising from its alleged entitlement to be paid interest on the loan until the vehicle is returned. The

defendant also takes the view that the applicant must pay compensation for the vehicle's loss in value resulting from his use of it.

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

- 18 The success of the actions hinges on whether the respective withdrawals of the loan agreements were effective and whether the respective lenders can possibly invoke the plea of forfeiture or the plea of abuse of the right of withdrawal.
- 19 The applicants' declarations of withdrawal will in each case be valid only if the two-week period for withdrawal regulated in Paragraph 355(2), first sentence, of the BGB had not expired when withdrawal was declared. According to Paragraph 356b(2), first sentence, of the BGB, the period for 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, Paragraph 356b(2), second sentence, states that the period commences only on subsequent provision of the mandatory information. Incomplete mandatory information in the cases referred would have to be assumed in particular if at least one of the mandatory items of information required under Article 10(2)(a), (d), (l), (r), (s) and (t) of Directive 2008/48 is not included in the credit agreement as required by law.
- 20 Even if the mutual contractual obligations had already largely been fulfilled at the time of withdrawal in the cases referred, withdrawal was still permissible in principle, since German law does not provide for extinction of the right of withdrawal for consumer credit agreements. The national legislature deliberately opted for an indefinite right of withdrawal.
- 21 It is possible that the creditors might successfully rely on the plea of forfeiture of the right of withdrawal or on the plea of abuse of the right of withdrawal in the cases referred. However, it is necessary to examine which conditions apply, under EU law, to the plea of forfeiture or of abuse in respect of the exercise of the right of withdrawal pursuant to the first sentence of Article 14(1) of Directive 2008/48.
- 22 The referring court states the following with regard to the individual questions referred:
- 23 Question 1: The issue in this question is how Article 10(2)(a) of Directive 2008/48, pursuant to which the credit agreement must specify the type of credit in a clear and concise manner, should be understood. This question is answered in differing ways in the national case-law and literature. The referring court takes the view that the decisive factor is how this question is to be answered under EU law.
- 24 On the one hand, it might be sufficient to specify the arrangement of paying in instalments and the fixed interest rate. The Bundesgerichtshof (Federal Court of Justice) considers this to be the only correct interpretation of Directive 2008/48, without there being any room for reasonable doubt. On the other hand, the

systematic relationship might suggest that, with regard to the type of credit, it is also necessary to specify that it is a linked credit agreement, since Article 3(n) of Directive 2008/48 defines a linked credit agreement as a special type of credit agreement and Article 15 of the directive provides for specific legal consequences for scenarios involving a linked credit agreement. It might also be inferred from the nomenclature that it must be expressly clarified whether the agreement is a fixed-term or open-end loan agreement, since Article 13 of Directive 2008/48 contains special rules for open-end credit agreements.

- 25 Question 2: The issue in this question is how Article 10(2)(d) of Directive 2008/48, pursuant to which the credit agreement must specify the conditions governing the drawdown of the credit in a clear and concise manner, should be understood. The referring court finds it problematic, *inter alia*, that the two credit agreements do not inform the borrower that, once a payment has been made, the liability towards the vendor in respect of the purchase price is extinguished in the amount of that payment and that, once the purchase price has been paid in full, the purchaser may require the vendor to hand over the purchased vehicle. However, it points out that the question of how Article 10(2)(d) of Directive 2008/48 is to be understood is not answered consistently in the national case-law and literature.
- 26 On the one hand, it might be sufficient, when the loan amount is disbursed to a third party, if the consumer is merely informed of the party to whom the amount of credit is disbursed. On the other hand, the wording of Article 10(2)(d) of Directive 2008/48 could, however, be interpreted as meaning that, in the case of a linked credit agreement concluded for the purpose of financing a vehicle, the consumer must be informed of the benefits that he will receive instead of the amount of the credit, and, in particular, he must be informed that he will be released from his obligation to pay the purchase price to the extent of the amount disbursed to the seller and that (provided that the purchase price is paid in full) he may require the seller to hand over the object of purchase.
- 27 Question 3: The issue in this question is how Article 10(2)(1) of Directive 2008/48, pursuant to which 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.
- 28 It might be sufficient that the content of the statutory rule on the interest rate applicable in the case of late payments in national law (*in casu*, Paragraph 288(1), second sentence, of the BGB) is included in the agreement. The referring court points out that, in a decision of February 2020, the Bundesgerichtshof (Federal Court of Justice) considered this interpretation of Directive 2008/48 to be correct, without there being any room for reasonable doubt.
- 29 However, the referring court takes the view that Article 10(2)(1) of Directive 2008/48 might be construed differently. The additional words ‘as applicable at the time of the conclusion of the credit agreement’ in the Directive 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 to say, 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. It might also be necessary for the arrangements for adjustment of the interest rate applicable in the case of late payments to 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 yearly by the Deutsche Bundesbank.

- 30 In addition, the referring court notes that, for the purpose of answering the decisive question of whether the interest rate applicable in the case of late payments must be specified as an absolute number, it is not possible to derive anything from the fact that the legislature did not define the interest applicable in the case of late payments in Article 3 of Directive 2008/48 — unlike the percentage rate of charge in Article 3(i) of that directive. This is because, even without a legislative definition in the Directive, it is perfectly clear that the interest rate applicable in the case of late payments is also expressed as an annual percentage rate. However, the relevant question of interpretation in this context is whether it is sufficient to refer here to a reference rate published elsewhere or whether it is necessary to specify to the consumer a precise interest rate applicable at the time of conclusion of the agreement in the form of a percentage.
- 31 Question 4(a): The issue in this question is how Article 10(2)(r) of Directive 2008/48, pursuant to which 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.
- 32 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. In a decision of February 2020, the Bundesgerichtshof (Federal Court of Justice) considers this to be the only correct interpretation of Directive 2008/48, without there being any room for reasonable doubt. However, the referring court considers that it might be interpreted differently and refers to, *inter alia*, recital 39 of the Directive.
- 33 If Question 4(a) is answered in the affirmative, it is also necessary to answer Question 4(b), which asks whether Article 10(2)(r) and the second sentence of Article 14(1) of Directive 2008/48 preclude national legislation pursuant to which, in the case of incomplete information within the meaning of Article 10(2)(r) of that directive, the period for withdrawal nevertheless commences on conclusion of the agreement and only the creditor's right to compensation for early repayment of the credit is lost. Opinions also differ on this point in the national case-law and literature. According to one view, insufficient information as to the calculation of

compensation for early repayment is penalised solely by loss of the right to compensation for early repayment. According to the opposing view, this is not compatible with Article 10(2)(r) of Directive 2008/48. The referring court is also inclined to take that latter view and refers to recital 39 of Directive 2008/48.

- 34 Question 5: The issue in this question is how Article 10(2)(s) of Directive 2008/48, pursuant to which 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. This provision might be interpreted as meaning that, although the legislature deliberately 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. The Bundesgerichtshof (Federal Court of Justice) considers this interpretation to be obvious.
- 35 On the other hand, the objective of offering ‘a sufficient degree of consumer protection’, also highlighted in recital 8 of Directive 2008/48, might require that information also be provided on rights of termination regulated under national law and the formal preconditions governing those rights. The referring court considers that this view is corroborated by recitals 24 and 31 of the Directive.
- 36 Question 6: The issue in this question is how Article 10(2)(t) of Directive 2008/48, pursuant to which the credit agreement must specify in a clear and concise manner whether or not there is an out-of-court complaint and redress mechanism for the consumer and, if so, the methods for having access to it, should be understood.
- 37 With regard to the methods for having access to a customer complaint mechanism, it might be sufficient to refer to rules of procedure on the internet. The Bundesgerichtshof (Federal Court of Justice) considers this to be sufficient in the aforementioned decision of February 2020. In particular, the clarity and conciseness required by the Directive might also mean that the formal methods for having access to the arbitration procedure must be reproduced in full in the credit agreement itself, in order that the consumer can clearly and easily ascertain how he can initiate such a procedure in a permissible manner. In particular, it might not be sufficiently clear and concise to refer, with regard to the methods for having access, to multiple pages of rules of procedure on the internet, whereby the consumer must firstly find and work through the currently valid version of the rules of procedure in order to find the part in which the formal methods for accessing a customer complaint mechanism are set out.
- 38 It might also give rise to concerns if dynamic reference is made to rules of procedure that will apply only in the future, when the customer makes a complaint at a later point in time, the content of which is necessarily unknown at the time when the agreement is concluded.

- 39 With regard to Questions 7 and 8, reference is made to the corresponding identical statements on the identically worded Questions 4 and 5 in the summary of the request for a preliminary ruling in Case C-155/20.
- 40 Finally, the referring court states that a single judge in a court of first instance is also entitled to refer questions to the Court of Justice for a preliminary ruling. This outcome is also not altered by the fact that, in its order of 11 February 2020, the Bundesgerichtshof (Federal Court of Justice) stated, with regard to Questions 3, 4(a) and 5 in the present case, that the correct interpretation of EU law was so obvious as to leave no scope for any reasonable doubt, and cited in that regard the existence of an '*acte clair*' within the meaning of the *CILFIT* case-law of the Court of Justice (judgment of 6 October 1982, *CILFIT*, 283/81, EU:C:1982:335, paragraph 16). This is because the court which is not ruling at final instance must be free, if it considers that the ruling on law made by the superior court could lead it to deliver a judgment contrary to EU law, to refer to the Court of Justice the questions which give it cause for doubt.
- 41 In addition, reference is also made to the in part identical questions and the parallels with the requests for preliminary rulings in Cases C-33/20 and C-155/20, and it is proposed that these proceedings be joined.