

Case C-47/21

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 January 2021

Referring court:

Landgericht Ravensburg (Germany)

Date of the decision to refer:

8 January 2021

Applicants:

F. F.

B. A.

Defendants:

C. Bank AG

Bank D. K. AG

Subject matter of the main proceedings

Consumer credit agreement – Mandatory information – Directive 2008/48/EC – Right of withdrawal – Forfeiture of the right of withdrawal – Abuse of the right of withdrawal – Consumer's obligation of advance performance in returning goods received after having made a declaration of withdrawal – Right of a single judge to request a preliminary ruling

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

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?

Independently of the answers to Questions 1(a) and 1(b):

2. Mandatory information required under Article 10(2) of Directive 2008/48/EC
 - (a) Is Article 10(2)(p) of Directive 2008/48/EC to be interpreted as meaning that the amount of interest payable per day, which must be specified in the credit agreement, must be calculated from the contractual borrowing rate specified in the agreement?
 - (b) Article 10(2)(r) of Directive 2008/48/EC:
 - (aa) Is that provision to be interpreted as meaning that the information in the credit agreement concerning the compensation payable in the event of early repayment of the loan must be sufficiently precise to enable the consumer to calculate at least approximately the compensation payable in the event of early termination?
- (should the previous question be answered in the affirmative)

- (bb) 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?
- (c) 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, and must the consumer be informed of the reference interest rate (base rate) and the variability of that rate?
- (d) 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 at least one of the above Questions 2(a) to 2(d) is answered in the affirmative:

- (e) 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?

If not:

- (f) What are the relevant criteria for determining whether the period of withdrawal is to begin in spite of the fact that that information is incomplete or incorrect?

If the above Question 1(a) and/or at least one of Questions 2(a) to 2(d) 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 forfeiture depend, from a subjective standpoint, on the consumer knowing that his or her right of withdrawal continued to exist or, at least, on his or her 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 of international law by which the German courts are bound under the Grundgesetz (Basic Law)?

If so:

- (f) How are German legal practitioners to resolve a conflict between the binding precepts of international law and the precepts of the Court of Justice of the European Union?

4. Assumption of an abuse of the consumer's right of withdrawal under Article 14(1), first sentence, of Directive 2008/48/EC:

- (a) Is it possible to abuse the right of withdrawal under Article 14(1), first sentence, of Directive 2008/48/EC?

If so:

- (b) Is the assumption of an abuse of the right of withdrawal a limitation of the right of withdrawal which must be regulated by an act of parliament?

If not:

- (c) Does the assumption of an abuse of the right of withdrawal depend, from a subjective standpoint, on the consumer knowing that his or her right of withdrawal continued to exist or, at least, on his or her 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 assumption of an abuse of rights in the exercise of the right of withdrawal in good faith?

If not:

- (e) Is this compatible with the established principles of international law by which the German courts are bound under the Basic Law?

If so:

- (f) 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?

5. Irrespective of the answers to the above questions:

- (a) Is it compatible with EU law, in particular with the right of withdrawal under Article 14(1), first sentence, of Directive 2008/48/EC if, under national law, in the case of a credit agreement linked to a contract of sale, following the effective exercise of the consumer's right of withdrawal under Article 14(1) of Directive 2008/48/EC,
 - (aa) a consumer's claim against the creditor for repayment of the loan instalments paid does not arise until he or she has in turn returned the object purchased to the creditor or provided proof that he or she has dispatched it to the creditor?
 - (bb) an action brought by the consumer for repayment of the loan instalments paid by the consumer, after having returned the object purchased, is to be dismissed as currently unfounded if the creditor has not delayed in accepting the object purchased?

If not:

- (b) Does it follow from EU law that the national rules described in (a)(aa) and/or (a)(bb) must be disapplied?

Irrespective of the answers to Questions 1 to 5 above:

6. 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)(l), (p) and (r) and Article 14(1)

Provisions of national law cited

Grundgesetz (Basic Law), 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, 273, 274, 288, 295, 322, 355, 356b, 357, 357a, 358, 495 and 502

Zivilprozessordnung (Code of Civil Procedure), Paragraph 348a

Brief summary of the facts and procedure

- 1 The present request for a preliminary ruling is based on two different sets of facts.
- 2 In the first case, the applicant concluded an agreement with the defendant on 12 April 2017 for a loan to purchase a used vehicle for private use from a car dealer. For the purposes of preparing and concluding the loan agreement, the vendor acted as the defendant's loan broker and used the standard form agreements provided by the defendant. According to the loan agreement, the purchase price was EUR 14 880, and the purchase price of EUR 12 880 remaining following the deduction of a down payment of EUR 2 000 was to be financed by the loan. Together with interest of EUR 944.37, the applicant therefore had to repay EUR 13 824.37 to the defendant.
- 3 In the agreement, the applicant was informed of his right of withdrawal in the following terms:

'Right of withdrawal

The borrower may withdraw his contractual declaration, without giving reasons, within 14 days. That period begins as soon as the agreement has been concluded, but not before the borrower has received all the mandatory information which must be provided pursuant to Paragraph 492(2) of the BGB (for example,

information concerning the type of loan, information relating to the net loan amount, information concerning the term of the contract) ...'

- 4 Furthermore, under the heading 'Specific information relating to further agreements', information was provided on related agreements, which, however, was not relevant for the applicant because he had not concluded any such agreements.
- 5 Initially, the applicant duly paid the agreed instalments, but then withdrew his declaration of intention to conclude the loan agreement by email of 1 April 2020. The applicant is of the opinion that the withdrawal is effective, as the period of withdrawal had not begun since incorrect information concerning withdrawal and erroneous mandatory information had been provided. The applicant seeks a declaration that, owing to his notification of withdrawal, and as from the point at which he gave it, he owes neither interest payments nor principal repayments under the loan agreement. In the event that the applicant is successful in his request for such a declaration, he seeks reimbursement of the loan instalments paid to date and of the down payment made to the vendor, which amounts to a total of EUR 10 110.11, payable after handover of the vehicle purchased, as well as a judicial declaration that the defendant had delayed in accepting the vehicle.
- 6 The defendant contends that the action should be dismissed. It submits that it had duly provided the applicant with the information concerning withdrawal and all the mandatory information. It had used the statutory model for the information concerning withdrawal and could therefore rely on Article 247(6), second paragraph, first and second sentences, of the EGBGB (so-called statutory presumption), with the result that the withdrawal was time-barred.
- 7 In the alternative, by way of a counterclaim, the defendant requests that the applicant be ordered to pay compensation of EUR 7 843 and seeks a declaration that the applicant be obliged to pay further compensation, in addition to the amount of EUR 7 843, in respect of the diminished value of the vehicle resulting from handling other than what is necessary to establish the nature, characteristics and functioning of the car. The defendant bases the claim for payment of EUR 7 843 on the loss of value of EUR 7 843 that had already occurred. The applicant opposes the counterclaim.
- 8 The second case is essentially the same as the first. In the second case, the applicant was informed of his right of withdrawal in the following terms:

'Right of withdrawal

You may withdraw your contractual declaration, without giving reasons, within 14 days. That period begins as soon as the agreement has been concluded, but not before you have received all the mandatory information which must be provided pursuant to Paragraph 492(2) of the BGB (for example, information concerning the type of loan, information relating to the net loan amount, information concerning the term of the contract)...

- 9 Furthermore, under the heading ‘Specific information relating to further agreements’, information was provided on related agreements, which, however, is not relevant for the applicant because he has not concluded any such agreements. In contrast to the first case, however, the information in this case included the stipulation ‘if concluded’.
- 10 In this case too, the applicant withdrew his declaration of intention to conclude the loan agreement.
- 11 The applicant is of the opinion that the withdrawal is effective, as the period of withdrawal had not begun since incorrect information concerning withdrawal and erroneous mandatory information had been provided. The applicant therefore seeks reimbursement from the defendant of the loan instalments paid to date and the down payment made to the vendor, payable after handover of the vehicle purchased, as well as a judicial declaration that the defendant had delayed in accepting the vehicle and that, as from the point at which the notification of withdrawal was received, the defendant is no longer entitled to interest and repayments of principal under the agreement.
- 12 The defendant contends that the action should be dismissed. It submits that it had duly provided the applicant with the information concerning withdrawal and all the mandatory information. It had used the statutory model for the information concerning withdrawal and could therefore rely on Article 247(6), second paragraph, first and third sentences, of the EGBGB, with the result that the withdrawal was time-barred. In the alternative, it argues that the applicant’s conduct constitutes an abuse of rights, as he attacks the effectiveness of the information concerning withdrawal on the basis of a situation which is clearly recognisable to him (which related agreements have been concluded and which have not), even though the information concerning withdrawal is not misleading for him, and he also continues to use the vehicle without offering it to the defendant as part of his obligation of advance performance so as to establish that the defendant has delayed in accepting the vehicle. Furthermore, the applicant wrongly denies the existence of the defendant’s entitlement to compensation in the event of the rescission of the agreement. In the alternative, should the action be well founded, the defendant requests that the applicant be ordered to return the vehicle purchased, and seeks a declaration that the applicant be obliged to pay compensation for the diminished value of the vehicle resulting from handling other than what is necessary to establish the nature, characteristics and functioning of the car. The applicant seeks a declaration that he is not obliged to pay the compensation sought by the defendant.

Brief summary of the basis for the reference

- 13 The success of the actions hinges on whether the withdrawal from the loan agreements was effective and whether the defendants can possibly invoke the plea of forfeiture or the plea of abuse of the right of withdrawal.

- 14 The referring court states the following with regard to the individual questions referred:
- 15 Questions 1(a) and 1(b): 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.
- 16 In the event that incomplete mandatory information is provided, withdrawal would be 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.
- 17 Incomplete mandatory information would therefore have to be assumed in the present case if, in particular, the information concerning withdrawal under Article 247(6), second paragraph, and Article 247(12), first paragraph, of the EGBGB was not duly provided.
- 18 However, Article 247(6), second paragraph, third sentence, and Article 247(12), first paragraph, third sentence, of the EGBGB stipulate that a clearly formulated, highlighted contractual clause that corresponds to the model 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).
- 19 However, the referring court considers that this statutory presumption is incompatible with the judgment of 26 March 2020, *Kreissparkasse Saarlouis* (C-66/19, EU:C:2020:242). The following statements correspond, in essence, to those regarding Questions 1(a) and 1(b) in paragraphs 10 to 15 of the summary of the request for a preliminary ruling in Case C-336/20, to which reference is made here.
- 20 In addition, the referring court takes account of a recent decision of the Bundesgerichtshof (Federal Court of Justice) of 27 October 2020, in which the Federal Court of Justice significantly extended the so-called statutory presumption. It is true that, in that decision, the Federal Court of Justice departed from its previous case-law, according to which setting out perfectly the mandatory information with a reference to Paragraph 492(2) of the BGB in the form of model

information concerning withdrawal does constitute clear and comprehensible information. However, the Federal Court of Justice emphasises that there may be an abuse of rights where the consumer invokes the absence of the statutory presumption even though it was clearly recognisable to him or her that the model had been deviated from in the individual case and therefore had no relevance.

- 21 The Federal Court of Justice's view that the fact that an inaccuracy in the information concerning withdrawal can be recognised means, in itself, that invoking the absence of the statutory presumption constitutes an abuse of rights has the consequence that the existence of the protection conferred on the creditor as a result of having provided all the information contained in the statutory model becomes the general rule in cases where the withdrawal from a consumer loan is declared later than 14 days after the conclusion of the agreement. It is often the case that a deviation from the model information concerning withdrawal is clearly recognisable to the consumer. Accordingly, effective exercise of the right of withdrawal would be possible only in exceptional cases.
- 22 This interpretation of the law, combined with an extension by the courts of an exception provided for by national law, ultimately renders the consumer's right of withdrawal granted under EU law almost entirely devoid of effect, for which reason, in the view taken by the referring court, the directive should be given direct effect, as in the case of an infringement of general principles of EU law.
- 23 Since it was apparent to the applicant in the first case that no related agreement had been concluded, he could not, in accordance with the national case-law, invoke the absence of the statutory presumption and his withdrawal would be time-barred and thus ineffective. In the second case, since the information concerning the right of withdrawal in the loan agreement bears the stipulation 'if concluded', the statutory presumption would be directly applicable in accordance with the national case-law, and the withdrawal would likewise be time-barred and thus ineffective.
- 24 Questions 1(a) and 1(b) are referred to the Court of Justice in order to clarify whether the so-called statutory presumption is contrary to Directive 2008/48 and, furthermore, whether it must be disapplied.
- 25 Question 2(a) (information concerning the borrowing rate): The statements regarding this question correspond, in essence, to those regarding Question 2(a) of the request for a preliminary ruling in Case C-38/21. In this respect, reference is made to paragraphs 14-16 of the summary of that request for a preliminary ruling.
- 26 Question 2(b) (compensation payable in the event of early repayment of the loan): The statements regarding this question correspond, in essence, to those regarding Questions 4(a) and 4(b) of the request for a preliminary ruling in Case C-187/20. In this respect, reference is made to paragraphs 31-33 of the summary of that request for a preliminary ruling.

- 27 Question 2(c) (information concerning the interest rate applicable in the case of late payments): 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 Federal Court of Justice considered that 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. The wording in point 3 of Annex II to Directive 2008/48 (Standard European Consumer Credit Information) also militates in favour of the interest rate specifically applicable being specified as a number.
- 30 It would also not appear to be sufficiently clear and concise to refer, with regard to the adjustment of the interest rate applicable in the case of late payments, to the fact that statutory interest payable in the case of late payments is charged at a rate of five percentage points above the base rate. This is because, in accordance with the case-law of the Court of Justice, knowledge and good understanding, on the part of the consumer, of the information that must be included in the credit agreement, in accordance with Article 10(2) of Directive 2008/48, are necessary for the exercise of the rights of the consumer. A reference to a legislative act is insufficient for that purpose (judgment of 26 March 2020, *Kreissparkasse Saarlouis*, C-66/19, EU:C:2020:242, paragraphs 45 to 47). In order for consumers to be able to estimate the interest rate applicable in the case of late payments, it should therefore be necessary that they be informed in the credit agreement of – at the very least – the reference interest rate (base rate) and of the fact that it can go up or down.
- 31 Question 2(d) (access to an out-of-court complaint and redress mechanism): The statements of the referring court correspond, in essence, to those regarding Question 6 of the request for a preliminary ruling in Case C-187/20. In this respect, reference is made to paragraphs 36-38 of the summary of that request for a preliminary ruling. In addition, the referring court also notes here, with reference

to the judgment of 26 March 2020, *Kreissparkasse Saarlouis* (C-66/19, EU:C:2020:242), that it considers that a mere reference to a legislative act determining the rights and obligations of the parties, which is available elsewhere, is not sufficient, for which reason the referring court takes the view that all the formalities for the admissibility of a complaint must be mentioned in the credit agreement itself.

- 32 Questions 2(e) and 2(f) (question of whether any failure adequately to provide the mandatory information means that the period of withdrawal does not begin to run): The statements of the referring court correspond, in essence, to those regarding Question 2(d) of the request for a preliminary ruling in Case C-336/20. In this respect, reference is made to paragraphs 17-19 of the summary of that request for a preliminary ruling.
- 33 Questions 3(a) to 3(f) (forfeiture) and 4(a) to 4(f) (abuse of rights): The statements of the referring court correspond to those regarding Questions 3(a) to 3(f) and 4(a) to 4(f) of the request for a preliminary ruling in Case C-38/21. In this respect, reference is made to paragraphs 18-39 of the summary of that request for a preliminary ruling.
- 34 Question 5 (consumer's obligation of advance performance where the object is returned after withdrawal): According to the national provision in Paragraph 357(4), first sentence, of the BGB, in the case of withdrawal from a sale of consumer goods, the trader (and, in the case of a contract of sale linked to a credit agreement, the creditor taking the place of the trader pursuant to Paragraph 358(4), fifth sentence, of the BGB) may refuse to repay the payments received (loan instalments and, if applicable, down payment) until it has received the goods back or the consumer has provided proof that he or she has dispatched them.
- 35 The Federal Court of Justice takes the view that it follows from Paragraph 358(4), first sentence, of the BGB, read in conjunction with Paragraph 357(4), first sentence, of the BGB, that, after withdrawing from a loan agreement linked to a contract of sale, the consumer must return the vehicle to the creditor as part of his or her obligation of advance performance. The assumption of an obligation of advance performance has the effect that the consumer's own claim against the creditor for reimbursement of the payments that he or she has made does not arise until he or she has returned the vehicle or provided proof that the vehicle has been dispatched. Due to the existence of an obligation of advance performance, the Federal Court of Justice proceeds on the assumption that a consumer's action for payment against the creditor after having returned the object of advance performance can be well founded only if the consumer has given the creditor the chance to accept that object, and the creditor has delayed in doing so. In that respect, there can be a delay in acceptance only where there is an actual offer of performance pursuant to Paragraph 294 of the BGB, that is to say, by an offer of performance at the defendant's place of business or demonstrable dispatch of the vehicle. A verbal offer of performance pursuant to Paragraph 295 of the BGB is

not sufficient where an obligation of advance performance exists, if the creditor has refused to take back the object of sale.

- 36 In both of the present cases, this means that if it were assumed under national law that the applicants have an obligation of advance performance, and a decision ordering payment following the return of the vehicle would be justified only from the time of delay in acceptance, both actions would have to be dismissed as currently unfounded, irrespective of the question of whether the withdrawal was effectively exercised. This is because it was not submitted either that the applicants had returned the vehicles or provided proof of dispatch or that the defendants had delayed in accepting an actual offer of performance pursuant to Paragraph 294 of the BGB.
- 37 That obligation of advance performance on the part of the consumer was recently confirmed by the Federal Court of Justice in a decision of 10 November 2020. However, the referring court questions whether that interpretation of national law, in so far as it imposes an obligation of advance performance in accordance with the case-law pronounced at the highest judicial level, is contrary to Article 14(1), first sentence, of Directive 2008/48/EC or any other provision of EU law.
- 38 The reason for this is that the exercise of the consumer's right of withdrawal is considerably restricted in practice if the consumer has to return the purchased item before he or she can take legal action for the repayment of the loan instalments, to which he or she is entitled. If the consumer has to return the car without knowing whether the withdrawal is actually effective and without knowing how soon he or she will receive the performance owed by the creditor, if at all, this will often discourage him or her from withdrawing, even if the withdrawal could be exercised legitimately in itself.
- 39 The assumption of an obligation of advance performance on the part of the consumer is also not necessary to protect the legitimate interests of the creditor. The creditor's need for security is satisfied even if it is obliged to repay the payments made by the consumer against return of the car. The acceptance of a right of retention pursuant to Paragraph 273 of the BGB sufficiently protects the trader, because it is not under any obligation to perform before it is effectively offered the vehicle.
- 40 Moreover, this interpretation of Paragraph 357(4) of the BGB at the highest judicial level deprives the right of withdrawal granted by Article 14(1) of Directive 2008/48 of its practical effectiveness in the case of consumer loan agreements linked to contracts of sale, significantly impeding the achievement of the objectives pursued by the directive in its core area.
- 41 The referring court takes the view that Article 14(1) of Directive 2008/48 should therefore be given direct effect in the sense that it is necessary to disapply a provision of national law pursuant to which, in the case of a credit agreement linked to a contract of sale, a consumer's claim against the creditor for repayment

of the loan instalments paid, following the effective exercise of his or her right of withdrawal under Article 14(1) of that directive, does not arise until he or she has in turn returned the object purchased to the creditor or provided proof that he or she has dispatched it to the creditor. It should likewise be necessary to disapply a provision pursuant to which an action for repayment of the loan instalments paid by the consumer, following the return of the object purchased, is to be dismissed as currently unfounded where the creditor is has not delayed in accepting the object purchased.

- 42 Question 6 (right of the single judge to request a preliminary ruling): The statements of the referring court correspond, in essence, to those regarding Question 4 of the request for a preliminary ruling in Case C-336/20. In this respect, reference is made to paragraphs 30-33 of the summary of that request for a preliminary ruling.
- 43 Lastly, it is pointed out that the questions referred in the present request for a preliminary ruling overlap in part with the questions in pending Cases C-33/20, C-155/20, C-187/20, C-336/20 and C-38/21, for which reason it is suggested that the cases be joined.