

**Case C-232/21**

**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:**

12 April 2021

**Referring court or tribunal:**

Landgericht Ravensburg (Germany)

**Date of the decision to refer:**

19 March 2021

**Applicants:**

CR

AY

ML

BQ

**Defendants:**

Volkswagen Bank GmbH

Audi Bank

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**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?

Irrespective 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?
- (should Question (aa) above 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?

If at least one of the above Questions 2(a) and 2(b) is answered in the affirmative:

- (c) 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:

- (d) 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 one of Questions 2(a) and 2(b) 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 statute?

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? Does the same apply to agreements that have been terminated?

If not:

- (d) Does the creditor's facility to provide the borrower 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? Does the same apply to agreements that have been terminated?

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? **[Or. 5]**

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 statute?

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? Does the same apply to agreements that have been terminated?

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? Does the same apply to agreements that have been terminated?

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? [**Or. 6**]

Irrespective of the answers to Questions 1 to 4 above:

5. (a) Is it compatible with EU law 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 relied on**

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)(p) and (r) and Article 14(1)

**Provisions of national law relied on**

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) in the version valid at the material time

Bürgerliches Gesetzbuch (German Civil Code, ‘the BGB’), in particular Paragraphs 242, 273, 274, 293, 294, 295, 322, 355, 356b, 357, 357a, 358, 492, 495 and 502 and (as regards the fourth case) Paragraphs 346(1) and 348 of the BGB instead of Paragraph 357(1) and (4) (new version)

Zivilprozessordnung (Code of Civil Procedure), Paragraph 348a

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The present request for a preliminary ruling is based on four different sets of facts.
- 2 As in the requests for a preliminary ruling in Cases C-33/20, C-155/20, C-187/20, C-336/20, C-38/21 and C-47/21, each of the applicants concluded a loan agreement with the defendant bank for a certain amount that was specifically for the purpose of purchasing a car for private use. The applicants paid a deposit to the car dealership and financed the remaining purchase price plus a certain amount for payment protection insurance via the respective loans. It was agreed in the loan agreements that the applicants would repay the loan in x equal monthly instalments of a given amount, followed by a final instalment of a given amount. The respective defendants prepared and concluded the loan agreements with the assistance of the respective car dealerships in their capacity as loan brokers. The applicants duly paid the agreed instalments, but each withdrew their declaration of intention to conclude the loan agreements.
- 3 Regarding possible compensation for early repayment of the loan, each of the loan agreements in the first, second and third cases contains the following wording:

*‘The bank may demand reasonable compensation in the event of early repayment for losses connected directly with the early repayment, in so far as the calculation of compensation for early repayment is not excluded by the law.*

*The bank shall calculate the losses in accordance with the asset/liability method, which takes 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.'*

4 In the fourth case, that clause reads as follows:

*'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 fees); 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.'*

5 In the first, second and third cases, the respective loans had not yet been fully repaid when withdrawal was declared, but in the fourth case this had already been done.

6 After declaring their withdrawal, the applicants in the first and third cases offered the respective defendants the opportunity to collect the vehicle against repayment of the payments they had made. In the fourth case, the applicant expressly offered, in its application initiating proceedings, to hand over the vehicle to the defendant at its place of business. In the second case, no information is given on this.

**Essential arguments of the parties in the main proceedings**

- 7 Each of the applicants takes the view that their declaration of withdrawal is effective, as the period of withdrawal had not begun due to the inadequacy of the mandatory information. The defendants contend that they had duly provided all the information and that the respective withdrawals were time-barred.

**Succinct presentation of the reasoning in the request for a preliminary ruling**

- 8 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.
- 9 The referring court states the following with regard to the individual questions referred:
  - 10 Questions 1(a) and 1(b): The referring court's findings on these questions correspond, in essence, to those on Questions 1(a) and 1(b) in the request for a preliminary ruling in Case C-47/21. In this respect, reference is made to paragraphs 15 to 24 of the summary of the request for a preliminary ruling in Case C-47/21.
  - 11 Question 2(a) (information concerning the borrowing rate): The findings on this question correspond, in essence, to those on Question 2(a) of the requests for a preliminary ruling in Cases C-38/21 and C-47/21. In this respect, reference is made to paragraphs 14 to 16 of the summary of the request for a preliminary ruling in Case C-38/21.
  - 12 Question 2(b): Question 2(b)(aa), which asks about the required precision of the information concerning the compensation payable in the event of early repayment and which was also raised in the requests for a preliminary ruling in Cases C-155/20 (Question 2) and C-187/20 (Question 4(a)), is formulated more specifically in the present request. Both of the cases mentioned posed the question as to whether it is necessary to 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.
  - 13 The present request asks only whether 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. Since, pursuant to Article 10(2)(r) of Directive 2008/48, 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, the referring court takes the view that the information must be sufficiently precise to enable the consumer to estimate at least approximately the compensation payable. The reference to calculation

factors which, according to case-law, are to be taken into account in determining the compensation for early repayment, as in the above clauses regarding the compensation for early repayment, therefore appears to be too imprecise.

- 14 If Question 2(b)(aa) is answered in the affirmative, this raises the question as to whether it follows, logically, that if the information on the amount of compensation for early repayment is too imprecise, the period of withdrawal does not begin and can only be triggered by subsequent provision of the information (Question 2(b)(bb)). This question is answered differently in the national case-law and legal literature.
- 15 The Bundesgerichtshof (Federal Court of Justice) takes the view that inadequate information regarding the calculation of compensation for early repayment is penalised solely by loss of the right to compensation for early repayment in accordance with point 2 of Paragraph 502(2) of the BGB. As regards information relating to compensation for early repayment, an exception should be made from the legislative approach adopted by the legislature, according to which, in the event of incomplete information, the period of withdrawal can be triggered only by subsequently providing the information. The subsequent provision of mandatory information is not appropriate here, as it does not restore the right to compensation for early repayment, and the loss of the right to compensation for early repayment is a sufficiently effective, proportionate and dissuasive penalty within the meaning of Article 23 of Directive 2008/48. The Federal Court of Justice considers, moreover, that there is no room for reasonable doubt as to the correctness of this view.
- 16 The referring court considers this case-law to be incompatible with Article 10(2)(r) and point (b) of the second subparagraph of Article 14(1) of Directive 2008/48, in so far as the Member States may not derogate from the directive when determining the beginning of the period of withdrawal because of the full harmonisation required by EU law. If, however, the legislature is prohibited from laying down in national law less stringent requirements for the commencement of the withdrawal period than those laid down in the directive, the same must apply, a fortiori, to national courts.
- 17 Questions 2(c) and 2(d): These questions correspond to Questions 2(d) and 2(e) of the request for a preliminary ruling in Case C-38/21.
- 18 Questions 3(a) to 3(f) (forfeiture) and 4(a) to 4(f) (abuse of rights): The referring court's findings correspond to those on Questions 3(a) to 3(f) and 4(a) to 4(f) of the requests for a preliminary ruling in Cases C-38/21 and C-47/21. In this respect, reference is made to paragraphs 18 to 39 of the summary of the request for a preliminary ruling in Case C-38/21.
- 19 The only difference in the cases referred here is that Questions 3(c) and 3(d) and 4(c) and 4(d) ask whether the conditions and obstacles referred to in those questions also apply to agreements that have already been terminated. That aspect

therefore primarily relates to the fourth case, in which the loan had already been repaid. The referring court takes the view that, because of the inadequacy of the information concerning the right of withdrawal, the consumer was unable effectively to exercise this right of withdrawal either during the term of the agreement or subsequently, with the result that there is no reason to consider that, once the agreement has been terminated, the consumer has forfeited or abused the right of withdrawal.

- 20 The case-law of the Federal Court of Justice assumes forfeiture or an abuse of rights in such a case. However, since the referring court questions whether this is compatible with EU law, the corresponding questions are referred to the Court of Justice.
- 21 Questions 5(a) and 5(b): The findings on these questions correspond to those on Question 5 of the request for a preliminary ruling in Case C-47/21 (see, by analogy, paragraphs 34 to 41 of the summary of that request for a preliminary ruling).
- 22 With regard to the four cases referred, the referring court points out that Questions 5(a) and 5(b) are only material to the decision to be given in the first, second and third cases. If, under national law in accordance with the first sentence of Paragraph 358(4) and the first sentence of Paragraph 357(4) of the BGB, it must be assumed that the applicants have an obligation of advance performance in relation to the return of the vehicle and that, without this advance performance, any action brought for the reimbursement of the payments made would therefore be well founded only if the creditor had delayed in acceptance, the actions brought in the present proceedings would have to be dismissed as currently unfounded, because the applicants in these cases have neither returned the vehicle to the respective defendant nor provided proof that they have dispatched the vehicle to the respective defendant. Nor have they submitted that the defendant delayed in acceptance.
- 23 In the fourth case, however, the obligation to return and the performance by the bank must be rendered reciprocally and simultaneously pursuant to Paragraph 348 of the BGB. In that case, an action under national law is therefore possible under Paragraphs 273(1) and 274(1) of the BGB, without it being necessary to establish that the defendant delayed in acceptance.
- 24 Question 6: The findings on this question correspond to those on the corresponding question in the requests for a preliminary ruling in Cases C-336/20 (Question 4) and C-47/21 (Question 6). In this respect, reference is made to paragraphs 30 to 33 of the summary of the request for a preliminary ruling in Case C-336/20.