

Case C-38/21

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:

22 January 2021

Referring court:

Landgericht Ravensburg (Germany)

Date of the decision to refer:

30 December 2020

Applicant:

VK

Defendant:

BMW Bank GmbH

Subject matter of the main proceedings

Leasing agreement – Categorisation as a consumer credit agreement – Mandatory information – Directive 2008/48/EC – Right of withdrawal – Forfeiture of the right of withdrawal – Abuse of the right of withdrawal

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?

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

2. Mandatory information required under Article 10(2) of Directive 2008/48/EC

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

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

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

- (d) Is Article 14(1), second sentence, point (b), of Directive 2008/48/EC to be interpreted as meaning that the period of withdrawal does not begin until the information required under Article 10(2) of Directive 2008/48/EC has been provided fully and correctly?

If not:

- (e) 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 (c) is answered in the affirmative:

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

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

If so:

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

If not:

- (c) Does 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 prescripts of international law and the prescripts 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?

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)(f), (l), (p) and (t) and Article 14(1), second sentence, point (b)

Provisions of national law relied on

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

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

Bürgerliches Gesetzbuch (German Civil Code, 'the BGB'), in particular Paragraphs 242, 247, 288, 355, 356b, 357, 357a, 495 and 506. Paragraph 506(1) of the BGB provides that the provisions applicable to general consumer credit agreements are to be applied *mutatis mutandis* to agreements by which a trader grants some other kind of financial accommodation to a consumer in return for remuneration. According to subparagraph 2, contracts between a trader and a consumer for the use of an object in return for remuneration are deemed to grant financial accommodation in return for remuneration if, inter alia, it is agreed that the consumer is liable for a certain value of the object when the contract comes to an end (Paragraph 506(2)(3) of the BGB).

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 10 November 2018, the applicant concluded with the defendant a leasing agreement for a motor vehicle for private use. It was agreed that the applicant was to make payments totalling EUR 12 486.80, consisting of a lease down payment of EUR 4 760 upon taking delivery of the car, followed by 24 lease instalments of EUR 321.95 each. The contractually agreed borrowing rate was 3.49% p.a. for the entire term, and the annual percentage rate of charge was 3.55% p.a. The net loan amount was specified as being EUR 40 294.85, corresponding to the purchase price of the vehicle. It was further agreed that the applicant's mileage would be 10 000 km per year and that, on return of the vehicle, he would be obliged to pay 7.37 cents for each additional kilometre driven, while 4.92 cents would be reimbursed for each kilometre not driven. In addition, if the vehicle was not in a condition corresponding to its age and the agreed mileage when returned, the lessee would be obliged to pay compensation for the reduction in value.
- 2 The applicant took delivery of the vehicle and paid the monthly lease instalments from January 2019. By letter of 25 June 2019, the applicant withdrew his declaration of intention to conclude the leasing agreement.
- 3 The agreement contains the following information on withdrawal:

'Right of withdrawal

You may withdraw your contractual declaration, without giving reasons, within 14 days. The period begins after conclusion of the contract, but not before the borrower has received all the mandatory information referred to in Paragraph 492(2) of the BGB (for example information concerning the type of loan, information relating to the net loan amount, information concerning the contractual term).'

'Consequences of withdrawal

If you have already taken delivery of the vehicle, you must return it at the latest within 30 days and pay interest at the agreed borrowing rate for the period between the taking of delivery and return of the vehicle. The period begins when the notification of withdrawal is dispatched. For the period between the taking of delivery and return, interest of EUR 0.00 per day is payable in the event of a complete transfer of the rights of use. This amount is reduced accordingly if the rights of use of the vehicle have been transferred only partially.'

Essential arguments of the parties in the main proceedings

- 4 The applicant takes the view that the withdrawal is effective because the period of withdrawal has not begun, and he bases this, inter alia, on inadequate mandatory information. The applicant therefore seeks a judicial finding that the defendant cannot assert any rights under the leasing agreement – in particular any entitlement to payment of lease instalments.
- 5 The defendant considers that the action is unfounded. It contends that the applicant did not have a right of withdrawal, since the provisions on withdrawal that apply to consumer credit agreements are not applicable to leasing agreements. Furthermore, submits the defendant, it had duly provided the applicant with both the information concerning withdrawal and all the mandatory information in the leasing agreement. In particular, the information concerning withdrawal corresponds exactly to the statutory model, with the result that the information concerning withdrawal is deemed to be correct in accordance with Article 247(6), second paragraph, first and third sentences, of the EGBGB, and the withdrawal is time-barred.

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

- 6 The success of the action hinges on whether withdrawal from the leasing agreement was effective and whether the defendant can possibly invoke the plea of forfeiture or the plea of abuse of the right of withdrawal.
- 7 The effectiveness of the applicant's notification of withdrawal presupposes, firstly, that he has a right of withdrawal in the first place. This is questionable because, according to Article 2(2)(d) of Directive 2008/48, the latter does not apply to hiring or leasing agreements where an obligation to purchase the object

of the agreement is not laid down either by the agreement itself or by any separate agreement. However, according to the case-law of the Court of Justice, it is clearly in the interest of the European Union that provisions taken from an EU measure should be interpreted uniformly (judgment of 26 March 2020, *Kreissparkasse Saarlouis*, C-66/19, EU:C:2020:242, paragraph 29).

- 8 The legislation applicable in the present case is based on provisions taken from EU law in such a manner, since the German legislature took up the option, provided for in recital 10 of Directive 2008/48, to extend the rules laid down in the directive to areas not covered by its scope. As a result of the reference in Paragraph 506(1), first sentence, and Paragraph 506(2)(3) of the BGB to the provisions on general consumer loan agreements, the provisions of Directive 2008/48 transposed into national law also apply by analogy to leasing agreements such as that in the present case, since the most important aspect is not the transfer of rights of use, but rather the financing. Accordingly, the applicant has a right of withdrawal.
- 9 Furthermore, the question arises as to whether the withdrawal was limited in time. The applicant's notification 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 notification 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 would therefore have to be assumed in the present case if, in particular, the information concerning withdrawal was not adequately provided or at least one of the items of information required by law in the credit agreement was incomplete or was incorrect.
- 10 In the event of incomplete mandatory information, 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.
- 11 Nevertheless, a forfeiture or an abuse of the right of withdrawal could be assumed if the conditions for this were met under national law and such an assumption did not run counter to the requirements of EU law.
- 12 The referring court states the following with regard to the individual questions referred:
- 13 Questions 1(a) and 1(b): The findings on Questions 1(a) and 1(b) correspond in essence to those on 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.

- 14 Question 2(a): This question concerns the indication of the borrowing rate. In the present case, a borrowing rate of 3.49% p.a. is specified on p. 5 of the leasing agreement, while an interest amount of EUR 0.00 is specified in the information concerning withdrawal on p. 4 of the leasing agreement.
- 15 The resolution of the dispute depends on how Article 10(2)(p) of Directive 2008/48 is to be understood. The wording does allow for the interpretation that it is possible to specify to the consumer an amount of interest payable per day which does not have to correspond to the contractually agreed borrowing rate (according to the view taken by the Bundgerichtshof (Federal Court of Justice, Germany)).
- 16 However, a different understanding of Article 10(2)(p) of Directive 2008/48 is supported by the wording of the second sentence of Article 14(3)(b) of that directive, according to which, after exercising the right of withdrawal, the interest to be paid by the consumer for the period from the date the credit was drawn down until the date the capital is repaid is to be calculated on the basis of the agreed borrowing rate. It can be inferred from this that the interest payable per day must also be calculated from the borrowing rate as defined in Article 10(2)(f) of Directive 2008/48. This is also supported by the fact that the information pursuant to Article 10(2)(p) of that directive must be specified in a clear and concise manner. The reason for this is that, if the amount of interest payable per day cannot be calculated on the basis of the contractually agreed borrowing rate, a consumer may get the impression that an amount of interest payable per day which differs therefrom (as in the present case of EUR 0.00) is simply a data entry error and that he or she is nevertheless supposed to be obliged to pay the contractual borrowing rate.
- 17 Questions 2(b) to 2(e): The findings of the referring court on these questions are essentially the same as those on the corresponding questions in the request for a preliminary ruling in Case C-336/20 (Questions 2(b) to 2(d)).
- 18 Questions 3(a) to 3(f) on forfeiture: The referring court explains that forfeiture under German law is treated as a case of the inadmissible exercise of a right by reason of inconsistent conduct and that the breach lies in the unwarranted delay in exercising the right. Forfeiture presupposes that the entitled party has a right which he or she fails to exercise for a long period of time, even though he or she was able in fact to do so, and that the obligated party was entitled to assume and act on the basis that the entitled party would not exercise his or her right. If the entitled party then exercises his or her right nonetheless, that act infringes Paragraph 242 of the BGB (good faith) on the grounds of the inconsistency between the entitled party's present and previous conduct.
- 19 However, there are doubts as to whether those forfeiture rules can be applied to the consumer's right of withdrawal (Question 3(a)). According to Article 14(1), second sentence, points (a) and (b), of Directive 2008/48, the 14-day period of withdrawal begins either on conclusion of the agreement or on the day on which the consumer receives the information in accordance with Article 10 of the

directive, whichever is the later. That suggests that withdrawal is not time limited if the consumer does not receive the information in accordance with Article 10 of Directive 2008/48. Moreover, it follows from Article 14(1), second sentence, point (b), of the directive that the creditor is able to trigger the period of withdrawal at any time by providing the information in accordance with Article 10 of the directive. That suggests that the period in which the right of withdrawal can be exercised has been regulated definitively and that there is no latitude to limit the right of withdrawal in time by relying on a plea of forfeiture.

- 20 Should Question 3(a) be answered to the effect that the exercise of the right of withdrawal in accordance with Article 14(1), first sentence, of Directive 2008/48 is subject to forfeiture, the question arises as to whether the national courts have the power to limit the right of withdrawal in time via the national forfeiture rules or whether this must be regulated by legislation adopted by parliament.
- 21 Although the Court of Justice has ruled that the right of withdrawal can be limited in time, it emphasised in its judgment of 19 December 2019, *Rust-Hackner and Others* (C-355/18 to C-357/18 and C-479/18, EU:C:2019:1123, paragraph 62) that, when limiting the right of withdrawal in time, the effectiveness of the directive must be ensured in the light of the aim that it pursues. Accordingly, the possibility of limiting the right of withdrawal on the basis of merely general legal principles should be precluded. In particular, there is a danger that the facility deliberately provided by the directive to enforce the right of withdrawal with no limitation in time will be excessively restricted or even rendered completely ineffective through extensive application of Paragraph 242 of the BGB.
- 22 If Question 3(b) is answered in the negative, clarification is required as to the extent to which forfeiture depends on the consumer having been informed of his or her right of withdrawal. It is clear from the existing case-law of the Court of Justice that forfeiture of the right of withdrawal is possible only after the consumer has been sufficiently informed of his or her right of withdrawal (order of 27 November 2007, *Diy-Mar Insaat Sanayi ve Ticaret and Akar v Commission*, C-163/07 P, EU:C:2007:717, paragraphs 32, 36). The principle of effectiveness in EU law, in particular, also militates in favour of this. This is because the consumer can exercise his or her right of withdrawal efficiently only if he or she is aware of it in the first place.
- 23 If Question 3(c) is answered in the negative, clarification is required as to whether the creditor's facility to provide the consumer subsequently with the information required under Article 14(1), second sentence, point (b), of Directive 2008/48 and thus make the period of withdrawal begin to run precludes the application of the rules of forfeiture in good faith. The referring court takes the view that it is evident that, in the case of inadequate provision of the information pursuant to Article 10(2) of Directive 2008/48, the possibility of invoking the plea of forfeiture can be ruled out from the outset. According to the case-law of the Court of Justice, the obligated party cannot validly rely on reasons of legal certainty in order to redress a situation caused by his or her own failure to comply with the

requirement, under European Union law, to communicate information relating to the right of the entitled party to cancel or withdraw from the contract (judgments of 19 December 2013, *Endress*, C-209/12, EU:C:2013:864, paragraph 30, and of 13 December 2001, *Heininger*, C-481/99, EU:C:2001:684, paragraph 47).

- 24 If Question 3(d) is answered in the negative, it is necessary to examine whether that is compatible with the principles by which the German courts are bound under the Basic Law and, if so, how German legal practitioners are to resolve a conflict between the binding prescripts of international law and the prescripts of EU law.
- 25 Forfeiture is one of the general principles of international law. Those general principles form part of federal law and, according to Article 25(2) of the Basic Law, they take precedence over legislation. They are therefore binding on a German court.
- 26 The possibility of forfeiture is recognised in international law. However, it is common ground in literature on international law that the party entitled to exercise the right must be aware of his or her right. A right cannot be forfeited merely because no action was taken. Consequently, a German court could find that a consumer's right of withdrawal had been forfeited only if the entitled party knew that he or she still had a right of withdrawal or was ignorant of that right due to gross negligence.
- 27 Thus, if the principles applicable under EU law to forfeiture of the consumer's right of withdrawal from a consumer credit agreement diverged from binding international prescripts, the Court of Justice would have to clarify, within the scope of Directive 2008/48, the legal requirements by which the national court has to be guided in such a conflict of rules.
- 28 The referring court summarises the relevance of Questions 3(a) to (f) to the outcome of the dispute pending before it as follows: if forfeiture of the right of withdrawal in accordance with Article 14(1), first sentence, of Directive 2008/48
- is excluded from the outset,
 - or must, in any event, be established by act of parliament,
 - or must, at the very least, presuppose ignorance due to gross negligence,
 - or is, in any event, precluded by the failure to provide information subsequently,
 - or is, in any event, incompatible with binding prescripts of international law, provided at the very least that the entitled party is not ignorant due to gross negligence,

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

- 29 Questions 4(a) to 4(f) (abuse of rights): In the national case-law and legal literature, there are conflicting views on whether and under which conditions an exercise of the consumer's right of withdrawal in consumer credit agreements can be qualified as a breach of the principle of good faith and thus as an abuse of rights. The interpretation and application of national law therefore depend on how Questions 4(a) to 4(f) are to be answered.
- 30 It is doubtful whether the exercise of the consumer borrower's right of withdrawal can be limited at all by the assumption of a breach of the principle of good faith. The following arguments militate against this:
- The clear set of rules in the directive leaves no room for limiting the right of withdrawal by assuming a breach of the principle of good faith.
 - The creditor can trigger the period of withdrawal at any time by subsequently providing the information required under Article 10 of Directive 2008/48/EC.
 - The right of withdrawal serves not only to protect the individual, but also to pursue overriding goals (preventing over-indebtedness, strengthening financial market stability).
 - Directive 2008/48/EC does not allow Member States to impose restrictions on the right of withdrawal, in particular a reduction of the period of withdrawal.
- 31 Should Question 4(a) be answered to the effect that the exercise of the right of withdrawal can constitute an abuse of rights, the further question arises as to whether the national courts have the power to limit the right of withdrawal in time on that ground or whether this must be regulated by legislation adopted by parliament. The referring court takes the view that a limitation of the right of withdrawal on the basis of merely general legal principles is precluded.
- 32 This is because, as is the case with the application of the rules on forfeiture, there is a danger that the facility deliberately provided by the directive to enforce the right of withdrawal with no limitation in time will be excessively restricted or even rendered completely ineffective through extensive application of Paragraph 242 of the BGB. If the protection conferred on the creditor as a result of having provided all the information contained in the model in accordance with Article 247(6), second paragraph, third sentence, and Article 247(12), first paragraph, third sentence, of the EGBGB is extended by the courts due to the assumption that the absence of that protection has been invoked in a manner that constitutes an abuse of rights, this shows that, if exercised later than 14 days after the conclusion of the contract, the right of withdrawal may in this way be deprived of its practical effect.
- 33 If Question 4(b) is answered in the negative, clarification is required as to the extent to which the assumption of a breach of the principle of good faith can be

justified in cases where the right of withdrawal is exercised later than 14 days after the conclusion of the contract, even if the creditor did not adequately inform the consumer of his or her right of withdrawal.

- 34 If Question 4(c) is answered in the negative, the question arises as to whether the creditor's facility to provide the consumer subsequently with the information required under Article 14(1), second sentence, point (b), of Directive 2008/48 and thus make the period of withdrawal begin to run precludes the assumption of a breach of the principle of good faith.
- 35 If Question 4(d) is answered in the negative, it is necessary to examine whether this is compatible with the established principles of international law by which the German courts are bound under the Basic Law. The principle of good faith is one of the general principles of international law. Those general principles form part of federal law and, according to Article 25(2) of the GG, they take precedence over legislation. They are therefore binding on a German court.
- 36 According to those principles, the beneficiary must be aware of his or her right, and only then can the other party attach legal effects to the non-exercise of that right. A consumer who is unaware of his or her continuing right of withdrawal, without gross negligence on his or her part, cannot be alleged to have breached the principle of good faith if he or she does not exercise his or her right of withdrawal until some time after the conclusion of the contract and derives from that the legal consequences possible under the law.
- 37 If the principles applicable under EU law to abuse of the consumer's right of withdrawal diverge from binding international prescripts, the Court of Justice would have to clarify, within the scope of Directive 2008/48, how the national court has to be guided in such a conflict of rules.
- 38 The referring court considers Questions 4(a) to (f) to be material to the decision in the present case. The reason for this is that, if the assumption of an abuse of the right of withdrawal under Article 14(1), first sentence, of Directive 2008/48
- is excluded from the outset,
 - or must, in any event, be regulated by an act of parliament,
 - or must, at the very least, presuppose ignorance on the part of the consumer due to gross negligence,
 - or is, in any event, precluded by the failure to provide information subsequently,
 - or is, in any event, incompatible with binding prescripts of international law, provided at the very least that the entitled party is not ignorant due to gross negligence,

fulfilment of the specific requirements for an infringement of Paragraph 242 of the BGB (good faith) and the evaluation and weighing up of those requirements would not be relevant in an individual case.

- 39 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 and C-336/20, for which reason it is suggested that the cases be joined.

WORKING DOCUMENT