Case C-718/22

Request for a preliminary ruling

Date lodged:

23 November 2022

Referring court:

Landgericht Erfurt (Germany)

Date of the decision to refer:

14 October 2022

Applicant:

HK

Defendant:

Debeka Lebensversicherungsverein aG

Order

for reference to the

Court of Justice of the European Union

In the case of

HK

– Applicant –

[…]

v

Debeka Lebensversicherungsverein a. G., […]

– Defendant –

[…]

[…], on 14 October 2022, the 8th Civil Chamber of the Landgericht Erfurt […] (Regional Court, Erfurt)

ordered as follows:

I. The proceedings are stayed.

II. The following questions on the interpretation of EU law are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:

1. Does EU law, in particular Article 31 of the Third Life Assurance Directive and Article 15(1) of the Second Life Assurance Directive, read where appropriate in the light of Article 38 of the Charter of Fundamental Rights of the European Union, preclude national legislation under which full consumer information is only provided with the insurance policy, that is after the consumer has made an application ('policy model')? If so: does that of itself substantiate the consumer's right to object, that is, to demand reversal of the insurance contract? Might the exercise of such a right be prevented by a plea of forfeiture or abuse of rights?

2. Is an insurer which provided the consumer with no information or with incorrect information on his or her right to object prohibited from relying on forfeiture or abuse of rights to prevent the exercise of the consumer's resultant rights, including the right to object?

3. Is an insurer which provided the consumer with no consumer information or with incomplete or incorrect consumer information prohibited from relying on forfeiture or abuse of rights to prevent the exercise of the consumer's resultant rights, including the right to object?

4. Does EU law, in particular Article 15(1) of the Second Life Assurance Directive, Article 31 of the Third Life Assurance Directive and Article 35(1) of Directive 2002/83/EC, read where appropriate in the light of Article 38 of the Charter of Fundamental Rights of the European Union, preclude national legislation or case-law under which a policyholder – who has legitimately exercised his or her right of cancellation – is required to bear the burden of demonstration and proof for the purpose of quantifying the benefits of use derived by the insurer itself? Where such an imposition of the burden of demonstration and proof is permissible, does EU law, especially the principle of effectiveness, require that the policyholder has in return rights to information or some other assistance from the insurer that will enable him or her to enforce those rights?

A. Facts and subject matter of the main proceedings

The parties (the policyholder and the insurer) are in dispute over the complete reversal of insurance contracts entered into under the 'policy model'.

The applicant concluded an endowment life insurance policy with the defendant insurance company in 1996; the payment of contributions, like the insurance, was due to end on 1 November 2024. The terms of insurance and the consumer information were only provided to the applicant with the insurance policy, as is usual under the policy model.

In 2020, the applicant objected to this insurance contract or to the fact that it had taken effect pursuant to Paragraph 5a of the old version of the Versicherungsvertragsgesetz (Law on Insurance Contracts, 'the VVG'). He claims that the policy model breaches EU law, and therefore he has a 'perpetual right' to object, and that the information provided on the right to object failed to fulfil the formal requirements. He also claims, in support of his objection, that the necessary consumer information was missing or incomplete.

The applicant is seeking, on the grounds of unjust enrichment, reimbursement of the premiums paid in the interim and compensation for the benefits of use which the insurer derived from the premiums and used in its business.

By his action, the applicant seeks, firstly, a determination that his objection to the conclusion of the insurance contract was valid. In order to calculate the compensation for benefits of use, the applicant has requested detailed information from the defendant, for example on the apportionment of the premiums paid by him between individual items such as administrative costs, contracting costs, risk costs or savings invested for the applicant, or on the precise use of the premiums.

The defendant insurance company contends that information on the right to object was provided in due form and that all the essential consumer information was sent, and it rejects all the rights to information claimed by the applicant. Moreover, the insurance company is relying on forfeiture or abuse of rights within the meaning of Paragraph 242 of the Bürgerliches Gesetzbuch (Civil Code, 'the BGB'). The contract was performed without complaint over a period of 24 years. The parties are in dispute as to whether the current case-law of the Court of Justice of the European Union on forfeiture and abuse of rights in connection with withdrawal from a consumer loan is applicable to insurance law.

B. Legal context

The provisions of German law which applied when the contract was concluded, and which are of relevance for the purpose of adjudicating the dispute, read as follows:

Paragraph 5a of the old version of the VVG

(1) If the insurer has not delivered the conditions of insurance to the policyholder at the time of the application or has failed to supply the consumer information required by Paragraph 10a of the Versicherungsaufsichtsgesetz (Law on the Supervision of Insurance Companies), the contract shall be considered to have

been concluded on the basis of the policy document, the conditions of insurance and the additional consumer information which is relevant to the subject matter of the contract, unless the policyholder objects in writing within 14 days from delivery of the documents …

(2) The period begins to run only when the policy document and the documentation under subparagraph 1 are fully available to the policyholder and the policyholder, on delivery of the policy document, has been informed in writing, in typographically clear form, about the right to object, the commencement of the period and its duration. It is for the insurer to prove receipt of the documentation. The posting of the objection in good time is sufficient to comply with the time limit. Notwithstanding the first sentence, however, the right to object expires one year after payment of the first premium.

Paragraph 242 of the BGB

An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.

C. Relevance of the questions referred to the judgment

This order for reference revolves around the question of the limits on the exercise of consumer rights in insurance law. The first issue under scrutiny is the 'policy model' and the effects of any incompatibility between it and EU law. If it substantiates a right to object, the question arises as to whether the principles of forfeiture and abuse of rights apply to the detriment of the consumer (first question referred for a preliminary ruling). It is also necessary to clarify whether an insurance company can in any case rely on forfeiture or abuse of rights where the information on the right to object was incomplete or the necessary consumer information was missing, and a right to object arises from this in principle (second and third questions referred for a preliminary ruling). Finally, the Court is asked to assist with the question of whether, following a successful objection, a policyholder has rights to information or some other form of assistance from the insurer when enforcing his or her claims (fourth question referred for a preliminary ruling).

The more specific questions disputed between the parties, as to whether the information on the right of cancellation met the formal and substantive requirements or whether all the necessary consumer information was provided, are not referred to the Court. After all, it is not a problem of interpretation that is the main issue; it is the simple application of the law required of the national courts, as courts of the European Union. The Court of Justice of the European Union and the Bundesgerichtshof (Federal Court of Justice) have already developed significant case-law in that regard; therefore, those questions can be resolved through the judicial system (see, for example, judgment of the Court of Justice of 19 December 2019, *Rust-Hackner*, C-355/18 to C-357/18 and C-479/18, EU:C:2019:1123; see also the comprehensive Opinion of Advocate General

Bobek of 2 September 2021, *A (Contrats d'assurance « unit-linked »)*, C-143/20 and C-213/20, EU:C:2021:687, and the decision of the Court of Justice in this case of 24 February 2022, EU:C:2022:118).

1. The first question referred

The 'policy model' was considered legally permissible in Germany under the VVG in force from 1994 until the end of 2007. Was that approach compatible with EU law? If not, does that of itself mean that the consumer has a right to object, meaning a claim to full reversal of the contract? Might a consumer forfeit that right in the light of good faith? All these questions and aspects are relevant for the purpose of adjudication. If the applicant has a perpetual, unrestricted, unforfeited right to object due to the incompatibility of the policy model with EU law, his action will have to be admitted on the merits. Specifically:

Paragraph 5a of the old version of the VVG allowed insurance contracts to be concluded with consumers using the policy model (see, in that regard, Opinion of Advocate General Sharpston of 11 July 2013, *Endress*, C-209/12, EU:C:2013:472, point 28). One feature of that model was that the customer made an application for insurance cover first and the insurer accepted the application by handing over the insurance policy. As a rule, the customer only received the required consumer information with the policy, that is to say that information was not provided when the application was made. However, the policyholder had a right to object within 14 days or, in the case of life assurance policies, within 30 days. That period began to run only when the contract documents were fully available to the policyholder and the policyholder, on delivery of the policy document, had been informed in writing, in typographically clear form, about the right to object, the commencement of the period and its duration. As an exception to that rule, the fourth sentence of Paragraph 5a(2) of the old version of the VVG, provided that the right to object expired one year after payment of the first insurance premium.

In a landmark judgment in 2014, the Federal Court of Justice held it to be *acte clair* that this model is compatible with EU law (judgment of the Federal Court of Justice of 16 July 2014, IV ZR 73/13, paragraph 16 et seq.). However, both the European Commission and Advocate General Sharpston expressed serious doubts (see Opinion of Advocate General Sharpston of 11 July 2013, *Endress*, C-209/12, EU:C:2013:472, point 57 et seq.). The referring court shares these doubts for the following reasons.

The life assurance directives are intended to ensure a high and comparable level of protection of consumers' interests throughout Europe, in keeping with the essence of Articles 12 and 169 TFEU and Article 38 of the Charter of Fundamental Rights. The system of protection provided for under the directives of relevance to this case (Directive 90/619/EEC and Directive 92/96/EEC) is based on the idea that the consumer is in a weak, asymmetric negotiating position compared to the insurance company and is in possession of less information. The catalogue of

compulsory information and formal requirements is designed to help the consumer take an independent, rational and comparative decision when considering 'whether' and 'how' to contract life assurance, before entering into a contract. This was emphasised by the Court of Justice in its decision of 24 February 2022 (judgment of the Court of Justice of 24 February 2022, *A (Contrats d'assurance « unit-linked »)*, C-143/20 and C-213/20, EU:C:2022:118, paragraph 109 et seq.). However, the purpose of the requirement to provide information enacted by the directives to ensure transparency is not fulfilled where the information is not provided until after the policyholder has submitted the offer, and thus after a particular insurer has been chosen and a specific contract provided. The policyholder has no opportunity to compare different insurance policies and offers in advance. In addition, the policyholder bears the 'burden of objection', in that he or she must take action within a short period of time in order to prevent the contract from taking effect. It follows from all the foregoing that the policy model undermines the effectiveness of consumer protection.

Although the Court has had the opportunity to rule on one particular problem in connection with the policy model, namely on the incompatibility with EU law of the one-year period laid down in the fourth sentence of Paragraph 5a(2) of the old version of the VVG, it has not ruled on the admissibility of the German model itself (judgment of 19 December 2013, *Endress*, C-209/12, EU:C:2013:864). Were the Court to conclude that the policy model is incompatible with EU law, a further relevant question arises, namely whether that of itself substantiates the consumer's right to object and to demand complete reversal of the contract. Does such a right therefore exist even where the information on the right to object was flawless and the consumer information was complete and error-free?

If the Court also answers that question in the affirmative, then an additional key argument of German case-law needs to be addressed. After all, the Federal Court of Justice has consistently held in its case-law that a policyholder who received the conditions of insurance, the consumer information required and information in due form on the right to object under Paragraph 5a of the old version of the VVG together with the insurance policy is barred on the grounds of good faith and contradictory conduct, following years of performance, from relying on the invalidity of the insurance contract under EU law (judgment of the Federal Court of Justice of 20 May 2020, IV ZR 234/19, DE:BGH:2020:200520UIVZR234.19.0, paragraph 17; based on the judgment of the Federal Court of Justice of 16 July 2014, IV ZR 73/13, paragraph 32 et seq.). The Federal Court of Justice clearly considers that it suffices if the policyholder's conduct is objectively inconsistent, that is to say where the policyholder allows the period granted and notified for exercising the right to object to expire without enforcing that right at the time when the contract is concluded and regularly pays the agreed insurance premiums. The policyholder contradicts that conduct, pursued over a long period of time in his or her own interest, if he or she later claims that a contract never existed and demands repayment of the premiums from the insurance company, which will have quite reasonably relied on the existence of the contract. In any event, neither dishonest intentions nor fault on the part of

the policyholder are required in order to invoke the plea of abuse of rights. The conduct of the person who holds the right need only have given rise to a legitimate expectation, recognisable to him or her, on the part of the other side of a particular situation in fact or in law.

However, that recourse by the Federal Court of Justice to the principle of good faith (Paragraph 242 of the BGB) would appear to be problematic in the light of mandatory and overriding EU law and the relevant case-law of the Court of Justice. According to that law, a plea of abuse of rights is subject to narrow limits and requires special justification. The Court has consistently held in its case-law that, as a rule, a subjective element must also be present in order to substantiate abuse of rights (judgment of the Court of Justice of 26 February 2019, *N Luxembourg 1*, C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraphs 98 and 102; see also Federal Court of Justice, order for reference to the Court of Justice of 29 March 2022, VI ZR 1352/20 and Case C-307/22, paragraph 20). Consequently, the consumer must know his or her rights, which the consumer did not in this case. In the interests of consumer protection, limitation of consumer rights is not possible (see judgment of 9 September 2021, *Volkswagen Bank*, C-33/20, C-155/20 and C-187/20, EU:C:2021:736).

That consumer-friendly position is also supported by Article 38 of the Charter of Fundamental Rights which, at the very least, has an advance effect here. Article 38 of the Charter of Fundamental Rights adopts the principle that EU policies shall ensure a high level of consumer protection. That goes hand in hand with the need for optimisation. The scope of the Charter of Fundamental Rights, as supreme law of the land and living instrument, applies in the present case, meaning that it is binding and gives rise to an obligation on the part of the European Union and its Member States (Article 51(1) of the Charter of Fundamental Rights). The applicability of European Union law (in this case the insurance law determined for the entire Union) entails and imposes applicability of the fundamental rights guaranteed by the Charter (judgment of the Court of Justice of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 21).

2. The second and third questions referred

Where a right of cancellation exists because information was missing or incorrect or consumer information required under EU law was missing, insurers and courts in Germany frequently rely on forfeiture and abuse of rights to refuse reversal or claims for damages on the grounds of incorrect information ([…] [reference to literature]; see also decision of the Verfassungsgerichtshof Rheinland-Pfalz (Constitutional Court, Rhineland-Palatinate) of 22 July 2022, VGH B 70/21, DE:VERFGRP:2022:0722.VGH.B70.21.00).

The Federal Court of Justice considers, even where information on the right to object is missing or, more often, where the information is incorrect, that the right

to object is inadmissible where the circumstances of the specific case are particularly serious (see decision of the Federal Court of Justice of 8 September 2021, IV ZR 133/20, DE:BGH:2021:080921BIVZR133.20.0, paragraph 17; see also judgment of the Federal Court of Justice of 10 February 2021, IV ZR 32/20, DE:BGH:2021:100221UIVZR32.20.0, paragraphs 17 and 18). The same applies where consumer information is missing or incorrect. However, the lower courts take a very generous approach to such exceptions.

Here again, the Federal Court of Justice clearly considers that it suffices if the policyholder's conduct is objectively inconsistent. This gives rise to the concerns listed. In particular, it should be possible to apply the basic findings in the Court of Justice's current case- law on forfeiture and abuse of rights in connection with withdrawal from consumer loans to insurance law (see, with regard to the details, judgment of the Court of Justice of 9 September 2021, *Volkswagen Bank*, C-33/20, C-155/20 and C-187/20, EU:C:2021:736). The Court has ruled that a lender is prohibited from invoking a plea of forfeiture to prevent a consumer from exercising his or her right of withdrawal where mandatory information was neither included in the credit agreement nor subsequently communicated in due form, irrespective of whether the consumer knew of his or her right of withdrawal and without their bearing any blame for ignorance. The same applies to the plea of abuse of rights. There does not appear to be any cogent reason why that case-law should not also apply to insurance law (see decision of the Constitutional Court, Rhineland-Palatinate of 22 July 2022, VGH B 70/21, DE:VERFGRP:2022:0722.VGH.B70.21.00, paragraph 75).

3. The fourth question referred

The further question arises as to whether and to what extent national *law in books* and *law in action* may hinder or frustrate the exercise and enforcement of the policyholder's rights, or whether the policyholder has rights to information or some other form of assistance from the insurer when enforcing his or her claims.

It is necessary, first of all, to specify the nature of the burden of demonstration and proof that the consumer must bear in order to enforce a legitimate claim through the courts to reversal of an insurance contract which never took effect. Does the consumer have any right to information from the insurer concerning the benefits of use derived in fact by the insurer from the premiums paid?

The rules governing life assurance have not been fully harmonised. It is therefore for the Member States to determine the scope and limits of the policyholder's claims following successful cancellation. In so doing, they must abide by the principles of equivalence and effectiveness. Under German law, the policyholder is entitled to the premiums already paid, less a small risk element, and compensation for benefits of use. Thus, the insurer, which has used the policyholder's money in its business, must pay out the return. This is permissible under EU law, but not following withdrawal from loan agreements, which are

fully harmonised and do not provide for compensation for benefits of use (see, in that regard, judgment of the Court of Justice of 4 June 2020, *Leonhard*, C-301/18, EU:C:2020:427).

A fair and reasonable balance has to be struck between the legitimate interests of policyholders, the concerns of insured persons and the legitimate interests of insurers and the insurance industry. The issue under scrutiny is whether that has been achieved in Germany with regard to compensation for benefits of use. According to the settled and unbroken case-law of the Federal Court of Justice, the policyholder bears the burden of demonstration and proof in order to claim the benefits of use derived in fact by the insurance company from his or her premiums. That means that the policyholder must conclusively demonstrate and, if necessary, prove the accrual and amount of the benefits of use derived in fact. In doing so, he or she must refer to the actual cash flow of the defendant insurer (in summary, see judgment of the Federal Court of Justice of 29 April 2020, IV ZR 5/19, DE:BGH:2020:290420UIVZR5.19.0, paragraph 16). Over the years, the Federal Court of Justice has rejected several formulae, as well as methods used by complainant consumers, to establish independently the compensation for benefits of use.

The criteria established in German case-law require the policyholder to carry out extensive research and to provide a comprehensive presentation of the facts. In fact, the consumer has to establish the insurer's cash flow and, for example, fund profits and the performance of a fund from its communications or from publicly accessible sources, such as the insurer's published annual reports, and then base his or her claim on these (see judgment of the Federal Court of Justice of 11 November 2015, IV ZR 513/14, paragraph 50). Obviously, this is often too much to expect of policyholders, and presumably that is why they do not assert their rights. Therefore, there is serious doubt as to whether this legal practice is compatible with the principle of effectiveness (see, with regard to the burden of proof in connection with unfair terms, judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19 to C-782/19, EU:C:2021:470). If the burden of demonstration and proof of benefits of use is imposed on the policyholder, it is liable to make it excessively difficult for the policyholder to exercise the rights conferred under consumer protection directives, including on life assurance. However, where the consumer or beneficiary in general under EU law is lacking evidence, because it is difficult or impossible to access the relevant information, the burden of proof is lightened or even reversed in application of the principle of effectiveness in EU law (see also judgment of the Court of Justice of 4 June 2015, *Faber*, C-497/13, EU:C:2015:357). The usual mechanisms of civil procedural law, based on formal parity between the parties and the principle of *actori incumbit probatio* do not suffice in the present case to ensure the effective and successful enforcement of consumer claims. Lastly, it is important to acknowledge that, in cancelling the policy, the consumer is exercising a right that presupposes breach on the part of the insurer. Therefore, the idea of penalties might also be of importance.

If the consumer bears the burden of demonstration and proof nonetheless, does he or she then have in return rights to information or some other form of assistance from the insurer? The general tenet under EU law is that evidence must be disclosed by the other party. This applies, for example, under antitrust law or intellectual property law (see also Article 18 of Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers). It might follow from Article 31(1) of the Third Life Assurance Directive and the Annex thereto that the policyholder has a right to information from the insurer. Advocate General Sharpston held in the case of a life assurance policy with an investment component, where the amount of the insurance benefit depends on how the insurer uses the premiums, that the insurer is required to provide the policyholder with information on the purposes for which the premiums are used, by reference to absolute amounts or percentages, prior to the conclusion of the contract and, in the event of any change thereto, during the term of the contract, so that the policyholder can make a more informed decision, and that, at the very least, the relevant criteria must be explained to him or her (Opinion of 12 April 2014, *Nationale-Nederlanden Levensverzekering Mij*, C-51/13, EU:C:2014:1921). If the insurer is required prior to the conclusion of the contract to explain (where possible) exactly how premium payments are used, by reference to absolute amounts or percentages, then it might be required *a fortiori* after the conclusion of the contract to explain exactly how the premiums were used, if benefits of use were derived from the premiums, in order to enable the complete reversal of the insurance contract.

D. Procedural features

[…] [No settlement through compromise])

The defendant's request that the matter not be referred to a single Judge at the Court of Justice of the European Union and that the case be referred to the Civil Chamber for a decision as to whether the Chamber should take on the case, which would make referral under Article 267 TFEU excessively difficult, if not impossible, was not accepted. The Vice-President of the European Court, in an overall analysis of its case-law, has recently clarified that the right of any national court to bring a matter before the Court of Justice must not be limited in any way, either by the parties to the main proceedings or by national law, by the nature of the main proceedings, by higher level authorities up to Constitutional Courts, or by EU law itself (Rosario Silva de Lapuerta, in: Lenaerts and Others (eds.): Building the European Union: The Jurist's View of the Union's Evolution, 2021, 215 et seq.; see only judgment of the Court of Justice (GC) of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, EU:C:2021:1034). It must therefore be assumed that there is no obligation for a single Judge to submit the dispute to the Civil Chamber (see Opinion of Advocate General Rantos delivered on 2 June 2022, *Mercedes-Benz Group (Responsabilité des constructeurs de véhicules munis de dispositifs d'invalidation)*, C-100/21, EU:C:2022:420, point 75 et seq.; see also judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 32 et seq.).

Finally, reference is made to the comparable submissions of the single Judge of 30 December 2021 (Ref: 8 O 1519/20 or C-2/22) and of 13 January 2022 (Ref: 8 O 1463/20 or C-41/22), with the submission of 30 December 2021 having since been withdrawn.

Dr Borowsky

Judge at the Landgericht (Regional Court)