

Case C-630/21

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:

13 October 2021

Referring court:

Oberlandesgericht Stuttgart (Germany)

Date of the decision to refer:

12 October 2021

Applicant and appellant:

O.K.

Defendant and respondent:

Mercedes-Benz Bank AG

Subject matter of the main proceedings

Directive 2008/48 – Consumer credit agreement – Right of withdrawal – Withdrawal period – Expiry – Full performance of the agreement – Consumer's rights – Right to have benefits surrendered

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

- a) Is Article 14 of Directive 2008/48 to be interpreted as meaning that the consumer's right of withdrawal no longer exists if the credit agreement has been fully performed by both parties?
- b) If Question a) is answered in the negative:

Does Article 14 of Directive 2008/48 preclude a rule in the national law of a Member State which has the effect that the consumer's right of withdrawal can no longer be exercised if the credit agreement has been fully performed by both parties?

c) If Question a) is answered in the negative and Question b) in the affirmative:

Does Article 14(3) of Directive 2008/48 preclude a rule in the national law of a Member State under which a consumer who has effectively exercised his or her right of withdrawal based on Article 14(1) of Directive 2008/48 has a right to have the creditor surrender the benefits that it has derived from the payments that the consumer has made to it up to the time of withdrawal?

Provisions of European Union 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, in particular Articles 14 and 22

Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, in particular Article 6

Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, in particular Articles 9 and 10

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises

Provisions of national law relied on

Bürgerliches Gesetzbuch (Civil Code; 'the BGB'), in the version published on 2 January 2002 (BGBl. I, p. 42, 2909; 2003 I, p. 738), last amended by Article 1 of the Law of 10 August 2021 (BGBl. I, p. 3 515), in particular Paragraphs 242, 346, 357, 492 and 495

Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Law to the Civil Code), in the version published on 21 September 1994 (BGBl. I, p. 2 494; 1997 I, p. 1 061), last amended by Article 2 of the Law of 10 August 2021 (BGBl. I, p. 3 515), in particular Article 247(3) and (6)

Succinct presentation of the facts and procedure in the main proceedings

- 1 Mercedes-Benz Bank AG granted O.K., in his capacity as a consumer, a loan to finance the purchase price of a motor vehicle by agreement of 16 June 2012. The interest rate applicable in the case of late payments as applicable at the time of the conclusion of the agreement was not indicated in the contractual documents.
- 2 O.K. repaid the loan in accordance with the agreement. Mercedes-Benz Bank AG then released the relevant security in May 2015. The credit agreement had therefore been fully performed.
- 3 By letter of 25 September 2018, O.K. withdrew from the credit agreement.
- 4 Mercedes-Benz Bank AG did not accept the withdrawal. O.K. then brought an action before the Landgericht Stuttgart (Regional Court, Stuttgart). He seeks reimbursement of the sums paid. He claims that, in addition, Mercedes-Benz Bank AG should pay interest on the benefits that it derived from those sums, at a rate of 5 percentage points above the relevant base rate.
- 5 The Regional Court, Stuttgart dismissed the action. It stated that the loan agreement had been fully performed and that more than three years had passed since then. Therefore, according to the court, O.K. can no longer invoke a right of withdrawal in good faith (Paragraph 242 of the BGB).
- 6 O.K. brought an appeal against the judgment of the Regional Court, Stuttgart before the referring court.

The essential arguments of the parties in the main proceedings

- 7 O.K. takes the view that his withdrawal is not time-barred, because the withdrawal period had not yet started to run at all. He submits that he did not receive all the information required under EU law (Article 14(1)(b) of Directive 2008/48, read in conjunction with Article 10(2) thereof), and under the relevant national legislation.

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

Question a)

- 8 Directive 2008/48 does not expressly regulate whether and, if so, when the right of withdrawal under Article 14 of the directive expires.
- 9 The referring court takes the view that there are many indications supporting the argument that the right of withdrawal ceases to exist when the credit agreement has been fully performed by both parties:

- Recital 34 of Directive 2008/48 (see Opinion of Advocate General Hogan in Cases C-33/20, C-155/20 and C-187/20, *Volkswagen Bank and Others*, EU:C:2021:629, point 107)
 - Purpose of the information obligations under Article 10 of Directive 2008/48 (see Opinion of Advocate General Hogan in Cases C-33/20, C-155/20 and C-187/20, *Volkswagen Bank and Others*, EU:C:2021:629, point 108)
 - Case-law of the Court on Directive 85/577 (judgment of 10 April 2008, *Hamilton*, C-412/06, EU:C:2008:215, paragraph 41 et seq.)
 - Article 6(2)(c) of Directive 2002/65 (see judgment of the Court of 11 September 2019, *Romano*, C-143/18, EU:C:2019:701, paragraph 39)
 - The exercise of the right of withdrawal under Article 14(1) of Directive 2008/48 is not subject to a time limit (judgment of the Court of 9 September 2021, *Volkswagen Bank and Others*, C-33/20, C-155/20 and C-187/20, EU:C:2021:736, paragraph 117). However, as far as can be seen, a right without any restriction would be unprecedented in the legal systems of the Member States.
 - Having regard to the objective of ensuring a high level of consumer protection, a right without any restriction is also likely to be disproportionate (see, by analogy, judgment of the Court of 9 November 2016, *Home Credit Slovakia*, C-42/15, EU:C:2016:842, paragraph 72).
- 10 The fact that the temporally unlimited right of withdrawal also serves dissuasive and punitive purposes might militate against the view that the right of withdrawal lapses after the contract has been fully performed (judgment of the Court of 9 September 2021, *Volkswagen Bank and Others*, C-33/20, C-155/20 and C-187/20, EU:C:2021:736, paragraph 124 et seq.).
- 11 However, the referring court takes the view that that consideration carries less weight for the following reasons:
- The punitive and dissuasive character of the right of withdrawal is not expressly emphasised in Directive 2008/48 (see recital 34 of the directive, which focuses on the approximation of the procedures for exercising the right of withdrawal in similar areas).
 - Directive 2011/83, in which the EU legislature provides that the withdrawal period expires after a certain time (Article 9(2)), even in the case of an omission of information on the right of withdrawal (Article 10).
 - Once the contract has been fully performed, it is no longer possible for information on the rights and obligations under the contract to be subsequently provided in a manner that makes logical sense.

- In accordance with the principle of the rule of law, which also applies in EU law, punishment presupposes that the obligated party could have behaved in a lawful manner. However, the provisions of Article 10(2) of Directive 2008/48 are worded vaguely and openly at many points. In several cases, interpretations given by the German legislature and the Bundesgerichtshof (Federal Court of Justice) have not withstood scrutiny following a review by the Court (see judgments of the Court of 9 September 2021, *Volkswagen Bank and Others*, C-33/20, C-155/20 and C-187/20, EU:C:2021:736, and of 26 March 2020, *Kreissparkasse Saarlouis*, C-66/19, EU:C:2020:242, paragraph 49).

Question b)

- 12 If a certain amount of time has passed since the conclusion of the credit agreement and the latter has been fully performed, it may in individual cases be contrary to good faith under national law for a consumer to invoke his or her right of withdrawal under Article 14(1) of Directive 2008/48 (national case-law handed down at the highest judicial level). This is because, according to Paragraph 242 of the BGB, an obligor has a duty to perform the obligation in accordance with the requirements of good faith, with due regard for customary practice.
- 13 It is unclear whether Article 14(1) of Directive 2008/48 precludes such an interpretation of national law.
- 14 The referring court takes the view that the grounds set out in paragraphs 9 and 11 militate against that interpretation, in particular:
 - Case-law of the Court on Directive 85/577 (judgment of 10 April 2008, *Hamilton*, C-412/06, EU:C:2008:215, paragraph 41 et seq.)
 - Directive 2011/83, in which the EU legislature provides that the withdrawal period expires after a certain time (Article 9(2)), even in the case of an omission of information on the right of withdrawal (Article 10)

Question c)

- 15 Directive 2008/48 does not regulate, either in Article 14(3) or elsewhere, which rights the consumer has following an effective withdrawal.
- 16 Under national law, following an effective withdrawal, the consumer is entitled under certain conditions not only to reimbursement of his or her (interest and redemption) payments, but also to the surrender of the benefits which the creditor has derived from his or her payments; if the creditor is a bank, there is a presumption that it has derived such benefits, specifically in the amount of the default interest to which it is entitled (national case-law handed down at the highest judicial level). In the present case, this is five percentage points above the relevant base rate.

- 17 In accordance with the case-law of the Court, so far as concerns contracts which fall within the scope of Directive 2008/48, Member States may not adopt obligations for the parties to the contract which are not provided for in that directive where the directive contains provisions harmonised in the area covered by those obligations (judgment of 9 September 2021, *Volkswagen Bank and Others*, C-33/20, C-155/20 and C-187/20, EU:C:2021:736, paragraphs 107 and 108).
- 18 Article 14(3) of Directive 2008/48 contains provisions on the legal consequences of an effective withdrawal. However, it is only the creditor's rights that are regulated.
- 19 The question therefore arises as to whether Directive 2008/48 contains harmonised provisions for all the legal consequences of an effective withdrawal – with the consequence that the Member States may not maintain or introduce in their national law provisions diverging from those laid down in that directive (Article 22(1) of Directive 2008/48) – or only for the creditor's rights. The objective of creating a genuine internal market (see recitals 7 and 9 of Directive 2008/48) militates against the latter possibility.
- 20 In the event that Directive 2008/48 nevertheless contains harmonised provisions only for the creditor's rights, it might be conceivable that Member States provide for consumer rights not provided for in Article 14(3) of the directive as penalties pursuant to Article 23 of the directive. This is because, if a consumer withdraws from a credit agreement more than 14 days after the conclusion of the agreement, this is generally likely to be due to a breach of an information obligation.
- 21 In accordance with the second sentence of Article 23 of Directive 2008/48, such penalties would have to be proportionate. If the credit agreement has already been fully performed, this would most likely be out of the question as a matter of principle (see paragraph 9 above). The reason for this is that, if the right to have benefits surrendered, as described in paragraph 16 above, were to be acknowledged, a withdrawal declared after the credit agreement has been fully performed would have the same effect for the consumer as if, with each of the payments made by him or her, he or she had made a financial investment bearing interest at five percentage points above the relevant base rate, and he or she could wait as long as he or she wished before withdrawing.
- 22 Recital 35 of Directive 2008/48, according to which the directive should be without prejudice to any regulation by Member States of questions concerning the return of the goods or any related questions, is unlikely to be relevant in the present case, since the right to have benefits surrendered is a regime which is directly linked to the withdrawal from the credit agreement.