Case C-143/23

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:

9 March 2023

Referring court:

Landgericht Ravensburg (Regional Court, Ravensburg, Germany)

Date of the decision to refer:

1 March 2023

Applicants:

TJ

KI

FA

Defendants:

Mercedes-Benz Bank AG

Volkswagen Bank GmbH

Subject matter of the case in the main proceedings

Consumer credit agreements – Directive 2008/48/EC – Right of withdrawal – Compensation – Calculation of compensation – Obligation on the consumer to pay interest on the amount of credit received in the event of withdrawal from the credit agreement

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Is it compatible with EU law, in particular Article 14(1) of Directive 2008/48/EC, if, in the case of withdrawal from a consumer credit agreement linked to a vehicle sales agreement concluded with a brick-and-mortar trader, the amount of compensation for the diminished value to be paid by the consumer to the creditor on return of the vehicle financed is calculated by deducting from the trader's sales price at the time of purchase of the vehicle by the consumer the trader's purchase price at the time of the return of the vehicle?

2. Is the first sentence of Article 14(3)(b) of Directive 2008/48/EC fully harmonised, and therefore binding on the Member States, as regards consumer credit agreements which are linked to an agreement for the sale of a vehicle?

If question 2 is answered in the negative:

3. Is it compatible with EU law, in particular Article 14(1) of Directive 2008/48/EC, if, following withdrawal from a consumer credit agreement linked to a vehicle sales agreement, the borrower is obliged to pay interest at the contractually agreed borrowing rate to the creditor (or to the seller) for the period between the payment of the loan to the seller of the vehicle being financed and the time when the vehicle is returned?

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 ('Directive 2008/48'), in particular Article 14(1)

Provisions of national legislation

Bürgerliches Gesetzbuch (Civil Code, 'the BGB'), in particular Paragraphs 355, 356b, 492 and 495 and Paragraphs 357, 357a and 358, in the version applicable until 27 May 2022.

Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Act to the Civil Code; 'the EGBGB'), Article 247(3) and (6)

Brief summary of the facts and procedure

1 The present request for a preliminary ruling is based on three different sets of facts.

2 In the first case, the applicant concluded with the defendant a credit agreement for EUR 36 159, which was used to purchase a motor vehicle for a purchase price of EUR 36 159 for private use. The amount was transferred directly to the seller of the vehicle. The latter acted as an intermediary for the conclusion of the credit agreement for the defendant. The credit agreement did not state as a percentage the interest rate applicable in the case of late payments at the time of the conclusion of the agreement.

3 The applicant paid loan instalments totalling EUR 7 872.67 and, on 8 March 2021, repaid the loan early, paying EUR 28 524.36. In total, the applicant made payments to the defendant in the amount of EUR 36 397.03. By letter of 11 October 2021, the applicant withdrew her declaration of intent to enter into the credit agreement.

4 The applicant considers that the withdrawal is effective because the period of withdrawal had not begun due to erroneous mandatory information in the agreement. She claims that the defendant should be ordered to pay EUR 36 589.92, after deduction of the loss in value of EUR 2 264.28.

5 The defendant contends that the action should be dismissed. It invokes, inter alia, the expiry of the period of withdrawal and the objection of inadmissible exercise of rights. The defendant further declares that a claim to interest of EUR 238.03 should be offset against the amount of credit granted and requests a declaration that the applicant is liable to pay compensation for the diminished value until the vehicle is returned.

6 The applicant recognises that right in principle, but takes the view that there is only a right to compensation of EUR 2 264.28, since there is no need to take into account VAT of 19% and the trader's margin of 15% of the net purchase price.

7 In the second case, the applicant concluded a credit agreement with the defendant for EUR 29 500, used to purchase a Mercedes E 220 for a purchase price of EUR 32 500 for private use. The amount was transferred directly to the seller of the vehicle. In addition, the applicant made an advance payment of EUR 3 000 to the seller. The latter acted as an intermediary for the conclusion of the credit agreement for the defendant. The agreement did not state as a percentage the interest rate applicable in the case of late payments at the time of the conclusion of the agreement.

8 The applicant paid the defendant loan instalments of EUR 5 924.48, that is a total of EUR 8 924.48 including the advance payment. By letter of 31 October 2019, the applicant withdrew his declaration of intent to enter into the credit agreement.

9 The applicant claims, inter alia, that the defendant should be ordered to pay the sum of EUR 8 924.48 concurrently with the transfer of the vehicle and seeks a declaration that he is not liable to pay interest or repayments because of the withdrawal. The applicant considers that the withdrawal is effective because the

period of withdrawal had not begun due to erroneous mandatory information in the agreement.

10 The applicant also seeks a declaration that he is not liable to pay compensation for any diminished value of the vehicle. The applicant questions, in the light of EU law, whether a bank may claim compensation where it has not complied with its obligations to provide information. At the very least, the VAT and trader margin should be excluded from the loss in value.

11 The defendant applies for the action to be dismissed. It raises, inter alia, the objection that the period of withdrawal has expired and the exercise of the right of withdrawal was inadmissible.

12 The defendant seeks a declaration from the Court that the applicant is liable to pay compensation for the diminished value until the return of the vehicle and, in addition, compensation for use of 3.92% per annum on the outstanding loan balance for the period between the payment of the loan to the seller and the return of the vehicle. The applicant rejects that claim.

13 In the third case, the applicant concluded with the defendant a credit agreement for EUR 35 300 for the purchase of a VW Touareg for a purchase price of EUR 51 300. The amount was transferred directly to the seller of the vehicle. In addition, the applicant made an advance payment of EUR 16 000 to the seller. The latter acted as an intermediary for the conclusion of the credit agreement for the defendant. The credit agreement did not state as a percentage the interest rate applicable in case of late payment at the time of the conclusion of the agreement.

14 The applicant paid the defendant loan instalments totalling EUR 8 800 and thus paid a total amount of EUR 24 800, including the advance payment. By letter of 20 July 2020, the applicant withdrew his declaration of intent to enter into the credit agreement.

15 The applicant considers that the withdrawal is effective because the period of withdrawal had not begun due to erroneous mandatory information in the agreement. The applicant claims, inter alia, that the defendant should be ordered to pay him EUR 24 800, less compensation in the amount of EUR 24 550, together with interest, concurrently upon delivery of the vehicle, and a declaration that, as a result of that withdrawal, he is not liable to make interest payments or loan repayments. The applicant calculates the loss in value on the basis of the difference between the purchase price of EUR 51 300 and the value of EUR 26 750 on the date on which the action was brought, calculated on the basis of the used car valuation of the German automobile club ADAC.

16 The defendant submits that the action should be dismissed. It raises, inter alia, the objection that the deadline for exercising the right of withdrawal has expired. The defendant considers that the first question referred for a preliminary ruling is not relevant to the outcome of the dispute, since it has not challenged the

compensation calculated by the applicant and that amount may certainly serve as a basis for the court decision.

Brief summary of the basis for the reference

17 The questions referred for a preliminary ruling follow on from the questions already referred in the pending cases C-38/21, C-47/21, C-232/21 and C-715/22. With regard to the questions referred for a preliminary ruling, the referring court states as follows:

18 The first question concerns the problem of calculating the compensation which the borrower must pay in respect of the diminished value of the goods. This is controversial in national case-law and academic writing. To date, the Bundesgerichtshof (Federal Court of Justice, 'the BGH') has relied on the so-called comparative value method. According to that method, the applicant is required to repay the difference between the market value of the vehicle financed at the time the loan agreement was concluded, determined on the basis of the consideration agreed in the contract, and the market value of the vehicle when returning it to the creditor.

19 However, by judgment of 25 October 2022, the BGH departed from that method and held that, for the application of the comparative value method, it is the trader's selling price (that is to say, including the trader's margin and turnover tax) that is decisive at the time of purchase by the consumer, and the trader's purchase price (that is to say, without the trader's margin and turnover tax) that is decisive for the value when returning the vehicle. The BGH justifies the approach of the trader's purchase price when returning the vehicle by stating that this is the price at which the consumer could sell the vehicle and, in addition, that price also represents the value of the vehicle to the trader at the time of return. The BGH also states that, in addition to the profit margin, the trader's sale price also covers the trader's general costs and its efforts to resell the vehicle, for example to draw up sales advertisements, the time devoted to sales discussions and test drives and the costs of preparing the vehicle. Furthermore, the price at which a second-hand vehicle is sold by a trader is higher, since, where vehicles are purchased from a commercial trader, the purchaser has guaranteed rights which are normally excluded in the event of purchase from a private seller.

20 Thus, the BGH departs from its previous case-law on compensation, according to which the costs of preparing and making a resale and any entrepreneurial profit do not have to be reimbursed, as they also accrue when the consumer is not required to pay compensation because he has not used the goods unreasonably or excessively. The determination of market values, as now established by the BGH, results in a significantly diminished value (and therefore right to compensation) even where the vehicle has not been registered or driven a single meter before exercise of the withdrawal right.

21 The question arises, however, whether that is compatible with the first sentence of Article 14(1) of Directive 2008/48. The referring court refers to the judgment of 3 September 2009, *Messner* (C-489/07, EU:C:2009:502), in which the Court held that it would be clearly at variance with the wording and purpose of Directive 97/7/EC if the consumer were required to pay compensation merely because he had the opportunity to use the goods acquired under a distance contract while they were in his possession. Since the right of withdrawal intended precisely to give the consumer the opportunity to exercise that right, the fact of having made use of it cannot have the consequence that the consumer is able to exercise that right only against payment of compensation. This would, in particular, deprive the consumer of the opportunity to make completely free and independent use of the period for reflection granted to him by that directive. In particular, the Court considers that the efficiency and effectiveness of the right of withdrawal would be adversely affected if the amount of compensation were to appear disproportionate in relation to the purchase price of the goods at issue.

22 The BGH's method of calculation could run counter to that principle because, ultimately, the BGH imposes on the consumer not only compensation for the diminished value resulting from the use of the goods, but also the costs of resale, profit margin and VAT. These price-increasing items are due solely to the exercise of the right to withdrawal. They arise independently from the use of the vehicle. They also accrue when the vehicle was not registered before the exercise of the right of withdrawal and has not been driven a single meter. Thus, the BGH grants the trader not only compensation for the diminished value, but also compensation for the mere exercise of the right of withdrawal.

23 Moreover, the method of calculation is contrary to the objective of Directive 2008/48. The fact that the BGB only takes into account the trader's purchase price at the time of return of the vehicle means that the consumer is in a less favourable position after declaring his withdrawal from the agreement than if he had not withdrawn from the agreement. If he sold the vehicle privately himself, he could obtain a considerably higher price than the trader's purchase price. In the case of resale, consumers are not required to charge VAT, pass on costs or include a profit margin in the price, unlike traders.

24 Furthermore, according to the referring court, the BGH's method of calculation is also incompatible with the principle of prohibition of unjust enrichment (see, in relation to that principle, judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 82). Due to the approach of the trader's purchase price when returning the vehicle, the creditor can make a profit by selling the vehicle at a price higher than the trader's purchase price. In so doing, it would enhance its assets and would be enriched.

25 As regards questions 2 and 3: In the event of withdrawal from a consumer credit agreement linked to a vehicle sales agreement, it is questionable whether the creditor can claim interest on the credit after the withdrawal from the credit agreement.

26 In its recent judgment of 25 October 2022, the BGH affirmed the right to receive interest for the period during which the loan was utilised. That is justified in particular by the fact that the obligation on the consumer to pay interest after withdrawing from the credit agreement, in accordance with Article 14(3)(b) of Directive 2008/48, is one of the fully harmonised subject matters of that Directive.

27 The referring court is uncertain whether the first sentence of Article 14(3)(b) of Directive 2008/48, as regards credit agreements linked to sales agreements, is subject to full harmonisation and is therefore binding on the Member States, in accordance with Article 22(1) of that Directive, and assumes that the first sentence of Article 14(3) (b) of that Directive must refer to a standard consumer credit agreement which is not linked to another agreement. The requirements of that provision are therefore limited to the contractual relationship between the consumer and the creditor. However, if linked purchase agreements also become ineffective as a result of the withdrawal, as is the case under German law (Paragraph 358(2) of the BGB), the linked purchase agreement must also be revoked, in addition to the credit agreement. However, Directive 2008/48 does not specify either the effect of withdrawal on the linked agreement or the benefits that the contractual partners of the financed agreement (in this case, the buyer and seller) must reimburse.

28 The revocation of a linked vehicle sales agreement cannot usefully be dissociated from the revocation of the credit agreement. In the case of a purchase financed by credit, the consumer does not receive a credit amount, but only the vehicle financed. By contrast, the seller receives the amount of credit in the form of the purchase price. The rights to revocation must also be based on that situation. It therefore seems possible to assume that the Member States may, in compliance with the general principles of EU law, regulate at their discretion the revocation of linked agreements, including by way of derogation from the first sentence of Article 14(3) (b) of Directive 2008/48.

29 Recital 9 and Article 15(3) of Directive 2008/48, which allow Member States to maintain or introduce national provisions on the joint and several liability of the supplier of goods or services and the creditor, also argue in favour of a wide margin of discretion on the part of the Member States when regulating that contractual situation, as do national provisions relating to the termination of a sales or service agreement in the event of the consumer withdrawing from the credit agreement.

30 If the second question referred for a preliminary ruling is answered in the negative, the further question arises as to whether it is compatible with EU law, in particular with the first sentence of Article 14(1) of Directive 2008/48, for the borrower to have to pay credit interest in the event of withdrawal from a consumer credit agreement linked to a vehicle sales agreement.

31 Specifically, the referring court considers that it is necessary to examine whether the credit interest obligation complies with the principle of prohibition of unjust

enrichment laid down by the Court of Justice. It is true that, in the present case of a credit agreement linked to a sales agreement, there is enrichment on the part of the consumer in that he or she is allowed to use the vehicle. This thereby enhances his or her assets (Opinion of Advocate General Hogan in Joined Cases *UK and Others*, C-33/20, C-155/20 and C-187/20, EU:C:2021:629, paragraph 131).

32 However, the consumer is not enriched by the use of the credit. The amount of credit is paid directly by the creditor, in the form of the purchase price of the vehicle, to the seller who can use the amount and is enriched by its use. It would therefore be contrary to the principle of prohibition of unjust enrichment if, in the context of the revocation of the credit and sales agreement, the consumer were to be required to pay interest for the use of the credit.

33 Furthermore, the obligation to pay interest could also undermine the practical effectiveness of the exercise of the right of withdrawal provided for in the first sentence of Article 14(1) of Directive 2008/48. In accordance with that principle, enshrined in EU law, the consumer must be able to decide freely and without fear of financial disadvantages whether or not to maintain his or her agreements constituting an economic unit.

34 According to the predominant view of the national case-law and academic writing, that protective objective of EU law is considered to be jeopardised if a consumer withdrawing from an agreement were to be required to repay to the creditor the amount of credit paid to the seller. He or she could indeed demand the return of that amount from the undertaking that received the amount of the credit. However, the consumer cannot be required to bear the risk of enforcing his or her claim against the seller.

35 This consideration must also apply by analogy to the question of paying interest on the credit. Admittedly, if the consumer were to pay interest to the creditor on the loan, he or she could subsequently pursue remedies against the seller who received the credit (in the form of the purchase price) and who was able to profit therefrom. The seller may use the amount of credit for himself and is thus enriched. In that case, however, the consumer would have to take the trouble to enforce the claim and, above all, bear the risk that it could not be enforced. First, in any event, the consumer would bear a double burden for the revocation of the two agreements (for the diminished value of the vehicle and for the use of the credit). He or she could therefore not take a decision on withdrawal ‘without fear of financial disadvantages’.

36 In conclusion, imposing on the consumer an obligation to pay interest for the use of the credit seems to be contrary both to the EU law principle of prohibition of unjust enrichment and to the EU law principle of the practical effectiveness of the exercise of the right of withdrawal.