

Anonymised version

Summary

C-143/23 – 20

Case C-143/23

Summary of the supplement to the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date supplementary decision received:

10 April 2024

Referring court:

Landgericht Ravensburg (Germany)

Date of the supplementary decision:

9 April 2024

Applicants:

TJ

KI

FA

Defendants:

Mercedes-Benz Bank AG

Volkswagen Bank GmbH

Landgericht Ravensburg (Regional Court, Ravensburg)

Order

on the preliminary ruling proceedings of the Court of Justice of the European Union

C-143/23

Mercedes-Benz Bank and Volkswagen Bank

1. Case – 2 O 214/20 -

KI, [...] 88410 Bad Wurzach

- applicant -

[...]

v

Mercedes-Benz Bank AG, [...] 70469 Stuttgart – defendant –

[...]

2. Case – 2 O 103/21 -

FA, [...] 88433 Schemmerhofen

- applicant -

[...]

v

Volkswagen Bank GmbH, [...] 38112 Braunschweig – defendant –

[...]

The Regional Court, Ravensburg [...] ordered on 9 April 2024:

- I. The proceedings shall remain suspended.
- II. The following other questions are referred to the Court of Justice of the European Union in the preliminary ruling procedure C-143/23 pursuant to Article 267(1)(a) and (2) TFEU, concerning the interpretation of EU law:

4. (a) Must Article 10(2)(l) of Directive 2008/48/EC, read in conjunction with Article 14(1)(2)(b) of Directive 2008/48/EC, be interpreted as meaning that the period of withdrawal does not begin if the rate of late-payment interest applicable at the time of conclusion of the credit agreement is not stated, in the form of a specific percentage, in that credit agreement?

If not:

- (b) Is the absence of such an indication capable of affecting an average consumer's ability to assess the extent of his or her rights and obligations under that directive or his or her decision to conclude the contract and, if so, capable of depriving him or her of the possibility of exercising his or her rights in essence under

the same conditions as would have prevailed if that information had been provided in a complete and correct manner?

5. (a) Is the creditor's plea that, as a result of the consumer's conduct between the conclusion of the agreement and the exercise of the right of withdrawal or after its exercise, the consumer exercised that right in an abusive manner precluded when the credit agreement does not state, in the form of a specific percentage, the rate of late-payment interest applicable at the time of conclusion of the agreement?

If not:

- (b) Can the plea of abuse of rights rely on the following factors in particular?
- The consumer continues to use the financed vehicle pending judicial clarification as to the validity of the withdrawal.
 - The consumer refuses to pay compensation for the use of the vehicle.

A.

Reference is made to the two sets of facts in Section A of the request for a preliminary ruling of 1 March 2023 in Case C-143/23.

B.

The applicable national rules follow from Section B of the request for a preliminary ruling of 1 March 2023 in Case C-143/23.

C.

The success or failure of the actions depends on the answer to the additional questions II. 4 and II. 5 in the operative part of the decision referred for a preliminary ruling.

This is because the success of the actions also depends on whether the withdrawal was validly declared and whether the exercise of the right of withdrawal by the applicants precludes the plea based on abuse of rights. Those questions appeared to have been resolved when the request for a preliminary ruling of 1 March 2023 was submitted, but they are now again open.

I. Validity of withdrawal

Under Paragraph 356b(1) and the first sentence of Paragraph 356b(2) of the Bürgerliches Gesetzbuch (German Civil Code; 'the BGB'), the withdrawal period provided for in the first sentence of Paragraph 355(2) of the BGB

does not start to run if the credit agreement does not contain all of the obligatory information specified in Paragraph 492(2) of the BGB and Article 247(6) to (13) of the Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Act to the German Civil Code. ‘the EGBGB’), or the information has been communicated subsequently. In the event of a valid withdrawal, the applicant is no longer bound by the loan agreement under Paragraph 495(1) and Paragraph 355(1) of the BGB.

In the cases before the Court, the rate of late-payment interest was not stated, in the form of a specific percentage, in the credit agreement.

It follows from the judgment of the Court of 9 September 2021 – Cases C-33/20, C-155/20, C-187/20 – that the period of withdrawal does not begin when the rate of late-payment interest has not been stated, in the form of a specific percentage, in the credit agreement. Since then, the Bundesgerichtshof (Federal Court of Justice, Germany, ‘the BGH’) has followed that judgment (judgment of 12 April 2022 – XI ZR 179/21 – DE:BGH:2022:120422U- XIZR179.21.0).

According to the understanding of the referring court, no other conclusion may be drawn from the judgment of the Court of Justice of 21 December 2023 – C-38/21, C-47/21, C-232/21.

However, the BGH interprets the judgment of 21 December 2023 in a completely different way and now takes the view that the failure to state, in the form of a specific percentage, the rate of late-payment interest applicable at the time of conclusion of the agreement does not preclude the start of the period of withdrawal (BGH, judgment of 27 February 2024 – XI ZR 258/22 – DE:BGH:2024:270224U- XIZR258.22.0, juris paragraph 32 et seq.).

The supplementary questions II. 4. (a) and (b) arise from that different interpretation of the Court’s judgment of 21 December 2023.

II. Plea of abuse of rights

In addition, the question arises as to whether, in the present cases, the creditors can validly plead that the applicant concerned exercised his or her right of withdrawal in an abusive manner.

From the operative part of point 7 of the judgment of the Court of 9 September 2021 – C-33/20, C-155/20, C-187/20 – and from the operative part of the judgment of the Court of 21 December 2023 – C-38/21, C-47/21, C-232/21 – it appears that the consumer’s reliance on his or her right of withdrawal in accordance with Article 14(1) of Directive 2008/48/EC cannot be considered to be an abuse of rights where the rate of late-payment interest was not stated, in the form of a specific percentage, in the credit agreement. However, the grounds of the judgment of 21 December 2023 raise residual

doubts as to whether that is the case. That is the subject matter of Question II. 5. (a).

In the event that the Court should answer Question II. 5. a) to the effect that, even in the absence of any reference to the rate of late-payment interest in the form of a specific percentage the plea of abuse of rights is not precluded, the referring court would then have to ascertain whether the constituent elements of an abusive practice are present in the cases in the main proceedings.

When examining these constituent elements, the referring court must also take into account the requirements of the BGH as the national supreme court. Given that it is doubtful whether those requirements are contrary to European Union law, Question II. 5. (b) referred for a preliminary ruling follows from this.

D.

I. Question II. 4.

1. The Court of Justice, on 9 September 2021 – C-33/20, C-155/20, C-187/20 – (operative part of that judgment point 3 sentence 1) ruled as follows:

3. Article 10(2)(l) of Directive 2008/48 must be interpreted as meaning that the credit agreement must state, in the form of a specific percentage, the rate of late-payment interest applicable at the time of conclusion of that agreement and must explain the specific arrangements for adjusting the rate of late-payment interest.

By judgment of 21 March 2023 – C-38/21, C-47/21, C-232/21 – (point 10 of the operative part), the Court confirmed that decision:

10. Article 10(2)(l) of Directive 2008/48 must be interpreted as meaning that a credit agreement must state, as a specific percentage, the rate of late-payment interest that is applicable at the time the agreement is concluded and must describe in specific terms the mechanism for adjusting that rate.

2. In paragraph 267 of the judgment of 21 December 2023 – C-38/21, C-47/21, C-232/21 – the Court sets out its considerations concerning another question referred for a preliminary ruling:

that where information provided by the creditor to the consumer under Article 10(2) of Directive 2008/48 proves to be incomplete or incorrect, the withdrawal period starts to

run only if the incomplete or incorrect nature of that information is not capable of affecting the consumer's ability to assess the extent of his or her rights and obligations under that directive or his or her decision to conclude the contract and, where relevant, is not capable of depriving him or her of the possibility of exercising his or her rights, in essence, under the same conditions as would have prevailed if that information had been provided in a complete and correct manner.

Paragraph 265 further states:

It is for the referring court to determine that point.

The referring court assumes that the two previous statements do not concern the part of the judgment of 21 December 2023 in which the Court dealt with the interpretation of Article 10(2)(l) of Directive 2008/48 (paragraphs 268 to 272 of the judgment). Otherwise, in that part of the judgment, the Court would have imposed a limitation and would have stated that the referring court must still verify whether the failure to state the specific rate of late-payment interest is capable of affecting the consumer's ability to assess the extent of his or her rights and obligations under that directive.

This is also shown by the Court's considerations in the judgment of 21 December 2023 concerning the interpretation of Article 10(2)(r) of Directive 2008/48 as regards information on compensation for early repayment. The Court of Justice expressly limits the obligation to provide information in the second sentence of point 8 of the operative part and, in the same terms, in the relevant part of the grounds of the judgment (paragraph 256):

...
even in the absence of a specific and easily understandable indication of the method of calculation, such an agreement may satisfy the obligation set out in that provision provided that it contains other information enabling the consumer easily to determine the amount of the relevant compensation, in particular the maximum amount thereof, which he or she will have to pay in the event of early repayment of the loan.

It follows that the Court considers that the indication of the rate of late-payment interest, stated in the form of a specific percentage, is fully necessary and that, in the absence of that indication, the period for withdrawal does not begin to run.

3. By contrast, the BGH held, on 27 February 2024, that the failure to state, in the form of a specific percentage, the rate of late-payment interest applicable at the time of conclusion of the agreement and the arrangements for adjusting it in the circumstances set out in paragraphs 265 and 267 of the judgment of the Court of 21 December 2023 do not preclude the start of the period of withdrawal (BGH, judgment of 27 February 2024 – XI ZR 258/22 – DE:BGH:2024:270224UXIZR258.22.0, juris paragraph 32 et seqq.). The BGH states its reasons (juris, paragraph 35):

... A reasonably well-informed and reasonably observant and circumspect consumer in the applicant's situation would also have concluded the loan agreement at issue if, at the time the agreement was concluded, he or she had also been informed, in addition to the information contained in the agreement, of the specific interest rate applicable at that time and the manner in which it was adjusted. He or she would not have attached to such an indication decisive importance for the purposes of contract implementation, by reason both of his or her intended proper performance of the contract, thus precluding late payment and of the six-monthly variability of the rate of late-payment interest, so that the absence of that indication did not mislead the applicant as to his or her rights and obligations.

4. The Court is therefore requested to clarify how the considerations set out in paragraphs 268 to 272 and paragraphs 257 to 267 of the judgment of 21 December 2023 are to be understood: is the failure to state the rate of late-payment interest, in the form of a specific percentage, in the credit agreement sufficient for the withdrawal period not to start running in accordance with the second subparagraph of Article 14(1) of Directive 2008/48/EC?
5. In the event that the Court should answer Question II. 4. (a) to the effect that the failure to state, in the form of a specific percentage, the rate of late-payment interest is not a sufficient condition for the period of withdrawal not to begin, then the Court is asked to rule on Question II. 4. (b) on a question of EU law, namely whether the absence of such an indication of the late-payment interest in the form of a specific percentage is capable of affecting an average consumer's ability to assess the extent of his or her rights and obligations under the directive or his or her decision to conclude the contract and, if so, is capable of depriving him or her of the possibility of exercising his or her rights, in essence, under the same conditions as would have prevailed if that information had been provided in a complete and accurate manner. It is a question of EU law to determine the conditions under which the period of withdrawal in accordance with Article 14(1) second subparagraph point (b) of Directive 2008/48/EC begins, by way of exception, even when not all the information required by

Article 10(2) of the directive has been provided in the credit agreement.

According to the referring court, the absence of an indication of the rate of late-payment interest in the form of a specific percentage is capable of affecting the consumer's ability to assess the extent of his or her rights and obligations under the directive or his or her decision to conclude the contract. The criterion is an average consumer who is reasonably well informed and reasonably observant and circumspect (judgment of the Court of Justice of 21 December 2023 – C-38/21, paragraph 256). Such an average consumer clearly understands the risk that late payment may arise during the term of the contract, which is usually for several years, in the case of a longer term loan agreement with instalments for the purchase of a new vehicle. In order to determine whether and with which provider a credit agreement is concluded, the level of the interest rate stated as a specific percentage may be an important criterion, depending on the consumer's financial situation.

6. It is therefore necessary, in order to be able take a decision compatible with EU law on the cases referred, that Questions II. 4. (a) and II. 4. (b) referred for a preliminary ruling be answered by the Court of Justice.

II. Question II. 5. (a) and II. 5. (b)

1. Point 7 of the operative part of the judgment of the Court of 9 September 2021 – C-33/20, C-155/20, C-187/20 – reads as follows:

Directive 2008/48 must be interpreted as precluding a creditor from legitimately claiming that a consumer has abused his or her right of withdrawal, laid down in Article 14(1) of that directive, where some of the mandatory information listed in Article 10(2) thereof was not included in the credit agreement and was also not duly communicated at a later stage, irrespective of whether the consumer was unaware of the existence of his or her right of withdrawal.

Point 11 of the operative part of the judgment of the Court of 21 December 2023 – C-38/21, C-47/21, C-232/21 – reads as follows:

Article 14(1) of Directive 2008/48 must be interpreted as meaning that the full performance of the credit agreement causes the right of withdrawal to be extinguished. Furthermore, the creditor cannot validly plead that, on account of the consumer's conduct between the conclusion of

the agreement and the exercise of the right of withdrawal, or even after exercising it, the consumer exercised that right abusively where, due to incomplete or incorrect information in the credit agreement, in breach of Article 10(2) of Directive 2008/48, the withdrawal period has not begun to run because it has been established that the incompleteness or incorrectness of that information affected the consumer's ability to assess the extent of his or her rights and obligations under Directive 2008/48 and his or her decision to conclude the agreement.

It is clear from the operative part of the two judgments of the Court of 9 September 2021 and 21 December 2023 that the plea of abuse of rights cannot be considered in the cases referred. The absence of an indication of the rate of late-payment interest in the form of a specific percentage is capable of affecting the consumer's ability to assess the extent of his or her rights and obligations under Directive 2008/48 or his or her decision to conclude the contract (see point D.I.5.).

2. The grounds of the two judgments of the Court of 9 September 2021 and of 21 December 2023 also support that interpretation. In the judgment of 9 September 2021 – C-33/20, C-155/20 and C-187/20 – the Court emphasises (paragraphs 124, 125):

In addition, as the Advocate General observed, in essence, in points 117 and 118 of his Opinion, the objective of point (b) of the second subparagraph of Article 14(1) of Directive 2008/48 is to ensure that consumers receive all the information necessary to assess the extent of their contractual obligations and to penalise creditors who fail to provide them with the information listed in Article 10 thereof.

This is confirmed by the Court in paragraph 288 of the judgment of 21 December 2023 – C-38/21, C-47/21 and C-232/21:

Second, the aim of point (b) of the second subparagraph of Article 14(1) of that directive is to ensure that consumers receive all the information necessary to assess the extent of their contractual obligations and to penalise creditors who fail to provide them with the information listed in Article 10 thereof

The penalties provided for in EU directives in the field of consumer protection are intended to dissuade traders from infringing their obligations under the provisions of those directives vis-à-vis consumers (see, by analogy, judgments of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13,

EU:C:2014:282, paragraph 84, and of 25 November 2020, Banca B., C-269/19, EU:C:2020:954, paragraphs 34 and 38).

In paragraph 291 of the judgment of 21 December 2023 – C-38/21, C-47/21 and C-232/21 – the Court states by way of clarification:

It must nevertheless be stated in that regard that, in accordance with the answer given by the Court in paragraph 267 of the present judgment, a creditor cannot plead that the right of withdrawal was exercised abusively where, in the event of incomplete or incorrect information contained in the agreement, the withdrawal period has not begun to run because it has been established that the incompleteness or incorrectness of that information affected the consumer's ability to assess the extent of his or her rights and obligations under Directive 2008/48 and his or her decision to conclude the agreement.

In the grounds of the judgment of 21 December 2023 – C-38/21, C-47/21, C-232/21 – the Court also states, however, that there is, in EU law, a general legal principle that EU law cannot be relied on for abusive or fraudulent ends. In paragraph 287, the Court notes that it is for the referring court to determine, in accordance with the rules of evidence of national law, whether the constituent elements of an abusive practice are present in the disputes in the main proceedings. That assertion might possibly conflict with point 11 of the operative part of the judgment of 21 December 2023, according to which the creditor cannot validly rely on the plea based on abuse of rights.

3. That is why the Court, in Question II. 5. (a), is asked to decide for the purpose of clarification whether the plea based on abuse of rights is precluded when the rate of late-payment interest applicable at the time of conclusion of the agreement has not been stated in the form of a specific percentage in the credit agreement.
4. In the event that the Court should answer Question II. 5. (a) to the effect that the plea based on abuse of rights is not precluded even if the rate of late-payment interest is not indicated in the form of a specific percentage, the referring court would have to determine whether there was an abuse of rights in the main proceedings.

When examining the facts constituting an abuse of rights, the referring court must also take into account the requirements of the BGH as the national supreme court. In its case-law, the BGH interprets the concept of abuse of rights in an extremely broad manner (BGH, judgment of 27 October 2020 – XI ZR 498/19, DE:BGH:2020:271020UXIZR498.19.0, juris, paragraph 28; Order for

reference of 31 January 2022 – XI ZR 498/19 and others. – DE:BGH:2022:310122BXIZR113.21.0, paragraphs 81 to 88). Reliance by the consumer on his or her right of withdrawal must be regarded as constituting an abuse of rights, in particular where

- the consumer continues to use the financed vehicle until the validity of the withdrawal is determined by a court;
- the consumer refuses to pay compensation for the use of the vehicle.

It is doubtful whether these requirements of the BGH comply with EU law:

- a) According to the criteria of EU law, it seems implausible to assume that there is an abuse of rights where a consumer does not return the vehicle and continues to use it until the judicial decision on the validity of the withdrawal has been taken. In order for there to be an abuse of rights, EU law requires that the essential purpose of the transactions in question is to obtain an undue advantage from the application of EU law. The principle of prohibition of abusive practices is not applicable when the transactions at issue – and, more particularly, the choice to exercise certain legal options or to resort to certain arrangements – are likely to have an independent justification other than simply obtaining such an advantage (Court of Justice, Opinion of Advocate General Hogan delivered on 15 July 2021 – C-33/20, C-155/20, C-187/20 –, point 116).

If, in the event of a dispute over the validity of the withdrawal, the consumer does not return the car and continues to use it despite the withdrawal, he or she does not obtain any financial advantage because, according to national case-law, he or she must pay an appropriate compensation for the use.

Moreover, as long as no decision is taken on the validity of a consumer's withdrawal, there is a legitimate interest on the part of the consumer in continuing to use the vehicle. The consumer's free choice to exercise withdrawal would be rendered excessively difficult if he or she were unable to keep and use the vehicle during the judicial review of the validity of the withdrawal.

- b) It also appears to be contrary to EU law for the BGH to consider that there is an abuse of rights where the consumer considers that he or she is not obliged to pay compensation for the use of the vehicle. It lacks an objective element as a condition for an abusive practice. This is also circular reasoning: either the consumer's legal point of view is correct, whereby the court

grants him or her an advantage justified by a court decision, or the legal point of view is incorrect; he or she must then pay compensation and also does not obtain an undue advantage.

The constituent elements of the abuse of rights mentioned by the BGH are also decisive in the cases referred. The applicants in both cases did not return their vehicles and therefore continue to use them. In the pending case – 2 O 214/20 – the applicant considers (contrary to national case-law) that she is not obliged to pay compensation for depreciation of the value of the vehicle.

It is therefore also necessary, in order for the cases referred to be decided in a manner consistent with EU law, for the Court to answer Question II. 5. (b).

E.

The questions specified in II. 4. (a) and II. 4. (b) as well as II. 5. (a) and II. 5. (b) of the operative part of the decision referred for a preliminary ruling, which concern the interpretation of the Court's judgments of 9 September 2021 – C-33/20, C-155/20, C-187/20 – and of 21 December 2023 – C-38/21, C-47/21, C-232/21 – have not yet been the subject of a decision of the Court.

It is true that, in the request for a preliminary ruling from the BGH of 31 January 2022 in Case C-117/22, similar questions were referred concerning the plea based on abuse of rights. However, the Court stayed that case in view of Case C-38/21, C-47/21, C-232/21 and, on 25 January 2024, the BGH informed the Court that it did not wish to maintain its request for a preliminary ruling in Case C-117/22. However, as explained under D. II., doubts remain as to the conformity with EU law of the case-law of the BGH concerning the alleged abuse of rights in the exercise of the right of withdrawal. Nor has the BGH abandoned its case-law, and it could resume it at any time, so that clarification of compliance with EU law remains necessary.

It is in the interest of the uniform interpretation of EU law for the court to refer of its own motion the questions in the operative part of the decision to the Court of Justice for a preliminary ruling pursuant to point (a) of the first subparagraph and the second subparagraph of Article 267 TFEU and to stay the present proceedings.

[...]