Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 16 February 2023 [1]

Joined Cases C-38/21, C-47/21 and C-232/21

VK
v
BMW Bank GmbH (C-38/21)
and
F. F.
v
C. Bank AG (C-47/21)
and
CR,
AY,
ML,
BQ
v
Volkswagen Bank GmbH,
Audi Bank (C-232/21)

(Requests for a preliminary ruling from the Landgericht Ravensburg (Regional Court, Ravensburg, Germany))

(Reference for a preliminary ruling — Consumer protection — Mileage-based leasing agreement for a motor vehicle — Loan agreement for the purchase of a second-hand motor vehicle — Directive 2002/65/EC — Directive 2008/48/EC — Directive 2011/83/EU — Concepts of 'off-premises contract' and 'distance contract' — Involvement of an intermediary at the preparatory stage of the contract — Exception to the right of withdrawal in respect of a provision of car rental services — Absence of direct horizontal effect of a directive — Requirements of information to be included in an agreement — Presumption of compliance with the obligation to provide information when using a statutory model — Right of withdrawal — Initiation of the period of withdrawal in case of incomplete or incorrect information — Abuse of the right of withdrawal — Prior restitution requirement)

[1] Original language: English.

Table of contents

I. Introduction . . . 3

II. Legal framework . . . 3

A. European Union law . . . 3

1. Directive 2002/65 . . . 3

2. Directive 2008/48 . . . 4

3. Directive 2011/83 . . . 7

B. German law . . . 11

1. Civil Code . . . 11

2. The EGBGB . . . 15

III. The main proceedings and the questions referred for a preliminary ruling . . . 17

A. Case C-38/21 . . . 17

B. Case C-47/21 . . . 24

C. Case C-232/21 . . . 28

IV. Procedure before the Court . . . 30

V. Analysis . . . 31

A. Case C-38/21 . . . 32

1. The fifth question in Case C-38/21 . . . 32

2. The sixth question in Case C-38/21 . . . 35

3. The seventh question in Case C-38/21 . . . 36

4. The eighth question in Case C-38/21 . . . 37

5. Interim conclusion . . . 39

B. Cases C-47/21 and C-232/21 . . . 39

1. The first question in Cases C-47/21 and C-232/21 . . . 39

2. The second question in Cases C-47/21 and C-232/21 . . . 42

3. The fourth question in Cases C-47/21 and C-232/21 . . . 43

4. The fifth question in Cases C-47/21 and C-232/21 46

VI. Conclusion 47

I. Introduction

1. These requests for a preliminary ruling from the Landgericht Ravensburg (Regional Court, Ravensburg, Germany) arise in the context of a number of disputes between consumers and financial institutions linked to motor vehicle manufacturers. The cases before the referring court raise issues as to whether the withdrawal of consumers from, in one case, a mileage-based leasing agreement for a motor vehicle and, in the other cases, loan agreements intended to finance the purchase of a second-hand motor vehicle, is valid.

2. In accordance with the Court's request, the issues the present Opinion will address include, first, the nature of a mileage-based leasing agreement in the light of Directive 2002/65/EC,[2] Directive 2008/48/EC,[3] and Directive 2011/83/EU.[4] In that context, the Court is also asked to interpret the concepts of 'off-premises contract' and of 'distance contract' for the purposes of Directive 2011/83, and to rule on the possible application of an exception to the right of withdrawal for which the latter directive provides. Second, the Court is invited to rule on three aspects of the obligation Directive 2008/48 imposes on creditors to provide consumers with information relating, inter alia, to the right of withdrawal. These are: the compatibility with that directive of national legislation that creates a legal presumption that the obligation to provide information is met by recourse to a model clause set out in national legislation ('statutory model'); the consequences of providing incorrect or incomplete information for the start of the withdrawal period; and the possibility for a creditor to rely on the abusive exercise of the right of withdrawal by a consumer. Third, the Court is asked about the compatibility with the principle of effectiveness of EU law of certain consequences that national law attaches to a withdrawal from a credit agreement that is linked to a sales contract.

II. Legal framework

A. European Union law

1. Directive 2002/65

3. Article 1(1) of Directive 2002/65 describes the object of this directive as being 'to approximate the laws, regulations and administrative provisions of the Member States concerning the distance marketing of consumer financial services'.

[2] Directive 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 (OJ 2002 L 271, p. 16).

[3] Directive of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66).

[4] Directive 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 (OJ 2011 L 304, p. 64).

4. Article 2(a) of Directive 2002/65 defines 'distance contract' as 'any contract concerning financial services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded'. Pursuant to Article 2(b) thereof, 'financial service' is 'any service of a banking, credit, insurance, personal pension, investment or payment nature'.

5. Article 6(1) of Directive 2002/65 provides, inter alia, that 'the Member States shall ensure that the consumer shall have a period of 14 calendar days to withdraw from the contract without penalty and without giving any reason'.

2. Directive 2008/48

6. Recitals 9, 10, 12, 30 and 31 of Directive 2008/48 read as follows:

'(9) Full harmonisation is necessary in order to ensure that all consumers in the Community enjoy a high and equivalent level of protection of their interests and to create a genuine internal market. Member States should therefore not be allowed to maintain or introduce national provisions other than those laid down in this Directive. However, such restriction should only apply where there are provisions harmonised in this Directive. Where no such harmonised provisions exist, Member States should remain free to maintain or introduce national legislation. Accordingly, Member States may, for instance, maintain or introduce national provisions on joint and several liability of the seller or the service provider and the creditor. Another example of this possibility for Member States could be the maintenance or introduction of national provisions on the cancellation of a contract for the sale of goods or supply of services if the consumer exercises his right of withdrawal from the credit agreement. …

(10) The definitions contained in this Directive determine the scope of harmonisation. The obligation on Member States to implement the provisions of this Directive should therefore be limited to its scope as determined by those definitions. However, this Directive should be without prejudice to the application by Member States, in accordance with Community law, of the provisions of this Directive to areas not covered by its scope. A Member State could thereby maintain or introduce national legislation corresponding to the provisions of this Directive or certain of its provisions on credit agreements outside the scope of this Directive …

…

(12) Agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for them for the duration of their provision by means of instalments, may differ considerably, in terms of the interests of the contractual parties involved, and the modalities and performance of the transactions, from credit agreements covered by this Directive. Therefore, it should be clarified that such agreements are not regarded as credit agreements for the purposes of this Directive. …

…

(30) This Directive does not regulate contract law issues related to the validity of credit agreements. Therefore, in that area, the Member States may maintain or introduce national provisions which are in conformity with Community law. …

(31) In order to enable the consumer to know his rights and obligations under the credit agreement, it should contain all necessary information in a clear and concise manner.

…'

7. Pursuant to Article 1 of Directive 2008/48 the purpose of the directive is 'to harmonise certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers'. Article 2(1) of Directive 2008/48 provides that it shall apply to credit agreements. Article 2(2)(d) states that that directive shall 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; such an obligation shall be deemed to exist if it is so decided unilaterally by the creditor'.

8. Article 3 of Directive 2008/48 defines a number of the terms used in that directive, including:

'(c) "credit agreement" means an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments;

…

(n) "linked credit agreement" means a credit agreement where

(i) the credit in question serves exclusively to finance an agreement for the supply of specific goods or the provision of a specific service, and

(ii) those two agreements form, from an objective point of view, a commercial unit; a commercial unit shall be deemed to exist where the supplier or service provider himself finances the credit for the consumer or, if it is financed by a third party, where the creditor uses the services of the supplier or service provider in connection with the conclusion or preparation of the credit agreement, or where the specific goods or the provision of a specific service are explicitly specified in the credit agreement.'

9. Article 10(2) of Directive 2008/48, that article being entitled 'Information to be included in credit agreements', provides, inter alia:

'The credit agreement shall specify in a clear and concise manner:

…

(l) the interest rate applicable in the case of late payments as applicable at the time of the conclusion of the credit agreement and the arrangements for its adjustment and, where applicable, any charges payable for default;

…

(p) the existence or absence of a right of withdrawal, the period during which that right may be exercised and other conditions governing the exercise thereof, including information concerning the obligation of the consumer to pay the capital drawn down and the interest in accordance with Article 14(3)(b) and the amount of interest payable per day;

…

(r) the right of early repayment, the procedure for early repayment, as well as, where applicable, information concerning the creditor's right to compensation and the way in which that compensation will be determined;

…

(t) whether or not there is an out-of-court complaint and redress mechanism for the consumer and, if so, the methods for having access to it;

…'

10. Article 14 of Directive 2008/48, entitled 'Right of withdrawal', reads as follows:

'1. The consumer shall have a period of 14 calendar days in which to withdraw from the credit agreement without giving any reason.

That period of withdrawal shall begin

(a) either from the day of the conclusion of the credit agreement, or

(b) from the day on which the consumer receives the contractual terms and conditions and information in accordance with Article 10, if that day is later than the date referred to in point (a) of this subparagraph.

…

3. If the consumer exercises his right of withdrawal, he shall:

(a) in order to give effect to the withdrawal before the expiry of the deadline referred to in paragraph 1, notify this to the creditor in line with the information given by the creditor pursuant to Article 10(2)(p) by means which can be proven in accordance with national law. The deadline shall be deemed to have been met if that notification, if it is on paper or on another durable medium that is available and accessible to the creditor, is dispatched before the deadline expires; and

(b) pay to the creditor the capital and the interest accrued thereon from the date the credit was drawn down until the date the capital is repaid, without any undue delay and no later than 30 calendar days after the dispatch by him to the creditor of notification of the withdrawal. The interest shall be calculated on the basis of the agreed borrowing rate. The creditor shall

not be entitled to any other compensation from the consumer in the event of withdrawal, except compensation for any non-returnable charges paid by the creditor to any public administrative body.

…'

11. Under Article 15 of Directive 2008/48, entitled 'Linked credit agreements':

'1. Where the consumer has exercised a right of withdrawal, based on Community law, concerning a contract for the supply of goods or services, he shall no longer be bound by a linked credit agreement.

…

3. This Article shall be without prejudice to any national rules rendering the creditor jointly and severally liable in respect of any claim which the consumer may have against the supplier where the purchase of goods or services from the supplier has been financed by a credit agreement.'

12. Article 22(1) of Directive 2008/48, that article being entitled 'Harmonisation and imperative nature of this Directive', provides:

'In so far as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive.'

3. Directive 2011/83

13. Recitals 2, 16, 20, 22 and 49 of Directive 2011/83 state the following:

'(2) … This Directive should therefore lay down standard rules for the common aspects of distance and off-premises contracts, moving away from the minimum harmonisation approach in the former Directives whilst allowing Member States to maintain or adopt national rules in relation to certain aspects.

…

(16) This Directive should not affect national laws on legal representation such as the rules relating to the person who is acting in the name of the trader or on his behalf (such as an agent or a trustee). Member States should remain competent in this area. …

…

(20) The definition of distance contract should cover all cases where a contract is concluded between the trader and the consumer under an organised distance sales or service-provision scheme, with the exclusive use of one or more means of distance communication (such as mail order, Internet, telephone or fax) up to and including the time at which the contract is concluded. That definition should also cover situations where the consumer visits the business premises merely for the purpose of gathering information about the goods or services and subsequently negotiates and concludes the contract at a distance. By contrast, a contract which is negotiated at the business premises of the trader and finally concluded by means of distance communication should not be considered a distance contract. Neither

should a contract initiated by means of distance communication, but finally concluded at the business premises of the trader be considered a distance contract. … The notion of an organised distance sales or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform. It should not, however, cover cases where websites merely offer information on the trader, his goods and/or services and his contact details.

…

(22) Business premises should include premises in whatever form (such as shops, stalls or lorries) which serve as a permanent or usual place of business for the trader. Market stalls and fair stands should be treated as business premises if they fulfil this condition. … The business premises of a person acting in the name or on behalf of the trader as defined in this Directive should be considered as business premises within the meaning of this Directive.

…

(49) Certain exceptions from the right of withdrawal should exist, both for distance and off-premises contracts. … The granting of a right of withdrawal to the consumer could also be inappropriate in the case of certain services where the conclusion of the contract implies the setting aside of capacity which, if a right of withdrawal were exercised, the trader may find difficult to fill. This would for example be the case where reservations are made at hotels or concerning holiday cottages or cultural or sporting events.'

14. Article 1 of Directive 2011/83, entitled 'Subject matter' states that its purpose is 'through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts concluded between consumers and traders'.

15. Article 2 of Directive 2011/83, entitled 'Definitions', reads as follows:

'For the purposes of this Directive, the following definitions shall apply:

…

(2) "trader" means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive;

…

(6) "service contract" means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof;

(7) “distance contract” means any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;

(8) “off-premises contract” means any contract between the trader and the consumer:

(a) concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;

(b) for which an offer was made by the consumer in the same circumstances as referred to in point (a);

(c) concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer; or

…

(9) “business premises” means:

(a) any immovable retail premises where the trader carries out his activity on a permanent basis; or

(b) any movable retail premises where the trader carries out his activity on a usual basis;

…

(12) “financial service” means any service of a banking, credit, insurance, personal pension, investment or payment nature;

…

(15) “ancillary contract” means a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and where those goods are supplied or those services are provided by the trader or by a third party on the basis of an arrangement between that third party and the trader.’

16. In accordance with Article 3(1) thereof, Directive 2011/83 shall apply, under the conditions and to the extent set out therein, to any contract concluded between a trader and a consumer. Pursuant to Article 3(3)(d), it does not apply to contracts for financial services.

17. Article 6(1) of Directive 2011/83, that article being entitled 'Information requirements for distance and off-premises contracts', provides:

'Before the consumer is bound by a distance or off- premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner:

…

(h) where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Article 11(1), as well as the model withdrawal form set out in Annex I(B);

…'

18. Paragraphs 1 and 2 of Article 9 of Directive 2011/83, that article being entitled 'Right of withdrawal', provide:

'1. Save where the exceptions provided for in Article 16 apply, the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those provided for in Article 13(2) and Article 14.

2. Without prejudice to Article 10, the withdrawal period referred to in paragraph 1 of this Article shall expire after 14 days from:

(a) in the case of service contracts, the day of the conclusion of the contract;

…'

19. Article 10(1) of Directive 2011/83, that article being entitled 'Omission of information on the right of withdrawal', provides:

'If the trader has not provided the consumer with the information on the right of withdrawal as required by point (h) of Article 6(1), the withdrawal period shall expire 12 months from the end of the initial withdrawal period, as determined in accordance with Article 9(2).'

20. According to Article 13(3) of Directive 2011/83, that article being entitled 'Obligations of the trader in the event of withdrawal':

'Unless the trader has offered to collect the goods himself, with regard to sales contracts, the trader may withhold the reimbursement until he has received the goods back, or until the consumer has supplied evidence of having sent back the goods, whichever is the earliest.'

21. Article 15 of Directive 2011/83, entitled 'Effects of the exercise of the right of withdrawal on ancillary contracts', provides:

'1. Without prejudice to Article 15 of Directive [2008/48], if the consumer exercises his right of withdrawal from a distance or an off-premises contract in accordance with Articles 9 to 14 of this Directive, any ancillary contracts shall be automatically terminated, without any costs for the consumer, except as provided for in Article 13(2) and in Article 14 of this Directive.

2. The Member States shall lay down detailed rules on the termination of such contracts.'

22. Article 16 of Directive 2011/83, entitled 'Exceptions from the right of withdrawal', states, inter alia, that Member States shall not provide for the right of withdrawal set out in Articles 9 to 15 in respect of distance and off-premises contracts as regards '(l) the provision of accommodation other than for residential purpose, transport of goods, car rental services, catering or services related to leisure activities if the contract provides for a specific date or period of performance'.

B. German law

1. Civil Code

23. Under Paragraph 242 of the Bürgerliches Gesetzbuch (Civil Code, 'the BGB'), entitled 'Performance in good faith', 'the obligor must perform in a manner consistent with good faith, taking into account accepted practice'.

24. Paragraph 273(1) of the BGB, that paragraph being entitled 'Right of retention', provides:

'If the obligor has a claim that is due against the obligee under the same legal relationship as that on which the obligation is based, he or she may, unless the debt relationship provides otherwise, refuse the performance owed by him, until the performance owed to him is rendered (right of retention).'

25. Pursuant to Paragraph 293 of the BGB, entitled 'Default in acceptance', 'the obligee is in default if he or she does not accept the performance offered to him or her'.

26. Under Paragraph 294 of the BGB, entitled 'Actual offer', 'the obligee must actually be offered performance exactly as it is to be rendered'.

27. Paragraph 312b of the BGB, entitled 'Off-premises contracts', provides:

'(1) [1]Off-premises contracts are contracts

1. concluded in the simultaneous physical presence of the consumer and the trader, in a place which is not the business premises of the trader,

2. for which an offer was made by the consumer under the circumstances referred to in point 1,

3. concluded on the business premises of the trader or through any means of distance communication, but where the consumer was, immediately beforehand, personally and individually addressed, in a place outside of the business premises of the trader in the simultaneous physical presence of the consumer and the trader, or

…

[2]Persons acting in the name or on behalf of the trader are to be treated in the same way as the trader.

(2) [1]Business premises within the meaning of subparagraph 1 are any immovable retail premises where the trader carries out his or her activity on a permanent basis, and any movable retail premises where the trader carries out his or her activity on a usual basis. [2]Retail premises where the person who is acting in the name or on behalf of the trader carries out his or her activity on a permanent or on a usual basis are equivalent to the premises of the trader.'

28. Paragraph 312c of the BGB, entitled 'Distance contracts', states that:

'(1) Distance contracts are contracts for which the trader, or a person acting in the name or on behalf of the trader, and the consumer make exclusive use of means of distance communication to negotiate and conclude the contract, except where the conclusion of the contract does not take place in the context of a sales or service-provision scheme organised for distance sales.

(2) Means of distance communication within the meaning of this Code are all means of communication which can be used to prepare the ground for or conclude a contract without the simultaneous physical presence of the parties to the contract, such as letters, catalogues, telephone calls, faxes, emails, text messages sent via the mobile telephone service (SMS) as well as broadcasting and telemedia.'

29. Paragraph 312g of the BGB, entitled 'Right of withdrawal', provides:

'(1) In the case of off-premises contracts and of distance contracts, the consumer has a right of withdrawal pursuant to Paragraph 355.

(2) Unless otherwise agreed by the parties, the right of withdrawal shall not exist for the following contracts:

…

9. contracts for the provision of services in the fields of accommodation other than for residential purposes, transport of goods, motor vehicle rental and catering and for the provision of other services related to leisure activities, if the contract provides for a specific date or period of performance;

…'

30. Under Paragraph 322(2) of the BGB, that article being entitled 'Order to perform concurrently', 'if the party bringing the action must perform his or her part first, he or she may, if the other party is in default through non-acceptance, bring an action for performance after receipt of counter-performance.'

31. Paragraph 346 of the BGB, entitled 'Effects of termination', provides, in subparagraph 1 thereof: [5]

'If one contractual party has contractually reserved the right to terminate the contract or if he has a statutory right of termination, then, if termination occurs, any services received shall be returned, and the benefits derived from such services surrendered.'

[5] That provision, in the version in force on 31 January 2012, applies in the fourth case in the main proceedings in Case C-232/21.

32. By virtue of Paragraph 348 of the BGB, entitled 'Concurrent performance': [6]

'The obligations of the parties arising from termination shall be performed concurrently. The provisions of Paragraphs 320 and 322 shall apply *mutatis mutandis*.'

33. Paragraph 355 of the BGB, entitled 'Right of withdrawal in consumer contracts', reads as follows:

'(1) [1]Where the law gives the consumer a right of withdrawal in accordance with this provision, the consumer and the trader shall cease to be bound by their declarations of intent to conclude the contract, if the consumer has withdrawn his or her declaration to that effect within the period specified. …

(2) [1]The withdrawal period is 14 days. [2]Unless otherwise provided, it shall begin at the time of conclusion of the contract.'

34. Paragraph 356b of the BGB, entitled 'Right of withdrawal in consumer credit agreements', provides in subparagraph 2 thereof:

'[1]If the document delivered to the borrower under subparagraph 1 does not contain the mandatory information provided for in Paragraph 492(2), the time limit shall not begin to run until this deficiency is remedied in accordance with Paragraph 492(6).

…'

35. Paragraph 357 of the BGB, entitled 'Legal consequences of withdrawal from contracts concluded away from business premises and at a distance, with the exception of contracts for financial services', provides in subparagraphs 1 and 4 thereof: [7]

'(1) The benefits received must be returned after 14 days at the latest.

…

(4) [1]In the case of a sale of consumer goods, the trader may refuse to make repayment until he or she has received the returned goods or the consumer has provided proof that he or she has dispatched the goods. [2]This does not apply if the trader has offered to collect the goods.'

36. Paragraph 357a of the BGB, entitled 'Legal consequences of withdrawal of contracts for financial services', states in subparagraphs 1 and 3 that:

'(1) Benefits received must be returned after 30 days at the latest.

…

6 Idem.

7 That provision, in the version in force on 31 January 2012, applies in the fourth case in the main proceedings in Case C-232/21 and reads as follows:
'(1) Save where otherwise provided, the provision on statutory termination shall apply *mutatis mutandis* to the right of withdrawal and return.
…'

(3) [1]Where a borrower withdraws from a consumer credit agreement, he or she shall pay the agreed interest for the period between the disbursement and repayment of the loan. …'

37. Paragraph 358 of the BGB, entitled 'Agreement linked to the agreement from which the consumer has withdrawn', provides in subparagraphs 2 to 4 thereof: [8]

'(2) If the consumer has validly withdrawn his or her declaration of intent to conclude a consumer credit agreement on the basis of Paragraph 495(1) or of Paragraph 514(2), first sentence, he or she shall also cease to be bound by his or her declaration of intent to conclude an agreement for the supply of goods or the provision of another service linked to that consumer credit agreement.

(3) [1]A contract for the supply of goods or the provision of other services and a credit agreement pursuant to subparagraph 1 or 2 shall be linked if the credit serves to finance the other agreement in whole or in part and if they both form an economic unit. [2]An economic unit shall be deemed to exist, in particular, where the trader himself or herself finances the consumer's counter-performance or, in the case of financing by a third party, where the lender involves the trader in the preparation or conclusion of the credit agreement. …

(4) [1]Paragraph 355(3) and, depending on the type of associated contract, Paragraphs 357 to 357b shall apply *mutatis mutandis* to the rescission of the associated contract, irrespective of the method of marketing. … [5]The lender shall assume in dealings with the consumer the rights and obligations of the trader arising from the linked agreement as regards the legal consequences of withdrawal if, at the time when the withdrawal takes effect, the amount of the loan has already been paid to the trader.

…'

38. Paragraph 492 of the BGB, entitled 'Written form, content of the agreement', states in subparagraphs 2 and 6 that:

'(2) The agreement must contain the information prescribed by Article 247(6) to 13 of the Einführungsgesetz zum Bürgerlichen Gesetzbuch [(Introductory Law to the Civil Code of 21 September 1994, [9] "the EGBGB")] for credit agreements with consumers.

…

(6) [1]If the agreement does not contain the information under subparagraph 2, or if it does not contain it in full, that information may be provided subsequently on a durable medium after the agreement has been effectively entered into, or, in cases under the first sentence of Paragraph 494(2), after the agreement has become valid. …'

[8] That provision applies in the version in force on 31 January 2012 in the fourth case in the main proceedings in Case C-232/21 and reads as follows:
'(2) If the consumer has validly withdrawn his or her declaration of intent to conclude a consumer credit agreement on the basis of Paragraph 495(1), he or she shall also cease to be bound by his or her declaration of intent to conclude an agreement for the supply of goods or the provision of another service linked to that consumer credit agreement.
…
(4) [1]Paragraph 357 shall apply *mutatis mutandis* to the linked agreement. …
…'

[9] BGBl. 1994 I, p. 2494, and corrigendum BGBl. 1997 I, p. 1061.

39. Paragraph 495 of the BGB, entitled 'Right of withdrawal; Period for reflection', provides in subparagraph 1 thereof:

'In the case of a credit agreement concluded with a consumer, the borrower has a right of withdrawal in accordance with Paragraph 355.'

40. Under Paragraph 506 of the BGB, entitled 'Deferral of payment, other financial accommodation':

'(1) [1]The provisions of Paragraphs 358 to 360, 491a to 502 and 505a to 505e applicable to general consumer credit agreements shall apply, with the exception of Paragraph 492(4) and subject to subparagraphs 3 and 4, to agreements by which a trader grants a consumer a non-gratuitous deferral of payment or other non-gratuitous financial accommodation. …

(2) [1]Agreements between a trader and a consumer for the non-gratuitous use of an object are deemed to constitute non-gratuitous financial accommodation if it is agreed that:

1. the consumer is obliged to acquire the object,

2. the trader can demand that the consumer acquire the object, or

3. the consumer shall be liable for a certain value of the object on termination of the agreement.

[2]Paragraph 500(2) and Paragraph 502 shall not apply to agreements in accordance with point 3 of the first sentence.

…

(4) [1]To the extent laid down in paragraph 491(2), second sentence, points 1 to 5, (3), second sentence, and (4), the provisions of this subtitle shall not apply. In so far as there is no net loan amount according to the type of agreement (Paragraph 491(2), second sentence, point 1), it shall be replaced by the cash payment price or, if the trader has acquired the article for the consumer, by the purchase price.'

2. The EGBGB

41. Article 247 of the EGBGB, entitled 'Information requirements for consumer loan agreements, paid financial assistance and credit intermediation agreements', contains the following: [10]

'…

§6 Content of the agreement

[10] That provision, which applies in the version in force on 31 January 2012 in the fourth case in the main proceedings in Case C-232/21, contains the following differences:
– Paragraph 6, subparagraph 2, third sentence, and Paragraph 12, subparagraph 1, third sentence, the references to 'Annex 7' should be to 'Annex 6';
– Paragraph 12, subparagraph 1, first and third sentences, the references to 'Paragraph 360(2) of [the BGB]' should be to 'Paragraph 359a(1) of [the BGB]'; and
– Paragraph 12, subparagraph 1, second sentence, the reference to 'Paragraphs 358 and 359 or Paragraph 360 of [the BGB]' should be to 'Paragraphs 358 and 359 of [the BGB]'.

(1) The following information shall be included in the consumer credit agreement in a clear and understandable manner:

1. the information indicated in Paragraph 3, first subparagraph, points 1 to 14, and fourth subparagraph,

…

(2) [1]Where a right of withdrawal exists under Paragraph 495 of [the BGB], the agreement must contain information about the time limit and other conditions for declaring the withdrawal as well as a reference to the borrower's obligation to repay a loan that has already been disbursed and to pay interest. [2]The agreement shall state the amount of interest to be paid per day. [3]Where the consumer credit agreement contains a prominent, clearly formulated contractual term, which, in the case of general consumer credit agreements, corresponds to the model in Annex 7 …, that contractual term shall satisfy the requirements of sentences 1 and 2.

…

[5]The lender may deviate from the model in terms of format and font size, taking into account sentence 3.

§7 Other information in the agreement

(1) The following information shall be included in the consumer credit agreement in a clear and understandable manner, in so far as it is relevant to the agreement:

…

3. the method for calculating compensation for early repayment, to the extent that the creditor intends to assert his or her right to such compensation in the event of early repayment of the loan by the borrower,

4. the borrower's access to an out-of-court complaint and redress procedure and, if applicable, the conditions of such access.

…

§12 Linked agreements and non-gratuitous financial accommodation

(1) [1]Paragraphs 1 to 11 shall apply *mutatis mutandis* to agreements for non-gratuitous financial accommodation referred to in Paragraph 506(1) of [the BGB]. [2]In the case of such agreements, as well as consumer credit agreements which are linked to another agreement in accordance with Paragraph 358 of [the BGB] or in which goods or services are specified in accordance with the second sentence of Paragraph 360(2) of [the BGB]:

1. the pre-contractual information must contain, including in the case under Paragraph 5, the subject matter and cash price,

2. the contract must contain

(a) the subject matter and cash price

(b) information about the rights arising under Paragraphs 358 and 359 or Paragraph 360 of [the BGB] and the conditions for exercising those rights.

[3]Where the consumer credit agreement contains a prominent, clearly formulated contractual term, which, in the case of general consumer credit agreements, corresponds to the model in Annex 7 …, that contractual term shall, in the case of linked agreements and transactions under the second sentence of Paragraph 360(2) of [the BGB], satisfy the requirements set out in point 2(b) of the second sentence. …

…'

III. The main proceedings and the questions referred for a preliminary ruling

A. Case C-38/21

42. On 10 November 2018, VK concluded, as a consumer, a mileage-based leasing agreement for a BMW motor vehicle for private use with BMW Bank GmbH. VK applied for that leasing agreement, and signed the application, on the car dealer's premises. The car dealer, who acted as credit intermediary for BMW Bank without having the power to conclude the agreement, calculated the different elements of the lease (lease term, down payment and amount of the monthly instalments) and explained them to VK. The car dealer was authorised and able to provide VK with information about the agreement and to answer any questions. The car dealer forwarded the leasing application to the bank, which accepted it.

43. The parties agreed that VK would pay a total sum of EUR 12 486.80, consisting of a down payment of EUR 4 760 followed by 24 lease instalments of EUR 321.95 each. The borrowing rate was 3.49% per annum for the entire duration of the leasing agreement and the annual percentage interest rate was 3.55%. The net amount of credit was EUR 40 294.85, which corresponded to the purchase price of the vehicle. It was further agreed that the vehicle's mileage would be capped at 10 000 kilometres per year. On the return of the vehicle, VK would pay EUR 0.0737 for each kilometre driven in excess of the cap, while EUR 0.0492 would be reimbursed to him for each kilometre not driven up to the cap. If, upon its return, the vehicle's condition did not correspond to its age and to the agreed mileage, VK would be required to compensate BMW Bank for that additional loss of value. Neither the leasing agreement nor any separate agreement contained an obligation to purchase the vehicle.

44. The leasing agreement contains the following clause, entitled 'Right of withdrawal':[11]

'You may withdraw your contractual declaration, without having to provide any reasons, within 14 days. The period begins after conclusion of the agreement, 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). …'

[11] According to the referring court, that clause corresponds to the statutory model specified in Annex 7 to the EGBGB, to which the third sentence of Article 247(6)(2) of the EGBGB refers.

45. VK took delivery of the vehicle. From January 2019, he duly paid the agreed monthly instalments. By letter of 25 June 2020, he withdrew from the agreement. BMW Bank rejected that withdrawal.

46. By his action against BMW Bank before the referring court, VK seeks a declaration that the bank cannot assert any rights under the leasing agreement, in particular any entitlement to receive the lease instalments. He argues that the withdrawal period had not begun to run since the mandatory information in the leasing agreement is insufficient and incomprehensible. Since the leasing agreement is an off-premises and/or distance contract, he also submits that Paragraph 312g(1) of the BGB gives him the right to withdraw from it. According to VK, it is not possible to seek clarification and to obtain mandatory information from BMW Bank if an employee or representative of that bank is not present at the car dealer's premises at the preparatory stage of the agreement.

47. BMW Bank contends that VK's action be dismissed as unfounded. It states that the rules on withdrawal applicable to consumer credit agreements do not apply to mileage-based leasing agreements. In any event, the leasing agreement duly communicated all the mandatory information to VK, including his right to withdraw from it. The information on the right of withdrawal corresponds exactly to the statutory model, so that it is deemed to meet the requirements of the first and third sentences of Article 247(6)(2) of the EGBGB, by reason of which the 14-day withdrawal period had expired long before VK exercised his right of withdrawal. BMW Bank further contends that since VK had personal contact with an intermediary who was able to inform him about the service offered, the leasing agreement is not a distance contract. Nor is the agreement an off-premises contract, since the intermediary must be regarded as having acted in the name or on behalf of the trader within the meaning of recital 22 of Directive 2011/83.

48. The referring court observes that until recently, German case-law recognised the existence of a right of withdrawal in the case of mileage-based leasing agreements by applying analogous national provisions governing agreements by which a trader grants a consumer a non-gratuitous deferral of payment or other non-gratuitous financial accommodation.[12] By judgment of 24 February 2021,[13] the Bundesgerichtshof (Federal Court of Justice, Germany) held, however, that that analogy was unsustainable. Paragraphs 495 and 355 of the BGB thus do not grant the lessee of a vehicle a right of withdrawal from that type of leasing agreement. According to that court, that solution is correct from the perspective of EU law since Article 2(2)(d) of Directive 2008/48 does not apply to hiring or leasing agreements where an obligation to purchase the object of the agreement is neither laid down by the agreement itself nor by a separate agreement. Since there is no obligation to purchase in the case of mileage-based leasing agreements, it is not open to a court to apply Directive 2008/48 by analogy. The referring court doubts whether that analysis is correct.

[12] See point 3 of the first sentence of Paragraph 506(2) and Paragraph 495(1) of the BGB. According to the referring court, that case-law was based on the fact that, under a mileage-based leasing agreement, the lease instalments and the initial rate of value are calculated so as to ensure that the lessee pays the full amortised value of the vehicle. Unlike standard contracts of transfer of use, the calculation of the residual value takes account of depreciation related to the number of kilometres driven only and not to other factors such as wear and tear corresponding to normal use. The essential element of the contract is thus not the transfer of the use of the vehicle but the financing of that use.

[13] Case No VIII ZR 36/20, DE:BGH:2021:240221, juris UVIIIZR36.20.0.

49. The referring court seeks, first, to ascertain whether a mileage-based leasing agreement, such as that at issue, comes within the scope of Directive 2008/48, of Directive 2011/83 or of Directive 2002/65. It envisages the possibility of applying Directive 2008/48 by analogy,[14] in so far as mileage-based leasing agreements are usually designed to ensure that, both in terms of calculation and in practice, they result in the full amortisation of the use of the vehicle. In the alternative, the referring court enquires as to whether mileage-based leasing for motor vehicles is a financial service within the meaning of Article 2(b) of Directive 2002/65 and Article 2(12) of Directive 2011/83.[15] In support of that approach, the referring court observes that, in the case of mileage-based leasing agreements, there is no material proximity between the lessor and the asset leased since the lessee chooses the leased item according to his or her requirements. Unlike a lessee *stricto sensu*, the lessee bears all of the risks during the term of the lease, must insure the vehicle and assert his or her rights against third parties in the event of defects in the vehicle, whereas the lessor merely finances the lessee's use of the vehicle.

50. In the event that a mileage-based leasing agreement such as that at issue in the main proceedings comes within the scope of Directive 2008/48, the referring court then seeks to ascertain the compatibility with Article 10(2)(p) and Article 14(1) thereof of national legislation, which establishes a legal presumption that, notwithstanding any inadequacy in the information provided, the obligation to provide the consumer with information on the right of withdrawal is fulfilled where the agreement contains a clause that corresponds to a statutory model annexed to that legislation ('the presumption of legality'). The referring court also asks if it must disapply that legislation when it considers it appropriate so to do.

51. The referring court doubts whether the presumption of legality is compatible with the Court's judgment in *Kreissparkasse Saarlouis*.[16] There it held, inter alia, that as regards the information referred to in Article 10 of Directive 2008/48, Article 10(2)(p) thereof must be interpreted as precluding a credit agreement that referred to a provision of national law which, in turn, referred to other national legislative provisions.[17] The referring court observes that the Eleventh Civil Chamber of the Bundesgerichtshof (Federal Court of Justice) considered that it could not follow that case-law since the text, the spirit, the purpose and the origin of the third sentence of Article 247(6)(2) of the EGBGB preclude an interpretation that would be compatible with Directive 2008/48.[18] Nor could that Chamber envisage the direct application of that directive, since the Court of Justice had ruled out, in the field of consumer credit, the possibility of a borderline *contra legem* interpretation of national law in order to comply with the requirements of EU law. The referring court considers, however, that the Court hitherto left open the application of the principle of the primacy of EU law with regard to Directive 2008/48.[19]

[14] Pursuant to Article 2(2)(d) thereof, Directive 2008/48 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. The mileage-based leasing agreement at issue does not contain such an obligation.

[15] Under Article 3(3)(d) thereof, Directive 2011/83 does not apply to contracts for financial services.

[16] Judgment of 26 March 2020, *Kreissparkasse Saarlouis* (C-66/19, EU:C:2020:242; 'the judgment in *Kreissparkasse Saarlouis*').

[17] As is apparent from point 44 of the present Opinion, the leasing agreement at issue in the main proceedings includes such a reference. The referring court seeks to ascertain whether, as a consequence of the judgment in *Kreissparkasse Saarlouis*, the information on the right of withdrawal included in that agreement must be regarded as insufficient, such that, in accordance with Paragraph 356b(2) of the BGB, read in conjunction with Paragraph 492(2) thereof together with the first sentence of Article 247(6)(2) and the second sentence of Article 247(12)(1) of the EGBGB, the withdrawal period has not begun to run.

[18] In the order for reference, the referring court observes that, in Germany, some legal commentators take the view that the presumption of legality can be interpreted as concerning compliance with the requirements imposed by national law only and not those EU law imposes.

[19] The referring court refers to the judgment of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraphs 76 to 79).

52. Second, the referring court seeks clarification as regards the information that must be included in consumer credit agreements by virtue of Article 10(2)(p), (l) and (t) of Directive 2008/48. It enquires whether only the absence of mandatory information can prevent the withdrawal period from starting to run in accordance with Article 14(1) thereof or whether the fact that the information provided is incomplete or materially incorrect has the same consequence.

53. Third, the referring court asks, in essence, whether the exercise by a consumer of the right of withdrawal in the case of a consumer credit agreement can be time-barred by reason of an infringement of the principle of good faith enshrined in Paragraph 242 of the BGB.

54. Fourth, the referring court wishes to know whether, and under which conditions, a consumer's exercise of the right of withdrawal from a consumer credit agreement may be deemed abusive. It observes that, in a recent judgment, the Bundesgerichtshof (Federal Court of Justice) held that the exercise of the right of withdrawal may be abusive, and thus constitute an infringement of Paragraph 242 of the BGB, where the consumer, by invoking the absence of the presumption of legality attached to the statutory model, seeks to exploit a formal legal position. According to that court it may be necessary to take account of a number of factors in that context, not limited to the following: that the consumer may have considered the information that did not comply with the statutory model irrelevant to his or her circumstances; that he or she may have raised the issue of the non-compliance of the statutory model for the first time during an appeal on a point of law; or that the consumer may have 'exercised his or her right of withdrawal in order to be able to return the vehicle, after having used it in accordance with its intended purpose for a relatively long period, taking the – mistaken – view that he or she would be exempt from the obligation to pay compensation'.

55. If, in the alternative, a mileage-based leasing agreement such as that at issue consists of the provision of a financial service for the purposes of Directives 2002/65 and 2011/83, the referring court asks, first, whether such an agreement qualifies as an 'off-premises contract' within the meaning of Article 2(8) of Directive 2011/83.[20] It wonders whether the business premises of a person who is merely involved in the preparation of the contract, here the car dealer, who does not have the power to represent the trader in order to conclude that contract, is that trader's business premises for the purposes of Article 2(9) of Directive 2011/83. The specific question arises as to whether the involvement of such a person can be equated with acting 'in the name or on behalf of the trader' within the meaning of Article 2(2) of Directive 2011/83 and, consequently, of the second sentence of Paragraph 312b(1) and Paragraph 312b(2) of the BGB.

56. Second, it is unclear to the referring court whether the mileage-based leasing agreement at issue falls within the scope of the exception to the right of withdrawal set out in Article 16(l) of Directive 2011/83 and in Paragraph 312g(2)(9) of the BGB with respect to car rental services. In

[20] According to the referring court, if the mileage-based leasing agreement is classified as an off-premises contract, the lessee has a right of withdrawal under Paragraph 312g(1) of the BGB. It observes that, although Directive 2011/83 does not give consumers a right of withdrawal in respect of financial services contracts, the interpretation of the second sentence of Paragraph 312b(1) of the BGB, which concerns off-premises contracts depends upon that laid down in Directive 2011/83. It refers to the judgment of 19 October 2017, *Solar Electric Martinique* (C-303/16, EU:C:2017:773, paragraph 26), and to the judgment in *Kreissparkasse Saarlouis* (paragraph 29), in which the Court held that 'where, in regulating situations outside the scope of the EU measure concerned, national legislation adopts the same solutions as those adopted in that measure, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions taken from that measure should be interpreted uniformly'.

that regard, the referring court observes, inter alia, that, according to a judgment of the Oberlandesgericht München (Higher Regional Court, Munich, Germany) of 18 June 2020,[21] 'car rental' encompasses short-term car rental not mileage-based leasing agreements.

57. Third, the referring court asks whether a mileage-based leasing agreement, such as that in issue, may be a 'distance contract' within the meaning of Article 2(a) of Directive 2002/65 and Article 2(7) of Directive 2011/83 where the consumer has personal contact only with an intermediary who is merely involved in the preparation of the contract and does not have the power to represent the trader in order to conclude it.[22] It observes, inter alia, that, according to the Bundesgerichtshof (Federal Court of Justice), the condition of the 'exclusive use of one or more means of distance communication' in those provisions is not satisfied where the consumer, in the preparatory stage of concluding a contract, has personal contact with a third party who, on the trader's behalf, provides him or her with information on that contract.

58. In those circumstances, the Landgericht Ravensburg (Regional Court, Ravensburg) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Statutory presumption in accordance with Article 247(6)(2), third sentence, and Article 247(12)(1), third sentence, of the [EGBGB]:

(a) Inasmuch as they state that contract terms which conflict with the requirements of Article 10(2)(p) of Directive [2008/48] satisfy the requirements of Article 247(6)(2), first and second sentences, of the EGBGB, and the requirements laid down in Article 247(12)(1), second sentence, point 2(b), of the EGBGB, are Article 247(6)(2), third sentence, and Article 247(12)(1), third sentence, of the EGBGB incompatible with Article 10(2)(p) and Article 14(1) of Directive [2008/48]?

If so:

(b) Does it follow from EU law, in particular from Article 10(2)(p) and Article 14(1) of Directive [2008/48], that, inasmuch as they state that contract terms which conflict with the requirements of Article 10(2)(p) of Directive [2008/48] satisfy the requirements of Article 247(6)(2), first and second sentences, of the EGBGB, and the requirements laid down in Article 247(12)(1), second sentence, point 2(b), of the EGBGB, Article 247(6)(2), third sentence, and Article 247(12)(1), 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]:

(a) Is Article 10(2)(p) of Directive [2008/48] 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?

[21] Case 32 U 7119/19, DE:OLGMUEN:2020:0618.32U7119.19.0A, BeckRS2020,13248, paragraph 39.

[22] According to the referring court, if the mileage-based leasing contract is classified as a distance contract the lessee has a right of withdrawal under Article 312g(1) of the BGB.

(b) Is Article 10(2)(l) of Directive [2008/48] 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 [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] 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] 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] 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]:

(a) Is the right of withdrawal in accordance with Article 14(1), first sentence, of Directive [2008/48] 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] 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]:

(a) Is it possible to abuse the right of withdrawal under Article 14(1), first sentence, of Directive [2008/48]?

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] 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?

(5) Do mileage-based leasing agreements for motor vehicles with a term of approximately two to three years which are concluded using a standard form that excludes the right of ordinary termination, and under which the consumer has to take out fully comprehensive insurance for the vehicle, must also assert defect-related rights against third parties (in particular the vehicle dealer and manufacturer) and, moreover, bears the risk of loss, damage and other impairment, fall within the scope of Directive [2011/83] and/or Directive [2008/48] and/or Directive [2002/65]? Are they credit agreements within the meaning of Article 3(c) of Directive [2008/48] and/or contracts relating to financial services within the meaning of Article 2(12) of Directive [2011/83] and Article 2(b) of Directive [2002/65]?

(6) If mileage-based leasing agreements for motor vehicles (as described in point 5) are contracts relating to financial services:

(a) Are business premises of a person who prepares the ground for transactions with consumers on behalf of the trader but who does not himself [or herself] have any power of representation to conclude the contracts in question also to be regarded as immovable business premises for the purposes of Article 2(9) of Directive [2011/83]?

If so:

(b) Does that also apply where the person who prepares the ground for the contract carries out a business activity in another sector and/or is not authorised under supervisory and/or civil law to conclude contracts relating to financial services?

(7) If either Question 6(a) or Question 6(b) is answered in the negative:

Is Article 16(l) of Directive [2011/83] to be interpreted as meaning that mileage-based leasing agreements for motor vehicles (as described in point II.5) are covered by that exception?

(8) If mileage-based leasing agreements for motor vehicles (as described in point 5) are contracts relating to financial services:

(a) Does a distance contract within the meaning of Article 2(a) of Directive [2002/65] and Article 2(7) of Directive [2011/83] exist also where the only personal contact during contractual negotiations was with a person who prepares the ground for transactions with consumers on behalf of the trader but does not personally have any power of representation to conclude the contracts in question?

If so:

(b) Does that also apply where the person who prepares the ground for the contract carries out a business activity in another sector and/or is not authorised under supervisory and/or civil law to conclude contracts relating to financial services?'

B. Case C-47/21

59. On 12 April 2017, F. F. concluded, as a consumer, a loan agreement with C. Bank AG in the sum of EUR 15 111.70 for the purchase of a second-hand motor vehicle for private use.

60. The car dealer from whom F. F. purchased the vehicle acted as a credit intermediary for C. Bank in the preparation and conclusion of the loan agreement and used the standard form agreement provided by the bank. The purchase price was EUR 14 880. After deduction of a down payment of EUR 2 000, the balance of EUR 12 880 was to be financed by way of a loan. That loan agreement provided for repayment in 60 monthly instalments, together with a final payment of a specified amount.

61. It contains the following clause: [23]

'Right of withdrawal

The borrower may withdraw from the agreement, without having to provide any reasons, within 14 days. The period begins after conclusion of the agreement, 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 term of the contract). …'

62. Ownership of the vehicle was transferred to C. Bank by way of guarantee for repayment of the loan. After disbursement of the loan, F. F. duly paid the agreed monthly instalments. On 1 April 2020, he withdrew from the loan agreement. C. Bank rejected his withdrawal.

63. In his action before the referring court, F. F. seeks, upon the return of the vehicle to C. Bank, reimbursement of the monthly instalments he had paid and of the down payment he made to the car dealer, that is to say EUR 10 110.11. He also seeks a declaration that C. Bank was late in taking back the vehicle. F. F. argues that his withdrawal is valid since the withdrawal period has not yet started to run due to the lack of clarity of the information relating to the right of withdrawal and to the incorrect mandatory information provided to him.

64. C. Bank contends that the action should be dismissed as unfounded. It claims that it provided F. F. with all of the mandatory information by means of the statutory model, so that that information must be deemed to be correct in accordance with the first and third sentences of Article 247(6)(2) of the EGBGB. F. F.'s withdrawal is thus out of time. In the alternative, C. Bank submits that F. F.'s conduct constitutes an abuse of rights.

65. First, the referring court seeks to ascertain whether the national legislation that established the presumption of legality is compatible with Directive 2008/48 and whether it must disapply that legislation where it considers it appropriate to do so. Although C. Bank used the statutory model, it did so incorrectly in so far as it also provided information on linked agreements that was irrelevant to F. F. since he had not entered into any such agreements. Since the criteria laid down by the Bundesgerichtshof (Federal Court of Justice) to identify the presence of an abuse of rights are met in the present case, F. F. cannot claim that the presumption of legality does not apply. The referring court also puts forward the same considerations as those set out in points 50 and 51 of the present Opinion.

66. Second, the referring court seeks clarification as regards the information that must be included in consumer credit agreements by virtue of Article 10(2)(l), (r) and (t) of Directive 2008/48. It wonders whether the fact that the information provided is merely incomplete or materially incorrect can prevent the withdrawal period from starting to run.

[23] That clause corresponds to the statutory model specified in Annex 7 to the EGBGB, referred to in the third sentence of Article 247(6)(2) of the EGBGB.

67. Third, the referring court asks, in essence, whether the exercise by a consumer of the right of withdrawal in the case of a consumer credit agreement can be time-barred by reason of an infringement of the principle of good faith enshrined in Paragraph 242 of the BGB.

68. Fourth, the referring court wishes to know whether, and under what conditions, the exercise by a consumer of the right of withdrawal in the case of a consumer credit agreement may be abusive. The referring court's considerations in that regard are set out in point 54 of the present Opinion.

69. Fifth, the referring court seeks clarification as regards the consumer's right to reimbursement of the monthly instalments paid in circumstances where a credit agreement from which he or she has withdrawn is linked to a contract for the sale of goods. In the opinion of the Bundesgerichtshof (Federal Court of Justice), national law [24] provides that where a consumer withdraws from a credit agreement linked to a contract for the purchase of a motor vehicle, the creditor [25] may refuse to reimburse the monthly instalments and, where appropriate, the down payment, until that vehicle has been returned to it or until the consumer has supplied evidence of having done so. In terms of civil procedure, the Bundesgerichtshof (Federal Court of Justice), applying Paragraph 322(2) of the BGB by analogy, considers that, as a result of that prior restitution requirement, once a consumer has exercised his or her right of withdrawal, an action for payment against the creditor is well founded only where either the consumer invited the creditor to take back that motor vehicle, thereby making an 'effective offer' to the creditor within the meaning of Article 294 of the BGB, or where the consumer supplies evidence of having returned the vehicle to the creditor.

70. The referring court has doubts as to the compatibility of both the prior restitution requirement and its procedural consequences with the effectiveness of the right of withdrawal provided for in Article 14(1) of Directive 2008/48. The exercise of the right of withdrawal would be considerably limited in practice if the consumer had to return the vehicle before being entitled to bring proceedings for reimbursement of the loan instalments. In addition, the referring court is uncertain as to whether Article 14(1) of Directive 2008/48 has direct effect, such that it ought to disapply the aforementioned national provisions.

71. Sixth, the referring court, which consists of a single Judge, submits that it is apparent from the case-law of the Bundesgerichtshof (Federal Court of Justice) that, under national procedural rules, a single Judge is not entitled to make a reference for a preliminary ruling to the Court of Justice under Article 267 TFEU and must, in such a case, transfer the proceedings to a court consisting of several Judges. It wonders whether those rules are compatible with Article 267 TFEU and, if not, whether they should be disapplied.

72. In those circumstances, the Landgericht Ravensburg (Regional Court, Ravensburg) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, the text of Questions 1, 3 and 4 being identical to those referred in Case C-38/21:

'(1) …

Independently of the answers to Questions 1(a) and 1(b):

(2) Mandatory information required under Article 10(2) of Directive [2008/48]:

[24] First sentence of Paragraph 358(4) of the BGB read in conjunction with the first sentence of Paragraph 357(4) thereof.

[25] See the fifth sentence of Paragraph 358(4) of the BGB.

(a) (Question 2(a) has been withdrawn)

(b) Article 10(2)(r) of Directive [2008/48]:

(aa) Is that provision to be interpreted as meaning that the information in the credit agreement concerning the compensation payable in the event of early repayment of the loan must be sufficiently precise to enable the consumer to calculate at least approximately the compensation payable in the event of early termination?

(should the previous question be answered in the affirmative)

(bb) Do Article 10(2)(r) and the second sentence of Article 14(1) of Directive [2008/48] preclude national legislation pursuant to which, in the case of incomplete information within the meaning of Article 10(2)(r) of that directive, the period for withdrawal nevertheless commences on conclusion of the agreement and only the creditor's right to compensation for early repayment of the credit is lost?

(c) Is Article 10(2)(l) of Directive [2008/48] 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 [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?

(d) Is Article 10(2)(t) of Directive [2008/48] 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 2(d) is answered in the affirmative:

(e) Is Article 14(1), second sentence, point (b), of Directive [2008/48] 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] has been provided fully and correctly?

If not:

(f) 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 2(d) is answered in the affirmative:

(3) …

(4) …

(5) Irrespective of the answers to the above questions:

(a) Is it compatible with EU law, in particular with the right of withdrawal under Article 14(1), first sentence, of Directive [2008/48] if, under national law, in the case of a credit agreement linked to a contract of sale, following the effective exercise of the consumer's right of withdrawal under Article 14(1) of Directive [2008/48],

(aa) a consumer's claim against the creditor for repayment of the loan instalments paid does not arise until he or she has in turn returned the object purchased to the creditor or provided proof that he or she has dispatched it to the creditor?

(bb) an action brought by the consumer for repayment of the loan instalments paid by the consumer, after having returned the object purchased, is to be dismissed as currently unfounded if the creditor has not delayed in accepting the object purchased?

If not:

(b) Does it follow from EU law that the national rules described in (a)(aa) and/or (a)(bb) must be disapplied?

Irrespective of the answers to Questions 1 to 5 above:

(6) Inasmuch as it also refers to orders for reference in accordance with the second paragraph of Article 267 TFEU, is Paragraph 348a(2), point 1, of the Zivilprozessordnung (German Code of Civil Procedure) incompatible with the right conferred on the national courts to request a preliminary ruling pursuant to the second paragraph of Article 267 TFEU and must it therefore be disapplied to orders for reference?'

C. Case C-232/21

73. The facts behind this reference for a preliminary ruling overlap considerably with those in Case C-47/21. Following applications for loans dated 30 June 2017, 28 March 2017, 26 January 2019 and 31 January 2012, CR, AY, ML and BQ respectively concluded, as consumers, with Volkswagen Bank GmbH (in the case of CR) or with its branch Audi Bank, loan agreements in the net sums of EUR 21 418.66, EUR 28 671.25, EUR 18 972.74 and EUR 30 208.10. Each of those loan agreements was intended to finance the purchase of a second-hand motor vehicle for private use. The sale prices of the vehicles purchased by CR, AY, ML and BQ was EUR 30 490, EUR 31 920 , EUR 28 030 and EUR 27 750 respectively. CR, AY and ML made down payments to the car dealers and financed the balance of the purchase price, together with the cost of life and disability insurance, by means of their respective loans. BQ did not make any down payment and paid the entire purchase price of the vehicle, together with the life and disability insurance, by way of the loan.

74. The loan agreements contain a clause identical or very similar to that reproduced in point 61 of the present Opinion.

75. The car dealers from whom the vehicles were purchased acted as credit intermediaries for the banks in connection with the preparation and conclusion of the loan agreements and used the standard form agreement provided by those banks. Loan repayments were to be made in 48 (in the case of CR and AY), 36 (in the case of ML) and 60 (in the case of BQ) monthly instalments. CR, AY, ML and BQ were also required to make a final payment of a specified amount.

76. After disbursement of the loans, CR, AY, ML and BQ duly paid the agreed monthly instalments. However, on 31 March 2019, 13 June 2019, 16 September 2019 and 20 September 2020, respectively, they each withdrew from their loan agreements. CR, ML and BQ offered to return the vehicle to the bank's registered office in return for the simultaneous reimbursement of the payments they had made. BQ repaid the loan in full. Volkswagen Bank and Audi Bank rejected all of those attempts to withdraw from the agreements.

77. CR, AY, ML and BQ brought actions before the referring court against Volkswagen Bank and Audi Bank. Since the information on the right of withdrawal and the other mandatory information were not duly communicated to them, they argue that the withdrawal period had not begun to run on the dates on which they had withdrawn from their respective loan agreements. CR claims, inter alia, reimbursement of the monthly instalments he has paid, together with the down payment made to the dealer, at the same time, or alternatively after, he has returned the vehicle. He also seeks a declaration that he is not liable for interest on, or instalments in respect of, the principal from the date of withdrawal and that the bank was late in taking back the vehicle. ML's claims are essentially the same as CR's. AY principally seeks a declaration that, as from the date of withdrawal, he is no longer liable for interest or capital on his loan. BQ principally seeks reimbursement of the monthly instalments paid and a declaration that the bank was late in taking back the vehicle.

78. Volkswagen Bank and Audi Bank contend primarily that the actions should be dismissed as unfounded. They claim that, by using the statutory model, they provided CR, AY, ML and BQ with all of the mandatory information and that the 14-day withdrawal period had thus expired. In the case of CR and AY, they argue, in the alternative, that the withdrawal is time-barred and that they legitimately relied on the fact that those consumers would no longer exercise their right of withdrawal after using the vehicles and paying their monthly instalments regularly. In the case of ML and BQ, they also contend that they are not late in taking back the vehicles since those consumers did not make them an actual offer for the purposes of Article 294 of the BGB.

79. The referring court observes that, according to the Bundesgerichtshof (Federal Court of Justice), issues of forfeiture and abuse of the right of withdrawal fall to be considered primarily with respect to agreements the parties have already performed in full.

80. In those circumstances, relying upon considerations essentially similar to those set out in points 65 to 71 of the present Opinion, the Landgericht Ravensburg (Regional Court, Ravensburg) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, the text of Questions 1, 3 and 4 to 6 being almost identical to those put in Case C-47/21:

'(1) …

(2) Mandatory information required under Article 10(2) of Directive [2008/48]:

(a) Is Article 10(2)(p) of Directive [2008/48] 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) …

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

(c) Is Article 14(1), second sentence, point (b), of Directive [2008/48] 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] has been provided fully and correctly?

If not:

(d) 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) and 2(b) is answered in the affirmative:

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

(a) …

(b) …

(c) … Does the same apply to agreements that have been terminated?

(d) … Does the same apply to agreements that have been terminated?

(e) …

(f) …

(4) Assumption of an abuse of the consumer's right of withdrawal under Article 14(1), first sentence, of Directive [2008/48]:

(a) …

(b) …

(c) … Does the same apply to agreements that have been terminated?

(d) … Does the same apply to agreements that have been terminated?

(e) …

(f) …

(5) …

(6) …'

IV. Procedure before the Court

81. By decision of 22 April 2021, the President of the Court joined Cases C-38/21 and C-47/21 for the purposes of the written and oral procedure and the judgment.

82. By decision of 3 August 2021, the referring court withdrew Question 2(a) in Case C-47/21, the dispute in one of the two cases in the main proceedings having been settled amicably.

83. In Case C-38/21, by order for reference of 24 August 2021, the referring court decided to submit an addendum to its initial request and to refer supplementary questions for a preliminary ruling.

84. By decision of 31 May 2022, the Court joined Case C-232/21 and Joined Cases C-38/21 and C-47/21 for the purposes of the oral procedure and the judgment.

85. BMW Bank, C. Bank, Volkswagen Bank and Audi Bank, the German Government and the European Commission submitted written observations. The same parties and CR replied in writing to a question put by the Court on 31 May 2022.

86. At the hearing of 7 September 2022, CR, BMW Bank, C. Bank, Volkswagen Bank and Audi Bank, the German Government and the Commission presented oral argument and replied to the Court's questions.

V. Analysis

87. The Court requests that the present Opinion examine the following questions:

— the first question in Cases C-38/21, C-47/21 and C-232/21;

— the second question in Cases C-38/21, C-47/21 and C-232/21, in so far as it concerns the triggering of the withdrawal period in the event of a consumer being furnished with incomplete or materially incorrect information;

— the fourth question in Cases C-38/21, C-47/21 and C-232/21, in so far as it envisages, by reference to the consumer's conduct after his or her withdrawal from the agreement, reliance upon the doctrine of the abuse of rights in order to limit the exercise of the right of withdrawal; and the relevance, in that context, of the fact that the parties had performed the agreement in full;

— the fifth question in Cases C-47/21 and C-232/21;

— the fifth, sixth and seventh questions in Case C-38/21.

88. In order to provide a useful answer to the referring court, I will also suggest a response to the eighth question in Case C-38/21.

89. My analysis of those questions is in two parts. I will first consider the request for a preliminary ruling in Case C-38/21, commencing with Question 5, which concerns the nature of the mileage-based leasing agreement. The answer to that question determines which of the other questions require an answer. I will then address the questions from the referring court in Cases C-47/21 and C-232/21.

A. Case C-38/21

1. The fifth question in Case C-38/21

90. By that question, the referring court asks, in essence, whether a mileage-based leasing agreement for a motor vehicle, such as that at issue in the action before it, falls within the scope of Directive 2002/65, Directive 2008/48 or Directive 2011/83.

91. According to the description provided by the referring court, BMW Bank and the German Government, the purpose of such an agreement is, in return for payment of a monthly instalment, to make a motor vehicle available to the lessee for a period of two to three years with a cap on the number of kilometres it can be driven for. At the conclusion of that period, if the number of kilometres driven exceeds that agreed, the lessee pays compensation to the lessor. Conversely, if the number of kilometres driven is lower than that agreed, the lessee obtains a reimbursement from the lessor. The lessee bears the risk of loss, damage and other impairment of the vehicle throughout the duration of the agreement and must therefore take out fully comprehensive insurance. In addition, it is incumbent on the lessee to assert defect-related rights against third parties, in particular the car dealer and the manufacturer. The mileage-based leasing agreement, or any separate agreement, does not impose any obligation on the lessee to purchase the vehicle. Finally, the lessee does not assume any residual value guarantee on the agreement's expiry; he or she is required to compensate for the loss of value only if, upon return of the vehicle it is found that its condition does not correspond to its age or that the maximum number of kilometres in the agreement has been exceeded.

92. I propose to address the fifth question in Case C-38/21 in three parts. First, it is clear, in my view, that a mileage-based leasing agreement for a motor vehicle, as described above, does not fall within the scope of Directive 2008/48.[26] Article 2(1) of Directive 2008/48 covers 'credit agreements' as defined by Article 3(c) thereof. It is clear from Article 2(2)(d) that Directive 2008/48 applies to leasing agreements only where they provide, by themselves or in a separate agreement, an obligation for the lessee to purchase the object of the agreement.[27] It is thus only in those clearly defined circumstances that leasing agreements can be considered as credit agreements for the purposes of Directive 2008/48. It is apparent from the order for reference in Case C-38/21 that neither the mileage-based leasing agreement nor any separate agreement contains an obligation to purchase the motor vehicle in question.

93. I do not accept the referring court's argument that it is possible to apply the provisions of Directive 2008/48 by analogy since mileage-based leasing agreements are generally designed to result in the full amortisation of the use of the vehicle over the duration of the lease. I reach that conclusion for the simple reason that Directive 2008/48 unambiguously excludes leasing agreements without a purchase obligation from its scope.[28] In any event, as BMW Bank and the German Government justly observe, in the present case there is no legal vacuum capable of justifying recourse to the application of different rules by analogy.

[26] All of the parties that filed observations in Case C-38/21, as well as the Bundesgerichtshof (Federal Court of Justice), share that view.

[27] Such an obligation is deemed to exist if the creditor so decides unilaterally. In Case C-38/21 BMW Bank states that it could not take such a unilateral decision. That is a matter for the referring court to determine.

[28] See, to that effect and by analogy, judgment of 18 September 2019, *Riel* (C-47/18, EU:C:2019:754, paragraph 43).

94. Second, as regards the application of Directive 2002/65, Article 1(1) thereof describes its object as to approximate the laws, regulations and administrative provisions of the Member States concerning the distance marketing of consumer financial services.[29] Article 2(b) of Directive 2002/65 defines 'financial service' as 'any service of a banking, credit, insurance, personal pension, investment or payment nature'.[30]

95. I share the opinion of the German Government that a mileage-based leasing agreement, such as that at issue, is not a contract for a 'service of a banking … nature' within the meaning of Article 2(b) of Directive 2002/65. The type of agreement under consideration is, almost exclusively, offered by banks owned by motor vehicle manufacturers, as in the present case, or by undertakings which specialise in motor vehicle leasing, such as car rental companies. Whilst it is a matter for the referring court to verify, mileage-based leasing agreements are not the stock in trade of what might be described as 'high street' banks. The fact that a bank is party to a mileage-based leasing agreement for a motor vehicle is not in itself sufficient to deem it a 'service of a banking nature'. As explained below, for that to be the case it is necessary that the agreement in question fulfils a financing function.

96. The question is rather whether such a leasing agreement may constitute a contract for a 'service of a … credit … nature' within the meaning of Article 2(b) of Directive 2002/65. Since that directive does not define the concept of 'credit', one might envisage a reference to the definition of 'credit agreement' in Article 3(c) of Directive 2008/48 in order to interpret it. Taking that approach, leasing agreements that do not provide for an obligation to purchase do not relate to a 'service of a credit nature' since, as point 92 of the present Opinion explains, they are not credit agreements for the purpose of Directive 2008/48. That solution appears to me to be somewhat artificial since one cannot rule out that, when it enacted Directive 2002/65, the legislature adopted a broader interpretation of the concept of credit than that which it later adopted in Directive 2008/48.

97. I share the view expressed by the parties that submitted observations in Case C-38/21 that the answer to that question depends on identifying the main purpose of a mileage-based leasing agreement for a motor vehicle that does not include an obligation to purchase that motor vehicle. In my view, it is only if that agreement principally fulfils a financing function that it can be deemed to relate to a financial service and, accordingly, fall within the scope of Directive 2002/65.

98. I share the analysis of BMW Bank and the German Government that the main purpose of such an agreement is to enable the consumer to use a vehicle of his or her choice during a specified period of time in return for payment of a monthly charge.

99. It is true that, as the Commission submits, under a leasing agreement a consumer receives financial assistance to facilitate the use of goods or property. A leasing agreement replaces the financing of that arrangement for which the consumer must otherwise provide. As the Commission also somewhat ambiguously submits, such an agreement constitutes a means of 'financing the use of a vehicle'.

[29] Recital 14 of Directive 2002/65 also states that the directive 'covers all financial services liable to be provided at a distance'.

[30] That definition is identical to that set out in Article 2(12) of Directive 2011/83, Article 3(3)(d) of which provides that that directive does not apply to contracts for financial services.

100. To my mind, a mileage-based leasing agreement such as that at issue in the main proceedings does not, strictly speaking, fulfil a financing function for the consumer, in the sense that it enables him or her to purchase a vehicle by way of deferred payment. The lessor does not provide the consumer with capital for that purpose. It purchases the vehicle and owns it during and after the expiry of the mileage-based leasing agreement, even though the consumer selected the vehicle. The consumer is not liable for the full amortisation of the costs the lessor incurred in acquiring the vehicle and the payments made thereunder do not necessarily compensate for those costs. The lessor also bears the risks associated with the residual value of the vehicle on the expiry of the agreement. As the German Government rightly observes, the compensation in the leasing agreement in respect of overuse or under use of the vehicle does not guarantee the lessor the benefit of a specific residual value or full amortisation of the use made of that vehicle.

101. The Commission also points out that under such an agreement the consumer assumes rights and obligations that normally accrue to the owner of a vehicle, including responsibility for insurance premiums, maintenance costs and taxes and the risk of loss or damage . The consumer must also assert any defect-related rights against third parties. Those rights and obligations nevertheless subsist throughout the period of use of the vehicle as stipulated in the leasing agreement and are limited to the risks arising from that use, which is ultimately a matter for the consumer.

102. I am therefore of the opinion that a mileage-based leasing agreement for a motor vehicle which does not provide for an obligation to purchase does not fall within the scope of Directive 2002/65. [31]

103. Third, I consider that such an agreement is in the nature of a service contract within the meaning of Directive 2011/83, which applies to 'any contract concluded between a trader and a consumer'. [32] Directive 2011/83 defines 'service contract' as any contract other than a sales contract, within the meaning of Article 2(5) thereof, [33] under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price therefor. [34] That type of contract clearly includes agreements, such as that at issue in Case C-38/21, by which a trader, in return for payment, transfers to a consumer the right to use a motor vehicle for a specified period of time. [35]

104. For the sake of completeness, I would add that my analysis leads me to conclude that the mileage-based leasing agreement at issue does not simultaneously pursue the purpose of financing and of transferring the right to use the vehicle. It follows that I do not agree with the Commission's approach according to which Directive 2002/65 and Directive 2011/83 apply in parallel. That approach is inconsistent with two facts. The scope of each directive is defined precisely. There is a single and indivisible agreement under which the consumer uses a vehicle in

[31] At the oral hearing, the Commission somewhat hesitantly accepted that the mileage-based leasing agreement at issue falls within the scope of that directive.

[32] Article 3(1) of Directive 2011/83. Under Article 3(3)(d) thereof, that directive does not apply to contracts for financial services.

[33] Article 2(5) of Directive 2011/83 defines a 'sales contract' as 'any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services'.

[34] Judgment of 31 March 2022, *CTS Eventim* (C-96/21, EU:C:2022:238, paragraph 31 and the case-law cited). It follows from Article 2(6) of Directive 2011/83 that the term 'service contract' must be understood to cover all contracts that do not fall within the term 'sales contract' (judgment of 12 March 2020, *Verbraucherzentrale Berlin*, C-583/18, EU:C:2020:199, paragraph 22).

[35] As point 100 of the present Opinion points out, the mileage-based leasing agreement at issue does not transfer ownership of goods. The bank retains ownership of the vehicle during and after the end of the agreement.

return for paying a fee. The simultaneous application of a number of directives to that agreement would therefore undermine legal certainty and the objective of providing a high level of consumer protection.

105. In those circumstances, I propose that the Court reply to Question 5 in Case C-38/21 to the effect that mileage-based leasing agreements for motor vehicles with a term of approximately two to three years which are concluded using a standard form that excludes the right of ordinary termination, which do not provide, by themselves or in a separate agreement, an obligation for the consumer to purchase the object of the agreement, such an obligation being deemed to exist if the lessor so decides unilaterally, and under which the consumer has to take out fully comprehensive insurance for the vehicle, must assert defect-related rights against third parties (in particular the vehicle dealer and the manufacturer) and bears the risk of loss, damage and other impairment, fall within the scope of Directive 2011/83. They are neither credit agreements within the meaning of Article 3(c) of Directive 2008/48, nor contracts relating to financial services within the meaning of Article 2(12) of Directive 2011/83 and Article 2(b) of Directive 2002/65.

2. The sixth question in Case C-38/21

106. By this question, the referring court asks, in essence, whether, given the circumstances in which the mileage-based leasing agreement at issue was concluded, described in point 42 of the present Opinion, that agreement must be regarded as an 'off-premises contract' for the purposes of Article 2(8) of Directive 2011/83. More specifically, it wishes to know whether the car dealer's premises where the consumer submits an application to lease a vehicle is to be regarded as the trader's 'business premises' for the purposes of Article 2(9) of that directive, where the dealer is merely involved in the preparation of the contract, without having the power to conclude it.

107. Article 2(8)(a) of Directive 2011/83 defines an 'off-premises contract' as any contract between the trader and the consumer 'concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader'. Under Article 2(9)(a) of that directive, 'business premises' is 'any immovable retail premises where the trader carries out his activity on a permanent basis'.

108. It is apparent from recital 22 of Directive 2011/83 that the concept of 'business premises' is to be understood broadly and that the premises of a person acting in the name or on behalf of the trader as defined in that directive should be considered as such. Article 2(2) of Directive 2011/83 defines a 'trader' as any natural person or any legal person, who acts, 'including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession' in relation to contracts covered by that directive.

109. It may be inferred from the foregoing that the decisive criterion as to whether the business premises of a person acting as an intermediary, here the car dealer, may be classified as the trader's 'business premises', is whether that person acts in the name of, or on behalf of, that trader.

110. Under recital 16 thereof, Directive 2011/83 does not purport to affect national laws on legal representation such as any rules that determine the person who acts in the name of the trader or on its behalf. It follows that, in order to answer the present question, it is for the referring court to assess, in the light of national law, the legal relationship between the car dealer and the bank in the circumstances of the present case, and to establish whether it can be inferred from that relationship that the former acted in the name or on behalf of the latter.

111. Notwithstanding that it is a question of national law, Directive 2011/83 gives some indications as to how this issue should be approached. In that regard, whilst Article 2(8)(a) of Directive 2011/83 refers to a contract being 'concluded', it seems to me that in order for the intermediary's premises to be regarded as the trader's 'business premises', it is not necessary that the intermediary is specifically instructed for the purposes of concluding the contract with the consumer.

112. It follows that the intermediary's involvement at the negotiation stage of the contract is sufficient for its premises to be treated as the trader's business premises, provided that such involvement is sufficiently substantial and includes a duty on the part of the intermediary to provide the consumer with the information to which Article 5 of Directive 2011/83 refers.

113. Finally, it appears that recital 21 of Directive 2011/83 sets out the objective of the provisions governing 'off-premises contracts', according to which, when he or she is away from the trader's business premises, the consumer may be under potential psychological pressure or may be confronted with an element of surprise, irrespective of whether the consumer solicited the trader's visit. [36] Those provisions are clearly not intended to protect consumers who spontaneously visit premises where they can expect to be solicited by the trader with a view to their entering into agreements. It follows that I am unpersuaded that a consumer wishing to buy a vehicle is would be surprised when, on visiting the premises of the car dealer linked to a bank that offers leasing agreements, he or she is confronted with offers to enter into an agreement of that kind.

114. In those circumstances, I propose that the Court reply to the sixth question in Case C-38/21 to the effect that Article 2(9) of Directive 2011/83 is to be interpreted as meaning that the business premises of a person acting in the name or on behalf of the trader as defined in Article 2(2) thereof is to be considered as that trader's 'business premises'. It is for the referring court to assess whether, in the specific circumstances of the case before it and pursuant to national law, the intermediary acted in the name or on behalf of the trader for the purposes of negotiating or concluding the mileage-based leasing agreement.

3. The seventh question in Case C-38/21

115. By this question, the referring court wishes to know whether the exception to the right of withdrawal in point (l) of Article 16 of Directive 2011/83 applies to a mileage-based leasing agreement such as that at issue in the main proceedings.

116. Articles 9 to 15 of Directive 2011/83 grant the consumer a right of withdrawal following the conclusion of a distance or off-premises contract as defined by Article 2(7) and (8) thereof respectively and describe the conditions and arrangements for the exercise of that right. Article 16 of Directive 2011/83 contains exceptions to the right of withdrawal, particularly from contracts for car rental services that contain a specific date or period of performance. That provision is to be interpreted strictly since it derogates from EU consumer protection rules. [37]

[36] Judgment of 7 August 2018, *Verbraucherzentrale Berlin* (C-485/17, EU:C:2018:642, paragraphs 33 and 34).

[37] Judgment of 14 May 2020, *NK (Design for a single-family house)* (C-208/19, EU:C:2020:382, paragraph 40 and the case-law cited).

117. As regards, first, the question as to whether mileage-based leasing agreements are contracts for the provision of car rental services, according to the case-law the concept of 'car rental services' refers to 'the making available to the consumer of a means of transport'. [38] The Court has also held that a car rental contract aims at enabling the transport of passengers. [39] In the light of those elements, it might appear at first sight that a mileage-based leasing agreement, the purpose of which is to make available the use of a motor vehicle to a consumer, falls within the concept of the 'provision of car rental services'.

118. It is, however, apparent from recital 49 of Directive 2011/83 that Article 16(l) thereof pursues the objective of protecting traders against the risk associated with the setting aside of capacity that they might find difficult to fill were a right of withdrawal to be available. [40] Similarly, it follows from the Court's case-law that Article 16(l) seeks, in particular, to shield certain service providers from the disproportionate consequences of facilitating cancellations at short notice without any expense to, or explanation from, the consumer. [41] Unlike the Commission, I am unpersuaded of the presence of such a risk or disproportionate consequences in the context of a leasing agreement for a motor vehicle. The lessor, who remains the owner of that vehicle, has the option of putting it to other uses, such as rental or resale, in the event a right of withdrawal is exercised. Consequently, I am of the view that the exception to the right of withdrawal in Article 16(l) of Directive 2011/83 does not apply in a case such as that pending before the referring court. In that context, I also observe that it follows from the fact that the exception applies where the contract provides for 'a specific date or period of performance', that the legislature's intent was to include short-term car rental only.

119. In those circumstances, I propose that the Court reply to the seventh question in Case C-38/21 to the effect that Article 16(l) of Directive 2011/83 is to be interpreted as meaning that the exception provided for therein does not apply to mileage-based leasing agreements for motor vehicles.

4. The eighth question in Case C-38/21

120. By this question, the referring court asks, in essence, whether a mileage-based leasing agreement such as that at issue may be classified as a 'distance contract' within the meaning of Article 2(a) of Directive 2002/65 and of Article 2(7) of Directive 2011/83 where the consumer has personal contact only with an intermediary, who prepares the agreement and is able to inform him or her about the service offered, but does not have the power to represent the trader in order to conclude that agreement.

121. Article 2(7) of Directive 2011/83 defines 'distance contract' as any contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time when that contract is concluded. Article 2(a) of Directive 2002/65 lays down a very similar definition. [42]

[38] See, to that effect, judgments of 10 March 2005, *easyCar* (C-336/03, EU:C:2005:150, paragraphs 23, 26 and 27), and of 12 March 2020, *Verbraucherzentrale Berlin* (C-583/18, EU:C:2020:199, paragraph 30).

[39] Judgment of 12 March 2020, *Verbraucherzentrale Berlin* (C-583/18, EU:C:2020:199, paragraph 34).

[40] Judgment of 31 March 2022, *CTS Eventim* (C-96/21, EU:C:2022:238, paragraph 44).

[41] See, by analogy, judgment of 10 March 2005, *easyCar* (C-336/03, EU:C:2005:150, paragraph 28).

[42] I limit my analysis to Article 2(7) of Directive 2011/83 since, in my view, Directive 2002/65 does not apply to the mileage-based leasing agreement at issue.

122. In my view, a contract is not concluded with the 'exclusive' use of one or more means of distance communication 'up to the time' of its conclusion where an intermediary was involved, in the name or on behalf of the trader, in the negotiation of that contract by giving the consumer, in the latter's presence, detailed information on the content of the contract and answering his or her questions.

123. Article 2(2) of Directive 2011/83 defines as a trader any person who acts in his or her name or on his or her behalf. It does not appear to me to be decisive that that person does not have the power to act in the name or on behalf of the trader for the purposes of concluding the contract, an involvement in that capacity at the negotiation stage being sufficient. In that regard, it appears from recital 20 of Directive 2011/83 that, although the definition of distance contract also covers situations where a consumer visits a business premises for the purpose of gathering information about goods or services and subsequently negotiates and concludes the contract at a distance, a contract negotiated at the trader's business premises and concluded by means of distance communication is not considered to be distance contract.

124. In the present case, it is apparent from the facts presented by the referring court that the car dealer, in VK's presence, calculated the various elements of the mileage-based leasing agreement (lease term, down payment and amount of the monthly instalments), discussed them with VK and was authorised and able to answer all of VK's questions. In those circumstances, it could be considered that VK was not merely gathering information about a mileage-based leasing agreement, but rather that he was 'physically' involved with the car dealer in the negotiation of that agreement, which therefore is not to be regarded as a distance contract. It is for the referring court to establish, in the light of national law and the specific circumstances of the case, whether the dealer was authorised to act in the name or on behalf of the bank, at least for the purposes of negotiating the mileage-based leasing agreement at issue, and whether the extent of that dealer's involvement may equate to negotiation.

125. For the sake of completeness, I observe the referring court does not indicate whether the agreement was concluded in the context of an 'organised distance sales or service-provision scheme.[43] It is again a matter for that court to ascertain the presence of that factor.

126. I therefore propose that the Court reply to the eighth question in Case C-38/21 to the effect that Article 2(7) of Directive 2011/83 is to be interpreted as meaning that a contract cannot be classified as a distance contract where a person, acting in the name or on behalf of the trader, is involved in the negotiation of that contract in the consumer's physical presence. It is for the referring court to assess whether, in the specific circumstances of the case and pursuant to national law, the intermediary acted in the name or on behalf of the trader for the purposes of negotiating the mileage-based leasing agreement.

[43] See Article 2(7) of Directive 2011/83.

5. Interim conclusion

127. If, in the light of the answers it receives from the Court, the referring court were to find that the mileage-based leasing agreement at issue constitutes an off-premises contract or a distance contract and that the exception to the right of withdrawal provided for in Article 16(l) of Directive 2011/83 does not apply to that agreement, it should, in principle, conclude that VK enjoyed that right on the basis of Article 9(1) thereof. [44]

128. In those circumstances it would still be necessary for the referring court to ascertain whether VK exercised that right within the prescribed period determined by Article 9(2) of Directive 2011/83, possibly read in conjunction with Article 10 thereof. Since one cannot exclude that VK enjoyed such a right of withdrawal, the third and fourth questions submitted by the referring court in Case C-38/21 are relevant in order to resolve the dispute in the main proceedings. [45] As regards the answer to the fourth question in Case C-38/21, which the Court has asked me to consider, I refer to my assessment of the corresponding question in Cases C-47/21 and C-232/21, set out in points 149 to 158 of the present Opinion.

B. Cases C-47/21 and C-232/21

1. The first question in Cases C-47/21 and C-232/21

129. The first question in Cases C-47/21 and C-232/21 asks, in essence, whether Directive 2008/48 precludes national legislation which establishes a legal presumption that the trader fulfils its obligation to inform the consumer about the right of withdrawal by including in the agreement a clause corresponding to a statutory model that does not comply with the requirements of that directive. In that case, must the referring court disapply that national legislation?

130. As regards the first part of the question, the loan agreements at issue in Cases C-47/21 and C-232/21 each contain a clause to the effect that the withdrawal period begins after the conclusion of the agreement but not before the borrower has received all the mandatory information to which Paragraph 492(2) of the BGB refers. That provision itself refers to Article 247(6) to (13) of the EGBGB, which in turn refers to other provisions of the BGB. A clause of that type is, for all practical purposes, identical to that which the Court held to be contrary to Article 10(2)(p) of Directive 2008/48 in the judgment in *Kreissparkasse Saarlouis*. [46]

131. The clause in the aforesaid loan agreements also corresponds to the model set out in the then applicable version of Annex 7 to the EGBGB. [47] The third sentence of Article 247(6)(2) and the third sentence of Article 247(12)(1) of the EGBGB establish a presumption of legality according to which, where the agreement contains a clause corresponding to that model, it meets the statutory requirements for the provision of information on the right of withdrawal.

[44] Conversely, if the referring court were to find that the mileage-based leasing agreement at issue does not constitute an off-premises contract or a distance contract, or that it does but that the exception to the right of withdrawal provided for in Article 16(l) of Directive 2011/83 applies to that agreement, it should, in principle, conclude that VK did not enjoy that right.

[45] In its addendum to its initial request, the referring court states that, should the Court conclude that the mileage-based leasing agreement at issue does not fall within the scope of Directive 2008/48, the first and second questions submitted in Case C-38/21 are no longer relevant.

[46] See footnote 16 to the present Opinion.

[47] At the material time, the model set out in Annex 7 to the EGBGB did not specify all of the information that had to be provided to the borrower, but merely referred to Article 492(2) of the BGB.

132. As regards the information to which Article 10 of Directive 2008/48 refers, the Court has held that Article 10(2)(p) thereof precludes a credit agreement referencing a national provision that itself refers to other national legislative provisions. It follows that national legislation which establishes a presumption of legality, as described in point 131 of the present Opinion, is also incompatible with that directive. Most of the parties before the Court appear to share that view. The German Government has even pointed out, both in its written observations and at the hearing, that the statutory model set out in Annex 7 to the EGBGB was amended with effect from 15 June 2021 in order to comply with the interpretation the Court adopted in the judgment in *Kreissparkasse Saarlouis*. [48]

133. The second part of that question concerns the legal consequences of a finding that the presumption of legality established by the third sentence of Article 247(6)(2) and the third sentence of Article 247(12)(1) of the EGBGB is incompatible with Directive 2008/48.

134. In accordance with settled case-law, the interpretation the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. The courts must apply the rule as thus interpreted, even to legal relationships established after that rule entered into force and before the judgment ruling on the request for interpretation, provided that the conditions for bringing a dispute relating to the application of that rule before the courts having jurisdiction are satisfied in other respects. [49] It is also settled case-law that it is the responsibility of national courts to interpret, to the greatest extent possible, their national law in conformity with EU law and to afford individuals the possibility of obtaining redress where their rights have been impaired by a breach of EU law attributable to a Member State. [50] In that regard, a national court cannot validly consider that it is impossible for it to interpret a provision of national law in conformity with EU law merely because that provision has been interpreted consistently in a manner incompatible with EU law. [51]

135. The obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is, however, limited by general principles of law. It cannot serve, moreover, as a basis to interpret national law *contra legem*. [52] In the present cases, the referring court states that the Bundesgerichtshof (Federal Court of Justice) has ruled that an interpretation of the national provisions at issue in conformity with Directive 2008/48 is not possible and would be thus *contra legem*. C. Bank, Volkswagen Bank, Audi Bank and the German Government support that view.

136. Where a national court called upon within the exercise of its jurisdiction to apply provisions of EU law is unable to interpret national law in compliance with the requirements of EU law, it is under a duty, in the light of the principle of the primacy of EU law, to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently. It is unnecessary for that court to request or to await the prior setting aside of such provision by legislative or other constitutional means. [53] A

48 See footnote 16 to the present Opinion.

49 Judgment of 5 September 2019, *Pohotovosť* (C-331/18, EU:C:2019:665, paragraph 53 and the case-law cited).

50 Judgment of 18 January 2022, *Thelen Technopark Berlin* (C-261/20, EU:C:2022:33, paragraph 26 and the case-law cited).

51 Judgment of 5 September 2019, *Pohotovosť* (C-331/18, EU:C:2019:665, paragraph 55).

52 Judgment of 18 January 2022, *Thelen Technopark Berlin* (C-261/20, EU:C:2022:33, paragraph 28 and the case-law cited).

53 Judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 58 and the case-law cited).

provision of EU law that does not have direct effect may, however, not be so relied upon in a dispute coming under EU law in order to disapply a provision of national law that conflicts with it.[54]

137. In the present cases it is unnecessary to determine whether the provisions of Directive 2008/48 at issue have direct effect. As the Court recently reiterated in its judgment in *Thelen Technopark Berlin*[55] and as C. Bank, Volkswagen Bank, Audi Bank, the German Government and the Commission observe in their respective written observations, it is settled case-law that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual before national courts. Since the disputes in the main proceedings are between consumers and privately owned banks, the referring court cannot be required to disapply the national provisions at issue by reference to Directive 2008/48 alone.

138. As the Commission submits in its written observations, the Federal Republic of Germany may nevertheless incur non-contractual liability on the ground that its national legislation was contrary to Directive 2008/48. As the Court also recalled in its judgment in *Thelen Technopark Berlin*,[56] a party that has been harmed as a result of national law not being in conformity with EU law could rely on the case-law derived from the judgment in *Francovich and Others*[57] in order to obtain appropriate compensation for any loss or damage sustained as a consequence thereof.

139. In the light of the foregoing, I propose that the Court answer the first question in Cases C-47/21 and C-232/21 to the effect that Article 10(2)(p) of Directive 2008/48, read in conjunction with Article 14(1) thereof, is to be interpreted as precluding national rules, such as those at issue in the main proceedings, which provide for a presumption of legality under which, where a credit agreement contains a clause corresponding to a statutory model, that clause complies with the national statutory requirements regarding information on the right of withdrawal, although it does not comply with the requirements in Article 10(2)(p) of that directive. A national court hearing a dispute between private individuals is not required, solely on the basis of EU law, to disapply such national rules, even if they are contrary to Article 10(2)(p) of Directive 2008/48, without prejudice to the right of a party who has been harmed as a result of the non-compliance of national law with EU law to claim compensation for loss or damage consequential thereon.

140. In view of the proposed answer to the present question, there is no need, in my view, to rule on the German Government's request to limit the effects of the Court's judgment to the date of its delivery. It may be observed that that request is made in the event that the Court were to consider either that 'the concept of presumption of legality as such, that is to say, irrespective of whether that presumption applies in conditions consistent with Articles 10 and 14 of Directive [2008/48], is contrary to EU law' or that the presumption should not be applied because it is contrary to Article 10(2)(p) of Directive 2008/48 and that the latter provision is of direct application. Neither of those two situations arise here.

54 Ibid., paragraph 62.

55 Judgment of 18 January 2022, *Thelen Technopark Berlin* (C-261/20, EU:C:2022:33, paragraph 32 and the case-law cited).

56 Ibid., paragraph 41 and the case-law cited.

57 Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428).

2. The second question in Cases C-47/21 and C-232/21

141. The second question, which is divided into several sub-questions, concerns the information that Article 10(2) of Directive 2008/48 requires to be included in a consumer credit agreement. The referring court asks, inter alia, whether the withdrawal period starts to run, in accordance with Article 14(1) of that directive, only where the information provided is complete and correct. If that is not the case, it enquires as to the criteria that determine the point in time at which the withdrawal period is deemed to commence.

142. The aim of the requirement to include the information referred to in Article 10(2) of Directive 2008/48 in the credit agreement in a clear and concise manner is to enable consumers to be aware of their rights and obligations thereunder.[58] Knowledge and good understanding of that information by consumers are necessary for the proper performance of the agreement and, in particular, the exercise of the consumer's rights, including the right to withdraw from it.[59] As the Court observed in the judgment in *Kreissparkasse Saarlouis*, that requirement contributes to attaining the objective of Directive 2008/48 to provide, as regards consumer credit, full and mandatory harmonisation in a number of key areas, regarded as necessary to ensure that all consumers in the European Union enjoy a high and equivalent level of protection of their interests and to facilitate the emergence of a well-functioning internal market in consumer credit.[60]

143. As the Commission rightly points out in its written observations, Article 10(2) of Directive 2008/48 is an expression of the system of protection that underlies that directive, based on the idea that the consumer is in a weak position vis-à-vis the creditor as regards both his or her bargaining power and his or her level of knowledge, which leads the consumer to agree to terms drawn up in advance by the creditor whilst being unable to influence their content.[61]

144. It appears from a combined reading of Article 10(2) and point (b) of the second subparagraph of Article 14(1) of Directive 2008/48 that the 14-day withdrawal period starts to run from the day the credit agreement is concluded if the agreement includes all the mandatory information. If any of the mandatory information is not provided to the consumer on that day, that 14-day withdrawal period begins to run from the day on which he or she receives the missing information.

145. In the light of the objective of Article 10(2) of Directive 2008/48, as set out in point 142 of the present Opinion, and the fact that the information to which that provision refers must be specified 'in a clear and concise manner', I take the view, like the Commission, that mandatory information must be regarded as not having been included within the meaning of that directive if it is so incomplete or materially incorrect that its content misleads the consumer as to his or her rights and obligations.[62] It is for the referring court to determine whether that is in fact the case here.

[58] See recital 31 of Directive 2008/48 and the judgment in *Kreissparkasse Saarlouis* (paragraph 35 and the case-law cited). See also Opinion of Advocate General Hogan in Joined Cases *Volkswagen Bank and Others* (C-33/20, C-155/20 and C-187/20, EU:C:2021:629, point 46).

[59] The judgment in *Kreissparkasse Saarlouis* (paragraph 45).

[60] Ibid, paragraph 36 and the case-law cited. See also recital 9 of Directive 2008/48.

[61] See, by analogy, judgment of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 39 and the case-law cited).

[62] On that last point, it may be observed that in the judgment in *Home Credit Slovakia*, the Court ruled that, by their nature, some of the items of information to which Article 10(2) of Directive 2008/48 refers cannot have a bearing on the consumer's ability to assess the extent of his or her liability. That is the case, for instance, of the name and address of the competent supervisory authority to which Article 10(2)(v) of that directive refers (judgment of 9 November 2016, C-42/15, EU:C:2016:842, paragraph 72).

146. I am unpersuaded by the argument that C. Bank, Volkswagen Bank, Audi Bank, and the German Government seek to draw from the fact that national law already provides for penalties in the event that incorrect mandatory information is included in a credit agreement, with the consequence that it would be disproportionate to require that the withdrawal period does not begin to run in accordance with point (b) of the second subparagraph of Article 14(1) of Directive 2008/48. The non-commencement of that withdrawal period is a direct consequence of the fact that the creditor failed to communicate to the consumer the mandatory information to which Article 10(2) of that directive refers. Since it provides for complete harmonisation, Member States cannot ignore or set aside Article 14(1) of Directive 2008/48. Subject to the qualification expressed in point 145 of the present Opinion, that requirement cannot thus be considered disproportionate.

147. I would add that, contrary to what the defendant banks contend, there is no question of a 'perpetual withdrawal right' coming into existence. As I will explain in point 150 of the present Opinion, once the parties have performed the agreement in full, the right of withdrawal for which Article 14 of Directive 2008/48 provides is no longer exercisable.

148. In the light of the above, I propose that the Court answer the second question in Cases C-47/21 and C-232/21 to the effect that point (b) of the second subparagraph of Article 14(1) of Directive 2008/48 is to be interpreted as meaning that the withdrawal period does not start to run until the mandatory information required under Article 10(2) of that directive has been provided to the consumer in a complete and materially correct manner, unless the incomplete or incorrect nature of the information provided is not such as to affect the consumer's ability to assess the extent of his or her rights and obligations, which is a matter for the national court to assess.

3. The fourth question in Cases C-47/21 and C-232/21

149. By its fourth question in Cases C-47/21 and C-232/21,[63] the referring court asks whether, and under what conditions, the exercise by a consumer of the right of withdrawal in the case of a consumer credit agreement may be deemed abusive. The Court asks me to direct my analysis to two aspects: first, the possibility of justifying a limitation on the exercise of the right of withdrawal by reference to the consumer's conduct after withdrawal and, second, whether the consumer can exercise his or her right of withdrawal where the parties have performed the credit agreement in full.[64]

150. As regards the second aspect of this question, I endorse the approach of Advocate General Hogan in his Opinion in *Volkswagen Bank and Others*.[65] Having observed that Article 14(1) of Directive 2008/48 establishes a right of *withdrawal* and not a right of *cancellation* and that the performance of a contract is the natural mechanism to terminate contractual obligations, he concluded that that provision had to be interpreted as meaning that the right of withdrawal it contains can no longer be exercised once both parties have performed the credit agreement in full. Recital 34 of Directive 2008/48 confirmed his conclusion. It specifies that Directive 2008/48 established a right of withdrawal under conditions similar to those provided for by Directive 2002/65, whereas under Article 6(2)(c) of the latter directive, the right of withdrawal does not

[63] As point 128 of the present Opinion observes, the considerations set out below apply equally to the fourth question in Case C-38/21.

[64] That second aspect of the question is relevant to Case C-232/21, where BQ repaid the entirety of the loan.

[65] Opinion of Advocate General Hogan in Joined Cases *Volkswagen Bank and Others* (C-33/20, C-155/20 and C-187/20, EU:C:2021:629, points 106 to 108).

apply to 'contracts whose performance has been fully completed by both parties at the consumer's express request before the consumer exercises his right of withdrawal'. Advocate General Hogan furthermore observed that the purpose of the information obligations in Article 10 of Directive 2008/48 is to enable consumers to know the extent of their rights and obligations during the performance of the contract. Those obligations serve no further purpose once the contract has been performed in full.

151. As for the first aspect, after having observed that Directive 2008/48 does not contain provisions governing a consumer's abuse of the rights conferred by that directive, in its judgment in *Volkswagen Bank and Others*, the Court confirmed the general EU law principle whereby a provision of EU law may not be used to further abusive or fraudulent ends.[66] It accordingly examined whether the exercise by a consumer of his or her right of withdrawal pursuant to Article 14(1) of that directive was limited as a result of the application of that general principle in the context of that case.[67]

152. I recommend that analysis to the Court. Article 14 of Directive 2008/48 expressly confers on the consumer the right to withdraw from a credit agreement. The exercise of that right must accord with EU law, of which the general prohibition of the abuse of rights is an integral part. I again share the view Advocate General Hogan expressed in his Opinion in *Volkswagen Bank and Others* to the effect that, in the areas governed by EU law, the possibility of invoking the abusive character of the exercise of a right derived from that law must be assessed exclusively with regard to that principle and not with regard to any national law requirements.[68]

153. In the judgment in *Cussens and Others*, which concerned a challenge to a refusal to exempt sales of immovable property from value added tax, the Court ruled that the prohibition on recourse to abusive practices is capable, regardless of any national measure giving effect to it, of being applied directly in the domestic legal order as a ground for that refusal, and the principles of legal certainty and the protection of legitimate expectations do not preclude that outcome.[69] It may be inferred from that case-law and from what is stated in point 152 of the present Opinion that it is unnecessary for the German legislature to adopt a law to empower the national court to restrict the exercise of the right of withdrawal where that exercise may be deemed abusive.[70]

154. It is settled case-law that proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the applicable EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from those EU rules by artificially creating the conditions laid down in order to obtain it.[71] Although the Court, when giving a preliminary ruling, may, where appropriate, provide clarification to assist the referring court in

[66] The application of EU legislation does not extend to transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages for which EU law provides (judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 49 and the case-law cited).

[67] Judgment of 9 September 2021, *Volkswagen Bank and Others* (C-33/20, C-155/20 and C-187/20, EU:C:2021:736, paragraphs 120 and 121).

[68] Opinion of Advocate General Hogan in Joined Cases *Volkswagen Bank and Others* (C-33/20, C-155/20 and C-187/20, EU:C:2021:629, point 112).

[69] Judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 44).

[70] See, in that regard, point (b) of the fourth question of the referring court.

[71] Judgment of 9 September 2021, *Volkswagen Bank and Others* (C-33/20, C-155/20 and C-187/20, EU:C:2021:736, paragraph 122 and the case-law cited).

the application of that interpretation, it is always for the referring court to establish whether the factors constituting an abuse are present in the case before it by reference to all relevant facts and circumstances. [72]

155. In its judgment in *Volkswagen Bank and Others*, the Court limited its consideration to the objective element, holding that where a trader fails to provide a consumer with the information listed in Article 10 of Directive 2008/48 and the consumer decides to withdraw from the credit agreement after the 14-day period following its conclusion, that trader cannot complain that the consumer abused his or her right of withdrawal, even where a considerable length of time has elapsed between the conclusion of the agreement and the consumer's withdrawal. The Court reached that conclusion after finding that Article 14 of Directive 2008/48 pursues the objective of allowing a consumer to choose the agreement best suited to his or her needs. A consumer may thus withdraw from an agreement that he or she entered into which proves to be unsuitable to his or her needs in the course of the cooling-off period. The objective of point (b) of the second subparagraph of Article 14(1) of Directive 2008/48 is, moreover, to ensure that consumers receive all the information necessary to assess the extent of their contractual obligations and to penalise traders who fail to provide them with that information. [73]

156. I agree with the views expressed by the defendant banks in the main proceedings and the German Government that, by so holding, the Court did not rule out the possibility, in a specific case marked by special circumstances that go beyond the mere passage of time, that the consumer's exercise of the right of withdrawal could be deemed abusive. [74] More specifically, I consider that, in principle, it may be possible to infer from the consumer's conduct after withdrawal that he or she exercised the right derived from Article 14(1) of Directive 2008/48 abusively. Since the existence of an abuse of rights requires national courts to take account of all relevant facts and circumstances, they may equally take account of facts that arise after withdrawal from an agreement. [75]

157. The consumer's conduct after withdrawal from the agreement could indicate that the objectives Article 14 of Directive 2008/48 pursues, as set out in point 155 of the present Opinion, have not, in fact, been achieved or, to put it differently, that the outcome of the exercise of the right of withdrawal is contrary to those objectives. Taking account of that conduct also makes it possible to draw conclusions as to the existence of the subjective element and, more specifically, to establish that the consumer exercised his or her right of withdrawal with the sole aim of artificially obtaining an economic advantage not provided for by EU law.

158. In the light of the foregoing, I propose that the Court interpret Article 14(1) of Directive 2008/48 as meaning that the right of withdrawal provided for therein may no longer be exercised once the credit agreement has been performed in full by the parties thereto. That provision does not preclude national courts, in a specific case marked by particular circumstances that go beyond the mere passage of time, from considering whether the exercise by the consumer of his or her right of withdrawal is abusive. In order to establish the existence of such an abuse in a specific case, the national court must take into account all relevant facts and circumstances, including, where appropriate, events subsequent to that withdrawal.

[72] Judgment of 14 April 2016, *Cervati and Malvi* (C-131/14, EU:C:2016:255, paragraph 35 and the case-law cited).

[73] Judgment of 9 September 2021, *Volkswagen Bank and Others* (C-33/20, C-155/20 and C-187/20, EU:C:2021:736, paragraphs 123 to 126).

[74] The Commission also acknowledges that, where both objective and subjective circumstances suggest abuse on the part of the consumer, which is a matter for the referring court to assess, that consumer may, exceptionally, be prevented from exercising his or her right of withdrawal.

[75] See, to that effect, judgment of 13 March 2014, *SICES and Others* (C-155/13, EU:C:2014:145, paragraph 34).

4. The fifth question in Cases C-47/21 and C-232/21

159. By its fifth question in Cases C-47/21 and C-232/21, the referring court asks whether Article 14(1) of Directive 2008/48 precludes national rules which provide that, where a credit agreement from which the consumer has withdrawn is linked to a sales contract, that consumer may request reimbursement of the loan instalments only after having returned the object purchased to the creditor or having supplied evidence that he or she has returned it. The referring court is also uncertain as to the compatibility with EU law of the conclusions the Bundesgerichtshof (Federal Court of Justice) drew from that prior restitution requirement in terms of civil procedure.

160. As the Commission rightly points out, Directive 2008/48 does not contain any provision dealing with the consequences of the withdrawal from a credit agreement on a sales contract linked to that agreement.[76]

161. I concur with the position taken by the German Government and by the Commission that, in those circumstances, it is for the Member States to define those consequences in their national laws. Recital 35 of Directive 2008/48 confirms that approach since it provides that, where a consumer withdraws from a credit agreement in connection with which he or she has received goods, that directive 'should be without prejudice to any regulation by Member States of questions concerning the return of the goods or any related questions'.[77]

162. In the present cases, it is apparent from the German Government's written observations that the national rules at issue are based on Article 13(3) of Directive 2011/83. That approach is not in itself open to criticism, provided that those rules are not less favourable than those governing similar domestic actions (principle of equivalence) and do not render impossible in practice or excessively difficult the exercise of rights conferred on consumers by EU law (principle of effectiveness).[78]

163. The referring court does not ask the Court to assist it in ruling upon whether the national rules at issue comply with the principle of equivalence, nor is there any material before the Court that might raise doubts as to their compliance with that principle.

164. As for the principle of effectiveness, I am not persuaded, in the light of the information before the Court, and subject to any verifications the referring court may carry out, that the prior restitution requirement may, in general, make it practically impossible or excessively difficult for a consumer to exercise his or her right of withdrawal under Article 14(1) of Directive 2008/48. The concerns expressed by the referring court are based, in essence, on the premiss that the creditor will challenge the validity of the withdrawal and that the consumer must take legal action to obtain reimbursement of the monthly instalments already paid. If, in the context of that action, it should transpire that prior restitution of the vehicle was unjustified, the consumer would have to attempt to get it back, thereby exposing himself or herself to the risk of additional litigation. If prior restitution were justified, the consumer would have to make a claim for reimbursement without being able to keep the vehicle. The referring court also refers to the fact that motor vehicles are often necessary in order to pursue professional activities and involve substantial amounts of capital. If consumers must return motor vehicles to creditors without knowing

[76] Such a credit agreement qualifies as a 'linked credit agreement' once the conditions in Article 3(n) of Directive 2008/48 are met.

[77] See also Opinion of Advocate General Hogan in Joined Cases *Volkswagen Bank and Others* (C-33/20, C-155/20 and C-187/20, EU:C:2021:629, points 126 to 128).

[78] See, to that effect, judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578, paragraph 83).

whether the withdrawal is effective, and therefore also without knowing the period within which they will receive reimbursement of the instalments paid to enable them to purchase replacement vehicles, they will be discouraged from exercising the right to withdraw from the agreement.

165. The various considerations upon which the referring court expounds appear to be of a speculative character. They are insufficient to establish that the requirement of prior restitution creates a substantial obstacle that is likely to discourage consumers from exercising the right of withdrawal. As the defendant banks and the German Government explained both in their written observations and at the hearing, without being contradicted in substance, it is a fairly common practice that the consumer, after exercising the right of withdrawal, does not return the vehicle, instead continuing to use it without compensating the creditor for its depreciation over that period of time.

166. I am still less convinced of the existence of a breach of the principle of effectiveness in the present cases since Article 13(3) of Directive 2011/83 provides that, in the event a consumer withdraws from a sales contract covered by that directive, the trader may withhold reimbursement of the price paid until the goods have been returned or the consumer supplies evidence of having returned them.

167. The second part of the fifth question should, in my view, receive the same answer as the first. As the German Government explains in its written observations, the application by analogy of Paragraph 322(2) of the BGB by the Bundesgerichtshof (Federal Court of Justice) is merely a procedural consequence of the prior restitution requirement.

168. In those circumstances, I propose that the Court reply to the fifth question in Cases C-47/21 and C-232/21 to the effect that Article 14(1) of Directive 2008/48 is to be interpreted as not precluding national rules under which, in the case of a credit agreement linked to a sales contract, following the effective exercise of the consumer's right of withdrawal, a consumer's claim against the creditor for repayment of the loan instalments paid does not arise until he or she has returned the object purchased to the creditor or has supplied evidence of having returned it to the latter, and an action brought by the consumer for reimbursement of the loan instalments paid, after having returned the object purchased, is to be dismissed as unfounded if the creditor has not delayed in accepting that object.

VI. Conclusion

169. In the light of the foregoing considerations I propose that the Court answer the questions referred by the Landgericht Ravensburg (Regional Court, Ravensburg, Germany) as follows:

(1) Mileage-based leasing agreements for motor vehicles with a term of approximately two to three years which are concluded using a standard form that excludes the right of ordinary termination, which do not provide, by themselves or in a separate agreement, an obligation for the consumer to purchase the object of the agreement, such an obligation being deemed to exist if the lessor so decides unilaterally, and under which the consumer has to take out fully comprehensive insurance for the vehicle, must assert defect-related rights against third parties (in particular the vehicle dealer and the manufacturer) and bears the risk of loss, damage and other impairment, fall within the scope of 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. They are neither credit agreements within the meaning of Article 3(c) of 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, nor contracts relating to financial services within the meaning of Article 2(12) of Directive 2011/83 and Article 2(b) of 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.

(2) Article 2(9) of Directive 2011/83 is to be interpreted as meaning that the business premises of a person acting in the name or on behalf of the trader as defined in Article 2(2) thereof is to be considered as that trader's 'business premises'. It is for the referring court to assess whether, in the specific circumstances of the case before it and pursuant to national law, the intermediary acted in the name or on behalf of the trader for the purposes of negotiating or concluding the mileage-based leasing agreement.

(3) Article 16(l) of Directive 2011/83 is to be interpreted as meaning that the exception provided for therein does not apply to mileage-based leasing agreements for motor vehicles.

(4) Article 2(7) of Directive 2011/83 is to be interpreted as meaning that a contract cannot be classified as a distance contract where a person acting in the name or on behalf of the trader, is involved in the negotiation of that contract in the consumer's physical presence. It is for the referring court to assess whether, in the specific circumstances of the case before it and pursuant to national law, the intermediary acted in the name or on behalf of the trader for the purposes of negotiating the mileage-based leasing agreement.

(5) Article 10(2)(p) of Directive 2008/48, read in conjunction with Article 14(1) thereof, is to be interpreted as precluding national rules, such as those at issue in the main proceedings, which provide for a presumption of legality under which, where a credit agreement contains a clause corresponding to a statutory model, that clause complies with the national statutory requirements regarding information on the right of withdrawal, although it does not comply with the requirements in Article 10(2)(p) of that directive. A national court hearing a dispute between private individuals is not required, solely on the basis of EU law, to disapply such national rules, even if they are contrary to Article 10(2)(p) of Directive 2008/48, without prejudice to the right of a party who has been harmed as a result of the non-compliance of national law with EU law to claim compensation for loss or damage consequential thereon.

(6) Point (b) of the second subparagraph of Article 14(1) of Directive 2008/48 is to be interpreted as meaning that the withdrawal period does not start to run until the mandatory information required under Article 10(2) of that directive has been provided to the consumer in a complete and materially correct manner, unless the incomplete or incorrect nature of the information provided is not such as to affect the consumer's ability to assess the extent of his or her rights and obligations, which is a matter for the national court to assess.

(7) Article 14(1) of Directive 2008/48 is to be interpreted as meaning that the right of withdrawal provided for therein may no longer be exercised once the credit agreement has been performed in full by the parties thereto. That provision does not preclude national courts, in a specific case marked by particular circumstances that go beyond the mere passage of time, from considering whether the exercise by the consumer of his or her right of withdrawal is

abusive. In order to establish the existence of such abuse in a specific case, the national court must take into account all relevant facts and circumstances, including, where appropriate, events subsequent to that withdrawal.

(8) Article 14(1) of Directive 2008/48 is to be interpreted as not precluding national rules under which, in the case of a credit agreement linked to a sales contract, following the effective exercise of the consumer's right of withdrawal, a consumer's claim against the creditor for repayment of the loan instalments paid does not arise until he or she has returned the object purchased to the creditor or has supplied evidence of having returned it to the latter, and an action brought by the consumer for reimbursement of the loan instalments paid, after having returned the object purchased, is to be dismissed as unfounded if the creditor has not delayed in accepting that object.