News on the withdrawal from consumer credit agreements – ECJ and BGH lock horns forcing credit institutions into a balancing act

DO CREDIT INSTITUTIONS NEED TO ACT ? THE ECJ DEMANDS THAT CONTRACTS CONTAIN CLEAR INFORMATION ON HOW THE WITHDRAWAL PERIOD IS CALCULATED INSTEAD OF "CASCADING REFERENCES" – GERMAN BGH RETORTS IMMEDIATELY.

Executive Summary

- The European Court of Justice (ECJ) expressed its opinion in a recent ruling from 26 March 2020 on the withdrawal from consumer credit agreements: according to the ECJ, these agreements must indicate in a clear and concise manner how the withdrawal period is calculated. It is not sufficient for a consumer credit agreement to refer to a national provision which again refers to other national laws (so-called "cascading references") when it comes to the information that must be provided to the consumer and that determines the beginning of the withdrawal period. According to the ECJ, such complicated references do not initiate the 14-day withdrawal period.

- The German Federal Court of Justice (BGH) responded only a few days later with two decisions from 31 March 2020: according to the BGH, "cascading referrals" must remain clear and comprehensible.

Consumer credit agreements may be cancelled within a period of 14 days, as per Sections 495(1), 355(2) BGB (German Civil Code). In principle, the period begins with the conclusion of the contract. However, in the case of consumer credit agreements, Section 356b of the Civil Code states that this period does not begin until the borrower has received the information required by law under Section 492(2) of the same Code, which in turn refers to which in turn refers to Sec. 247(6) to (13) of the Introductory Act to the Civil Code (EGBGB) for the details.

1. Implementation to date and judicial assessment in Germany

In practice, some types of contracts use a template which informs the borrower that he / she can revoke his / her contractual declaration within 14 days, with that period beginning after the conclusion of the contract, but only after the borrower has received all mandatory information according to Sec. 492(2) BGB.

This implementation resulted from the template included in Annex 7 of the Introductory Act to the German Civil Code (EGBGB) for general consumer credit agreements, which provides for such a "cascading referral".

In this context, the German BGH had already declared "cascading references" to the mandatory information pursuant to Section 492(2) BGB to be sensible and correct several times before the ECJ's ruling of 26 March 2020 – most recently in its decision of 19 March 2019 (XI ZR 44/18) – and had dismissed listing the individual mandatory information as redundant and hardly legible "information". As per the BGH, no lender would have grounds to demand more precise information on the right of withdrawal than already contained in the model withdrawal information provided by the legislator (in the EGBGB).

2. The decision of the ECJ

In its ruling of 26 March 2020 (C-66/19), the ECJ now dealt with the question of whether Art. 10 (2)(p) of the Directive on Credit Agreements for Consumers (2008/48/EC) is to be interpreted as meaning that the "period" or the "other modalities for exercising the right of withdrawal" also include the conditions for the beginning of the withdrawal period, and, if so, whether a reference to a national provision which itself refers to another national provision (Sec. 492(2) BGB, Sec. 247 EGBGB) meets these requirements. The discussion about this was triggered by the Regional Court Saarbrücken's request for a preliminary ruling of 17 January 2019 (1 O 164/18).

In response, the ECJ first clarified that consumer credit agreements must contain, in a clear and concise manner, the modalities for calculating the withdrawal period. Secondly, it said that the fact that a credit agreement referred to a national provision which itself refers to other national provisions regarding the mandatory information was contrary to the Directive. It ruled that based on the agreement text alone such "cascading references" did not allow the consumer to determine the scope of his / her contractual obligation or to verify that the contract he / she concluded contained all the necessary information. It is thus impossible for the borrower to verify the beginning of the withdrawal period solely on the basis of the contract documents.

3 The BGH's instant retort

Just a few days after the ECJ issued its ruling, the BGH expressed in two decisions from 31 March 2020 that it will not deviate in principle from its previous case law:

The BGH emphasised that the ("cascading") reference in the withdrawal information to Sec. 492(2) BGB, in combination with the exemplary list of mandatory information according to the standards of national law (Sec. 247(6)(1) EGBGB) was and remained clear and understandable.

The BGH also stated that a lender can invoke the legal fiction of Sec. 247(6)(2)(3) EGBGB if the withdrawal information contained in the agreement corresponds to the model in Annex 7 to Sec. 247(6)(2) and Sec. 12(1) EGBGB (cf. decision of 31 March 2020 – XI ZR 198/19). According to the BGH, even the new ECJ ruling from 26 March 2020 does not prevent the application of the legal fiction. It argued, German legislators had just provided that the model containing the "cascading reference" in Annex 7 to Sections 247(6)(2) and 12(1) EGBGB satisfied the requirements of clear and comprehensible withdrawal information. Such models are supposed to create legal clarity and legal certainty for users and to simplify legal transactions. Legislators would fail this objective if those making use of the model were to be denied fiction of legality, for instance, because the ("cascading") reference in the withdrawal information to Sec. 492(2) BGB, in combination with the exemplary list of mandatory information pursuant to Sec. 47(6) EGBGB, did not comply with the Directive following the ECJ ruling of 26 March 2020. If the German courts were to follow the ECJ, they would have to disregard the express order of the German legislator in violation of the principle of the rule of law.

In addition, the BGH stated (cf. decision of 31 March 2020 – XI ZR 581/18) that it did not consider the ECJ's decision with regard to mortgage loan agreements to be relevant, as the Consumer Credit Directive on which the ECJ decision is based did not apply to mortgage loan agreements. Mortgage loan agreements are regulated

by the German legislature and, the BGH argued, the interpretation of national law falls within the exclusive jurisdiction of the national courts.

4. What should lenders do regarding future consumer credit agreements?

Despite the BGH's quick response, the more consumer-friendly ECJ ruling does create a certain level of legal uncertainty:

It requires lenders to expressly include all of the mandatory information that must be provided to the consumer in the agreement text. The borrower should be able to see explicitly in his/her contract documents which information triggers the withdrawal period. This allows the borrower to assess whether the agreement already contains all the mandatory information or whether further information needs to be provided before the withdrawal period starts.

According to the BGH, however, lenders should avoid deviating from the legal models for withdrawal information according to Sec. 247(6)(2) and Sec. 12(1) EGBGB as much as possible in order to maintain the protection of the legal fiction.

In this context, it is still unclear how credit institutions are supposed to master this "balancing act" between the ECJ and the BGH rulings in order to satisfy the requirements of the ECJ on the one hand and not to deviate from the legal models for withdrawal information of the EGBGB on the other, which according to the BGH is the (only) way to maintain a legal fiction of proper consumer information.

5. What should lenders do regarding existing consumer credit agreements?

Insofar as existing consumer credit agreements contain a so-called "cascading reference" in the sense of the new ECJ decision and comprehensive information is not otherwise already required to be provided to the consumer, the further legal assessment depends on whether the requirements of the legal model for withdrawal information under the EGBGB have been fulfilled, what type of contract is involved and when the agreement was concluded.

If lenders informed their borrowers in a clear and comprehensible form about the right of withdrawal by including the applicable models of withdrawal information according to the EGBGB in the credit agreements in a highlighted and clear way, they are at least in a clear and strong negotiating position since they can refer to the BGH and the fiction of legality – even if there is no legal certainty because of the ECJ-BGH dispute.

Where lenders deviated from the legal models, the following should also be considered:

In order to prevent perpetual rights of withdrawal, the legislator has limited the periods for asserting withdrawal rights for certain types of contracts to a maximum of twelve months and 14 days. According to Sec. 356b(2)(4) BGB, such maximum periods exist, for example, for mortgage loan agreements concluded from spring 2016 onwards. In addition, the BGH stated that it does not consider the ECJ's decision to be relevant for mortgage loan agreements. There should therefore also be no reason for concern in principle in the case of mortgage loan agreements.

In contrast, in the case of general consumer credit agreements, a "perpetual" right of withdrawal would apply in principle in the event of incorrect information on the right of withdrawal which would lead to the permanent possibility of revoking consumer credit agreements concluded even years before. As a rule, a later revocation is only excluded if there are special circumstances in the individual case making the later revocation appear surprising and dishonest in the sense of forfeiture. However, case law has made these "special circumstances" a condition for this and regular repayment and interest payments alone, for example, are not sufficient. The situation may be different in the case of consumer credit agreements that have ended but, here too, each individual case must be assessed separately (cf. most recently BGH, ruling of 15 October 2019, XI ZR 759/17).

If the maximum periods of twelve months and 14 days have not already been exceeded in existing consumer credit agreements (as in the case in mortgage loan agreements) or if (in exceptional cases) it can be assumed that the right of withdrawal has been forfeited, there is a risk that the borrower may still revoke the conclusion of the agreement on the basis of the new ECJ case law.

In such cases, there is the possibility of communicating the correct withdrawal policy now – this time in accordance with the requirements of the ECJ – in order to (re)start the withdrawal period.

This way, the withdrawal period can be limited to one month from the date of the rectification, as per Sections 356b(2) and 492(6) BGB.

Whether or not this makes sense must be decided on a case-by-case basis. For example, such a rectification would not shorten the withdrawal period if only done just before the end of the maximum period.

6. Outlook

Rather than strengthening legal certainty, the ECJ decision has increased uncertainty in favour of alleged consumer protection when it comes to what constitutes legally correct withdrawal information. However, the BGH quickly counteracted this with its current decisions providing more legal certainty.

Credit institutions will therefore have to find a way to implement the valid communication of withdrawal information that satisfies both the model text and the case law of the BGH as well as the requirements of the European Court of Justice.

With regard to possible court proceedings for past cases, it remains to be seen how the German courts of appeal will apply the new ECJ and BGH decisions.

One way or another, this argument is not yet settled; at least the legislator must understand the ECJ decision as a prompt to rectify the situation.

Germany, for example, faces possible state liability claims from consumers because the German legislator- at least probably in the opinion of the ECJ – has not sufficiently taken into account the requirements of the Consumer Credit Directive.

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