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Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

5 October 2023 (*)

(Reference for a preliminary ruling – Consumer protection – Directive 2011/83/EU – Consumer rights – Subscription of a consumer to an online learning platform – Automatic extension of the contract – Right of withdrawal)

In Case C-565/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 20 July 2022, received at the Court on 26 August 2022, in the proceedings

Verein für Konsumenteninformation

v

Sofatutor GmbH,

THE COURT (Seventh Chamber),

composed of M.L. Arastey Sahún (Rapporteur), President of the Chamber, F. Biltgen and J. Passer, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Verein für Konsumenteninformation, by S. Langer, Rechtsanwalt,
- Sofatutor GmbH, by M. Görg, Rechtsanwalt,
- the Netherlands Government, by M.K. Bulterman and A. Hanje, acting as Agents,
- the European Commission, by I. Rubene and E. Schmidt, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 9(1) 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 (OJ 2011 L 304, p. 64).

2 The request has been made in proceedings between the Verein für Konsumenteninformation (Association for Consumer Information, Austria) ('the VKI') and Sofatutor GmbH, a German company, concerning the VKI's request that that company be ordered to inform consumers of the conditions, time limits and procedures for exercising their right to withdraw from a distance contract.

Legal context

European Union law

3 Recital 37 of Directive 2011/83 states:

'Since in the case of distance sales, the consumer is not able to see the goods before concluding the contract, he should have a right of withdrawal. For the same reason, the consumer should be allowed to test and inspect the goods he has bought to the extent necessary to establish the nature, characteristics and the functioning of the goods. Concerning off-premises contracts, the consumer should have the right of withdrawal because of the potential surprise element and/or psychological pressure. Withdrawal from the contract should terminate the obligation of the contracting parties to perform the contract.'

4 Article 2 of that directive, entitled 'Definitions', defines, in point 7 thereof, 'distance contract' as follows:

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

...

(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'.

5 Under Article 4 of that directive, entitled ‘Level of harmonisation’:

‘Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.’

6 Article 6 of that directive, entitled ‘Information requirements for distance and off-premises contracts’, provides, in paragraph 1 thereof:

‘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:

...

(e) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. ...

...

(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);

...

(o) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;

...’

7 Article 8 of Directive 2011/83, entitled ‘Formal requirements for distance contracts’, provides:

‘1. With respect to distance contracts, the trader shall give the information provided for in Article 6(1) or make that information available to the consumer in a way appropriate to the means of distance communication used in plain and intelligible language. In so far as that information is provided on a durable medium, it shall be legible.

2. If a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the information provided for in points (a), (e), (o) and (p) of Article 6(1).

The trader shall ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall be labelled in an easily legible manner only with the words “order with obligation to pay” or a corresponding unambiguous formulation indicating that

placing the order entails an obligation to pay the trader. If the trader has not complied with this subparagraph, the consumer shall not be bound by the contract or order.

...

8. Where a consumer wants the performance of services, or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, to begin during the withdrawal period provided for in Article 9(2), the trader shall require that the consumer make an express request.

...’

8 Article 9 of that directive, entitled ‘Right of withdrawal’, is worded as follows:

‘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;

...

(c) in the case of contracts for the supply ... of digital content which is not supplied on a tangible medium, the day of the conclusion of the contract.

3. The Member States shall not prohibit the contracting parties from performing their contractual obligations during the withdrawal period. ...’

9 Article 10 of that directive, entitled ‘Omission of information on the right of withdrawal’, provides:

‘1. 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).

2. If the trader has provided the consumer with the information provided for in paragraph 1 of this Article within 12 months from the day referred to in Article 9(2), the withdrawal period shall expire 14 days after the day upon which the consumer receives that information.’

10 Article 11 of that directive, entitled ‘Exercise of the right of withdrawal’, states, in paragraph 1 thereof:

‘Before the expiry of the withdrawal period, the consumer shall inform the trader of his decision to withdraw from the contract. For this purpose, the consumer may either:

(a) use the model withdrawal form as set out in Annex I(B); or

(b) make any other unequivocal statement setting out his decision to withdraw from the contract.

...’

11 Under Article 12 of Directive 2011/83, entitled ‘Effects of withdrawal’:

‘The exercise of the right of withdrawal shall terminate the obligations of the parties:

- (a) to perform the distance or off-premises contract; or
- (b) to conclude the distance or off-premises contract, in cases where an offer was made by the consumer.’

12 Article 14 of that directive, entitled ‘Obligations of the consumer in the event of withdrawal’, provides:

‘...’

3. Where a consumer exercises the right of withdrawal after having made a request in accordance with Article 7(3) or Article 8(8), the consumer shall pay to the trader an amount which is in proportion to what has been provided until the time the consumer has informed the trader of the exercise of the right of withdrawal, in comparison with the full coverage of the contract. The proportionate amount to be paid by the consumer to the trader shall be calculated on the basis of the total price agreed in the contract. If the total price is excessive, the proportionate amount shall be calculated on the basis of the market value of what has been provided.

4. The consumer shall bear no cost for:

- (a) the performance of services or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, in full or in part, during the withdrawal period, where:
 - (i) the trader has failed to provide information in accordance with points (h) or (j) of Article 6(1); or
 - (ii) the consumer has not expressly requested performance to begin during the withdrawal period in accordance with Article 7(3) and Article 8(8); or
- (b) the supply, in full or in part, of digital content which is not supplied on a tangible medium where:
 - (i) the consumer has not given his prior express consent to the beginning of the performance before the end of the 14-day period referred to in Article 9;
 - (ii) the consumer has not acknowledged that he loses his right of withdrawal when giving his consent; or
 - (iii) the trader has failed to provide confirmation in accordance with Article 7(2) or Article 8(7).

5. Except as provided for in Article 13(2) and in this Article, the consumer shall not incur any liability as a consequence of the exercise of the right of withdrawal.’

Austrian law

13 According to Paragraph 4(1) of the Fern- und Auswärtsgeschäfte-Gesetz (Federal Law on distance and off-premises contracts) of 26 May 2014 (BGBl. I, 33/2014; ‘the FAGG’):

‘Before the consumer is bound by a contract or his or her contractual declaration, the trader shall provide him or her with the following information in a clear and comprehensible manner:

...

(8) where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right, whereby the model withdrawal form pursuant to Part B of Annex I shall also be provided,

...

(14) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract,

...’

14 Paragraph 11(1) of the FAGG provides:

‘The consumer may withdraw from a distance or off-premises contract within a period of 14 days, without giving any reason.’

The dispute in the main proceedings and the question referred for a preliminary ruling

15 Sofatutor operates online learning platforms intended for pupils in primary and secondary education. It offers its services throughout the territory of Austria and thus enters into legal relationships with consumers who are domiciled or habitually resident in Austria. Sofatutor concludes contracts on the basis of its general terms and conditions.

16 Those general terms and conditions provide that, when a subscription is booked on those platforms for the first time, it can be tested free of charge for 30 days from the conclusion of the contract and can be terminated without notice at any time during that period. Those general terms and conditions also stipulate that that subscription becomes chargeable only after the expiry of those 30 days and that, if it is not terminated within those 30 days, the paid subscription period agreed at the time of that booking begins to run.

17 Those general terms and conditions provide that, in the event that the paid subscription period expires without Sofatutor or the consumer having terminated the subscription in due time, the subscription concerned is automatically extended for a fixed term.

18 When consumers conclude a distance contract, Sofatutor informs them of the right of withdrawal to which they are entitled by virtue of having concluded such a contract.

19 The VKI considers that, in accordance with Article 9 of Directive 2011/83 and the FAGG, the consumer has a right of withdrawal not only when he or she books a 30-day free trial subscription, but also when that subscription is converted into a standard subscription and when that standard subscription is renewed.

20 In those circumstances, the VKI brought an action before the Handelsgericht Wien (Commercial Court, Vienna, Austria) seeking an order requiring Sofatutor, when extending a fixed-

term distance contract in the course of trade with consumers, to inform them, in a clear and comprehensible manner, of the conditions, time limits and procedures for exercising their right to withdraw from that contract, by providing the model withdrawal form or by implementing similar practices.

21 By judgment of 23 June 2021, that court upheld that action.

22 After Sofatutor brought an appeal against that judgment, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) varied that judgment by judgment of 18 March 2022 in such a way as to dismiss the action.

23 The VKI subsequently brought an appeal on a point of law (*Revision*) against that judgment before the referring court, the Oberster Gerichtshof (Supreme Court, Austria).

24 That court notes, on the one hand, that, as is apparent from the preparatory documents relating to Paragraph 11 of the FAGG, the right of withdrawal is not limited to the first time a contract is concluded between a trader and a consumer. On the contrary, an extension of an existing but fixed-term contractual relationship or an amendment of the content of that contractual relationship, if agreed at a distance or off-premises, could also be subject to the FAGG and, consequently, give rise to a right of withdrawal on the part of the consumer in respect of that extension or that amendment.

25 On the other hand, it refers to the judgment of 18 June 2020, *Sparkasse Südholstein* (C-639/18, EU:C:2020:477) by which the Court of Justice held that Article 2(a) 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 (OJ 2002 L 271, p. 16) must be interpreted as meaning that an agreed amendment to a loan contract cannot be categorised as a ‘contract concerning financial services’, within the meaning of that provision, where the amendment does no more than alter the originally agreed rate of interest, but does not extend the term of the loan contract or alter its amount, and where the original clauses of that contract provided for the agreement of such an amendment or, failing such agreement, the application of a variable interest rate.

26 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 9(1) of Directive [2011/83] be interpreted as meaning that the consumer has a new right of withdrawal where a distance contract is “extended automatically” (Article 6(1)(o) of that directive)?’

Consideration of the question referred

27 By its question, the referring court asks, in essence, whether Article 9(1) of Directive 2011/83 must be interpreted as meaning that the consumer’s right to withdraw from a distance contract is guaranteed only once in respect of a contract for the performance of services which provides for an initial free period for the consumer after which – unless the consumer terminates or withdraws from that contract during that period – payment is required for a period that is automatically extended – unless that contract is terminated – for a fixed term, or as meaning that the consumer has that right when that contract is converted and each time it is extended.

28 As a preliminary point, it should be noted that Directive 2011/83 has been amended by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ 2019 L 328, p. 7). However, Directive 2019/2161, which entered into force on 7 January 2020, requires Member States to transpose its provisions into their respective legal systems by 28 November 2021 at the latest and to apply them from 28 May 2022. In so far as the dispute in main proceedings was ruled on at first instance by the Handelsgericht Wien (Commercial Court, Vienna) on 23 June 2021 and the referring court makes no reference to the national provisions introduced to transpose Directive 2019/2161 into the Austrian legal system, it must be held that, in the present case, Directive 2011/83 remains applicable in the version not amended by Directive 2019/2161.

29 Having clarified that point, the Court observes that, under Article 9(1) of Directive 2011/83, save where the exceptions provided for in Article 16 thereof apply, the consumer is to 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 of that directive.

30 Article 9(2)(a) and (c) of that directive provides that, without prejudice to Article 10 thereof, that withdrawal period is to expire after 14 days from the day of the conclusion of the contract in the case of service contracts and contracts for the supply of digital content which is not supplied on a tangible medium.

31 It follows from Article 11(1) of Directive 2011/83 that, if the consumer wishes to exercise his or her right of withdrawal, he or she is to inform the trader, before the expiry of that period, of his or her decision to withdraw from the contract. That provision states that, for that purpose, the consumer may either use the model withdrawal form as set out in Annex I(B) to that directive or make any other unequivocal statement setting out that decision.

32 In accordance with Article 12(a) of that directive, the exercise of the right of withdrawal is to terminate the obligations of the parties to perform the distance or off-premises contract.

33 One of the consequences of the existence of the consumer's right to withdraw from such a contract is the information requirement provided for in Article 6(1)(h) of Directive 2011/83. Under that provision, before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader is to provide the consumer, in a clear and comprehensible manner, with information concerning the conditions, time limit and procedures for exercising the right of withdrawal in accordance with Article 11(1) of that directive, as well as the model withdrawal form as set out in Annex I(B) thereto.

34 The Court recalls in that regard that, bearing in mind the importance of the right of withdrawal for consumer protection, the pre-contractual information concerning that right is of fundamental importance for that consumer and enables him or her to make an informed decision on whether or not to conclude the distance contract with the trader. In order to benefit fully from that information, the consumer must be aware of the conditions, time limit and procedures for exercising that right beforehand (judgment of 23 January 2019, *Walbusch Walter Busch*, C-430/17, EU:C:2019:47, paragraph 46).

35 Furthermore, Article 6(1) of Directive 2011/83 seeks, inter alia, to ensure the communication to consumers, before the conclusion of a contract, of information necessary for proper performance

of that contract and, in particular, for the exercise of their rights, in particular the right of withdrawal (see, to that effect, judgment of 10 July 2019, *Amazon EU*, C-649/17, EU:C:2019:576, paragraph 43).

36 In the present case, in the main proceedings, the VKI's action seeks an order requiring Sofatutor, when extending a fixed-term distance contract in the course of trade with consumers, to inform them, in a clear and comprehensible manner, of the conditions, time limits and procedures for exercising their right to withdraw from that contract, by providing the model withdrawal form or by implementing similar practices.

37 It is apparent from the order for reference that the Austrian legislature has transposed Article 9(1) of Directive 2011/83 into the Austrian legal system by adopting Paragraph 11(1) of the FAGG, which provides that the consumer may withdraw from a distance or off-premises contract within a period of 14 days, without giving any reason. It must be stated that the wording of that provision offers no answer as to whether the consumer has such a right of withdrawal only once by virtue of concluding a contract or whether he or she has a new right of withdrawal upon extension of that contract, such as the extension at issue in the main proceedings.

38 In so far as Directive 2011/83, in accordance with Article 4 thereof, harmonises the legislation of the Member States, in principle completely, the scope of and conditions for exercising the right of withdrawal provided for in Article 9(1) of that directive determine those of the right of withdrawal provided for in the national legislation which transposes that provision into the legal systems of the Member States.

39 As regards the purpose of the right of withdrawal, it is intended to offset the disadvantage for the consumer resulting from a distance contract by granting him or her an appropriate period for reflection during which he or she can examine and test the goods acquired (judgment of 27 March 2019, *slewo*, C-681/17, EU:C:2019:255, paragraph 33 and the case-law cited).

40 That conclusion is supported by recital 37 of Directive 2011/38, which states that the consumer should have a right of withdrawal since, 'in the case of distance sales, [he or she] is not able to see the goods before concluding the contract'. According to that recital, 'for the same reason, the consumer should be allowed to test and inspect the goods he [or she] has bought to the extent necessary to establish the nature, characteristics and the functioning of the goods'.

41 In that regard, it should be noted that the period for reflection granted to the consumer is justified by those purposes in respect of both the sale of goods and the performance of services.

42 The right of withdrawal aims to allow the consumer to become aware, in good time, of the characteristics of the service which forms the subject matter of the contract concerned. Furthermore, that right promotes informed decision-making by the consumer, taking into account all the contractual terms and the consequences of concluding the contract concerned, allowing that consumer to decide whether he or she wishes to be contractually bound to a trader (see, to that effect, judgments of 23 January 2019, *Walbusch Walter Busch*, C-430/17, EU:C:2019:47, paragraph 36, and of 10 July 2019, *Amazon EU*, C-649/17, EU:C:2019:576, paragraph 43).

43 In the present case, it is apparent from the order for reference that the performance of services at issue in the main proceedings is free of charge for 30 days and that, unless the consumer terminates or withdraws from the contract during those 30 days, it is converted into a performance of services against payment during a renewable fixed term. However, that order does not contain

any information indicating that the contract concerned being thus converted or extended would lead to an amendment of other terms of that contract.

44 In that regard, it should be noted that, in accordance with Article 6(1)(e) and Article 8(2) of Directive 2011/83, one of the essential characteristics of a distance contract, for the purpose of that directive, is the total price of the services which form the subject of that contract.

45 Under Article 6(1)(e) of that directive, before such a contract is concluded, the trader is to provide the consumer with information on that price in a clear and comprehensible manner. As is apparent from Article 8(2) of that directive, if a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader is to make the consumer aware in a clear and prominent manner, and directly before the consumer places his or her order, of the total price of the services which form the subject of that contract. The latter provision states that the trader is to ensure that the consumer, when placing his or her order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function is to be labelled in an easily legible manner only with the words ‘order with obligation to pay’ or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. If the trader has not complied with that requirement, the consumer is not to be bound by the contract or order.

46 The importance of the trader explicitly communicating information to the consumer on the price of the services which form the subject of the contract concerned has been confirmed by the Court in paragraphs 25 to 30 of the judgment of 7 April 2022, *Fuhrmann-2* (C-249/21, EU:C:2022:269).

47 In light of the foregoing, it must be held that the purpose of the consumer’s right to withdraw from a distance contract for the performance of services is fulfilled if that consumer has been provided, prior to the conclusion of that contract, with clear, comprehensible and explicit information on the price of the services which form the subject of that contract, whether it is to be paid upon conclusion of that contract or at a later date, such as the date on which that contract is converted into a paid contract or on which it is extended for a fixed term.

48 Accordingly, although the consumer has been informed in a clear, comprehensible and explicit manner by the trader, when concluding a contract providing for a period in which the services are performed free of charge, that after that free period – and unless the consumer terminates or withdraws from that contract during that period – payment will be required for that performance, the contractual terms brought to the attention of the consumer do not change. In such a case, the purpose referred to in the preceding paragraph does not justify the consumer concerned having a new right of withdrawal once that contract has been converted into a paid contract. Furthermore, that consumer cannot have such a right of withdrawal when that paid contract is extended for a fixed term either.

49 In the present case, it is for the referring court to assess whether Sofatutor communicated clear, comprehensible and explicit information on the total price of the services concerned to consumers, in accordance with Directive 2011/83.

50 By contrast, where such information was not communicated transparently when the contract concerned was concluded, assuming that the consumer is bound by that contract as follows from paragraph 45 of the present judgment, the difference between, on the one hand, the information actually communicated on the contractual terms and, on the other, the terms of that contract after a free trial period such as that at issue in the main proceedings would be so fundamental that a new

right of withdrawal, within the meaning of Article 9(1) of Directive 2011/83, should be recognised after that free trial period.

51 In light of all the foregoing considerations, the answer to the question referred is that Article 9(1) of Directive 2011/83 must be interpreted as meaning that the consumer's right to withdraw from a distance contract is guaranteed only once in respect of a contract for the performance of services which provides for an initial free period for the consumer after which – unless the consumer terminates or withdraws from that contract during that period – payment is required for a period that is automatically extended – unless that contract is terminated – for a fixed term, provided that, when concluding that contract, the consumer has been informed in a clear, comprehensible and explicit manner by that trader that, after that initial free period, payment will be required for that performance of services.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

Article 9(1) 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,

must be interpreted as meaning that the consumer's right to withdraw from a distance contract is guaranteed only once in respect of a contract for the performance of services which provides for an initial free period for the consumer after which – unless the consumer terminates or withdraws from that contract during that period – payment is required for a period that is automatically extended – unless that contract is terminated – for a fixed term, provided that, when concluding that contract, the consumer has been informed in a clear, comprehensible and explicit manner by that trader that, after that initial free period, payment will be required for that performance of services.

[Signatures]

* Language of the case: German.