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Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

31 March 2022 (\*)

(Reference for a preliminary ruling – Consumer protection – Directive 2011/83/EU – Right of withdrawal for distance and off-premises contracts – Exceptions to the right of withdrawal – Article 16(1) – Provision of services related to leisure activities – Contract providing for a specific date or period of performance – Provision of ticket agency services – Intermediary acting in its name but on behalf of the organiser of a leisure activity – Risk associated with the exercise of the right of withdrawal)

In Case C-96/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Bremen (District Court, Bremen, Germany), made by decision of 8 January 2021, received at the Court on 16 February 2021, in the proceedings

**DM**

v

**CTS Eventim AG & Co. KGaA,**

THE COURT (Eighth Chamber),

composed of N. Jääskinen, President of the Chamber, M. Safjan (Rapporteur) and N. Piçarra, Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– CTS Eventim AG & Co. KGaA, by M. Schlingmann and M. Gerecke, Rechtsanwälte,

- the Finnish Government, by H. Leppo, A. Laine and S. Hartikainen, acting as Agents,
- the European Commission, by B.-R. Killmann and I. Rubene, 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 16(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 DM and CTS Eventim AG & Co. KGaA (‘CTS Eventim’), a provider of ticket agency services, concerning the existence of a right of withdrawal in respect of a contract for the purchase of admission tickets for a concert.

## **Legal context**

### *European Union law*

3 Recitals 4 and 49 of Directive 2011/83 are worded as follows:

‘(4) In accordance with Article 26(2) TFEU, the internal market is to comprise an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured. The harmonisation of certain aspects of consumer distance and off-premises contracts is necessary for the promotion of a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity.

...

(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.’

4 Article 1 of Directive 2011/83, entitled ‘Subject matter’, provides:

‘The purpose of this Directive 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.’

5 Article 2 of that directive, entitled ‘Definitions’, provides:

‘For the purpose 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;

(3) “goods” means any tangible movable items, with the exception of items sold by way of execution or otherwise by authority of law; water, gas and electricity shall be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or a set quantity;

...

(5) “sales contract” means 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;

(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;

...’

6 Under Article 6 of that directive, entitled ‘Information requirements for distance and off-premises contracts’:

‘1. 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:

...

(c) the geographical address at which the trader is established and the trader’s telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting;

(d) if different from the address provided in accordance with point (c), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints;

...’

7 Article 9 of the same directive, entitled ‘Right of withdrawal’, provides, in paragraph 1 thereof:

‘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 ...’

8 Article 12(a) of Directive 2011/83, entitled ‘Effects of withdrawal’, reads as follows:

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

(a) to perform the distance or off-premises contract ...’

9 Article 16 of that directive, entitled ‘Exceptions from the right of withdrawal’, provides:

‘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 the following:

...

(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;

...’

### ***German law***

10 Paragraph 312g of the Bürgerliches Gesetzbuch (Civil Code), 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 accommodation other than for residential purpose, transport of goods, car rental services, catering or the provision of other services related to leisure activities if the contract provides for a specific date or period of performance,

...’

11 Under Article 355 of that code, entitled ‘Right of withdrawal in consumer contracts’:

‘1. Where a consumer is granted a statutory right of withdrawal under this provision, the consumer and the trader shall no longer be bound by their declarations of intention to conclude the contract if the consumer has withdrawn his or her declaration of intention within the period specified.

...'

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

12 On 12 November 2019, DM, in her capacity as consumer, ordered tickets through an online booking platform operated by CTS Eventim, a provider of ticket agency services, to a concert organised by a third party.

13 That concert, which was due to take place on 24 March 2020 in Brunswick (Germany), was cancelled due to the administrative restrictions adopted by the German authorities amid the COVID-19 pandemic. As is apparent from the order for reference, it is possible that that concert will be held at a later date.

14 On 19 April 2020, DM requested reimbursement of the purchase price of the tickets as well as ancillary costs from CTS Eventim, namely a total amount of EUR 207.90. The referring court states that, in so doing, DM implicitly declared that she was withdrawing from her contract concluded with CTS Eventim.

15 Subsequently, in accordance with German legislation on the cancellation of leisure activities amid the COVID-19 pandemic, CTS Eventim, acting on behalf of the concert organiser, sent DM a voucher issued by that organiser, for an amount of EUR 199, corresponding to the purchase price of the tickets.

16 Before the referring court, DM is calling for CTS Eventim to reimburse the purchase price of the tickets as well as ancillary costs.

17 Called upon to rule on the validity of DM's withdrawal, the referring court takes the view that the exception to the right of withdrawal in Article 16(1) of Directive 2011/83 cannot be applied to the case in the main proceedings. It is of the opinion that that exception should benefit only the direct provider of a service related to a leisure activity – the concert organiser in this case – and not a provider of ticket agency services whose activity is limited to transferring a right of access to that concert. It adds that, following a withdrawal within a period of several months before the date scheduled for that activity, the trader has the possibility of using by other means the capacity set aside and resell the tickets concerned to other persons.

18 In those circumstances, the Amtsgericht Bremen (District Court, Bremen, Germany) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 16(1) of Directive [2011/83] to be interpreted as meaning that it is sufficient for the exclusion of the consumer's right of withdrawal if the trader does not directly provide the consumer with a service related to leisure activities but sells the consumer a right of access to such a service?'

### **Consideration of the question referred**

19 It should be noted as a preliminary matter that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it (judgment of 26 October 2021, *PL Holdings*, C-109/20, EU:C:2021:875, paragraph 34 and the case-law cited).

20 In addition, the Court has jurisdiction to provide guidance to the referring court based on the documents in the file and on the written and oral observations submitted to it, in order to enable the referring court to give judgment (see, to that effect, judgment of 24 February 2015, *Grinewald*, C-559/13, EU:C:2015:109, paragraph 32 and the case-law cited).

21 In the present case, it should be noted that, on the one hand, in so far as CTS Eventim's activity is limited to transferring a right of access to a leisure activity organised by a third party, the referring court is of the opinion that that company does not directly provide the consumer with a service related to that activity, the concert organiser alone being the immediate provider of such a service.

22 The order for reference does not contain precise information on the context in which CTS Eventim carries on its activity, particularly as regards the contractual terms governing the relationship between CTS Eventim and the organiser of the concert the cancellation of which gave rise to the main proceedings. However, it is apparent from the file before the Court and, more specifically, from the written observations submitted by CTS Eventim, that those parties are linked by a contractual relationship under which CTS Eventim sells tickets in its name, but on behalf of the organiser.

23 On the other hand, it is apparent from the order for reference that the contract at issue in the main proceedings constitutes a 'distance contract' within the meaning of Article 2(7) of Directive 2011/83 since it was concluded between DM as a consumer and CTS Eventim as a trader within the meaning of Article 2(2) of that directive. The latter concept covers not only a natural or legal person who is acting for purposes relating to his or her own trade, business, craft or profession in relation contracts covered by that directive, but also a natural or legal person who is acting as an intermediary, in the name of or on behalf of that person (judgment of 24 February 2022, *Tiketa*, C-536/20, EU:C:2022:112, paragraph 31).

24 In order to provide the referring court with a helpful answer, the question referred for a preliminary ruling must therefore be understood as seeking to ascertain, in essence, whether Article 16(1) of Directive 2011/83 must be interpreted as meaning that the exception to the right of withdrawal provided for in that provision may be relied on against a consumer who has concluded, with an intermediary acting in its name, but on behalf of the organiser of a leisure activity, a distance contract for acquiring a right of access to that activity.

25 Articles 9 to 15 of Directive 2011/83 grant the consumer a right of withdrawal following, inter alia, the conclusion of a distance contract within the meaning of Article 2(7) of that directive and set out the conditions and arrangements for exercising that right.

26 Thus, in accordance with Article 9(1) of Directive 2011/83, the consumer has, in principle, a period of 14 days to withdraw from a distance contract, as the exercise of the right of withdrawal terminates, in accordance with Article 12(a) of that directive, the obligations of the parties to perform that contract.

27 However, Article 16 of that directive provides for exceptions to the right of withdrawal, in particular in the case, referred to in point (1) of that article, of a provision of services related to leisure activities if the contract provides for a specific date or period of performance.

28 In that regard, it is important to state from the outset that, according to settled case-law, where a provision of EU law does not refer to the law of the Member States for the purpose of determining its meaning and scope, it must be given an autonomous and uniform interpretation

throughout the European Union, which interpretation must take into account not only the wording of that provision but also the context and the objective pursued by the legislation in question (see, to that effect, judgment of 21 October 2020, *Möbel Kraft*, C-529/19, EU:C:2020:846, paragraph 21 and the case-law cited).

29 It follows that the legal nature conferred by national law on a service provided by a trader to a consumer cannot, in any event, have a bearing on the interpretation of Article 16(1) of Directive 2011/83.

30 With regard, in the first place, to the question whether the transfer to a consumer of a right of access to a leisure activity by an intermediary acting on behalf of the organiser of that activity constitutes a provision of services related to that activity, within the meaning of Article 16(1) of Directive 2011/83, it must first be verified whether such a contractual relationship between the intermediary and the consumer can fall within the concept of ‘service contract’ as defined in Article 2(6) of that directive.

31 It is apparent from the case-law of the Court that that concept is broadly defined as referring to any contract other than a sales contract, within the meaning of Article 2(5) of Directive 2011/83, 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 (see, to that effect, judgment of 14 May 2020, *NK (Individual house project)*, C-208/19, EU:C:2020:382, paragraph 62 and the case-law cited).

32 According to Article 2(5) of Directive 2011/83, the concept of ‘sales contract’ is defined 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. Furthermore, the concept of ‘goods’ is defined in Article 2(3) of that directive as referring, in principle, to any tangible movable items, with the exception of items sold by way of execution or otherwise by authority of law.

33 In the present case, it is apparent from the order for reference that the contractual relationship between DM and CTS Eventim concerns, as a fundamental obligation of the latter, the transfer of the right of access to the leisure activity shown on the tickets at issue in the main proceedings.

34 Therefore, it must be held that such a contractual relationship, which essentially concerns the transfer of a right and not of goods, falls by default within the concept of ‘service contract’ within the meaning of Article 2(6) of Directive 2011/83. Accordingly, its performance by the trader amounts to a provision of services, within the meaning of Article 16(1) thereof.

35 It should be specified in that respect that the fact that a right or permits are set down in documents which, as such, may be the subject of trade is not sufficient to bring them within the scope of the provisions of the Treaty relating to the free movement of goods, as opposed to those relating to the freedom to provide services (see, to that effect, judgment of 21 October 1999, *Jägerskiöld*, C-97/98, EU:C:1999:515, paragraphs 35 and 36).

36 Second, it must be verified whether the transfer of a right of access to a leisure activity by an intermediary acting on behalf of the organiser of that activity may be regarded as a service related to that activity, within the meaning of Article 16(1) of Directive 2011/83.

37 In that regard, it is apparent from the case-law of the Court that the various categories of services listed in that provision represent sectoral exemptions which relate generally to services provided in the sectors concerned, except for those the performance of which is not due on a

specific date or within a specific period (see, by analogy, judgment of 10 March 2005, *easyCar*, C-336/03, EU:C:2005:150, paragraphs 22 and 24).

38 In so far as Article 16(1) of Directive 2011/83 thus covers, in principle, all services provided in the leisure sector, it follows from the use of the term ‘related’ that the exception provided for in that provision is not limited solely to services directly relating to the pursuit of a leisure activity as such.

39 Accordingly, it must be held that the transfer of a right of access to a leisure activity constitutes, in itself, a service related to that activity, within the meaning of Article 16(1) of Directive 2011/83.

40 On the other hand, it is not apparent from the wording of that provision to what extent such a service may, while falling within that provision, be provided by a person other than the organiser of the leisure activity itself.

41 In that regard, as for the context of Article 16(1) of Directive 2011/83, it should be noted that, according to Article 6(1)(c) and (d) of that directive, each trader is required, before the consumer is bound by a distance or off-premises contract, or any corresponding offer, where applicable, to communicate to him or her, inter alia, the identity of the trader on whose behalf he or she is acting.

42 Thus, Directive 2011/83 expressly provides for the possibility for a contract falling within its scope to be concluded by a trader in performance of a contractual relationship under which he or she is acting on behalf of another trader.

43 It follows that the fact that a service is provided not by the organiser of a leisure activity itself but by an intermediary acting on behalf of that organiser does not preclude such a service from being regarded as being related to that activity.

44 Furthermore, as regards the objective pursued in Article 16(1) of Directive 2011/83, it must be observed that, as is apparent from recital 49 of that directive, that objective is to protect traders against the risk associated with the setting aside of some capacity which, if a right of withdrawal were exercised, the trader may find difficult to fill, inter alia in the case of cultural or sporting events.

45 It is also apparent from the case-law of the Court that Article 16(1) of Directive 2011/83 seeks, in particular, to protect the interests of the providers of certain services, in order that the latter should not suffer the disproportionate consequences arising from the cancellation at no expense and with no explanation of a service for which there is a prior booking, as a consequence of the consumer’s withdrawal at short notice before the date specified for the provision of that service (see, by analogy, judgment of 10 March 2005, *easyCar*, C-336/03, EU:C:2005:150, paragraph 28).

46 It follows from the two preceding paragraphs that the exception to the right of withdrawal provided for in that provision can apply only to services provided in performance of a contractual obligation to the consumer, of which the termination by means of withdrawal, in accordance with Article 12(a) of Directive 2011/83, would place the risk linked to the setting aside of the capacity thus released on the organiser of the activity concerned.

47 Consequently, it is only in so far as that risk falls on the organiser of the activity concerned that the transfer of a right of access to that activity by an intermediary can constitute a service related to that activity, within the meaning of Article 16(1) of Directive 2011/83.



48 In that regard, it is irrelevant whether, on the date on which the consumer invokes his or her right of withdrawal, it is possible for the trader, where appropriate, to fill by other means the capacity that would be released due to the exercise of that right, in particular by means of the resale of the tickets concerned to other customers. The application of Article 16(1) of Directive 2011/83 cannot depend on such an assessment of the circumstances of each case.

49 In the present case, the documents available to the Court show that, under the contractual terms linking CTS Eventim and the organiser of the concert the annulment of which gave rise to the dispute in the main proceedings, that organiser is required to release CTS Eventim from all liability where a buyer seeks reimbursement of the price of a ticket. Thus, in the event of termination of the contract at issue in the main proceedings following a withdrawal by DM, it would be for the concert organiser to reimburse her for the purchase price of the tickets acquired from CTS Eventim.

50 In those circumstances, it must be held that, subject to the verifications which it is for the referring court to carry out, the transfer, by CTS Eventim to DM, of the right of access for the concert the cancellation of which gave rise to the dispute in the main proceedings constitutes a service related to a leisure activity, within the meaning of Article 16(1) of Directive 2011/83.

51 As regards, in the second place, the question whether a contract such as that at issue in the main proceedings must be regarded as providing for a specific date or period of performance, it should be stated that, due to its purpose, a contract for the transfer of a right of access to a leisure activity must necessarily be performed during the period between the date of the transfer and the date on which the activity to which that right of access gives access must take place.

52 In that regard, whether the right of access is transferred by the organiser of the leisure activity itself or by an intermediary is irrelevant.

53 Consequently, a contract for the transfer of a right of access to a leisure activity concluded by an intermediary acting in its name, but on behalf of the organiser of that activity, must be regarded as providing for a specific date or period of performance, since that activity is scheduled to take place on a specific date or within a specific period.

54 According to the order for reference, such is the case in the case in the main proceedings, the concert to which the rights transferred by CTS Eventim to DM give access being scheduled to take place on a specific date.

55 Having regard to all the foregoing considerations, the answer to the question referred is that Article 16(1) of Directive 2011/83 must be interpreted as meaning that the exception to the right of withdrawal provided for in that provision may be relied on against a consumer who has concluded, with an intermediary acting in its name, but on behalf of the organiser of a leisure activity, a distance contract for acquiring a right of access to that activity, provided that, first, the termination of the obligation to perform that contract vis-à-vis the consumer by means of withdrawal, in accordance with Article 12(a) of that directive, would place the risk linked to the setting aside of the capacity thus released on the organiser of the activity concerned and, second, the leisure activity to which that right gives access is scheduled to take place on a specific date or within a specific period.

## **Costs**

56 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 (Eighth Chamber) hereby rules:

**Article 16(l) 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 exception to the right of withdrawal provided for in that provision may be relied on against a consumer who has concluded, with an intermediary acting in its name, but on behalf of the organiser of a leisure activity, a distance contract for acquiring a right of access to that activity, provided that, first, the termination of the obligation to perform that contract vis-à-vis the consumer by means of withdrawal, in accordance with Article 12(a) of that directive, would place the risk linked to the setting aside of the capacity thus released on the organiser of the activity concerned and, second, the leisure activity to which that right gives access is scheduled to take place on a specific date or within a specific period.**

[Signatures]

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\* Language of the case: German.

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