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Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

17 May 2023 (*)

(Reference for a preliminary ruling – Consumer protection – Directive 2011/83/EU – Article 14(4)(a)(i) and (5) – Right of withdrawal for off-premises contracts – Information requirements for the trader concerned – Failure of that trader to inform the consumer – Obligations of the consumer in the event of withdrawal – Withdrawal after the performance of the contract – Consequences)

In Case C-97/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Essen (Regional Court, Essen, Germany), made by decision of 27 December 2021, received at the Court on 10 February 2022, in the proceedings

DC

v

HJ,

THE COURT (Eighth Chamber),

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

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- DC, by M. Höffken, Rechtsanwalt,
- 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 14(5) 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 DC and HJ concerning payment for a service supplied to HJ, pursuant to a contract concluded off-premises, by an undertaking which had assigned all the rights arising under that contract to DC.

Legal context

European Union law

3 Recitals 4, 5, 7, 21 and 57 of Directive 2011/83 state:

‘(4) ... 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 ...

(5) ... the full harmonisation of consumer information and the right of withdrawal in distance and off-premises contracts will contribute to a high level of consumer protection and a better functioning of the business-to-consumer internal market.

...

(7) Full harmonisation of some key regulatory aspects should considerably increase legal certainty for both consumers and traders. ...

...

(21) An off-premises contract should be defined as a contract concluded with the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader, for example at the consumer’s home or workplace. In an off-premises context, the consumer may be under potential psychological pressure or may be confronted with an element of surprise, irrespective of whether or not the consumer has solicited the trader’s visit. ...

...

(57) It is necessary that Member States lay down penalties for infringements of this Directive and ensure that they are enforced. The penalties should be effective, proportionate and dissuasive.’

4 Article 1 of that directive, 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 Directive 2011/83 contains, in points (1), (2), (6) and (8) thereof, the following definitions:

‘(1) “consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;

(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;

...

(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; ...

...’

6 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.’

7 Article 6 of Directive 2011/83, 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:

...

(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);

...

(j) that, if the consumer exercises the right of withdrawal after having made a request [for the performance of a service to begin during the withdrawal period], the consumer shall be liable to pay the trader reasonable costs in accordance with Article 14(3);

...’

8 Article 9 of that 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, and without incurring any costs other than those provided for in Article 13(2) and Article 14.’

9 Article 10 of that directive, entitled ‘Omission of information on the right of withdrawal’, provides, in paragraph 1 thereof:

‘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).’

10 Article 14 of Directive 2011/83, entitled ‘Obligations of the consumer in the event of withdrawal’, provides, in paragraphs 3 to 5 thereof:

‘3. Where a consumer exercises the right of withdrawal after having made a request in accordance with Article 7(3) ... 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. ...

4. The consumer shall bear no cost for:

(a) the performance of services ... 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); ...

...

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.’

German law

11 Paragraph 357 of the Bürgerliches Gesetzbuch (German Civil Code), in the version applicable to the dispute in the main proceedings (‘the Civil Code’), entitled ‘Legal consequences of withdrawing from off-premises and distance contracts, with the exception of contracts relating to financial services’, provides, in subparagraph 8 thereof:

‘Where a consumer withdraws from a contract for the supply of services ... the consumer shall owe the trader compensation for performance provided until the time of the withdrawal where the consumer has expressly required that the trader begin the performance before the expiry of the withdrawal period. The right arising under the first sentence shall exist only where the trader has duly informed the consumer in accordance with Article 246a ... of [the Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Law to the Civil Code) of 21 September 1994 (BGBl. 1994 I, p. 2494, and corrigendum BGBl. 1997 I, p. 1061), in the version applicable to the dispute in the main proceedings (‘the EGBGB’)] ...’

12 Article 246a of the EGBGB, entitled ‘Information requirements for off-premises contracts and distance contracts, with the exception of contracts relating to financial services’, provides, in paragraph 1 of that article, entitled ‘Information requirements’, in points 1 and 3 of the first sentence of subparagraph 2 thereof:

‘Where a consumer is entitled to a right of withdrawal ..., the trader shall be obliged to inform the consumer:

1. of the conditions, time limit and procedure for exercising the right of withdrawal pursuant to Paragraph 355(1) of the Civil Code, as well as the model withdrawal form set out in Annex 2,

...

3. that, in the case of a contract for the provision of services ... the consumer shall owe the trader concerned reasonable costs in accordance with Paragraph 357(8) of the Civil Code for performance provided by the trader where the consumer exercises the right of withdrawal after expressly requiring, on the invitation of the trader, that the latter begin the performance before the expiry of the withdrawal period.’

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

13 On 6 October 2020, HJ orally concluded a contract with an undertaking for the renovation of the electrical installations in his house, without that undertaking informing him of his right of withdrawal in accordance with Paragraph 246a of the Introductory Law to the Civil Code, in the version applicable to the dispute in the main proceedings.

14 On 21 December 2020, having performed that contract, the abovementioned undertaking submitted to HJ the corresponding invoice, which HJ did not pay.

15 On 15 March 2021, that undertaking assigned all the rights arising under that contract to DC.

16 Following the notification by HJ, on 17 March 2021, of the withdrawal from that contract, DC brought an action before the Landgericht Essen (Regional Court, Essen, Germany), the referring court, seeking payment for the service supplied to HJ. DC submits that the assigning undertaking, notwithstanding the withdrawal by HJ, has a right to such a payment, even if the conditions required for that purpose under Paragraph 357(8) of the Civil Code are not satisfied. DC maintains that precluding such a right on account of a failure to comply with the information requirement incumbent on the trader concerned constitutes a ‘disproportionate penalty’, in disregard of recital 57 of Directive 2011/83.

17 For his part, HJ contends that, since the assigning undertaking failed to provide him with information on his right of withdrawal, DC has no right to payment of the price of the service supplied under the contract at issue in the main proceedings.

18 The referring court considers that the outcome of the dispute in the main proceedings depends on the interpretation of Article 14(5) of Directive 2011/83. It accepts that, under the provisions of the Civil Code adopted in order to transpose that directive, a consumer is to bear no cost for the service supplied, before the expiry of the withdrawal period, where the trader concerned has failed to provide that consumer with information on his or her right of withdrawal.

19 However, the referring court is uncertain as to whether Article 14(5) of that directive precludes any right of that trader to ‘compensation’, including in a situation where that consumer exercised his or her right of withdrawal only after the performance of an off-premises contract and thus obtained an enhancement of his or her assets, in breach of the principle of the prohibition of unjust enrichment, which is recognised by the Court of Justice as a general principle of EU law.

20 In those circumstances, the Landgericht Essen (Regional Court, Essen) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 14(5) of Directive [2011/83] ... be interpreted as meaning that, in the event that the customer withdraws his or her declaration of intention to conclude an off-premises construction contract only after the trader has already (fully) performed his or her services, [that provision] also precludes any entitlement to compensation or compensation for value on the part of the trader where the conditions of entitlement to [such compensation] ... under the rules governing the legal consequences of withdrawal are not met, but the customer’s assets have been enhanced as a result of the trader’s construction work, that is to say, he or she has been enriched?’

Consideration of the question referred

21 By its question, the referring courts asks, in essence, whether Article 14(5) of Directive 2011/83 must be interpreted as meaning that it exempts a consumer from any obligation to pay for performance provided pursuant to an off-premises contract, where the trader concerned did not provide him or her with the information referred to in Article 14(4)(a)(i) of that directive and that consumer exercised his or her right of withdrawal after the performance of that contract.

22 As a preliminary point, it should be noted that, by letter of 29 September 2022, received at the Court on 13 October 2022, the referring court stated, having learned of doubts raised in the written observations submitted by the European Commission with regard to the nature of the off-premises contract at issue in the main proceedings, that that contract should be treated as a ‘service contract’ within the meaning of Article 2(6) of Directive 2011/83.

23 That said, it should be borne in mind that, according to Article 14(5) of Directive 2011/83, a consumer who exercises his or her right of withdrawal from an ‘off-premises contract’, within the meaning of Article 2(8) of that directive, read in conjunction with Article 2(1) and (2) thereof, is not to incur any liability as a consequence of that exercise, except as provided for in Article 13(2) and Article 14 of that directive.

24 Those latter provisions include Article 14(3) of Directive 2011/83, according to which a consumer who exercises the right of withdrawal after requesting that the trader concerned perform an off-premises contract, during the withdrawal period of 14 days provided for in Article 9 of that directive, must pay to that trader an amount, calculated on the basis of the total price agreed in that

contract, which is in proportion to what has been provided until the time when that trader has been informed of the exercise of the right of withdrawal, in comparison with the full coverage of the contract.

25 However, Article 14(3) of Directive 2011/83 must be read in conjunction with Article 14(4)(a)(i) of that directive. It follows that, if the trader concerned has failed to provide a consumer, before the latter is bound by an off-premises contract, with the information referred to in Article 6(1)(h) or (j) of that directive, as regards, first, the conditions, time limit and procedures for exercising the right of withdrawal and, second, the obligation to pay the amount referred to in Article 14(3) of that directive, that consumer is to bear no cost for the services supplied to him or her, in full or in part, during the withdrawal period. In addition, failure to provide the information referred to in Article 6(1)(h) of Directive 2011/83 gives rise, in accordance with Article 10(1) of that directive, to an extension of 12 months to the initial withdrawal period, from the end of that period.

26 The right of withdrawal mentioned in Article 14(5) of Directive 2011/83 is designed to protect the consumer in the particular context of concluding an off-premises contract, in which, as recital 21 of that directive states, that consumer may be under potential psychological pressure or may be confronted with an element of surprise, irrespective of whether or not the consumer has solicited the relevant trader's visit. Therefore, the pre-contractual information concerning that right of withdrawal is of fundamental importance for that consumer and enables him or her to make an informed decision on whether or not to conclude the contract (see, by analogy, judgment of 23 January 2019, *Walbusch Walter Busch*, C-430/17, EU:C:2019:47, paragraphs 45 and 46).

27 It follows that, in a situation where, prior to the conclusion of an off-premises contract within the meaning of Article 2(8) of Directive 2011/83, the trader concerned fails to provide a consumer with the information referred to in Article 6(1)(h) or (j) of that directive, and where that consumer exercises his or her right of withdrawal, the combined provisions of Article 14(4)(a)(i) and (5) of that directive exempt the abovementioned consumer from any obligation to pay the trader the price of the service supplied by that trader during the withdrawal period.

28 However, the referring court is uncertain as to whether the enhancement of assets thus obtained by the consumer contravenes the principle of the prohibition of unjust enrichment.

29 In that regard, it should be recalled that the objective of Directive 2011/83 is to provide, in accordance with Article 1 thereof, a high level of consumer protection, as enshrined in Article 169 TFEU and in Article 38 of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment of 10 July 2019, *Amazon EU*, C-649/17, EU:C:2019:576, paragraph 39).

30 In order to achieve that objective, Directive 2011/83 undertakes, as is apparent from recitals 4, 5 and 7 thereof, full harmonisation of certain essential aspects of contracts concluded between consumers and traders (judgment of 13 September 2018, *Starman*, C-332/17, EU:C:2018:721, paragraph 27). In that context, Article 4 of Directive 2011/83 requires Member States not to maintain or introduce, in their national law, provisions diverging from the level of consumer protection laid down in that directive, unless otherwise provided for in that directive.

31 However, the objective laid down by Directive 2011/83 would be undermined if Article 14(5) of that directive were to be interpreted as meaning that it allows the clear provisions of Article 9(1) and of Article 14(4)(a)(i) of that directive to be disapplied, with the result that a consumer, following his or her withdrawal from a service contract concluded off-premises, could incur costs that are not expressly provided for by that directive.

32 That approach is consistent with the fundamental importance which Directive 2011/83 ascribes to the pre-contractual information regarding the right of withdrawal from off-premises contracts, as referred to in paragraph 26 above. Thus, where the trader concerned has failed to provide a consumer with that information, that trader must bear the costs which he, she or it has incurred due to the performance of the service contract concluded off-premises during the withdrawal period from which that consumer benefits by virtue of Article 9(1) of Directive 2011/83. In those circumstances, DC's reliance on the principle that penalties should be proportionate, set out in recital 57 of that directive, in order to avoid such costs cannot succeed.

33 Lastly, those findings are without prejudice to the possibility, where provided for by national law, for DC, in so far as the latter cannot be held liable for the failure to provide HJ with the information on his right of withdrawal from the off-premises contract, to bring an action for contribution or indemnity against the trader who assigned all the rights arising under that contract to DC in such circumstances (see, by analogy, judgment of 17 October 2019, *Comida paralela 12*, C-579/18, EU:C:2019:875, paragraph 44).

34 In the light of the foregoing considerations, the answer to the question referred is that Article 14(4)(a)(i) and (5) of Directive 2011/83 must be interpreted as meaning that it exempts a consumer from any obligation to pay for performance provided pursuant to an off-premises contract, where the trader concerned did not provide him or her with the information referred to in Article 14(4)(a)(i) of that directive and that consumer exercised his or her right of withdrawal after the performance of that contract.

Costs

35 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 14(4)(a)(i) and (5) 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 it exempts a consumer from any obligation to pay for performance provided pursuant to an off-premises contract, where the trader concerned did not provide him or her with the information referred to in Article 14(4)(a)(i) of that directive and that consumer exercised his or her right of withdrawal after the performance of that contract.

[Signatures]

* Language of the case: German.