



Date de réception : 12/07/2019

Case C-438/19

Request for a preliminary ruling

Date lodged:

11 June 2019

Referring court:

Oberlandesgericht Düsseldorf (Germany)

Date of the decision to refer:

4 June 2019

Applicant, appellant and respondent:

Bundesverband der Verbraucherzentralen und
Verbraucherverbände — Verbraucherzentrale Bundesverband e.V.

Defendant, appellant and respondent:

Frontline Digital GmbH

[...]

Made on 4 June 2019

[...]

[...]

OBERLANDESGERICHT DÜSSELDORF
(HIGHER REGIONAL COURT, DÜSSELDORF)

ORDER

In the case of

Bundesverband der Verbraucherzentralen und Verbraucherverbände —
Verbraucherzentrale Bundesverband e.V. (Federal Union of Consumer Advice
Centres and Consumer Associations),

applicant, appellant and respondent, [...]

v

Frontline Digital GmbH,

defendant, appellant and respondent,

[...] the 20th Civil Chamber of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), at the hearing held on 30 April 2019, [...] **[Or. 2]**

made the following o r d e r:

I.

The proceedings are stayed.

II.

The Oberlandesgericht Düsseldorf refers the following questions to the Court of Justice of the European Union for a preliminary ruling on the interpretation 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) ('the Directive'):

1. In the case of distance contracts, is there a supply of digital content to the consumer within the meaning of Article 16(m) of Directive 2011/83/EU where the consumer concludes with a trader a contract for participation in an internet-based 'dating website'?
2. If Question 1 is to be answered in the affirmative:

Does the commencement of the supply of digital content by the trader to the consumer lead to the loss of the consumer's right of withdrawal, as provided for in Article 16(m) of the Directive, even in the case where, contrary to Article 8(7) of the Directive, the trader has not sent beforehand to the consumer confirmation of the contract concluded together with the information referred to in that latter provision?

If the consumer's right of withdrawal continues in existence in that event:

Must the consumer be provided with information to that effect beforehand, in accordance with Article 6(1)(k) of the Directive? **[Or. 3]**

G r o u n d s:

1 The applicant is the umbrella federation for all 16 consumer advice centres and 25 other consumer and socially-oriented organisations in Germany. It is included in the list of accredited [consumer-protection] institutions provided for in Paragraph 4 of the Unterlassungsklagegesetz (Law on prohibitory injunctions). It has been tasked by the Bundesamt für Justiz (Federal Office for Justice) (Germany), as the authority requested by the Bundeskartellanwalt (Federal Cartel Prosecutor) for the Republic of Austria under Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ 2004 L 364, p. 1), with bringing to an end certain intra-Community infringements of laws on the protection of consumer interests.

2 The defendant is the German-based operator of the www.parwise.at 'dating website'. This is an online dating service aimed at consumers ordinarily resident in the Republic of Austria. It describes the object of its business as follows:

The supplier provides free and chargeable digital content. This, most of which is user-generated and takes the form of user profiles, photos, messages and so on, can be viewed and used by customers. No obligation to arrange contact between users is owed.

Before registering on the website free of charge, consumers are requested to provide a number of character traits so that they can be sent potential match suggestions. 'Premium membership', which is subject to a charge, includes receipt of unlimited messages, the ability to view all photos and the unlimited right to contact other users. Before the chargeable contract is concluded, the consumer receives, inter alia, the following information:

It is my express wish that, immediately after purchase, the supplier should begin to provide me with digital content without delay and before the expiry of the withdrawal period. I am aware that, in thus giving my consent to be provided with digital content, I lose my right of withdrawal.

3 It is this information, together with other clauses that are of no interest here, that forms the subject of the applicant's objection. It claims that the defendant fails to provide consumers with proper information on their right of withdrawal (expressed in the Austrian legal system by a term (Rücktrittsrecht) different from that used in Germany (Widerrufsrecht), the latter being the term used exclusively hereafter [in the German version of this order]). In the applicant's submission, the contract [Or. 4] is not concerned with the supply of digital content but is to be classified as an ordinary services contract. The defendant, on the other hand, takes the view that the contract does relate to the supply of digital content. Account being taken of Article 6(1)(k) and Article 16(m) of the Directive, that information is not therefore, in its view, open to objection.

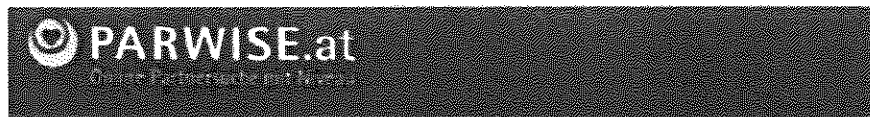
4 The Landgericht (Regional Court) upheld the application and found against the defendant for the practice whereby,

in the course of business with consumers who are ordinarily resident in the Republic of Austria,

it provides consumers, before they submit their declaration of acceptance of a contract for the establishment of chargeable membership of a dating platform, with the following information on the extinguishment of their right of withdrawal:

‘It is my express wish that, immediately after purchase, the supplier should begin to provide me with digital content without delay and before the expiry of the withdrawal period. I am aware that, in thus giving my consent to be provided with digital content, I lose my right of withdrawal’,

in the following circumstances.



Wählen Sie ihr gewünschtes Zahlungsmittel



Ihr Zahlungsmittel: SEPA-Bankinzug



SEPA Bankinzug

SEPA

Ihre Zahlungsdaten

Vorname

Fragen Sie hier den Vornamen des Kontoinhabers ein

Nachname

IBAN

BIC

Alle Preisangaben einschließlich gesetzlicher MwSt. Details zu Ihrem Widerrufsrecht finden Sie in unseren AGB. Ich erkläre ausdrücklich, dass der Anbieter sofort nach dem Kauf ohne Verzögerung mit der Bereitstellung der digitalen Inhalte vor Ablauf der Widerrufsfrist beginnt. Mir ist bekannt, dass ich durch diese Zustimmung mit Bereitstellung der digitalen Inhalte mein Widerrufsrecht verliere. Für die von Ihnen gewählte Zahlungsart fallen keine zusätzlichen Gebühren an.

Kaufen

[Or. 5] By way of grounds, the Landgericht held that such a declaration by the consumer can be made only after the contract has been concluded, but not before

or at the same time as the declaration of acceptance of the contract. The defendant's appeal is directed against that judgment.

- 5 The Federal Republic of Austria transposed the Directive, inter alia, in the Bundesgesetz über Fernabsatz- und außerhalb von Geschäftsräumen geschlossene Verträge (Federal Law on distance contracts and contracts negotiated away from business premises) (Fern- und Auswärtsgeschäfte Gesetz — FAGG). This provides, inter alia:

Paragraph 3

In this Federal Law, the term

....

6. 'digital content' means data which are produced and supplied in digital form;

Paragraph 4(1)

Before the consumer is bound by a contract or by his declaration of acceptance of a contract, the trader must provide the consumer with the following information in a clear and comprehensible manner:

8. where a right of withdrawal exists, the conditions, time-limits and procedure for exercising that right, ...

...

11. where applicable, the non-existence of a right of withdrawal as provided for in Paragraph 18 or the circumstances in which the consumer loses his right of withdrawal,

Paragraph 7(3)

The trader shall provide the consumer with a confirmation of the contract concluded, ... within a reasonable time after the conclusion of the contract, but at the latest ... before the performance of the service begins ... Where applicable, the confirmation of contract must also contain a confirmation of the consumer's consent and acknowledgement in accordance with Paragraph 18(1), point 11.

Paragraph 18(1)

The consumer has no right of withdrawal in the case of distance contracts or contracts negotiated away from business premises concerning **[Or. 6]**

11. the supply of digital content not stored on a tangible medium where the trader — with the [consumer's] express consent in the case where performance of the contract begins early, and following the provision of a confirmation ... in

accordance with ... Paragraph 7(3) — has begun to supply [the content] ... even before the withdrawal period has expired.

First question:

- 6 First of all, it must be made clear that the subject matter of the action, as apparent from the version of the application debated at the hearing before the present Chamber and the arguments and evidence exchanged there, is confined to the allegedly incorrect information provided to consumers with respect to their right of withdrawal. Accordingly, the fact, apparent from the screenshot inserted above, that, by clicking on the ‘Kaufen’ (‘Buy’) button immediately below the text [of the declaration], consumers simultaneously give their consent for performance of the contract to commence immediately and, by extension, for their right of withdrawal to be lost, is immaterial. It does not therefore fall to the present Chamber to decide whether such consent may be given only after and not at the same time as the declaration of acceptance of the contract (which is a point of contention between the parties and which the Landgericht has assumed to be the case) or whether that consent is ‘express’ (which is doubtful given that the defendant treats the declaration of consent as the default position and that position cannot be deselected by the consumer).
- 7 The outcome of the dispute depends first of all on whether or not the subject matter of the ‘dating website’ contract is (exclusively) the supply of digital content. If so, the information must be assessed by reference to the particulars set out in Article [6](1)(k) of the Directive (see in this regard Question 2). If Question 1 is to be answered in the negative, the action is well founded not least because, in that event, the defendant is wrongly informing consumers that the right of withdrawal ceases to exist as soon as performance of the supply commences, whereas, in accordance with Article 16(a) of the Directive, the provision that would in that event (if the supply were classified as a service) be applicable, that right could not cease to exist until after the services have been completely performed.
- 8 The courts, in their case-law, assume that a supply of digital content may refer not only to one-off acts of supply by the trader but also to a longer-term ongoing obligation (see OLG [Oberlandesgericht] München (Higher Regional Court, Munich), ECLI:DE:OLGMUEN:2016:0630.6U732.16.0A [...], concerning a contract for access to a television programme broadcast via the internet). This assumption is supported by, inter alia, Article 14(4)(b) of the Directive, **[Or. 7]** which provides that the consumer is to be exempted from any obligation to provide consideration even in cases where the digital content owed has been supplied only in part.
- 9 Even on the basis of that view, the present Chamber is inclined to consider that provision to be inapplicable to the present case. The subject matter of the contract is not confined to the ‘supply’ of digital content to the consumer. On the contrary, the defendant also had the option of supporting the establishment of contacts with

other members throughout the term of the contract. In addition, the defendant had a duty to enable members to enter their details and — as part and parcel of the business concept — make these available to other members so that the latter could contact the former. The consumer is thus not merely a recipient of digital content who, at his will, simply triggers the delivery of that content, but also himself a supplier of data made available to other customers. The whole premiss of the defendant's business concept is for as many consumers as possible to enter their details and make these known to, and thereby make contact with, other consumers. The performance owed by the defendant thus extends, by definition, beyond the mere supply of digital content to the consumer requesting it. For the purposes of ensuring a high level of consumer protection (Article 1 of the Directive), exceptions are usually interpreted narrowly. On the exception provided for in Article 16(c) of the Directive, the Bundesgerichtshof (Federal Court of Justice) (ECLI:DE:BGH:2018:300818UVIIZR243.17.0, [...]), in a case concerning the supply and construction of a stair lift in a residential property, held that that exception does not apply where the supply of goods does not constitute the focal point of the contract. The question as to whether Article 16(m) of the Directive is applicable has not yet been resolved and has repercussions not only within the framework of the directive at issue but also within the framework of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ 2019 L 136, p. 1).

Second question

- 10 Should the contract be concerned with the supply of digital content, it is necessary to examine whether the information provided by the defendant is consistent with the rules applicable to it. This raises the following part questions: **[Or. 8]**
- Does the consumer's right of withdrawal in the circumstances referred to in Article 16(k) of the Directive cease to exist in every case or must other conditions be present in order for this to be so (see in this regard section (a))?
 - If other conditions must be present, must the information to be provided by the trader to the consumer contain those conditions (see in this regard section (b))?

(a)

- 11 It is unclear whether the right of withdrawal under Article 16([m]) of the Directive ceases to exist — subject to the consumer's due consent — as soon as the trader begins to perform the supply or whether this is contingent upon other conditions. This is the subject of the first part question. In accordance with the first sentence of Article 8(7) of the Directive, the trader must send the consumer a confirmation [of the contract concluded] at the latest at the time of delivery of the goods or before the performance of the service begins. In accordance with point (b) of the

second sentence [of that provision] of the Directive, that confirmation also includes ‘the consumer’s prior express consent and acknowledgement in accordance with point (m) of Article 16’. In dispute is the question whether the consumer loses his right of withdrawal even if such a confirmation is not provided before the trader begins to supply the digital content. The Austrian legislature considers not when it expressly makes the loss of that right subject to the condition that the supply must begin ‘after the confirmation provided for in ... Paragraph 7(3) has been provided’; [...]. The German legislature, on the other hand, has assumed that Article 8(7) of the Directive is simply an obligation to provide documentation, while the right of withdrawal may cease to exist even if that confirmation is not sent out beforehand (Bundestagsdrucksache (Bundestag printed paper) 17/12637, pp. 55/56, p. 64; [...]), the absence of such a confirmation having the effect only of creating evidential difficulties for the trader.

- 12 The wording of Article 16(m) of the Directive does not contain such a requirement. The only question is whether such a requirement is to be inferred from that provision when read in the context of Article **[Or. 9]** 8(7) of the Directive. The national legislature has no legislative discretion in this regard (see Article 4 of the Directive). It is also important to note that there would otherwise be no further scope for the application of Article 14(4)(b)(iii) [of the Directive] (Bundestagsdrucksache (Bundestag printed paper) 17/12637, p. 64, also makes this point but draws from it the conclusion that there is need for that provision to be transposed into national law).

(b)

- 13 If it is assumed that the right of withdrawal ceases to exist only when the trader has also sent the confirmation provided for in Article 8(7) before the supply of digital content begins, the second part question arises as to whether the trader must provide information on that condition too (which it did not do in this instance). Article 6(1)(k) of the Directive states that, where a right of withdrawal is not provided for in accordance with Article 16, the trader must also provide the consumer with information on the circumstances under which the consumer loses his right of withdrawal.
- 14 The wording of Article 6(1)(k) is not entirely unambiguous. On the one hand, it can be understood as meaning that the consumer must be provided with information only on the circumstances referred to in Article 16; this would not then include the requirement under Article 8(7) of the Directive that the confirmation of the contract be sent out beforehand. On the other hand, it can also be understood as meaning that, in cases under Article 16 in which the right of withdrawal may cease to exist, the consumer must be provided with information, in full, on the circumstances leading to the extinguishment of the right of withdrawal, including, therefore, information on the requirement that a confirmation of the contract be sent out beforehand.

- 15 The objective of achieving a high level of consumer protection (Article 1 of the Directive) militates in favour of an obligation to provide comprehensive information. The provision of insufficient information may have the effect of preventing the consumer from exercising his right of withdrawal in cases where he nonetheless still has that right.
- 16 The only objection that might conceivably be raised against the foregoing is that an obligation to provide information also on the requirement that the confirmation of the contract provided for in Article 8(7) of the Directive be sent out beforehand places an excessive demand on the trader because **[Or. 10]** that requirement emerges only from an interpretation of a text by reference to its context, and one which is, moreover, contested. Some German courts have assumed in their case-law on the information to be provided on the right of withdrawal that, when formulating such information, a trader may be guided by the wording of the legislation, even if this is unclear or, when read in conjunction with other provisions, imprecise (see, for example, Bundesgerichtshof (Federal Court of Justice) ECLI:DE:BGH:2017:16057UXIZR586.15.0, paragraph 23 [...]).

[Signatures]

[...]

