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Lingua del documento :

ECLI:EU:C:2020:846

Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

21 October 2020 (*)

(Reference for a preliminary ruling – Consumer protection – Directive 2011/83/UE – Article 16(c) – Right of withdrawal – Exceptions – Goods made to the consumer’s specifications or clearly personalised – Goods which the trader has begun to produce)

In Case C-529/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Potsdam (District Court, Potsdam, Germany), made by decision of 12 June 2019, received at the Court on 11 July 2019, in the proceedings

Möbel Kraft GmbH & Co. KG

v

ML,

THE COURT (Sixth Chamber),

composed of C. Toader, acting as President of the Chamber, M. Safjan (Rapporteur), and N. Jääskinen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Möbel Kraft GmbH & Co. KG, by J. Jeep, Rechtsanwalt,
 - ML, by R. Sterzel, Rechtsanwalt,
 - the European Commission, by C. Hödlmayr, B.-R. Killmann and C. Valero, 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(c) 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 Möbel Kraft GmbH Co. KG, a German furniture company, and ML, a consumer, concerning a claim for damages following ML's withdrawal from the contract concluded between those parties.

Legal context

EU law

3 Recitals 7, 40 and 49 of Directive 2011/83 state:

‘(7) Full harmonisation of some key regulatory aspects should considerably increase legal certainty for both consumers and traders. Both consumers and traders should be able to rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Union. ...

...

(40) The current varying lengths of the withdrawal periods both between the Member States and for distance and off-premises contracts cause legal uncertainty and compliance costs. ...

...

(49) Certain exceptions from the right of withdrawal should exist, both for distance and off-premises contracts. A right of withdrawal could be inappropriate for example given the nature of particular goods or services. ... The right of withdrawal should neither apply to goods made to the consumer's specifications or which are clearly personalised such as tailor-made curtains, nor to the supply of fuel, for example, which is a good, by nature inseparably mixed with other items after delivery. ...’

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

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

...

(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;

(4) “goods made to the consumer’s specifications” means non-prefabricated goods made on the basis of an individual choice of or decision by the consumer;

...

(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;

(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;

...

(c) concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer; or

...

(9) “business premises” means:

(a) any immovable retail premises where a trader carries out his activity on a permanent basis; or

(b) any movable retail premises where the trader carries out his activity on a usual basis;

...’

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

...

(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);

...

(k) where a right of withdrawal is not provided for in accordance with Article 16, the information that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal;

...’

6 Article 9 of that directive, entitled ‘Right of withdrawal’, provides, in paragraph 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.’

7 Article 16 of Directive 2011/83, entitled ‘Exceptions from the right of withdrawal’, reads as follows:

‘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:

(a) service contracts after the service has been fully performed if the performance has begun with the consumer’s prior express consent, and with the acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the trader;

...

(c) the supply of goods made to the consumer’s specifications or clearly personalised;

...

(e) the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery;

...

(i) the supply of sealed audio or sealed video recordings or sealed computer software which were unsealed after delivery;

...

(m) the supply of digital content which is not supplied on a tangible medium if the performance has begun with the consumer’s prior express consent and his acknowledgment that he thereby loses his right of withdrawal.’

German law

8 Under Paragraph 312g(2)(1) of the Bürgerliches Gesetzbuch (Civil Code), which transposes Article 16 of Directive 2011/83 into German law, the right of withdrawal does not apply in the case of contracts for the supply of non-prefabricated goods made according to the consumer’s individual choice or which are clearly adapted for his or her needs.

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

9 At a trade fair, ML concluded a sales contract with Möbel Kraft concerning a fitted kitchen ('the contract at issue'). Since ML subsequently invoked a right of withdrawal and, on that ground, refused to accept delivery of that kitchen, Möbel Kraft brought an action for damages before the referring court, the Amtsgericht Potsdam (District Court, Potsdam, Germany), on account of ML's failure to perform the contract at issue.

10 It is apparent from the order for reference that the kitchen parts covered by the contract at issue, the manufacture of which Möbel Kraft had not yet begun when ML decided to withdraw from that contract, were to be assembled by another undertaking using a drilling pattern on digital manufacturing lines and fitted at ML's premises, not by the employees of that other undertaking, but by Möbel Kraft's employees. The referring court adds, in that respect, that the prefabricated parts of the kitchen could have been dismantled without loss for the trader; only the niche back wall, the worktop, the trimming and the connection pieces would have been adjusted on-site and would not have been reusable elsewhere.

11 That court has doubts whether, in accordance with Paragraph 312g(2)(1) of the Civil Code, the right to withdraw from a contract for the supply of goods made to the consumer's specifications or clearly personalised is excluded where:

- (a) at the time of the withdrawal, the seller had not yet begun to have the goods assembled from the component parts;
- (b) the goods would be adjusted on-site by the seller itself, not by a third party, and
- (c) the goods could be returned to the condition they were in before customisation with only low dismantling costs, such as some 5% of the value of the goods.

12 In that respect, the national court points out that the Bundesgerichtshof (Federal Court of Justice, Germany), in its case-law prior to the entry into force of Directive 2011/83, held that the right of withdrawal is not excluded where the goods can be restored – without loss of substance or functionality – to the condition they were in prior to customisation, at a relatively low cost. The Bundesgerichtshof thus considered that, in the case of a computer made in accordance with the purchaser's specifications, dismantling costs amounting to 5% of the value of the goods remained relatively low.

13 The order for reference also indicates that, according to the case-law of the Oberlandesgericht Stuttgart (Higher Regional Court, Stuttgart, Germany), the purchaser of personalised goods may not exercise his or her right of withdrawal even if the trader has not yet begun to manufacture the goods or customise them to the consumer's personal needs. However, some authors of German legal literature disagree with the approach adopted in that case-law.

14 In those circumstances, the Amtsgericht Potsdam (Potsdam District Court) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'Is the right of withdrawal under Article 16(c) of [Directive 2011/83] also excluded where goods are made to the consumer's specifications but the seller has not yet begun to manufacture the goods and would be making adjustments to them itself at the consumer's premises, not through a third party? Does the answer depend on whether it would be possible to return the goods to the state they

were in before customisation with only low dismantling costs, such as some 5% of the value of the goods?’

Consideration of the question referred

15 By its question, the referring court asks, in essence, whether Article 16(c) 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 an off-premises contract for the sale of goods which are to be made to his or her specifications, even though the trader has not begun to produce those goods.

16 As a preliminary point, it should be noted that a contract concluded at a trade fair may be classified as an ‘off-premises contract’ within the meaning of Article 2(8) of Directive 2011/83, provided that the contract was not concluded at a trade fair stand, which may be regarded as a ‘business premises’ within the meaning of Article 2(9) of that directive (see, to that effect, judgment of 7 August 2018, *Verbraucherzentrale Berlin*, C-485/17, EU:C:2018:642, paragraphs 43 to 46).

17 It is for the referring court to verify, in accordance with the case-law referred to in the preceding paragraph, whether, in the light of the facts before it, the contract at issue must indeed be regarded as an ‘off-premises contract’ within the meaning of Article 2(8) of Directive 2011/83.

18 If so, it should be recalled that Articles 9 to 15 of Directive 2011/83 grant the consumer a right of withdrawal following, inter alia, the conclusion of an off-premises contract, within the meaning of Article 2(8) of that directive, and lay down the conditions and detailed rules for the exercise of that right.

19 Thus, in accordance with Article 9(1) of Directive 2011/83, the consumer has, in principle, a period of 14 days to withdraw from an off-premises contract, without, inter alia, incurring costs other than those provided for in Article 13(2) and Article 14 of that directive.

20 However, Article 16 of that directive provides for exceptions to the right of withdrawal, in particular in the case, referred to in point (c) of that article, of off-premises contracts for ‘the supply of goods made to the consumer’s specifications or clearly personalised’.

21 In that respect, according to the Court’s settled case-law, where provisions of EU law do not refer to the law of the Member States for the purpose of determining their meaning and scope, they must be given an autonomous and uniform interpretation throughout the European Union, which interpretation must take into account not only the wording of those provisions but also their context and the objective pursued by the legislation in question (see, to that effect, judgment of 16 July 2020, *AFMB*, C-610/18, EU:C:2020:565, paragraph 50 and the case-law cited).

22 It is apparent from the wording of Article 16 of Directive 2011/83 that the Member States are required to provide, in the national legislation transposing that directive, that the consumer cannot rely on his or her right of withdrawal where, inter alia, certain events have occurred after the conclusion of the off-premises contract. Those include the circumstances referred to in Article 16(a), (e), (i) and (m), which relate to the performance of such a contract.

23 Under those provisions, that exception applies to, respectively, ‘service contracts after the service has been fully performed if the performance has begun with the consumer’s prior express consent’, ‘the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery’, ‘the supply of sealed audio or sealed video

recordings or sealed computer software which were unsealed after delivery’ and ‘the supply of digital content which is not supplied on a tangible medium if the performance has begun with the consumer’s prior express consent’.

24 However, there is nothing in the wording of Article 16(c) of Directive 2011/83 to indicate that the exception to the right of withdrawal provided for in that provision is dependent on the occurrence of any event subsequent to the conclusion of the off-premises contract relating to ‘the supply of goods made to the consumer’s specifications or clearly personalised’. On the contrary, it is expressly apparent from that wording that that exception is inherent in the very subject matter of such a contract, namely the production of goods manufactured to the consumer’s specifications, within the meaning of Article 2(4) of that directive, with the result that that exception applies from the outset to that consumer, without being conditional on the occurrence of such an event and irrespective of whether that contract has been performed or whether it is being performed by the trader.

25 That interpretation, which is consistent with the wording of Article 16(c) of Directive 2011/83, is supported by the context of that provision, in particular as regards the obligation, laid down in Article 6(1)(h) and (k) thereof, to inform the consumer, before he or she is bound by a distance or off-premises contract or by an offer of the same type, of the existence or absence of the right of withdrawal.

26 In that regard, the Court has held that Article 6(1) of Directive 2011/83 seeks to ensure the communication to consumers, before the conclusion of a contract, both of information concerning the contractual terms and the consequences of that conclusion, allowing consumers to decide whether they wish to be contractually bound to a trader, and of information necessary for proper performance of that contract and, in particular, for the exercise of their rights (judgment of 10 July 2019, *Amazon EU*, C-649/17, EU:C:2019:576, paragraph 43 and the case-law cited).

27 A situation in which the existence of the consumer’s right of withdrawal would be conditional on a future event, the occurrence of which depends on a decision by the trader, would not be reconcilable with that obligation to provide pre-contractual information.

28 Furthermore, as regards the objectives pursued by Directive 2011/83, it is apparent from, *inter alia*, recitals 7 and 40 of that directive that it is intended to enhance the legal certainty of transactions between a trader and a consumer.

29 The interpretation of Article 16(c) of Directive 2011/83 referred to in paragraph 24 of the present judgment contributes to the attainment of that objective, inasmuch as it prevents a situation in which the existence or absence of the consumer’s right to withdraw from the contract would depend on the state of progress of the performance of that contract by the seller or supplier, a state of progress of which the consumer is not, as a general rule, informed and over which he or she has, *a fortiori*, no control.

30 It follows from all the foregoing considerations that the answer to the question referred is that Article 16(c) of Directive 2011/83 must be interpreted as meaning that the exception to the right of withdrawal laid down in that provision may be relied on against a consumer who has concluded an off-premises contract for the sale of goods which are to be made to his or her specifications, irrespective of whether the trader has begun to produce those goods.

Costs

31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Sixth Chamber) hereby rules:

Article 16(c) 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 laid down in that provision may be relied on against a consumer who has concluded an off-premises contract for the sale of goods which are to be made to his or her specifications, irrespective of whether the trader has begun to produce those goods.

[Signatures]

* Language of the case: German.