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ECLI:EU:C:2020:808

Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

8 October 2020 (\*)

(Reference for a preliminary ruling – Consumer protection – Directive 2011/83/EU – Point 11 of Article 2, Article 14(3) and Article 16(m) – Distance contract – Supply of digital content and digital services – Right of withdrawal – Obligations of the consumer in the event of withdrawal – Determination of the amount to be paid by the consumer for the services provided before the exercise of the right of withdrawal – Exception to the right of withdrawal in the case of the supply of digital content)

In Case C-641/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Hamburg (Local Court, Hamburg, Germany), made by decision of 23 August 2019, received at the Court on 30 August 2019, in the proceedings

**EU**

v

**PE Digital GmbH**

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:

- EU, by T. Meier-Bading, Rechtsanwalt,
- PE Digital GmbH, by C. Rohnke, Rechtsanwalt,
- the Belgian Government, by P. Cottin and S. Baeyens, acting as Agents,
- the European Commission, by 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 point 11 of Article 2, Article 14(3) and Article 16(m) 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 EU, as a consumer, and PE Digital GmbH concerning the amount owed to the latter following the exercise by EU of the right to withdraw from a contract concluded with that company.

### **Legal context**

#### ***European Union law***

3 Recitals 4, 19 and 50 of Directive 2011/83 state:

‘(4) ... The harmonisation of certain aspects of consumer distance ... 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.

...

(19) Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. Contracts for the supply of digital content should fall within the scope of this directive. ... Contracts for digital content which is not supplied on a tangible medium should be classified, for the purpose of this directive, neither as sales contracts nor as service contracts. For such contracts, the consumer should have a right of withdrawal unless he has consented to the beginning of the performance of the contract during the withdrawal period and has acknowledged that he will consequently lose the right to withdraw from the contract. ...

...

(50) On the one hand, the consumer should benefit from his right of withdrawal even in case he has asked for the provision of services before the end of the withdrawal period. On the other, if the consumer exercises his right of withdrawal, the trader should be assured to be adequately paid for the service he has provided. The calculation of the proportionate amount should be based on the price agreed in the contract unless the consumer demonstrates that that total price is itself disproportionate, in which case the amount to be paid shall be calculated on the basis of the market value of the service provided. The market value should be defined by comparing the price of an equivalent service performed by other traders at the time

of the conclusion of the contract. Therefore the consumer should request the performance of services before the end of the withdrawal period by making this request expressly and, in the case of off-premises contracts, on a durable medium. Similarly, the trader should inform the consumer on a durable medium of any obligation to pay the proportionate costs for the services already provided. ...'

4 Under Article 2 of that directive, entitled 'Definitions':

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

...

(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.

...

(11) "digital content" means data which are produced and supplied in digital form;

...'

5 Article 7 of Directive 2011/83, entitled 'Formal requirements for off-premises contracts', provides, in paragraph 3 thereof:

'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 such an express request on a durable medium.'

6 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.'

7 Article 14 of Directive 2011/83, 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).

...'

8 Under Article 16 of that directive, entitled 'Exceptions from the right of withdrawal':

'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:

...

(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***

9 Paragraph 312f(3) of the Bürgerliches Gesetzbuch (German Civil Code; 'the BGB') defines digital content as 'content that is not contained in a tangible medium and that is produced and made available in digital form'.

10 Paragraph 356 of the BGB, entitled 'Right of withdrawal in off-premises contracts and distance contracts', provides, in paragraph 5 thereof:

'In the case of a contract for the supply of digital content that is not contained in a tangible medium, the right of withdrawal also expires if the trader began to perform the contract after the consumer

1. had expressly consented to the trader performing the contract prior to expiry of the withdrawal period, and
2. had acknowledged that, by his consent, he would lose the right to withdraw from the contract upon commencement of performance of the contract.'

11 Paragraph 357 of the BGB states, in (8) and (9) thereof:

'(8) Where the consumer withdraws from a contract for the provision of services or the supply of water, gas, or electricity, without their supply having been offered for sale in a limited volume or set quantity, or for the supply of distance heating, the consumer shall owe the trader compensation for the performance provided until the time of the withdrawal in those cases in which the consumer has expressly required that the trader begin the performance prior to expiry of the withdrawal period. The right under the first sentence exists only in those cases in which the trader has informed the consumer of the right of withdrawal pursuant to points 1 and 3 of the first sentence of Paragraph 1(2) of Article 246a of the Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Law to the BGB). For off-premises contracts, the right under the first sentence exists only in those cases in which the consumer has transmitted his request under the first sentence on a durable medium. In calculating the compensation payment, the total

price agreed upon is to be used as a basis. If the total price agreed upon is excessive, the compensation payment shall be calculated on the basis of the market value of the performance provided.

(9) Where the consumer withdraws from a contract for the supply of digital content that is not contained in a tangible medium, he shall not pay compensation for the services received.'

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

12 PE Digital, a company with its registered office in Germany, operates the dating website 'Parship' ([www.parship.de](http://www.parship.de)). It offers its users two forms of membership, namely a free, basic membership with an extremely limited ability to contact other users, and a paid 'premium' membership for a period of 6, 12 or 24 months. The latter membership enables users, during the term of their membership, to contact any other 'premium' member, namely any one of over 186 000 users across Germany, and to exchange information and images with that member.

13 'Premium' membership also includes the 'contact' guarantee, which guarantees the materialisation of a certain number of contacts with other users. A contact is thus considered to be any response, read by the user concerned, to a message sent by that user and any message received by that user following which that user has read and exchanged at least two messages with another user.

14 An average of 31.3 messages are sent and received in the first week of the period of 'premium' membership, 8.9 in the second week, 6.1 in the third week, 5.1 in the fourth week and fewer than five from the fifth week.

15 For each member, a selection of partner recommendations in the same *Land* is automatically provided immediately following registration on the basis of an approximately 30-minute personality test regarding partnership-relevant characteristics, habits and interests. With a 12-month 'premium' membership, that selection already makes up around half of all the partner recommendations received by the member during the term of the contract concluded. The algorithm for the personality test was created and developed under the direction of a qualified psychologist. 'Premium' members receive the result of that computer-generated test in the form of a 50-page 'personality report' which can be acquired by 'basic' members for a fee as a sub-service.

16 On 4 November 2018, EU, as a consumer, concluded a contract with PE Digital for a 12-month 'premium' membership for a price of EUR 523.95 ('the contract at issue'). That price was more than twice as high as that which PE Digital charged some of its other users for a contract for the same term concluded in the same year. In accordance with the requirements of points 1 and 3 of the first sentence of Paragraph 1(2) of Article 246a of the Introductory Law to the BGB, PE Digital informed EU of her right of withdrawal and EU confirmed to PE Digital that the latter was to begin to supply the service provided for in the contract before the expiry of the withdrawal period.

17 After EU had withdrawn from the contract at issue on 8 November 2018, PE Digital charged her a total amount of EUR 392.96 by way of compensation for the service used.

18 By an action brought before the Amtsgericht Hamburg (Local Court, Hamburg, Germany), EU sought the repayment of all the payments made to PE Digital.

19 Relying on the European Commission's Guidance Document concerning Directive 2011/83, drawn up in June 2014, and in particular on section 6.5.1. thereof, which relates to Article 14(3) of that directive, the referring court takes the view that, where the overall service includes distinguishable sub-services, which are not all provided simultaneously in accordance with the contract, account should be taken of the duration of each of those sub-services for the calculation of the amount of the compensation owed to the trader.

20 As regards the calculation of the ‘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’, within the meaning of Article 14(3) of Directive 2011/83, the referring court considers taking into account not only the service provided by the trader, but also the value of the service carried out, which the consumer received.

21 The referring court states that the compensation that the consumer is required to pay to the trader in the event of withdrawal from the contract concluded, in accordance with Article 14(3) of Directive 2011/83 and Paragraph 357(8) of the BGB, must be calculated, in the first place, by distinguishing from one another the individual sub-services provided for in the contract. In the second place, it is necessary to define prices for the individual sub-services, taking into account their value for the average consumer in the light of the purpose underlying the contract, using as a basis statistics relating to consumer behaviour. In the third place, the elements of the amount to be paid for the individual sub-services should be calculated in the light, first, of the extent to which the sub-services have already been provided and, second, of the value of the services performed. In the fourth place, the sum of the amounts thus calculated is the total amount owed by the consumer.

22 In that regard, the referring court takes the view that the provision of the personality report at the beginning of the performance of the contract at issue could nevertheless, as a distinguishable sub-service, be classified as the supply of digital content which is not supplied on a tangible medium, which would lead to the application of the derogations set out in Article 14(4)(b)(ii) and Article 16(m) of Directive 2011/83, and in Paragraph 356(5) and Paragraph 357(9) of the BGB.

23 However, that interpretation would lead to the consumer being refused the right of withdrawal and would thus infringe that consumer’s rights.

24 Furthermore, referring to Article 14(3) of Directive 2011/83, read in the light of recital 50 thereof, the referring court takes the view that a total price which is twice as high as that charged to other users for the same service is not ‘excessive’ within the meaning of that provision as long as it does not reach or only marginally exceeds the market value of the service provided.

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

‘(1) Is Article 14(3) of Directive 2011/83 ..., with regard to recital 50 thereof, to be interpreted as meaning that the “amount” to be paid by the consumer “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” is to be calculated on a purely *pro rata temporis* basis in the case of a contract according to the content of which an overall service made up of several sub-services, rather than a single service, is to be provided, if the consumer pays for the overall service on a *pro rata temporis* basis, but the sub-services are provided within different intervals?

(2) Is Article 14(3) of Directive 2011/83 to be interpreted as meaning that the “amount” to be paid by the consumer “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” is to be calculated on a purely *pro rata temporis* basis even if a (sub-)service is continuously provided, but has a higher or lower value for the consumer at the beginning of the contract term?

(3) Are point 11 of Article 2 of Directive 2011/83 and point 1 of Article 2 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)] to be interpreted as meaning that files which are supplied as a sub-service within the scope of an overall service principally provided as a

“digital service” within the meaning of point 2 of Article 2 of Directive 2019/770 may also constitute “digital content” within the meaning of Article 2.11 of Directive 2011/83 and point 1 of Article 2 of Directive 2019/770, with the result that the trader could terminate the right of withdrawal under Article 16(m) of Directive 2011/83 with regard to the sub-service, but the consumer, if the trader fails to do so, could withdraw from the contract as a whole and would not have to pay compensation for that sub-service by reason of Article 14(4)(b)(ii) of Directive 2011/83?

(4) Is Article 14(3) of Directive 2011/83, with regard to recital 50 thereof, to be interpreted as meaning that the total price contractually agreed for a service within the meaning of the third sentence of Article 14(3) of Directive 2011/83 is “excessive” if it is significantly higher than the total price agreed with another consumer for a service that is identical in terms of content provided by the same trader for the same contract term and, furthermore, under the same framework conditions?’

### **Consideration of the questions referred**

#### ***The first and second questions***

26 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 14(3) of Directive 2011/83 must be interpreted as meaning that, in order to determine the proportionate amount to be paid by the consumer to the trader where that consumer has expressly requested that the performance of the contract concluded begin during the withdrawal period and withdraws from that contract, it is appropriate to take account of the price agreed in the contract for the full coverage of the contract and to calculate the amount owed *pro rata temporis*, or whether it is appropriate to take account of the fact that one of the services covered by the contract was provided to the consumer in full before the latter’s withdrawal.

27 In that regard, it should be recalled that, under Article 14(3) of Directive 2011/83, where a consumer who has requested that the trader begin the performance of the contract before the expiry of the withdrawal period exercises the right of withdrawal in that context, that consumer is required to pay that 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’. That provision also states that ‘the proportionate amount to be paid ... shall be calculated on the basis of the total price agreed in the contract’.

28 The proportionate amount that must be paid by the consumer in accordance with Article 14(3) of Directive 2011/83 must be calculated, in principle, by taking into account all the services covered by the contract, namely the principal service and the ancillary services that are necessary to ensure the performance of that principal service. Where the parties to the contract agree a price for the services provided, that price corresponds, in principle, to the value of all those services, both principal and ancillary.

29 It is only where the contract expressly provides that one or more of the services are to be provided in full from the beginning of the performance of the contract and separately, for a price which must be paid separately, that the consumer may properly decide whether to make an express request, in accordance with Article 7(3) of Directive 2011/83, that the trader begin the performance of services during the period for the exercise of the right of withdrawal. It is therefore only in such a case that the full price for such a service should be taken into account in the calculation of the amount owed to the trader under Article 14(3) of that directive.

30 The interpretation, set out in paragraphs 28 and 29 of this judgment, corresponds to the objective, stated in recital 4 of Directive 2011/83, of ensuring the right balance between a high level of consumer protection and the competitiveness of undertakings (see, by analogy, judgments of 23 January 2019,

*Walbusch Walter Busch*, C-430/17, EU:C:2019:47, paragraph 41; of 27 March 2019, *slewo*, C-681/17, EU:C:2019:255, paragraph 39; and of 10 July 2019, *Amazon EU*, C-649/17, EU:C:2019:576, paragraph 44).

31 In the present case, however, the contract at issue did not provide for a separate price for any service that could be regarded as separable from the principal service provided for in that contract.

32 In light of the foregoing, the answer to the first and second questions is that Article 14(3) of Directive 2011/83 must be interpreted as meaning that, in order to determine the proportionate amount to be paid by the consumer to the trader where that consumer has expressly requested that the performance of the contract concluded begin during the withdrawal period and withdraws from that contract, it is appropriate, in principle, to take account of the price agreed in the contract for the full coverage of the contract and to calculate the amount owed *pro rata temporis*. It is only where the contract concluded expressly provides that one or more of the services are to be provided in full from the beginning of the performance of the contract and separately, for a price which must be paid separately, that the full price for such a service should be taken into account in the calculation of the amount owed to the trader under Article 14(3) of that directive.

#### ***The fourth question***

33 By its fourth question, which it is appropriate to examine in the second place, the referring court seeks, in essence, to ascertain which criteria should be applied for the purpose of assessing whether the total price is excessive within the meaning of Article 14(3) of Directive 2011/83.

34 In that regard, it should be recalled that, in accordance with that provision, ‘if the total price is excessive, the proportionate amount shall be calculated on the basis of the market value of what has been provided’.

35 Article 14(3) of Directive 2011/83 must be interpreted in the light of recital 50 thereof, which states that the market value should be defined by comparing the price of an equivalent service performed by other traders at the time of the conclusion of the contract.

36 It follows that all the circumstances relating to the market value of the service provided are relevant for the purpose of assessing whether the total price is potentially excessive, namely the comparison both with the price charged by the trader concerned to other consumers under the same conditions and with the price of an equivalent service provided by other traders.

37 In light of the foregoing, the answer to the fourth question is that Article 14(3) of Directive 2011/83, read in the light of recital 50 thereof, must be interpreted as meaning that, in order to assess whether the total price is excessive within the meaning of that provision, account should be taken of the price of the service offered by the trader concerned to other consumers under the same conditions and that of the equivalent service supplied by other traders at the time of the conclusion of the contract.

#### ***The third question***

38 By its third question, which it is appropriate to examine last, the referring court asks, in essence, what consequence is to be drawn, for the purpose of determining the amount to be paid by the consumer to the trader in accordance with Article 14(3) of Directive 2011/83, from the fact that one of the services covered by the contract concluded concerns the supply of digital content which is not supplied on a tangible medium, which cannot be the subject of a withdrawal by the consumer pursuant to Article 16(m) of that directive.

39 As is apparent from the order for reference, the service with which the third question is concerned consists in the provision of the personality report, referred to in paragraph 15 of this judgment, to the consumer.



40 In that regard, the referring court is uncertain as to the relevance, in the case in the main proceedings, of Article 16(m) of Directive 2011/83, under which Member States are not to provide for a right of withdrawal in respect of distance contracts for 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 the consumer's acknowledgment that the right of withdrawal is thereby lost.

41 It should be recalled that point 11 of Article 2 of Directive 2011/83 defines 'digital content' as: 'data which are produced and supplied in digital form'.

42 As stated in recital 19 of that directive, 'digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means'.

43 Article 16(m) of Directive 2011/83, which constitutes an exception to the right of withdrawal, is, as a provision of EU law which restricts the rights granted for reasons relating to consumer protection, to be interpreted strictly (see, by analogy, judgment of 14 May 2020, *NK (Planning for the construction of a new single-family house)*, C-208/19, EU:C:2020:382, paragraphs 40 and 56 and the case-law cited).

44 In those circumstances, a service, such as that provided by the dating website at issue in the main proceedings, that allows the consumer to create, process, store or access data in digital form and allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service, cannot, as such, be regarded as the supply of 'digital content' within the meaning of Article 16(m) of Directive 2011/83, read in conjunction with Article 2(11) of that directive and in the light of recital 19 thereof.

45 Similarly, nor can the generation of a personality report, such as that referred to in paragraph 15 of this judgment, by a dating website be regarded as falling within the exception provided for in Article 16(m) of Directive 2011/83, read in conjunction with Article 2(11) thereof.

46 In light of all the foregoing, the answer to the third question is that Article 16(m) of Directive 2011/83, read in conjunction with Article 2(11) thereof, must be interpreted as meaning that the generation of a personality report by a dating website on the basis of a personality test carried out by that website does not constitute the supply of 'digital content' within the meaning of that provision.

### **Costs**

47 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 (Sixth Chamber) hereby rules:

**1. Article 14(3) 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, in order to determine the proportionate amount to be paid by the consumer to the trader where that consumer has expressly requested that the performance of the contract concluded begin during the withdrawal period and withdraws from that contract, it is appropriate, in principle, to take account of the price agreed in the contract for the full coverage of the contract and to calculate the amount owed *pro rata temporis*. It is only where the contract concluded expressly provides that one or more of the services are to be provided in full from the beginning of the performance of the contract and separately, for a price which**

must be paid separately, that the full price for such a service should be taken into account in the calculation of the amount owed to the trader under Article 14(3) of that directive.

2. Article 14(3) of Directive 2011/83, read in the light of recital 50 thereof, must be interpreted as meaning that, in order to assess whether the total price is excessive within the meaning of that provision, account should be taken of the price of the service offered by the trader concerned to other consumers under the same conditions and that of the equivalent service supplied by other traders at the time of the conclusion of the contract.

3. Article 16(m) of Directive 2011/83, read in conjunction with point 11 of Article 2 thereof, must be interpreted as meaning that the generation of a personality report by a dating website on the basis of a personality test carried out by that website does not constitute the supply of 'digital content' within the meaning of that provision.

[Signatures]

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\* Language of the case: German.

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