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Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

5 March 2026 (*)

(Reference for a preliminary ruling – Consumer protection – Directive 2011/83/EU – Distance contract concluded between a consumer and a trader – Concept of ‘consumer’ – Contact established between the consumer and the trader by another trader commissioned by the consumer – Article 2(7) – Right of withdrawal of the consumer – Article 9(1) – Abuse of rights)

In Case C564/24,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kammergericht Berlin (Higher Regional Court, Berlin, Germany), made by decision of 9 April 2024, received at the Court on 20 August 2024, in the proceedings

Eisenberger Gerüstbau GmbH

v

JK,

THE COURT (Fifth Chamber),

composed of M.L. Arastey Sahún (Rapporteur), President of the Chamber, J. Passer, E. Regan, D. Gratsias and B. Smulders, Judges,

Advocate General: A. Biondi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Czech Government, by M. Smolek, S. Šindelková and J. Vlášil, acting as Agents,
- the European Commission, by P. Kienapfel and I. Rubene, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 September 2025,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(7), Article 9(1), Article 14(4)(a) and 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 Eisenberger Gerüstbau GmbH, an undertaking governed by German law, and JK, concerning the payment of remuneration for the making available and erection of scaffolding by that undertaking.

Legal context

European Union law

3 Recitals 4, 5, 7, 14, 17, 20 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, while ensuring respect for the principle of subsidiarity.

(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. ... Furthermore consumers should enjoy a high common level of protection across the [European] Union.

...

(14) This Directive should not affect national law in the area of contract law for contract law aspects that are not regulated by this Directive. Therefore, this Directive should be without prejudice to national law regulating for instance the conclusion or the validity of a contract (for instance in the case of lack of consent). Similarly, this Directive should not affect national law in relation to the general contractual legal remedies, the rules on public economic order, for instance rules on excessive or extortionate prices, and the rules on unethical legal transactions.

...

(17) The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer.

...

(20) ... The notion of an organised distance sales or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform. It should not, however, cover cases where websites merely offer information on the trader, his goods and/or services and his contact details.

...

(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 is worded as follows:

'The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts concluded between consumers and traders.'

5 Article 2 of that directive provides:

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

(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;

(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;

(b) for which an offer was made by the consumer in the same circumstances as referred to in point (a);

(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

(d) concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer;

...

(15) "ancillary contract" means a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and where those goods are supplied or those services are provided by the trader or by a third party on the basis of an arrangement between that third party and the trader;'

6 Article 3(5) of that directive provides:

‘This Directive shall not affect national general contract law such as the rules on the validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in this Directive.’

7 Under Article 4 of Directive 2011/83:

‘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.’

8 Article 6(1) of that directive is worded as follows:

‘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);

...’

9 Under Article 9 of that directive:

‘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.

2. Without prejudice to Article 10, the withdrawal period referred to in paragraph 1 of this Article shall expire after 14 days from:

(a) in the case of service contracts, the day of the conclusion of the contract;

...

3. The Member States shall not prohibit the contracting parties from performing their contractual obligations during the withdrawal period. ...’

10 Article 10 of that directive provides:

‘1. 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).

2. If the trader has provided the consumer with the information provided for in paragraph 1 of this Article within 12 months from the day referred to in Article 9(2), the withdrawal period shall expire 14 days after the day upon which the consumer receives that information.’

11 Under Article 11(1) of Directive 2011/83:

‘Before the expiry of the withdrawal period, the consumer shall inform the trader of his decision to withdraw from the contract. For this purpose, the consumer may either:

(a) use the model withdrawal form as set out in Annex I(B); or

(b) make any other unequivocal statement setting out his decision to withdraw from the contract.

Member States shall not provide for any formal requirements applicable to the model withdrawal form other than those set out in Annex I(B).’

12 Article 12 of that directive provides:

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

- (a) to perform the distance or off-premises contract; or
- (b) to conclude the distance or off-premises contract, in cases where an offer was made by the consumer.’

13 The first subparagraph of Article 13(1) of that directive is worded as follows:

‘The trader shall reimburse all payments received from the consumer, including, if applicable, the costs of delivery without undue delay and in any event not later than 14 days from the day on which he is informed of the consumer’s decision to withdraw from the contract in accordance with Article 11.’

14 Under Article 14 of that directive:

‘...

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

...

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.’

15 Article 15 of Directive 2011/83 provides:

‘1. Without prejudice to Article 15 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers [and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66)], if the consumer exercises his right of withdrawal from a distance or an off-premises contract in accordance with Articles 9 to 14 of this Directive, any ancillary contracts shall be automatically terminated, without any costs for the consumer, except as provided for in Article 13(2) and in Article 14 of this Directive.

2. The Member States shall lay down detailed rules on the termination of such contracts.’

16 Article 24(1) of that directive is worded as follows:

‘Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.’

German law

17 Paragraph 242 of the Bürgerliches Gesetzbuch (Civil Code; ‘the BGB’) provides:

‘The obligor shall be bound to perform in good faith, taking account of customary practice.’

18 Paragraph 312c of the BGB provides:

‘(1) “Distance contracts” shall mean contracts where the trader, or a person acting in the trader’s name or on that trader’s behalf, and the consumer exclusively use means of distance communication for the negotiation and conclusion of the contract, except where the conclusion of the contract does not take place under an organised distance sales or service-provision scheme.

(2) Means of distance communication within the meaning of this Code shall mean all means of communication that can be used for the preparation or conclusion of a contract without the simultaneous physical presence of the contracting parties, such as letters, catalogues, telephone calls, faxes, electronic mail, text messages sent via mobile telephone service (SMS) as well as broadcasting and telemedia.’

19 Paragraph 357 of the BGB is worded as follows:

‘(1) The benefits received must be restituted within 14 days at the latest.

...

(8) Where the consumer withdraws from a contract for the provision of services ..., the consumer shall owe the trader compensation for the value of the benefit provided until the withdrawal, if the consumer has expressly requested the trader to begin performance before the expiry of the withdrawal period. The right arising under the first sentence shall exist only if the trader has duly informed the consumer pursuant to points 1 and 3 of the first sentence of Article 246a(1)(2) of the Einführungsgesetz zum Bürgerlichen Gesetzbuch [(Introductory Law to the BGB)]. ... In calculating the compensation for the value, the total price agreed upon shall be used as a basis. If the total price agreed upon is excessive, the compensation for the value shall be calculated on the basis of the market value of the benefit provided.

...’

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

20 Eisenberger Gerüstbau provides, as a business, scaffolding for rental, which it erects and then dismantles on behalf of its customers. JK, who is a federal civil servant in Germany, owns a plot of land in Berlin on which a multi-storey block of flats is built.

21 In 2020, JK decided to convert the top floor of that building for her own residential purposes, by adding two new floors comprising a total of four residential units. To that end, she commissioned an architect to plan and oversee the building works, who was also entrusted with drawing up specifications for the work required in that regard, obtaining offers from specialist undertakings and, ultimately, participating in the conclusion of the contracts by drawing up draft contracts (‘the architect’). As part of those tasks, that architect sent Eisenberger Gerüstbau, inter alia, specifications for the making available and erection of scaffolding, inviting it to submit an offer on that basis. That undertaking accepted those specifications, indicating unit prices and an estimated total gross price of EUR 45 663.18, signed those specifications on 24 April 2020 and sent them back to the architect.

22 The architect selected Eisenberger Gerüstbau as the specialist undertaking to carry out the work of making available and erecting the scaffolding. He drew up a draft contract accordingly, which was based on the offer of 24 April 2020, and, on 14 December 2020, sent that draft contract by email to both parties, namely Eisenberger Gerüstbau and JK. There was no indication in that draft that JK would be entitled to withdraw from the contract. Eisenberger Gerüstbau signed the draft contract on 14 December 2020, without making any amendments to it, and sent it to JK. JK also signed that draft contract, on 15 December 2020, and returned the copy signed by both parties to Eisenberger Gerüstbau by post (‘the contract at issue’).

23 On 1 January 2021, Eisenberger Gerüstbau sent JK, by email, an offer that was supplementary to the contract at issue (‘addendum’), relating to two additional loading bay platforms at a gross cost of

EUR 7 730.00 for the installation, dismantling and maintenance of that equipment for four weeks, and, from the fifth week of the making available of that equipment, an additional hire fee totalling EUR 517.65 gross per week. JK signed that addendum and returned it to Eisenberger Gerüstbau by email on 22 January 2021. In January 2021, Eisenberger Gerüstbau began to erect the scaffolding.

24 On 26 January 2021, Eisenberger Gerüstbau made the scaffolding available to JK for use in the construction works planned for the building in question. By the end of May 2021, JK had paid Eisenberger Gerüstbau a total amount of EUR 95 937.84 in settlement of progress invoices issued by that undertaking.

25 By letter of 7 December 2021, JK informed Eisenberger Gerüstbau that she was revoking her declarations of intent to conclude the contract at issue and the addendum; in addition, she refused to make further payments on that basis and claimed reimbursement of the progress payments made in the amount of EUR 95 937.84. In December 2021, all the construction works envisaged by JK for which scaffolding had been indispensable were completed. At JK's request, the scaffolding was dismantled on 20 December 2021.

26 Eisenberger Gerüstbau brought an action against JK before the Landgericht Berlin (Regional Court, Berlin, Germany), seeking payment of what it considered to be the remuneration that had remained unpaid as at the date of that action, namely an amount of EUR 101 000.25, payable under the contract for the erection of the scaffolding. In those proceedings, JK lodged a counterclaim for reimbursement of the progress payments made in the amount of EUR 95 937.84.

27 By a judgment of 19 May 2023, the Landgericht Berlin (Regional Court, Berlin) dismissed the action and upheld the counterclaim in its entirety.

28 Eisenberger Gerüstbau lodged an appeal against that judgment with the Kammergericht Berlin (Higher Regional Court, Berlin, Germany), which is the referring court.

29 The referring court considers that the contract at issue concluded through the architect, who acted as a negotiating agent, does not come within the scope of Paragraph 312c(1) of the BGB, which transposes Article 2(7) of Directive 2011/83 into German law.

30 In that regard, the referring court states that it is true that, until the conclusion of that contract, Eisenberger Gerüstbau, on the one hand, and JK and the architect, on the other, communicated exclusively by means of distance communication, namely by post or by email. However, JK's recourse to the architect, who is a trader, in order to prepare the contract precludes the protection under Paragraph 312c of the BGB from being applicable.

31 According to the referring court, in accordance with the drafting history relating to the adoption of Paragraph 312c of the BGB and the case-law of the Bundesgerichtshof (Federal Court of Justice, Germany), the objective of that provision, which is also based on recital 37 of Directive 2011/83, is to protect consumers who cannot test the goods or services in question before the conclusion of the contract and who are unable to obtain further information in that regard.

32 The referring court states that there is no failure to inform the consumer in a case, such as that before it, in which that consumer has recourse to a trader as a negotiating agent, who has sufficient know-how as regards the services that are the subject of the contract and is available to answer any questions from the consumer in that regard.

33 In any event, according to the referring court, the consumer does not enjoy a right of withdrawal from a contract where a trader acting as a negotiating agent defines the subject of performance and contacts the trader who is the other party to the contract with that consumer only in order to clarify certain terms and conditions of the contract.

34 The referring court states that if a consumer does not have the right to revoke his or her declaration of intent to conclude the main contract, such a right also cannot be recognised in respect of supplementary agreements or addenda relating to that contract.

35 If JK's right to withdraw from the contract at issue were nevertheless recognised in the present case, the referring court considers that Eisenberger Gerüstbau would not be entitled to receive remuneration for the service provided and, in accordance with Paragraph 357(8) of the BGB and Article 14(4)(a) and Article 14(5) of Directive 2011/83, would also not be entitled to compensation.

36 The referring court considers that a situation in which a consumer who has withdrawn from a contract, in circumstances such as those of the case before it, refuses to pay compensation to the trader with whom he or she was bound by that contract could be classified as contrary to the requirement of good faith.

37 However, the referring court is uncertain whether that assessment is consistent with the judgment of 17 May 2023, *DC (Withdrawal after performance of the contract)* (C97/22, EU:C:2023:413), in which the Court of Justice held that Article 14(4)(a) and Article 14(5) of Directive 2011/83 must be interpreted as meaning that they exempt 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.

38 In those circumstances the Kammergericht Berlin (Higher Regional Court, Berlin) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a contract a distance contract within the meaning of Article 2(7) of [Directive 2011/83] for which a right of withdrawal exists under Article 9(1) of that directive if, before or at the time of conclusion of the contract, the consumer is assisted by a trader whom he or she has commissioned independently of the service provider?

(2) If the Court answers [the first question] in the affirmative:

Is a contract likewise a distance contract within the meaning of Article 2(7) of [Directive 2011/83] for which a right of withdrawal exists under Article 9(1) of that directive where one of the following additional conditions is fulfilled?

(a) It was the trader assisting the consumer who took the initiative to establish the contact between the consumer and the service provider.

(b) Prior to the conclusion of the contract, the trader assisting the consumer influenced key parts of its content, for example by drawing up specifications or providing a draft contract.

(3) If the Court were to consider that, in the cases referred to in [the first question and points (a) and (b) of the second question] above, the contract were not a distance contract for which a right of withdrawal existed:

If, after the conclusion of that contract, the parties, again with the exclusive use of means of distance communication, conclude another agreement, the object of which is the provision of additional services by the service provider which are of lesser importance than those covered by the first contract:

Is that additional agreement in itself a distance contract within the meaning of Article 2(7) of [Directive 2011/83] for which a right of withdrawal exists under Article 9(1) of that directive, or is it, like the main contract which it supplements, not subject to a right of withdrawal as a distance contract?

(4) If the consumer has exercised his or her right of withdrawal under a distance contract for which such a right exists after the other party to the contract has already provided services:

Notwithstanding Article 14(4)(a) and [Article 14](5) of [Directive 2011/83], can the consumer be required to pay the trader adequately for the services he or she has provided if any other outcome would, in the light of all the circumstances of the case, be abusive or constitute a breach of good faith?’

Consideration of the questions referred

The first and second questions

39 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2(7) of Directive 2011/83 must be interpreted as meaning that the fact that a consumer is assisted, before and at the time of the conclusion of a contract between him or herself and a trader, by another trader of that consumer’s choice, who took the initiative to establish the contact between the consumer and the first trader and who influenced key parts of the content of that contract, is relevant for the purpose of categorising that contract as a ‘distance contract’ within the meaning of that provision.

40 As a preliminary point, it must be recalled that, under that provision, in order for a contract to be categorised as a distance contract, three cumulative conditions must be satisfied. First, that contract must be concluded between a consumer and a trader, within the meaning of the definitions laid down in points 1 and 2 of Article 2 of Directive 2011/83, respectively. Second, it must be concluded under an organised distance sales or service-provision scheme. Third, the conclusion of that contract must take place without the simultaneous physical presence of the trader and the consumer, and the contractual relationship between the parties must be established with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.

41 It is true that the order for reference does not make it clear about which of those conditions the referring court has doubts. However, that court has stated that, until the conclusion of the contract, JK and the architect, on the one hand, and Eisenberger Gerüstbau, on the other, communicated exclusively by means of distance communication, namely by post or by email, from which it follows that that court considers the third of those conditions to be satisfied. It is therefore necessary to examine only the first two conditions.

42 In the first place, it is important to ascertain whether a person such as JK, who is the owner of a plot of land on which a multi-storey block of flats is built and who has had recourse to a trader, namely Eisenberger Gerüstbau, for the purpose of building two new floors, comprising a total of four residential units, must be categorised as a ‘consumer’ as regards the contract at issue.

43 In that regard, it must be recalled that, under Article 2(1) of Directive 2011/83, a ‘consumer’ is any natural person who, in contracts covered by that directive, is acting for purposes which are outside his or her trade, business, craft or profession.

44 In accordance with settled case-law, Directive 2011/83 seeks to provide a high level of protection for consumers who are in a weaker position in relation to traders, inasmuch as they must be deemed to be less informed, economically weaker and legally less experienced than the opposite party (see, to that effect, judgments of 27 March 2019, *slewo*, C681/17, EU:C:2019:255, paragraph 32, and of 14 May 2020, *NK (Design for a single-family house)*, C208/19, EU:C:2020:382, paragraph 39).

45 The concept of ‘consumer’ within the meaning of Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), which corresponds to the concept of ‘consumer’ within the meaning of Article 2(1) of Directive 2011/83, is objective in nature and is distinct

from the concrete knowledge the person in question may have, or from the information that person actually has (see, to that effect, judgments of 3 September 2015, *Costea*, C110/14, EU:C:2015:538, paragraph 21, and of 8 May 2025, *Pielatak*, C410/23, EU:C:2025:325, paragraph 36).

46 In order to determine whether the person in question may be categorised as a ‘consumer’, within the meaning of that provision, the national court must take into account all the circumstances of the case, particularly the nature of the goods or service covered by the contract at issue, capable of showing the purpose for which those goods or that service is being acquired (judgment of 8 June 2023, *YYY (Concept of ‘consumer’)*, C570/21, EU:C:2023:456, paragraph 55 and the case-law cited).

47 It is apparent from the explanations provided by the referring court that that court is uncertain whether or not the fact that JK was assisted by another trader of her choice, in the present case an architect, who influenced key parts of the content of the contract at issue, is relevant for the purpose of categorising JK as a consumer.

48 In that regard, first, as the Advocate General observed, in essence, in point 29 of his Opinion, the fact that, as in the case in the main proceedings, a consumer was assisted by a trader, in the present case an architect, in the context of the negotiation and conclusion of a contract between that consumer and another trader, is not such as to call into question the weaker position, referred to in the paragraph 44 above, of that consumer vis-à-vis that other trader, even though the trader who assisted that consumer took the initiative to establish the contact between that consumer and the other trader and influenced the content of that contract.

49 Second, as has been recalled in paragraph 45 above, it is necessary to adopt an interpretation of the concept of ‘consumer’, within the meaning of Article 2(1) of Directive 2011/83, which is objective in nature and is distinct from the concrete knowledge the person in question may have, or from the information that person actually has. Thus, the fact that that person was assisted by a trader is not such as to call into question his or her status as a consumer; nor does it mean, moreover, that the contract concerned has a trade purpose (see, to that effect, judgment of 3 September 2015, *Costea*, C110/14, EU:C:2015:538, paragraphs 21 and 25 to 27).

50 In the event that the referring court considers that JK must be categorised as a consumer for the purposes of the contract at issue in the main proceedings, it is necessary, in the second place, to examine whether, in the light of the facts set out by that court in its order for reference concerning the procedure for the conclusion of that contract between JK and Eisenberger Gerüstbau and the assistance provided in that context by the architect to whom JK had recourse, that contract must be regarded as having been concluded under an organised distance sales or service-provision scheme, within the meaning of Article 2(7) of Directive 2011/83.

51 In that regard, recital 20 of that directive states that the notion of an organised distance sales or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform, but should not cover cases where websites merely offer information on the trader, the trader’s goods and/or services and the trader’s contact details.

52 In the present case, it must be stated, as the Advocate General also observed in point 33 of his Opinion, that the file before the Court does not contain any information about any organised distance sales or service-provision scheme that might have been put in place by Eisenberger Gerüstbau. However, the facts set out by the referring court suggest that the contract at issue was not concluded under such a scheme. It follows from those facts that that contract was concluded on the basis of a draft contract prepared under the sole responsibility of JK, specifying the precise services with which she wished to entrust Eisenberger Gerüstbau; that draft was sent, by email, to that undertaking for signing, which it did without making any amendments to it. Therefore, even assuming that that undertaking had an organised

distance sales or service-provision scheme, it does not appear that the contract at issue in the main proceedings was concluded by means of such a scheme, which it is, however, for the referring court to ascertain.

53 In the light of all the foregoing considerations, the answer to the first and second questions is that Article 2(7) of Directive 2011/83 must be interpreted as meaning that the fact that a consumer is assisted, before and at the time of the conclusion of a contract between him or herself and a trader, by another trader of that consumer's choice, who took the initiative to establish the contact between the consumer and the first trader and who influenced key parts of the content of that contract, is not relevant for the purpose of categorising that contract as a 'distance contract' within the meaning of that provision.

The third question

54 By its third question, the referring court asks, in essence, whether Article 2(7) of Directive 2011/83 must be interpreted as meaning that, where the parties to a contract that cannot be categorised as a 'distance contract', within the meaning of that provision, conclude, using exclusively means of distance communication, an addendum to that contract regarding additional services that are of secondary importance in relation to the services under that contract, that addendum constitutes a 'distance contract' within the meaning of that provision.

55 In order to answer that question, it must, as a preliminary point, be recalled that Article 2(15) of Directive 2011/83 defines 'ancillary contract' as a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and where those goods are supplied or those services are provided by the trader or by a third party on the basis of an arrangement between that third party and the trader.

56 In that regard, Article 15 of that directive sets out the effects of the exercise of the right of withdrawal from a distance or an off-premises contract on ancillary contracts.

57 That said, that directive does not lay down any specific rules regarding the legal categorisation, as a distance contract, of an agreement amending another contract whose legal categorisation as a distance contract has been ruled out.

58 In those circumstances, in order to ascertain whether the contract amending another contract must be regarded as a 'distance contract' within the meaning of Article 2(7) of Directive 2011/83, the referring court will have to examine whether the conditions referred to in paragraph 40 above are satisfied with regard to the amending contract, in the present case that addendum to the contract at issue.

59 Accordingly, the answer to the third question is that Article 2(7) of Directive 2011/83 must be interpreted as meaning that, where the parties to a contract that cannot be categorised as a 'distance contract', within the meaning of that provision, conclude, using exclusively means of distance communication, an addendum to that contract regarding additional services that are of secondary importance in relation to the services under that contract, that addendum constitutes a 'distance contract' within the meaning of that provision, as long as the conditions laid down in that provision are satisfied.

The fourth question

60 By its fourth question, the referring court asks, in essence, whether Directive 2011/83 must be interpreted as meaning that, where a consumer has withdrawn from a distance contract at the end of the withdrawal period as extended in accordance with Article 10(1) of that directive and at a time when the services which are the subject of that contract and which are non-recoverable have already been provided, the trader may legitimately claim that that consumer has exercised the right of withdrawal in an abusive manner.

61 In that regard, Article 6(1)(h) of Directive 2011/83 provides that, before the consumer is bound by a distance contract, the trader is to provide the consumer, in a clear and comprehensible manner, with information on the conditions, time limit and procedures for exercising the right of withdrawal in accordance with Article 11(1) of that directive, as well as the model withdrawal form set out in Annex I(B) to that directive.

62 Furthermore, in accordance with Article 9(1) of Directive 2011/83, save where the exceptions provided for in Article 16 of that directive apply, the consumer is to 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 of that directive.

63 Moreover, under Article 9(2)(a) of Directive 2011/83, without prejudice to Article 10 thereof, the withdrawal period referred to in Article 9(1) is to expire, in the case of service contracts, after 14 days from the day of the conclusion of the contract.

64 That said, failure to provide the information referred to in Article 6(1)(h) of that directive gives rise, in accordance with Article 10(1) thereof, to an extension of 12 months to the initial withdrawal period, from the end of that period.

65 Furthermore, Article 14(4)(a)(i) of that directive states that the consumer is to bear no cost for the provision of services where the trader has failed to provide information in accordance with Article 6(1)(h) or (j) of that directive.

66 In addition, in accordance with Article 14(5) of Directive 2011/83, except as provided for in Article 13(2) of that directive and in Article 14 thereof, the consumer may not incur any liability as a consequence of the exercise of the right of withdrawal.

67 As a preliminary point, it must be stated that the question referred is based on the premiss that JK has satisfied the conditions governing the exercise of the right of withdrawal provided for in Article 9 of Directive 2011/83, read in conjunction with Article 10(1) of that directive.

68 It is therefore necessary to examine whether, in the event that the consumer withdraws, as JK has, from a distance contract during the withdrawal period as extended in accordance with Article 10(1) of Directive 2011/83, where services, which are non-recoverable, have already been provided by the trader under that contract, that trader may assert that the exercise by that consumer of the right of withdrawal is abusive.

69 In that regard, the Court of Justice has held that the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law (judgment of 21 December 2023, *BMW Bank and Others*, C38/21, C47/21 and C232/21, EU:C:2023:1014, paragraph 282).

70 Proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from those rules by artificially creating the conditions laid down for obtaining it (judgment of 21 December 2023, *BMW Bank and Others*, C38/21, C47/21 and C232/21, EU:C:2023:1014, paragraph 285).

71 In establishing such abuse, the referring court must take into account all the facts and circumstances of the case, including those subsequent to the transaction which is alleged to be abusive (judgment of 21 December 2023, *BMW Bank and Others*, C38/21, C47/21 and C232/21, EU:C:2023:1014, paragraph 286).

72 It is therefore for the national court to determine, in accordance with the rules of evidence of national law, provided that the effectiveness of EU law is not undermined, whether the constituent

elements of an abusive practice, as recalled in paragraph 70 above, are present in the dispute in the main proceedings. However, the Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (judgment of 21 December 2023, *BMW Bank and Others*, C38/21, C47/21 and C232/21, EU:C:2023:1014, paragraph 287).

73 As regards the existence of objective evidence of an abusive practice, as referred to in paragraph 70 above, it must be noted that, as is clear from Article 1 of Directive 2011/83, read in the light of recitals 4, 5 and 7 thereof, that directive seeks to provide a high level of consumer protection by ensuring that consumers are informed and secure in transactions with traders. The purpose of that directive is thus to afford consumers extensive protection by conferring on them a number of rights in relation to, inter alia, distance contracts, including the right of withdrawal. The objective of the EU legislature is to avoid a situation where the use of means of distance communication leads to a reduction in the information provided to the consumer (see, to that effect, judgment of 23 January 2019, *Walbusch Walter Busch*, C430/17, EU:C:2019:47, paragraphs 34 and 35).

74 In particular, Article 9 of Directive 2011/83 is intended to enable a consumer to choose the agreement best suited to his or her needs and, thus, to withdraw from an agreement that has been concluded but proves to be unsuitable to those needs in the course of the cooling-off period during which the right of withdrawal may be exercised. In that context, the aim of Article 10(1) of that directive is to ensure that consumers receive the information on the conditions, time limit and procedures for exercising the right of withdrawal, as well as the model withdrawal form, and to penalise traders who fail to provide them with that information (see, by analogy, judgment of 21 December 2023, *BMW Bank and Others*, C38/21, C47/21 and C232/21, EU:C:2023:1014, paragraph 288).

75 As the Advocate General observes, in essence, in points 54 to 56 of his Opinion, those aims are also pursued by Article 14(4)(a)(i) of Directive 2011/83, read in conjunction with Article 14(5) thereof, under which a consumer who has not received the information referred to in Article 6(1)(h) of that directive does not have to bear any costs owing to the exercise of his or her right of withdrawal.

76 In that regard, it is true that the Court has held, as regards the right of withdrawal provided for in Article 14(1) of Directive 2008/48, that, in order for the trader to be deterred from infringing his or her or its obligations to the consumer under that directive, where that trader has not provided the information listed in Article 10 of that directive and that consumer decides to withdraw from the credit agreement after the 14-day period following its conclusion, that trader cannot complain that the consumer has abusively exercised his or her right of withdrawal, even if a considerable length of time has elapsed between conclusion of that agreement and withdrawal by the consumer (judgments of 9 September 2021, *Volkswagen Bank and Others*, C33/20, C155/20 and C187/20, EU:C:2021:736, paragraphs 126 and 127, and of 21 December 2023, *BMW Bank and Others*, C38/21, C47/21 and C232/21, EU:C:2023:1014, paragraphs 289 and 290).

77 For similar reasons, the mere fact that the consumer has exercised his or her right of withdrawal provided for in Article 9(1) of Directive 2011/83 towards the end of the withdrawal period as extended pursuant to Article 10(1) of that directive cannot be regarded as sufficient, in itself, to serve as such objective evidence.

78 However, in the present case, not only did the consumer exercise her right of withdrawal towards the end of the period extended in that manner by 12 months from the end of the initial withdrawal period, but, as has been noted in paragraph 52 above and as the Advocate General also stated, in essence, in point 61 of his Opinion, the contract was concluded on the basis of a draft prepared under the sole responsibility of the consumer by an agent of her choice, in accordance with the information given by the latter as regards the precise services expected from the trader, which that trader then signed without making any amendments.

79 In such a situation, it does not appear inconceivable that the exercise by the consumer of her right of withdrawal is not in line with the objectives referred to in paragraph 73 above.

80 Those circumstances militate in favour of a finding, which it is ultimately for the referring court to make, that there is objective evidence of an abusive practice on the part of the consumer who has withdrawn from the distance contract, in the present case JK.

81 If that is the case, the referring court must ascertain whether a subjective factor exists in relation to the consumer, which is, despite the doubts expressed by that court, a necessary condition for establishing an abusive practice for the purposes of the case-law referred to in paragraphs 69 and 70 above. In that regard, factors indicating that the time of exercise of that right was expressly decided by the consumer for the sole purpose of being able to obtain the full benefit of the service that was entirely or almost entirely provided by the trader, while avoiding having to provide, by way of consideration, any remuneration for that service, may be relevant.

82 In the light of all the foregoing considerations, the answer to the fourth question is that Directive 2011/83 must be interpreted as meaning that, where a consumer has withdrawn from a distance contract at the end of the withdrawal period as extended in accordance with Article 10(1) of that directive and at a time when the services which are the subject of that contract and which are non-recoverable have already been provided, the trader may legitimately claim that that consumer has exercised, on account of that consumer's own conduct, the right of withdrawal in an abusive manner, if it is apparent from all the circumstances that, first, the exercise by the consumer of his or her right of withdrawal is not in line with the objectives pursued by that directive of ensuring that consumers are informed and secure in transactions with traders, and second, the consumer seeks, by his or her conduct, to obtain an advantage in an abusive manner to the detriment of the trader.

Costs

83 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 (Fifth Chamber) hereby rules:

1. Article 2(7) 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 fact that a consumer is assisted, before and at the time of the conclusion of a contract between him or herself and a trader, by another trader of that consumer's choice, who took the initiative to establish the contact between the consumer and the first trader and who influenced key parts of the content of that contract, is not relevant for the purpose of categorising that contract as a 'distance contract' within the meaning of that provision.

2. Article 2(7) of Directive 2011/83

must be interpreted as meaning that, where the parties to a contract that cannot be categorised as a 'distance contract', within the meaning of that provision, conclude, using exclusively means of distance communication, an addendum to that contract regarding additional services that are of secondary importance in relation to the services under that contract, that addendum constitutes a 'distance contract' within the meaning of that provision, as long as the conditions laid down in that provision are satisfied.

3. Directive 2011/83

must be interpreted as meaning that, where a consumer has withdrawn from a distance contract at the end of the withdrawal period as extended in accordance with Article 10(1) of that directive and at a time when the services which are the subject of that contract and which are non-recoverable have already been provided, the trader may legitimately claim that that consumer has exercised, on account of that consumer's own conduct, the right of withdrawal in an abusive manner, if it is apparent from all the circumstances that, first, the exercise by the consumer of his or her right of withdrawal is not in line with the objectives pursued by that directive of ensuring that consumers are informed and secure in transactions with traders, and second, the consumer seeks, by his or her conduct, to obtain an advantage in an abusive manner to the detriment of the trader.

[Signatures]

* Language of the case: German.