

## Case C-208/19

## Request for a preliminary ruling

## Date lodged:

4 March 2019

## Referring court:

Landesgericht für Zivilrechtssachen Graz (Austria)

## Date of the decision to refer:

5 February 2019

## Applicant and appellant:

NK

## Defendants and respondents:

MS

AS

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[...]

## REPUBLIK ÖSTERREICH

## LANDESGERICHT FÜR ZIVILRECHTSSACHEN GRAZ (REGIONAL COURT FOR CIVIL MATTERS, GRAZ)

The Landesgericht für Zivilrechtssachen Graz (Regional Court for Civil Matters, Graz), in its appellate capacity [...] in the matter of the applicant **DI N\*\*\* K\*\*\*** [...] against the defendants **(1.) Dr M\*\*\* S\*\*\***, doctor, **(2.) A\*\*\* S\*\*\***, nurse, [...] concerning **EUR 3 780.00 plus interest and costs**, regarding the applicant's appeal against the judgment of the Bezirksgericht Graz-Ost (District Court, Graz-East) of 12 June 2018 [...], sitting in closed session, has made the following

## ORDER:

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. Is a contract between an architect and a consumer, according to which the architect is required (only) to carry out the planning for the construction of a new single-family house, including the preparation of plans, a contract ‘for the construction of new buildings’ within the meaning of Article 3(3)(f) 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?

2. If Question 1 is answered in the negative: **[Or. 2]**

Is a contract between an architect and a consumer, according to which the architect is required to carry out the planning for the construction of a new single-family house in accordance with the specifications and wishes of her clients and, in this context, is required to draw up plans, a contract for the supply of ‘goods made to the consumer’s specifications or clearly personalised’ within the meaning of Article 16(c) and Article 2(3) and (4) of Directive 2011/83/EU?

II. The appeal proceedings are stayed pending delivery of the preliminary ruling of the Court of Justice of the European Union [...].

## **GROUND:**

### **I. Facts:**

1. The applicant is an architect and runs an architect’s office. She is a trader within the meaning of Directive 2011/83/EU; the defendants are consumers within the meaning of that directive. The applicant seeks that the defendants be ordered to pay the fee for architectural services provided on the defendants’ instruction. The subject of the present request to the Court of Justice is the question whether the contract concluded between the parties to the proceedings is excluded from the scope of application of Directive 2011/83/EU pursuant to Article 3(3)(f) thereof and — if that is not the case and the contract thus comes within the scope of application of that directive — whether a right of withdrawal of the defendants is excluded pursuant to Article 16(c) of the directive. The following facts are to be assessed in this case:

2. The defendants contacted the applicant with a view to commissioning her to draw up plans for the construction of a new single-family house. They made an appointment to meet the applicant — without having previously visited her business premises — on 22 December 2016 at the defendants’ property site. After the site had been inspected **[Or. 3]** and the applicant had gained an idea of the position, orientation, density of development and other local conditions, she discussed with the two defendants, in a coffee house, their wishes and

prerequisites for the outline planning to be performed. The defendants' desired requirements were established by the applicant and set down in writing. After the applicant had developed the plan and drawn up a rough summary of costs, she sent the planning documents and the statement of costs to the defendants on 2 February 2017. On the same day, she invoiced an amount of EUR 3 780.00 to the defendants for the planning services provided. By email of 12 February 2017, the defendants informed the applicant that the result of the plans differed from their ideas and specifications to such an extent that the achievement of an acceptable result was inconceivable. They declared that they were ending the 'working relationship' with immediate effect and 'withdrawing' the 'planning instruction'.

## **II. Legal basis:**

1. The provisions of Directive 2011/83/ EU ('the Consumer Rights Directive') that are decisive in the view of the appellate court are worded as follows:

Article 2 Definitions:

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

[...]

3. 'goods' means any tangible movable items [...];

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;

[...]

Article 3 Scope

1. This Directive shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer. [...]

**[Or. 4]**

[...]

3. This Directive shall not apply to contracts:

[...]

(f) for the construction of new buildings, the substantial conversion of existing buildings and for rental of accommodation for residential purposes;

[...]

## Article 6 Information requirements for distance and off-premises contracts

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) [...];

[...]

## Article 7 Formal requirements for off-premises contracts

[...]

3. Where a consumer wants the performance of services [...] to begin during the withdrawal period provided for in Article 9(2), the trader shall require that the consumer makes such an express request on a durable medium.

[...]

## Article 9 Right of withdrawal

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.

[...]

## Article 10 Omission of information on the right of withdrawal

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). **[Or. 5]**

[...]

## Article 14 Obligations of the consumer in the event of withdrawal

[...]

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. [...]

4. The consumer shall bear no cost for:

(a) the performance of services, in full or in part, during the withdrawal period, where:

(i) the trader has failed to provide information in accordance with points (h) or (j) of Article 6(1); 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); [...]

#### Article 16 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:

(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;

[...]

2. The Consumer Rights Directive was transposed into Austrian law (inter alia) by means of the *Bundesgesetz über Fernabsatz- und außerhalb von Geschäftsräumen geschlossene Verträge (Fern- und Auswärtsgeschäfte-Gesetz — FAGG)* (Federal Law on distance and off-premises contracts (Distance and Off-Premises Transactions Law — FAGG)), which contains, inter alia, the following provisions, which are essentially consistent with the corresponding provisions of the Consumer Rights Directive: **[Or. 6]**

**Paragraph 1.** (1) This Federal Law applies to distance and off-premises contracts (distance and off-premises transactions) between traders and consumers [...].

(2) This Federal Law shall not apply — [...] — to contracts:

[...]

7. for the construction of new buildings, the substantial conversion of existing buildings and for rental of accommodation for residential purposes,

[...]

**Paragraph 4.** (1) Before the consumer is bound by a contract or his contractual declaration, the trader must provide him with the following information in a clear and comprehensible manner:

[...]

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

[...]

10. where appropriate, the consumer's obligation, if he withdraws from the contract pursuant to Paragraph 16, to pay a proportionate amount for the services already provided,

11. where appropriate, the non-existence of a right of withdrawal under Paragraph 18 or the circumstances under which the consumer loses his right of withdrawal,

[...]

**Paragraph 10.** If a distance or off-premises contract relates to a service [...] and the consumer wants the trader to begin to perform the contract before expiry of the withdrawal period under Paragraph 11, the trader must require that the consumer make a request expressly directed at this early contractual performance — in the case of an off-premises contract on a durable medium.

**Paragraph 11.** (1) The consumer can withdraw from a distance or off-premises contract within 14 days without giving any reason.

[...]

**Paragraph 12.** (1) If the trader has not complied with his information obligation under Paragraph 4(1)(8), the withdrawal period provided for in Paragraph 11 shall be extended by twelve months.

[...]

[Or. 7]

**Paragraph 16.** (1) Where the consumer withdraws from a contract relating to services [...] under Paragraph 11(1) after he has made a request pursuant to Paragraph 10 and the trader has thereupon begun to perform the contract, he shall pay to the trader an amount which is in proportion to the services provided by the trader up to the withdrawal, in comparison with the overall price contractually agreed. [...]

(2) The proportionate payment obligation under subparagraph (1) shall not exist in the case where the trader has not met his information obligation under Paragraph 4(1)(8) and (10).

[...]

**Paragraph 18.** (1) The consumer shall have no right of withdrawal in the case of distance or off-premises contracts relating to

1. services, if the trader — on the basis of an express request by the consumer under Paragraph 10 and confirmation by the consumer of his awareness of the loss of the right of withdrawal once the contract has been fully performed — had begun to perform the service before expiry of the withdrawal period under Paragraph 11 and the service was then provided in full.

[...]

3. goods made to the consumer's specifications or clearly personalised,

[...].

### **III. Forms of order sought and arguments of the parties:**

1. In the present case, the applicant is seeking that the defendants be ordered to pay the fee for the planning services which she provided. She argues that the FAGG is not applicable to the architectural contract concluded with the defendants, because she provided services in connection with the new construction of a building within the meaning of the exception provision of Paragraph 1(2)(7) FAGG. The defendants, she argues, also have no right to withdraw from that contract, because the applicant had to draw up plans which had been personalised for the defendants. The exception set out in Paragraph 18(1)(3) FAGG, which also relates to works contracts, is therefore realised. The applicant's payment request is accordingly justified.

2. The defendants request that the form of order sought be rejected and they reply — **[Or. 8]** in so far as is relevant to the present request for a preliminary ruling — that Article 3(3)(f) of the Consumer Rights Directive, which was transposed in Paragraph 1(2)(7) FAGG, relates to construction services, not to planning services. Architectural contracts are not mentioned in recital 26 of the Consumer Rights Directive. The FAGG is therefore applicable to the present contract. The applicant did not meet her information obligations under Paragraph 4(1)(8) and (10) FAGG. The withdrawal period of 14 days established in Paragraph 11(1) FAGG was therefore extended by twelve months pursuant to Paragraph 12(1) FAGG. The withdrawal from the contract declared by the defendants on 12 February 2017 is therefore effective. The applicant began to perform the contract before expiry of the withdrawal period, without requesting the defendants expressly to make their request for early contractual performance



(Paragraph 10 FAGG). The defendants' proportionate payment obligation established for the case of withdrawal from the contract in Paragraph 16(1) FAGG does not, they submit, apply, because the applicant breached her information obligations. The defendants therefore did not owe any fee.

#### **IV. Previous proceedings:**

1. The court of first instance rejected the form of order sought in full. It took the view that the architectural contract concluded between the parties to the proceedings was not to be regarded as a contract in connection with the construction of a building within the meaning of Paragraph 1(2)(7) FAGG, which meant that the FAGG was applicable. The rough draft to be prepared by the applicant for the single-family house had been drawn up according to the defendants' specific wishes. Pursuant to Paragraph 18(1)(3) FAGG, the defendants therefore had no right to withdraw from the contract. However, the defendants had not been informed of this by the applicant. Due to the failure to meet the information obligations under Paragraph 4(1)(8) and (10) FAGG, the defendants therefore did not owe a fee pursuant to Paragraph 16(1) FAGG.

2. That judgment is the subject of the applicant's appeal, by which she once again argues, *inter alia*, that the contract concluded with the defendants [**Or. 9**] comes under the exception set out in Paragraph 1(2)(7) FAGG. The FAGG, she argues, is therefore not applicable. However, even if it were to be applicable, the criteria for the factual situation of Paragraph 18(1)(3) FAGG are met, because the construction plans prepared by the applicant are 'goods' within the meaning of Article 2(3) and (4) of the Consumer Rights Directive. The defendants therefore had no right to withdraw from the contract.

#### **V. Questions referred:**

1. For the legal assessment to be made by the appellate court, it is, *inter alia*, decisive whether the criteria for the exception of Paragraph 1(2)(7) FAGG are met and the matter comes within the scope of application of the FAGG. In the event that the FAGG is applicable, it is furthermore also material to the decision whether the conditions for the exception under Paragraph 18(1)(3) FAGG are met, in order to be able to assess whether or not the defendants had a right to withdraw from the contract. As the FAGG serves to transpose the Consumer Rights Directive, it is therefore to be interpreted in line with that directive.

#### **2. Question 1:**

2.1. In order to resolve the question of whether the FAGG applies to the facts of the present case, it is necessary to examine whether the architectural contract concluded between the parties to the proceedings is a contract for the 'construction of new buildings' within the meaning of Paragraph 1(2)(7) FAGG. Should this be answered in the affirmative, the criteria for the exception



established in that statutory provision would be met and the FAGG would therefore not be applicable. The cited exception provision corresponds to Article 3(3)(f) of the Consumer Rights Directive.

2.2. In question is how the term ‘contract for the construction of new buildings’ is to be interpreted and whether a contract for the planning to be carried out by an architect for the construction of a new building is also to be subsumed thereunder. This is supported by the fact that planning together with the preparation of construction plans is always also required for the construction of a new building, which means that a contract for the provision of the planning services required for the construction project [Or. 10] could be regarded as being part of the services to be provided in connection with the construction of a new building. On the other hand, this reading might be contradicted by the fact that the main performance obligation of an architectural contract that relates only to the preparation of plans (as in the case to be assessed here) does not lie in the construction of the building in the narrower sense. Nothing can be derived from recital 26 of the Consumer Rights Directive for resolving this question. The Court of Justice is therefore requested to provide clarification.

### 3. Question 2:

3.1. Should the contract concluded between the parties to the proceedings not be subsumed under the exception provided for in Article 3(3)(f) of the Consumer Rights Directive (Paragraph 1(2)(7) FAGG) and the FAGG is therefore to be applied to the present case, it would then be necessary to resolve the question of whether the defendants legitimately withdrew from the contract and whether they have to pay a fee for the services already provided by the applicant. In this context, a decisive question is whether a right of withdrawal is excluded under Paragraph 18 FAGG on the ground that the contract concluded between the parties to the proceedings is a contract for ‘goods made to the consumer’s specifications or clearly personalised’ within the meaning of Paragraph 18(1)(3) of the FAGG. The Austrian FAGG does not define the term ‘goods’ in more detail.

3.2. The exception provision of Paragraph 18(1)(3) FAGG corresponds to Article 16(c) of the Consumer Rights Directive. This provision is therefore also to be interpreted in line with the Consumer Rights Directive. According to recital 49, tailor-made curtains or the supply of fuel which by nature is inseparably mixed with other items after delivery are, for example, covered by the cited exception. Pursuant to Article 2(3) of the Consumer Rights Directive, ‘tangible movable items’ come under the term ‘goods’. It could be argued here that a [Or. 11] plan is a tangible item and therefore to be subsumed under Article 2(3) of the Consumer Rights Directive. The subsumption under Article 16(c) of the Consumer Rights Directive would also be supported by the fact that the applicant had to carry out the planning in accordance with the defendants’ wishes and specifications and to draw up corresponding plans. Against this, it could be argued that the (intellectual) service or work of planning is to the fore in the architectural contract

and that there is therefore no supply of goods within the meaning of Article 2(3), in conjunction with Article 16(c), of the Consumer Rights Directive.

3.3. In the view of the appellate court, this question also requires clarification by the Court of Justice.

**VI. Procedural law matter:**

[...]

**Landesgericht für Zivilrechtssachen Graz, Sixth Chamber**

**Graz, 5 February 2019**

[...]

WORKING DOCUMENT