**Case C-641/19**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

30 August 2019

**Referring court:**

Amtsgericht Hamburg (Germany)

**Date of the decision to refer:**

23 August 2019

**Applicant:**

EU

**Defendant:**

PE Digital GmbH

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**Subject matter of the main proceedings**

Online dating agency contract — Directive 2011/83 — Article 14(3) and Article 2.11 — Duties of the consumer in the event of withdrawal — Overall service made up of several sub-services provided within different intervals — Amount which is in proportion to what has been provided until the time at which the consumer has informed the trader of the exercise of the right of withdrawal, in comparison with the full coverage of the contract — Calculation — Sub-service which is continuously provided, but which has a higher or lower value for the consumer at the beginning of the contract term — Directive 2019/770 — Article 2.1 — 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 Article 2.2 of Directive 2019/770 — Concept of excessive total price within the meaning of the third sentence of Article 14(3) of Directive 2011/83

## Subject matter and legal basis of the request

Interpretation of EU law, heading (b) of the first paragraph and the third paragraph of Article 267 TFEU

## Questions referred

1. Is Article 14(3) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011, 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 Article 2.11 of Directive 2011/83 and Article 2.1 of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 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 Article 2.2 of Directive 2019/770 may also constitute 'digital content' within the meaning of Article 2.11 of Directive 2011/83 and Article 2.1 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?

**Provisions of EU law cited**

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), in particular Article 2, Article 9(1), Article 14(3) and 14(4)(b)(ii) and Article 16(m)

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), in particular Article 2.1 and 2.2

**Provisions of national law cited**

Zivilprozessordnung (Code of Civil Procedure; ZPO) in the version published on 5 December 2005 (BGBl. [Federal Law Gazette] I p. 3202; 2006 I p. 431; 2007 I p. 1781), as last amended by Article 5(26) of the Law of 21 June 2019 (BGBl. I p. 846), in particular Paragraph 287 and Paragraph 511(1)

Bürgerliches Gesetzbuch (Civil Code; BGB) in the version published on 2 January 2002 (BGBl. I p. 42, 2909; 2003 I p. 738), as last amended by Article 7 of the Law of 31 January 2019 (BGBl. I p. 54), in particular Paragraph 158(1), Paragraph 312f(3), Paragraph 312g(1), Paragraph 355(1), Paragraph 356(5) and Paragraph 357(1), (8) and (9)

Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Law to the Civil Code; EGBGB) in the version published on 21 September 1994 (BGBl. I p. 2494; 1997 I p. 1061), as last amended by Article 2 of the Law of 18 December 2018 (BGBl. I p. 2648), in particular Article 246a Paragraph 1(2) sentence 1 No 1 and No 3

**Brief summary of the facts and procedure**

1 The parties are in dispute over the existence and amount of a claim made by the defendant for payment of compensation following the applicant's withdrawal from an online dating agency contract.

2 The defendant operates the global online dating agency 'Parship' under the domain 'www.parship.de'. It offers its users two forms of membership: free-of-charge basic membership with an extremely limited possibility of contacting other users and paid-for premium membership for 6, 12 or 24 months. Premium membership enables users, during the term of their membership, to contact any other premium member — over 186 000 premium members across Germany — via the platform and to exchange messages and images in the scope thereof.

3 Premium membership also includes what is known as the contact guarantee, by which the user is guaranteed the materialisation of a certain number of contacts with other users, for example the materialisation of seven contacts over a 12-month period. In this case, a contact includes any ‘free text’ response, read by the user concerned, to a message sent by that user and a message received by the user in the further course of which he has read and exchanged at least two ‘free text’ messages with the other user.

4 An average of 31.3 messages in the first contract week, 8.9 messages in the second contract week, 6.1 messages in the third contract week, 5.1 messages in the fourth contract week and consistently fewer than five messages from the fifth contract week are sent and received.

5 For each consumer who decides on a membership, a selection of partner recommendations from the same federal *Land* is automatically provided immediately following registration on the basis of an approximately thirty-minute personality test regarding partnership-relevant characteristics, habits and interests. With a 12-month premium membership, this selection already makes up almost half of all the partner recommendations made in the contract period. The algorithm for the personality test was created and developed under the direction of a qualified psychologist. Premium members receive the computer-generated test result in the form of a 50-page ‘personality report’; this can be acquired by basic members for a fee as a sub-service. On 4 November 2018, the applicant concluded a contract with the defendant for a 12-month premium membership for a total price of EUR 523.95. This price was more than twice those which the defendant charged some of its other users for the same contract period in the same contract year. In accordance with the requirements of Article 246a Paragraph 1(2) sentence 1 No 1 and No 3 of the EGBGB, the defendant informed the applicant of her right of withdrawal and the applicant confirmed to the defendant that the latter should begin the service before expiry of the withdrawal period. After the defendant had withdrawn from the contract on 8 November 2018, the defendant charged her compensation (‘Wertersatz’; ‘value compensation’) totalling EUR 392.96 and retained that amount debited from the applicant’s account.

6 By her action, the applicant is demanding repayment of all the payments made.

**Principal arguments of the parties in the main proceedings**

7 The applicant is of the opinion that the defendant could demand value compensation within the meaning of Paragraph 357(8) BGB at best in accordance with a *pro rata temporis* calculation.

8 The defendant takes the view that the value compensation within the meaning of Paragraph 357(8) BGB is not solely to be calculated on a *pro rata temporis* basis. Firstly, the service promised by it comprises distinguishable sub-services which it has to provide within different intervals: unlimited communication, viewing released photos, exclusive interests filter, analysis of the partnership personality,

contact guarantee, regional proximity search, full list of interested parties, scan service for the customer's profile photos, profile check and constantly updated partner recommendations. The core service of the contract, in particular the personality report, the calculation/provision of the partner recommendations and several days of full use of the platform, is provided mainly at the beginning of the contract. In any event, the personality report and the partner recommendations made on the basis of the personality analysis therefore are to be regarded as a one-off service at the beginning of the contract. Secondly, the earliest phase of the membership must have a disproportionately higher value for the calculation of the value compensation, because the user can contact the entire group of members at the very beginning of the premium membership.

**Brief summary of the basis for the request**

9 The referring court (Amtsgericht Hamburg; District Court, Hamburg)) assumes that all four questions referred are to be answered in the negative.

***Question 1***

10 In Section 6.5.1. of its Guidance Document concerning Directive 2011/83 published in June 2014, the European Commission made it clear that where the provision of services involves one-off costs to the trader to make them available to the consumer, the trader is entitled to include those costs in the calculation of the compensation. The Guidance Document may be used as an aid for interpreting Directive 2011/83 (and therefore indirectly for interpreting Paragraph 357(8) sentences 1, 2 and 5, of the BGB). The referring court therefore assumes that whenever the overall service includes distinguishable sub-services which are provided within different intervals in accordance with the agreement, account is to be taken of their respective duration for the calculation of the compensation.

***Question 2***

11 For 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', the referring court is of the opinion that, beyond the wording of Article 14(3) of Directive 2011/83, account must be taken not (solely) of the service provided by the trader, but also of the value of the service realised for the consumer (as is also the legal opinion expressed by the German legislature in Paragraph 357(8) of the BGB and by the Hanseatisches Oberlandesgericht (Higher Regional Court, Hamburg) [judgment of 2 March 2017 — 3 U 122/14], in contrast to the legal view expressed by the Austrian Oberster Gerichtshof (Supreme Court) [judgment of 23 October 2018 — 4Ob179/18d]). This is because, in view of the spirit and purpose of Directive 2011/83, the referring court provisionally assumes that the amount to be paid by the consumer following withdrawal is supposed to be value compensation and it is accordingly of significance whether and to what extent the

consumer has already benefited from the value of the commercial service to be derived from the respective purpose underlying the contract. In this case, the referring court recognises that the European legislature did not use the term 'value compensation' in Article 14(3) of Directive 2011/83 and that contradictory valuations could possibly result from the discrepancy in the terminology used in Directive 2011/83 and the BGB. However, the referring court for the moment assumes that Article 14(3) of Directive 2011/83, with regard to the spirit and purpose of that directive, is to be interpreted as also encompassing the concept of 'value compensation', that is to say, it is to be read as if it stated '… an amount which is in proportion to what … has been provided and realised as value for the consumer'.

12 On the basis of the obligation to consider sub-services provided within different intervals (see above, paragraph 10) and the characterisation of the compensation payment owed by the consumer as 'value compensation' (see above, paragraph 11), Article 14(3) of Directive 2011/83 and Paragraph 357(8) of the BGB enacted in implementation thereof should not prescribe a purely *pro rata temporis* calculation of the compensation in the present case. Instead, in a first step, the individual sub-services included in an overall service should be delimited from one another for the purposes of that calculation. In a second step, sub-prices should be defined for the individual sub-services in consideration of their value for the (average) consumer within the scope of the purpose underlying the contract, with account having to be taken of the average consumer's sense of value expressed in the statistical user behaviour. In the third step, the value compensation parts for the individual sub-services should be calculated firstly on the basis of the extent to which the sub-services have already been provided and secondly with regard to the extent to which their value has already been realised for the (average) consumer. In the fourth step, the sum of the amounts thus calculated would then result in the overall value compensation.

13 This would accordingly result in an overall value compensation of EUR 50.77 in the present case.

14 In the calculation of the overall value compensation according to the method set out above, the court has assumed that the objective value of a sub-service for the average consumer is to be placed at a higher level, the more the sub-service concerned helps in meeting a suitable partner for the purpose of entering into a relationship. It accordingly estimated the sub-prices for the sub-services pursuant to Paragraph 287 of the ZPO as follows (percentage share of the total price):

– Personality report: 3%

– Access to the database: 70%

– Partner recommendations: 20%

– Identification as (new) user: 5%

– Contact guarantee: 2%

15 The court has also assumed that the sub-services were provided up to the time of the applicant's withdrawal to the following extent:

– Personality report: 100/100

– Access to the database: 4/365

– Partner recommendations: 50/100

– Identification as (new) user: 4/365

– Contact guarantee: 4/365

16 However, with the 'access to the database' and 'partner recommendations' sub-services, the court assumed that the value thereof was not continuously realised, but was particularly strong precisely in the first few days. In this respect, it took account of the behaviour of an average user and, when calculating the value of these sub-services, as realised in the case of the applicant, used corresponding statistics as a basis.

17 However, with regard to the circuitousness of such a calculation process and the transparency for the user strived for by Directive 2011/83 as well as the open wording of Article 14(3) of Directive 2011/83, it appears just as possible that the Court of Justice of the European Union could answer the first two questions in the affirmative and therefore also does not ultimately share the understanding, used as a basis by the German legislature, of the compensation to be paid by the consumer under Article 14(3) of Directive 2011/83 as 'value compensation'. The notional division of the contractually agreed service into sub-services with their own sub-prices could thus be ruled out and it could be necessary to understand the service as a unit with a single price which, regardless of different sub-service times and different value realisation speeds, is provided linearly over the full contractual term.

18 Accordingly, 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' would then have to be calculated on a purely *pro rata temporis* basis, that is to say, placed at 4/365 of the total price = EUR 5.74.

***Question 3***

19 However, the provision of the personality report at the beginning of the contract term could nevertheless have to be assessed as a detachable sub-service and consist in a provision of digital content which is not supplied on a tangible medium, as a result of which the legal consequences would possibly be determined according to the provisions of Article 16(m) and Article 14(4)(b)(ii) of

Directive 2011/83 via Paragraph 356(5) and Paragraph 357(9) of the BGB. In view of the associated consumer-hostile (partial) refusal of the right of withdrawal and with regard to recital 30 of the Resolution of 17 April 2019 on the draft directive amending inter alia Directive 2011/83 ('In case of doubt as to whether the contract is a service contract or contract for digital content which is not supplied on a tangible medium, the right of withdrawal rules for services should be applied'), the referring court considers this to be rather unlikely, but requests clarification in this regard.

***Question 4***

20 In view of the significantly divergent prices which the defendant offers to various users for similar contract terms, the court assumes for the moment that a total price which is twice as high as for other users, even though the trader promises the other users the same service, that is to say, a service with identical value (in which case the objective value may even be lower than all the total prices), should nevertheless not be 'disproportionately high' as long as it does not reach or only marginally exceeds the level of the market price. This is because Article 14(3) of Directive 2011/83, with regard to recital 50 thereof, relates the total price to the market price and therefore neither to other total prices of the same trader nor to the objective value of the service. The fundamental admissibility of what is known as personalised pricing is also emphasised in recital 45 of the Resolution of the European Parliament of 17 April 2019 on the draft directive amending inter alia Directive 2011/83.