

## **Anonymised version**

Translation

C-97/22 – 1

### **Case C-97/22**

#### **Request for a preliminary ruling**

**Date lodged:**

10 February 2022

**Referring court:**

Landgericht Essen (Germany)

**Date of the decision to refer:**

27 December 2021

**Applicant:**

DC

**Defendant:**

HJ

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**Landgericht Essen (Regional Court, Essen, Germany)**

#### **Order**

In the case of

DC v HJ

I.

The following question on the interpretation of EU law is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to point (a) of the first paragraph and the second paragraph of Article 267 TFEU:

Must 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 ('Directive 2011/83/EU') be interpreted as meaning that, in the event that the customer withdraws his or her declaration of intention to conclude an off-premises construction contract only after the trader has already (fully) performed his or her services, it also precludes any entitlement to compensation or compensation for value on the part of the trader where the conditions of entitlement to compensation or compensation for value under the rules governing the legal consequences of withdrawal are not met, but the customer's assets have been enhanced as a result of the trader's construction work, that is to say, he or she has been enriched?

II.

[...] [statements regarding the stay of proceedings]

### Grounds:

A.

The facts and relevant law

I.

The case referred rests on the following facts:

The applicant, acting under assigned rights, seeks from the defendant the provision of a construction work security pursuant to Paragraph 650f(1) of the Bürgerliches Gesetzbuch (Civil Code; 'the BGB'), or, in the alternative, (partial) remuneration for the work performed by the assignor.

On 6 October 2020, the defendant orally concluded, in accordance with Paragraph 650a of the BGB, a construction contract with the assignor for the replacement of the electrical installations in his house, which was being renovated. The assignor did not inform the defendant in accordance with the requirements of 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 Civil Code; 'the EGBGB'). After completing his services, the assignor issued a final invoice to the defendant on 21 December 2020, which the defendant did not pay. On 15 March 2021, the assignor assigned all claims under the works contract to the applicant. By letter from his lawyer of 17 March 2021, the defendant declared to the assignor that he was withdrawing his declaration of intention to conclude the construction contract.

II.

The provisions of German law relevant to the resolution of the dispute read as follows, in the version applicable in the cases referred:

1.

*Bürgerliches Gesetzbuch (German Civil Code; 'the BGB')*

*Paragraph 312b Off-premises contracts*

*(1) Off-premises contracts are contracts*

1. *concluded in the simultaneous physical presence of the consumer and the trader, in a place which is not the business premises of the trader,*
2. *for which an offer was made by the consumer under the circumstances referred to in point 1;*
3. *concluded on the business premises of the trader or through any means of distance communication by which the consumer was, immediately beforehand, personally and individually addressed in a place outside of the business premises of the trader in the simultaneous physical presence of the consumer and the trader; or*
4. *[...].*

*Persons acting in the name of the trader or on his or her behalf are to be treated in the same way as the trader.*

*(2) Business premises within the meaning of paragraph 1 are any immovable retail premises where the trader carries out his or her activity on a permanent basis, and any movable retail premises where the trader carries out his or her activity on a usual basis. Retail premises where the person who is acting in the name or on behalf of the trader carries out his or her activity on a permanent basis or on a usual basis are equivalent to the premises of the trader.*

*Paragraph 312g Right of withdrawal*

*(1) In the case of off-premises contracts and of distance contracts, the consumer has a right of withdrawal pursuant to Paragraph 355.*

*(2) Unless otherwise agreed by the parties, the right of withdrawal does not apply to the following contracts:*

1. *[...]*
11. *contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance; this does not apply to other services provided on the occasion of such visit which were not specifically requested by the consumer or to goods supplied on the occasion of the visit other than replacement parts necessarily used in carrying out the maintenance or in making the repairs;*

12. [...]

*Paragraph 355 Right of withdrawal in consumer contracts*

(1) *If a consumer is given, by statute, a right of withdrawal according to this provision, then the consumer and the trader are no longer bound by their declarations of intention to conclude the contract if the consumer withdraws his declaration of intention within the period specified. The withdrawal is effected by a declaration being made to the trader. That declaration must unambiguously reflect the consumer's decision to withdraw from the contract. The withdrawal does not have to provide any grounds. Dispatch of the withdrawal in good time is sufficient to comply with the time limit.*

(2) *The withdrawal period is 14 days. Unless otherwise provided, that period shall begin at the time of conclusion of the contract.*

(3) *In the event of withdrawal, the performance received shall be returned without delay. If the law specifies a time limit for the return, that period begins, for the trader, upon receipt of the declaration of withdrawal and, for the consumer, upon dispatch of that declaration. Dispatch of the goods in good time is sufficient for the consumer's compliance with that time limit. In the case of withdrawal, the trader bears the risk of returning the goods.*

*Paragraph 356 Right of withdrawal in off-premises contracts and distance contracts*

(1) [...].

(2) *That period of withdrawal shall begin*

1. [...],

2. *upon conclusion of the contract in the case of contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, the supply of district heating or the supply of digital content which is not supplied on a tangible medium.*

(3) *The withdrawal period does not commence prior to the trader having informed the consumer in accordance with the requirements of point 1 of the first sentence of Paragraph 1(2) of Article 246a or of Article 246b(2)(1) of the Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Law to the Civil Code). The right of withdrawal expires at the latest 12 months and 14 days following the point in time set out in subparagraph (2) or Paragraph 355(2), second sentence. The second sentence does not apply to contracts relating to financial services.*

(4) *In the case of contracts for the performance of services, the right of withdrawal expires even if the trader has fully performed the service and started*

*to perform the service only after the consumer had given his or her express consent thereto and at the same time acknowledged that he or she will lose his or her right of withdrawal once the contract has been fully performed by the trader. In the case of off-premises contracts, the consumer's consent must be transmitted on a durable medium. [...].*

*(5) [...]*

*Paragraph 357 Legal consequences of withdrawal from off-premises contracts and distance contracts, with the exception of contracts for financial services*

- (1) The performance received shall be returned at the latest after 14 days.*
- (2) The trader must also return any payments made by the consumer for the supply. This does not apply where the consumer has incurred supplementary costs because he or she has opted for a type of delivery other than the least expensive type of standard delivery offered by the trader.*
- (3) The trader must use the same means of payment for the reimbursement as the consumer used for the payment. The first sentence does not apply if the parties have expressly agreed otherwise and the consumer does not incur any fees as a result.*
- (4) In the case of a sale of consumer goods, the trader may withhold the reimbursement until he or she has received the goods back, or until the consumer has supplied evidence of having dispatched the goods. This does not apply if the trader has offered to collect the goods.*
- (5) The consumer is not obliged to return the goods received if the trader has offered to collect them.*
- (6) The consumer shall bear the direct costs of returning the goods if the trader has informed the consumer of that obligation in accordance with point 2 of the first sentence of Paragraph 1(2) of Article 246a of the Introductory Law to the Civil Code. The first sentence does not apply if the trader has agreed to bear those costs. In the case of off-premises contracts where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader is required to collect the goods at his or her own expense if, by their nature, those goods cannot be returned by post.*
- (7) The consumer shall pay compensation for any diminished value of the goods where*
  - 1. the diminished value results from the handling of the goods other than what was necessary to establish the nature, characteristics and functioning of the goods, and*

2. *the trader has informed the consumer of his or her right of withdrawal in accordance with point 1 of the first sentence of Paragraph 1(2) of Article 246a of the Introductory Law to the Civil Code.*

(8) *Where the consumer withdraws from a contract for the provision 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 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 Introductory Law to the Civil Code). For off-premises contracts, the right under the first sentence exists only in those cases in which the consumer has transmitted his or her 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 or she shall not pay compensation for the services received.*

*Paragraph 357d Legal consequences of withdrawal in the case of consumer construction contracts*

*If the return of the performance rendered up to the time of withdrawal is precluded by its nature, the consumer shall owe the trader compensation for value. In calculating the compensation for value, the remuneration agreed upon is to be used as a basis. If the remuneration agreed upon is excessive, the compensation for value shall be calculated on the basis of the market value of what has been provided.*

*Paragraph 361 Further claims, different agreements and burden of proof*

(1) *Beyond the provisions of this subtitle, there are no further claims against the consumer as a result of withdrawal.*

(2) *The provisions of this subtitle may not be derogated from to the detriment of the consumer unless otherwise provided. Unless otherwise provided, the provisions of this subtitle shall apply even where they are circumvented by other arrangements.*

(3) *In the event of a dispute regarding the beginning of the withdrawal period, the trader shall bear the burden of proof.*

2.

6



*Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Law to the Civil Code)*

*Paragraph 1 of Article 246a Information requirements*

*(1) The trader shall, pursuant to Paragraph 312d(1) of the Civil Code, provide the consumer with the following information:*

- 1. the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods and services;*
- 2. his or her identity, such as his or her trading name, the geographical address at which he or she is established and his or her telephone number and, where available, his or her fax number and email address and, where applicable, the geographical address and identity of the trader on whose behalf he or she is acting;*
- 3. in addition to the information under point 2, the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he or she is acting, where the consumer can address any complaints, if different from the address provided in accordance with point 2;*
- 4. the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable.*
- 5. [...],*
- 6. [...],*
- 7. the arrangements for payment, delivery, performance, the time by which the trader must deliver the goods or perform the services and, where applicable, the trader's complaint handling policy;*
- 8. the existence of a legal guarantee of conformity for goods;*
- 9. where applicable, [...]*

*[...]*

*(2) If the consumer is entitled to a right of withdrawal pursuant to Paragraph 312g(1) of the BGB, the trader is obliged to inform the consumer*

1. *of the conditions, time limits and procedure for exercising the right of withdrawal pursuant to Paragraph 355(1) of the BGB, as well as the model withdrawal form set out in Annex 2,*
2. *where applicable, that the consumer will have to bear the cost of returning the goods in case of withdrawal and also, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods; and*
3. *that, in the case of a contract for the provision of services or the supply of water, gas or electricity, where that supply is not agreed in a limited volume or set quantity, or for the supply of distance heating, the consumer shall owe the trader reasonable costs in accordance with Paragraph 357(8) of the Civil Code for what has been provided by the trader if the consumer exercises the right of withdrawal after expressly requiring, at the request of the trader, that the latter begin the performance prior to expiry of the withdrawal period.*

*The trader may satisfy those information requirements by submitting the model withdrawal instruction set out in Annex 1, correctly filled in and in the form of a text.*

*(3) The trader shall also be required to inform the consumer*

1. *that the consumer may not revoke his or her declaration of intent where he or she does not have the right of withdrawal under points 1, 2, 5 and 7 to 13 of Paragraph 312g(2) of the BGB; or*
2. *the circumstances in which the consumer loses an initially existing right of withdrawal where his or her right of withdrawal may expire prematurely in accordance with Paragraph 312g(2), points 3, 4 and 6, and Paragraph 356(4) and (5) of the Civil Code.*

### III.

The above provisions transposed the following provisions 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:

#### *Article 13*

##### *Obligations of the trader in the event of withdrawal*

1. *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.*

*The trader shall carry out the reimbursement referred to in the first subparagraph using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.*

*2. Notwithstanding paragraph 1, the trader shall not be required to reimburse the supplementary costs, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader.*

*3. Unless the trader has offered to collect the goods himself, with regard to sales contracts, the trader may withhold the reimbursement until he has received the goods back, or until the consumer has supplied evidence of having sent back the goods, whichever is the earliest.*

#### *Article 14*

##### *Obligations of the consumer in the event of withdrawal*

*1. Unless the trader has offered to collect the goods himself, the consumer shall send back the goods or hand them over to the trader or to a person authorised by the trader to receive the goods, without undue delay and in any event not later than 14 days from the day on which he has communicated his decision to withdraw from the contract to the trader in accordance with Article 11. The deadline shall be met if the consumer sends back the goods before the period of 14 days has expired.*

*The consumer shall only bear the direct cost of returning the goods unless the trader has agreed to bear them or the trader failed to inform the consumer that the consumer has to bear them.*

*In the case of off-premises contracts where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader shall at his own expense collect the goods if, by their nature, those goods cannot normally be returned by post.*

*2. The consumer shall only be liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods. The consumer shall in any event not be liable for diminished value of the goods where the trader has failed to provide notice of the right of withdrawal in accordance with point (h) of Article 6(1).*

*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).*

*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.*

## B.

In the context of the claim made in the alternative, the parties are in dispute as to whether, following the defendant's withdrawal, the applicant is entitled to compensation for the construction services rendered, even though the conditions for entitlement to compensation for value under Paragraph 357(8) of the BGB are not met.

## I.

The applicant takes the view that it necessarily follows from recital 57 of Directive 2011/83/EU that the trader must be entitled to compensation for value in the event of withdrawal. This is because, according to the applicant, the exclusion of entitlement to compensation for value as a penalty for the trader's failure to provide the required information in a protracted and convoluted process to conclude the contract constitutes a disproportionate penalty for an infringement of Directive 2011/83/EU.

## II.

By contrast, the defendant takes the view that, in accordance with the case-law of the Bundesgerichtshof (Federal Court of Justice), the applicant is not entitled to compensation for value, either on the merits or in terms of amount.

## C.

In the case referred, the success or failure of the action with regard to the claim made in the alternative depends on the answer to the question on the interpretation of Article 14(5) of Directive 2011/83/EU, set out in point I of the operative part of this order.

### I.

The intraprocedural condition for a ruling on the claim made in the alternative will be met, as the main claim directed at the provision of a construction work security pursuant to Paragraph 650f(1) of the BGB will have no prospect of success, because the defendant effectively withdrew his declaration of intention to conclude the construction contract. The withdrawal gave rise to a repayment obligation pursuant to Paragraph 355 of the BGB. Any claims arising therefrom are not eligible for security pursuant to Paragraph 650f(1) of the BGB.

### II.

Entitlement to compensation for value pursuant to the second sentence of Paragraph 357(8) of the BGB does not exist in the present case – irrespective of the conditions laid down in the first sentence – because the assignor did not inform the defendant of the right of withdrawal and the obligation to pay compensation for value in accordance with points 1 and 3 of Paragraph 1(2) of Article 246a of the Introductory Law to the Civil Code ('the EGBGB'). Paragraph 361(1) of the BGB provides that, beyond the provisions of this subtitle, there are no further claims against the consumer as a result of withdrawal. Therefore, the success of the action by way of the alternative claim for payment of part of the remuneration for the work on the merits depends on whether Article 14(5) of Directive 2011/83/EU is to be interpreted as meaning that the legal consequence of a withdrawal in the event that the customer withdraws his or her declaration of intention to conclude an off-premises construction contract only after the trader has already (fully) performed his or her services is that any entitlement to compensation or compensation for value on the part of the trader is

also excluded where the conditions of entitlement to compensation for value under the rules governing the legal consequences of withdrawal are not met, but the customer's assets have been enhanced as a result of the trader's construction work, that is to say, he or she has been enriched.

The question referred, set out in point I of the operative part of this order, is therefore relevant to the decision to be given.

#### D.

To date, no clear answer to the question referred has been provided in the case-law or legal literature.

#### I.

The Federal Court of Justice takes the view (judgment of 30 August 2018 – VII ZR 243/17 – NJW 2018, 3380, 3381, paragraph 35) that the subcontractor is not entitled to compensation for value for any performance provided up to the time of withdrawal in accordance with the first sentence of Paragraph 357(8) of the BGB if he or she did not inform the customer of the conditions, time limits and procedure for exercising the right of withdrawal, as well as the model withdrawal form (second sentence of Paragraph 357(8) of the BGB and point 1 of the first sentence of Paragraph 1(2) of Article 246a of the EGBGB).

#### II.

According also to the prevailing opinion in the German legal literature, the entitlement to compensation which is provided for in Paragraph 357(8) of the BGB, read in conjunction with Paragraph 361(1) thereof, and which was introduced to implement Article 14(5) of Directive 2011/83/EU, is an exhaustively regulated regime which excludes further claims based on the withdrawal from the contract, for example those based on unjust enrichment pursuant to Paragraph 812 of the BGB [...] [references in the legal literature].

#### E.

However, the present Chamber has considerable doubts as to whether, in so far as the specific conditions of entitlement to compensation for value following withdrawal are not met, Article 14(5) of Directive 2011/83/EU excludes any entitlement to compensation or compensation for value where the trader has already (fully) performed his or her services.

#### I.

The Chamber considers that the views set out in section D reveal a considerable discrepancy between, on the one hand, the legal consequences of the withdrawal of a declaration of intention to conclude a construction contract – as occurred in the present case – where entitlement to compensation for value is excluded

pursuant to the second sentence of Paragraph 357(8) of the BGB and, on the other hand, the legal consequences of a withdrawal of a declaration of intention to conclude a consumer construction contract pursuant to Paragraph 650i of the BGB, since, in the latter case, the consumer owes the contractor compensation for value pursuant to the first sentence of Paragraph 357d of the BGB where the return of the performance provided up to the time of the withdrawal is precluded by its nature, without provision being made for an exclusion of such entitlement, in line with the second sentence of Paragraph 357(8) of the BGB. The Chamber takes the view that this unequal treatment of the legal consequences of the withdrawal of a declaration of intention to conclude an off-premises construction contract and the withdrawal of a declaration of intention to conclude a consumer construction contract cannot be objectively justified, at least in the case where – as in the present case – the customer's assets have been enhanced by the construction services, that is to say, he or she has been enriched. Rather, in the present case, the assumption that claims under the law on unjust enrichment are (also) excluded by Paragraph 361(1) of the BGB would in fact run counter to the balancing function of the system of the law on unjust enrichment, with its restitution and its disgorgement function, that system being oriented towards material aspects of justice and equity [...] [reference in the legal literature].

## II.

The Chamber takes the view that the interpretation given to Paragraph 361(1) of the BGB – which transposed Article 14(5) of Directive 2011/83/EU into national law – by the case-law and prevailing legal literature outlined in section D is not binding in the sense of a comprehensive exclusion of claims. The exclusion of claims against the consumer 'as a consequence of the exercise of the right of withdrawal' formulated in Article 14(5) of Directive 2011/83/EU does not necessarily have to encompass claims made under the law on unjust enrichment after a withdrawal, as such an interpretation might contradict the principle of prohibition of enrichment – under EU law also. That principle is intended to ensure that the consumer surrenders to the trader the advantages to which he or she is not entitled from the material point of view of justice or – if that is not possible – to ensure that the consumer does not definitively retain those advantages without paying compensation [...] [reference in the legal literature]. At the same time, the application of the principles of the law on unjust enrichment would also ensure that the consumer need only pay compensation for the performance that also has value for him or her or is in line with his or her interests, as the principles of 'imposed' enrichment [...] [reference in the legal literature] would also remain applicable.

In that respect, the Chamber takes the view that the interpretation of Article 14(5) of Directive 2011/83/EU might have to take into account that the prohibition of unjust enrichment is a principle common to the legal systems of the Member States which has been at least implicitly recognised by the Court as one of the general principles of EU law (see CJEU, judgment of 16 December 2008 – C-47/07 P (*Masdar (UK) v Commission*) [...] [reference in the legal literature].



According to this principle, a person who has suffered a loss which enhances the assets of another person without there being any valid legal basis for that enrichment is entitled to restitution, up to the amount of that loss, from the person enriched (see CJEU (Grand Chamber), judgment of 9 July 2020 – C-575/18 P (*Czech Republic v Commission*) [...] [reference in the legal literature]; Opinion of Advocate General Hogan of 15 July 2021 – C-33/20, C-155/20, C-187/20, point 134 [OMISSIS] [...] [reference in the legal literature]. Member States must take account of that principle of prohibition of enrichment when specifying the consequences of the exercise of the right of withdrawal (see the Opinion of Advocate General Hogan, *loc. cit.*, point 135).

The recitals of Directive 2011/83/EU do not necessarily preclude an understanding of Article 14(5) of Directive 2011/83/EU to the effect that it also respects the principle of prohibition of enrichment, that is to say, it does not exclude possible compensation claims brought by the trader under the law on unjust enrichment. Recital 47 of Directive 2011/83/EU states that, in the event that a consumer has used the goods to an extent more than necessary to establish the nature, characteristics and the functioning of the goods, the consumer should not lose the right to withdraw but should be liable for any diminished value of the goods (transposed into national law by Paragraph 357(7) of the BGB). It is stated at the end of that recital that the obligations of the consumer in the event of withdrawal should not discourage the consumer from exercising his or her right of withdrawal. Therefore, the recital might express the consideration under the law on unjust enrichment that a pecuniary advantage unjustifiably accrued to the consumer should not remain with the consumer, but should be reimbursed to the trader at whose expense the advantage was obtained. If the restitution and disgorgement functions of the law on unjust enrichment were to be understood as general principles of substantive justice, and if the principle of prohibition of enrichment under EU law is taken into account, the obligations imposed on the consumer by the law on unjust enrichment might also not be such as to prevent him or her from exercising his or her right of withdrawal. Furthermore, recital 50 of Directive 2011/83/EU provides that, on the one hand, the consumer should benefit from his or her right of withdrawal even where he or she has asked for the provision of services before the end of the withdrawal period, and, on the other hand, if the consumer exercises his or her right of withdrawal, the trader should be assured to be adequately paid for the service he or she has provided (transposed into national law by Paragraph 357(8) of the BGB). That recital might also express the intention for the principle of prohibition of enrichment under EU law to be taken into account. Therefore, it may be doubted whether, by excluding claims against the consumer ‘as a consequence of the exercise of the right of withdrawal’, the EU legislature intended, for the event that the trader does not properly inform the consumer of the right of withdrawal and of a possible obligation to pay compensation for value, a penalty of such severity that even the principle of prohibition of enrichment under EU law should take second place to this.

### III.



If Article 14(5) of Directive 2011/83/EU is understood to leave room for the application of the EU-law principle of prohibition of enrichment, the Chamber takes the view that Paragraph 361(1) of the BGB, due to its wording ‘claims against the consumer as a result of withdrawal’, might also be interpreted in conformity with the directive as meaning that claims under the law of unjust enrichment are not completely excluded by that provision. In that case, the applicant’s claim in the alternative could be successful on the basis of entitlement to compensation under the law on unjust enrichment.

F.

The decision on how the provision of Article 14(5) of Directive 2011/83/EU is to be interpreted in the context set out in sections A to E above is ultimately a matter for the Court of Justice. Since the question referred, set out in point I of the operative part of this order, has not yet been answered by the case-law of the Court of Justice, it is in the interest of a uniform interpretation of EU law for the court to refer it, of its own motion, to the Court of Justice for a preliminary ruling pursuant to point (a) of the first paragraph and the second paragraph of Article 267 TFEU.

Essen, 27 December 2021

[...]

WORKING DOCUMENT