

Case C-565/22**Request for a preliminary ruling****Date lodged:**

26 August 2022

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

20 July 2022

Appellant on a point of law (applicant at first instance):

Verein für Konsumenteninformation

Respondent in the appeal on a point of law (defendant at first instance):

Sofatutor GmbH

The Oberster Gerichtshof (Supreme Court, Austria), sitting as the court ruling on appeals on points of law [...], in the case of the action brought by the applicant, Verein für Konsumenteninformation (Association for Consumer Information), 1060 Vienna, [...] against the defendant, Sofatutor GmbH, Germany, 10245 Berlin, [...], for a prohibitory injunction and publication of the judgment, following the appeal on a point of law lodged by the applicant against the judgment of the Oberlandesgericht Wien (Higher Regional Court, Vienna), sitting as the court ruling on appeals on the merits ('the appellate court'), of 18 March 2022, GZ 5 R 141/21y-30, by which the judgment of the Handelsgericht Wien (Commercial Court, Vienna) of 23 June 2021, GZ 30 Cg 29/20x-25, was varied, has made, [...], the following

Order:

I. The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

Must Article 9(1) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights be interpreted as meaning that the consumer has a new right of withdrawal where a distance contract is 'extended automatically' (Article 6(1)(o) of that directive)?

II. [...] [stay of proceedings]

G r o u n d s:

A. Facts

- 1 The applicant is an association with standing to bring proceedings in accordance with Paragraph 29 of the Konsumentenschutzgesetz (Law on consumer protection, Austria; ‘the KSchG’).
- 2 The defendant operates online learning platforms for pupils. It also offers its services throughout the territory of Austria via the internet and, in the course of its business activities, regularly enters into contact with consumers, who have their place of residence or habitual residence in Austria, for the purpose of concluding legal transactions within the meaning of Paragraph 1 of the KSchG. The defendant concludes contracts with consumers on the basis of its general terms and conditions.
- 3 The defendant’s general terms and conditions provide that, when a subscription is booked on the platform for the first time, it can be tested free of charge for 30 days from the conclusion of the contract and can be terminated without notice at any time during that period, that the subscription becomes chargeable only after the expiry of the 30 days and that, in the event of failure to terminate within the 30 days, the paid subscription period agreed in the booking process begins to run.
- 4 The general terms and conditions provide that, in the event that the paid subscription period expires without the defendant or the consumer having terminated the subscription in due time, the subscription is automatically extended for a certain period of time.
- 5 When consumers conclude a contract for the first time, the defendant informs them of the right of withdrawal to which they are entitled by virtue of having concluded a contract at a distance, as in the present case.

B. The arguments of the parties in the proceedings and the procedure to date

- 6 The **applicant** seeks – in so far as still relevant to the proceedings relating to the appeal on a point of law – a finding that the defendant is guilty of ‘*failing, in the course of trade with consumers, to inform the latter, in a clear and comprehensible manner, of the conditions, time limits and procedure for exercising the right of withdrawal, and also to provide the model withdrawal form, in the context of extending fixed-term distance contracts*’. It takes the view that no restriction to the conclusion of a contract for the first time can be inferred from the wording of Article 9 of Directive 2011/83/EU (‘the Consumer Rights Directive’). Consequently, according to the applicant, the consumer also has a right of withdrawal under Paragraph 11 of the Fern- und Auswärtsgeschäfte-Gesetz (Federal Law on distance and off-premises contracts, Austria; ‘the FAGG’), which transposes Article 9 of the Consumer Rights Directive, when his

or her trial subscription is converted into a regular subscription and also when a regular subscription is renewed. The defendant does not inform consumers of that second right of withdrawal. The defendant thus breaches its obligation to provide information under point 8 of Paragraph 4(1) of the FAGG, thereby making it liable to a prohibitory injunction under Paragraph 28a(1) of the KSchG.

- 7 The **defendant** opposed that application for a prohibitory injunction. It took the view that the automatic extension of contracts which is provided for in the legislation does not give rise to a second right of withdrawal on the part of the consumer, with the result that it is not required to inform consumers of such a right.
- 8 The **court of first instance** found against the defendant – in so far as is relevant in the present proceedings – in accordance with the form of order sought by the action.
- 9 The **appellate court** varied the judgment
– in so far as is relevant in the present proceedings – in such a way as to dismiss the action.
- 10 The **applicant's appeal on a point of law** before the Supreme Court, for which the appellate court granted leave, is directed against that decision.

C. Relevant provisions

Article 2(7), Article 6(1)(h) and (o) and Article 9(1) of the Consumer Rights Directive, together with their headings, read as follows:

Article 2

Definitions

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

[...]

(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;*

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), as well as the model withdrawal form set out in Annex I(B);

[...]

(o) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;

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.

The provisions of Paragraph 3(2), Paragraph 4(1), points 8 and 14, and Paragraph 11(1) of the FAGG, together with their headings, read as follows:

Definitions

Paragraph 3 In this Federal Law, the term

[...]

2. 'distance contract' means any contract concluded between a trader and a 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 means of distance communication up to and including the time at which the contract is concluded;

Content of the obligation to provide information; Legal consequences

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

[...]

8. where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right, whereby the model withdrawal form pursuant to Part B of Annex I shall also be provided.

[...]

14. the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract,

Right of withdrawal and time limit for withdrawal

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

[...]

D. Reasoning in the request for a preliminary ruling

- 11 The outcome of the dispute depends essentially on the interpretation of Article 9(1) of the Consumer Rights Directive, which in turn must guide the interpretation of Paragraph 11(1) of the FAGG.
- 12 According to the *travaux préparatoires* relating to Paragraph 11 of the FAGG, the right of withdrawal is not limited to the first time a contract is concluded between a trader and a consumer, but, rather, an extension of an existing but fixed-term contractual relationship or an amendment of the content of an existing contractual relationship, if agreed at a distance or off-premises, may also be subject to the FAGG and thus give rise to a right of withdrawal on the part of the consumer in respect of the agreed extension or amendment of the contract [...].
- 13 According to a view expressed in the legal literature, with reference being made to the *travaux préparatoires*, a right of withdrawal also enters into consideration in the case of an amendment of the content of, or (separately agreed) extension of, a contractual relationship, however created, by way of an off-premises or distance contract [...]. According to that view, if the consumer's consent is deemed to be given by means of a fictitious declaration, the consumer must be specifically informed of the significance of his or her conduct [...].
- 14 In the legal literature, doubts are expressed as to whether an *automatic* extension of a distance contract gives rise to a new right of withdrawal. It is stated that Article 6(1)(o) of the Consumer Rights Directive merely provides for an obligation to inform the consumer of 'the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract', but there is no mention of a right of withdrawal, or information regarding such a right, in the provision, even though it concerns the automatic extension of contracts. In addition, doubt is cast on the supposition that an automatic extension constitutes a (second)

‘distance contract’ within the meaning of Article 2(7) of the Consumer Rights Directive. That doubt is justified on the ground that no (second) contract is ‘concluded’, but, rather, the first contract is merely not terminated (and, as provided for in that contract, its term is thereby extended), and on the ground that, where a contract is automatically extended, there can be no question of ‘exclusive use of means of distance communication’ within the meaning of the legal definition of ‘distance contract’. Lastly, it is argued that the typical risk which exists in the case of distance selling (and which objectively justifies the right of withdrawal) no longer exists in the case where a contract is automatically extended (see recital 37 of the Consumer Rights Directive). In that respect, the consumer is already sufficiently familiar with the goods or services and has already been adequately informed, when the contract was initially concluded, of the possibility of extension [...].

- 15 The Court of Justice of the European Union has ruled that Article 2(a) of Directive 2002/65/EC concerning the distance marketing of consumer financial services must be interpreted as meaning that an agreed amendment to a loan agreement cannot be categorised as a ‘contract concerning financial services’, within the meaning of that provision, where the amendment does no more than alter the originally agreed rate of interest, but does not extend the term of the loan or alter its amount, and where the original clauses of the loan agreement provided for the agreement of such an amendment or, failing such agreement, the application of a variable interest rate (CJEU, C-639/18, *Sparkasse Südholstein*).

- 16 The Supreme Court takes the view

that there is no *acte clair* with regard to the question set out above – even if the arguments presented in the legal literature militate against a right of withdrawal and the decision of the Court of Justice in Case C-639/18 can be usefully applied to the present case [...]. Therefore, the Supreme Court, as the court of last instance, considers that it is obliged to submit a request for a preliminary ruling (see RS0082949).

[...] 20 July 2022

[...]