



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

5 July 2012 *

(Reference for a preliminary ruling — Directive 97/7/EC — Consumer protection — Distance contracts — Consumer information — Information given or received — Durable medium — Meaning — Hyperlink on the website of the supplier — Right of withdrawal)

In Case C-49/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Wien (Austria), made by decision of 26 January 2011, received at the Court on 3 February 2011, in the proceedings

Content Services Ltd

v

Bundesarbeitskammer,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, E. Juhász (Rapporteur), G. Arestis and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 26 January 2012,

after considering the observations submitted on behalf of:

- Content Services Ltd, by J. Öhlböck, Rechtsanwalt,
- the Bundesarbeitskammer, by A.M. Kosesnik-Wehrle and S. Langer, Rechtsanwälte,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the Belgian Government, by T. Materne, acting as Agent,
- the German Government, by T. Henze and J. Kemper, acting as Agents,
- the Greek Government, by G. Kotta, F. Dedousi and G. Alexaki, acting as Agents,

* Language of the case: German.

— the Italian Government, by G. Palmieri, acting as Agent, assisted by L. D’Ascia, avvocato dello Stato,

— the Netherlands Government, by C.M. Wissels and B. Koopman, acting as Agents,

— the European Commission, by M. Owsiany-Hornung and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 March 2012,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 5(1) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19).
- 2 The reference has been made in proceedings between Content Services Ltd (‘Content Services’) and the Bundesarbeitskammer (Federal Chamber of Labour) concerning the form in which a consumer who has concluded a distance contract via the internet must receive information relating to the contract.

Legal context

European Union law

- 3 Recitals 9, 11, 13, 14 and 22 in the preamble to Directive 97/7 state:

‘(9) ... contracts negotiated at a distance involve the use of one or more means of distance communication; ... the constant development of those means of communication does not allow an exhaustive list to be compiled but does require principles to be defined which are valid even for those which are not as yet in widespread use;

...

(11) ... the use of means of distance communication must not lead to a reduction in the information provided to the consumer; ... the information that is required to be sent to the consumer should therefore be determined, whatever the means of communication used; ...

...

(13) ... information disseminated by certain electronic technologies is often ephemeral in nature insofar as it is not received on a permanent medium; ... the consumer must therefore receive written notice in good time of the information necessary for proper performance of the contract;

(14) ... the consumer is not able actually to see the product or ascertain the nature of the service provided before concluding the contract; ... provision should be made, unless otherwise specified in this Directive, for a right of withdrawal from the contract ...

(22) ... in the use of new technologies the consumer is not in control of the means of communication used ... it is therefore necessary to provide that the burden of proof may be on the supplier;

...’

4 Article 4 of that directive, headed 'Prior information', provides:

'1. In good time prior to the conclusion of any distance contract, the consumer shall be provided with the following information:

- (a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address;
- (b) the main characteristics of the goods or services;
- (c) the price of the goods or services including all taxes;
- (d) delivery costs, where appropriate;
- (e) the arrangements for payment, delivery or performance;
- (f) the existence of a right of withdrawal, except in the cases referred to in Article 6(3);

...

2. The information referred to in paragraph 1, the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors.

...'

5 Article 5 of that directive, headed 'Written confirmation of information', provides:

'1. The consumer must receive written confirmation or confirmation in another durable medium available and accessible to him of the information referred to in Article 4(1)(a) to (f), in good time during the performance of the contract, and at the latest at the time of delivery where goods not for delivery to third parties are concerned, unless the information has already been given to the consumer prior to conclusion of the contract in writing or on another durable medium available and accessible to him.

In any event the following must be provided:

- written information on the conditions and procedures for exercising the right of withdrawal, within the meaning of Article 6, including the cases referred to in the first indent of Article 6(3),
- the geographical address of the place of business of the supplier to which the consumer may address any complaints,
- information on after-sales services and guarantees which exist,
- the conclusion for cancelling the contract, where it is of unspecified duration or a duration exceeding one year.

2. Paragraph 1 shall not apply to services which are performed through the use of a means of distance communication, where they are supplied on only one occasion and are invoiced by the operator of the means of distance communication. Nevertheless, the consumer must in all cases be able to obtain the geographical address of the place of business of the supplier to which he may address any complaints.'

6 Article 6 of Directive 97/7, entitled ‘Right of withdrawal’, provides:

‘1. For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason ...

...

3. Unless the parties have agreed otherwise, the consumer may not exercise the right of withdrawal provided for in paragraph 1 in respect of contracts:

— for the provision of services if performance has begun, with the consumer’s agreement, before the end of the seven working day period referred to in paragraph 1,

...’

7 Article 14 of Directive 97/7, headed ‘Minimal clause’, provides that Member States may introduce or maintain, in the area covered by that directive, more stringent provisions compatible with the FEU Treaty, to ensure a higher level of consumer protection and that such provisions include, where appropriate, a ban, in the general interest, on the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts, with due regard for the Treaty.

8 According to Article 2(f) of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16), ‘durable medium’ means ‘any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored’.

9 According to Article 2(12) of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ 2003 L 9, p. 3), ‘durable medium’ means ‘any instrument which enables the customer to store information addressed personally to him in a way accessible for future reference for a period of time adequate to the purposes of the information and which allows the unchanged reproduction of the information stored’.

10 According to Article 3(m) 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), ‘durable medium’ means ‘any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored’.

11 Article 31 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) repeals Directive 97/7 as of 13 June 2014. According to Article 2(10) of Directive 2011/83, ‘durable medium’ means ‘any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored’.

Austrian law

12 Directive 97/7 was transposed at national level by the Consumer Protection Law (Konsumentenschutzgesetz) of 8 March 1979 (BGBl. 140/1979), in the version applicable to the case in the main proceedings ('the KSchG').

13 Under Paragraph 5c(1) of the KSchG:

'The consumer must receive, in good time, before submitting his declaration of intention to enter into the contract, information on the following points:

1. the trader's business name and address for service,
 2. the essential characteristics of the goods or service,
 3. the price of the goods or service including all taxes,
 4. delivery costs, where applicable,
 5. the arrangements for payment and delivery or performance of the service,
 6. the existence of a right of withdrawal, other than in the cases provided for in Paragraph 5f,
- ...'

14 Paragraph 5d(1) and (2) of the KSchG provide:

'1. The consumer must receive written confirmation of the information referred to in Paragraph 5c(1)(1) to (6) [of the KSchG] in good time during the performance of the contract and at the latest at the time of delivery where goods not for delivery to third parties are concerned, unless that information has already been given to him in writing prior to conclusion of the contract. Confirmation in a durable medium available and accessible to the consumer is to be treated as written confirmation.

(2) The following information must also be communicated to the consumer in good time, in writing or on another durable medium available and accessible to him;

1. information on the conditions and procedures for exercising the right of withdrawal under Paragraph 5e, including the cases provided for in Paragraph 5f(1),
2. the geographical address of the place of business of the undertaking to which the consumer can address any complaints,
3. information on the after-sales service and the applicable warranty conditions, and
4. the conditions for cancelling where the contract is of an unspecified duration or the duration exceeds one year.'

15 Paragraph 5e(1) to (3) of the KSchG provides:

'(1) The consumer may cancel a contract concluded at a distance or cancel an order placed at a distance until the expiry of the time-limits referred to in subparagraphs (2) and (3). It is sufficient if the declaration of withdrawal is sent before the expiry of the time-limit.

(2) The time-limit for withdrawal is seven working days, Saturday not counting as a working day. The time-limit runs, for contracts for the delivery of goods, from the day that they are received by the consumer and, for contracts for the provision of services, from the day that the contract is concluded.

(3) If the undertaking has failed to comply with its obligations to supply information under Paragraph 5d(1) and (2), the time-limit for withdrawal shall run for three months from the dates referred to in subparagraph (2). If, during that time-limit, the undertaking fulfils its obligations, the time-limit for exercising the right of withdrawal referred to in subparagraph 2 runs from the date on which it communicated the information.'

- 16 According to Paragraph 5f(1) of the KSchG, the consumer has no right of withdrawal in the case of contracts for services the performance of which in relation to the consumer begins, as agreed, within seven working days from conclusion of the contract.

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

- 17 Content Services, a limited liability company governed by English law, operating a branch in Mannheim (Germany), offers various services online on its website, which is configured in German and is also accessible in Austria. On that site, it is possible inter alia to download free software or trial versions of software which incur a charge.
- 18 To be able to use that site, internet users must fill in a registration form. When they place an order, they must declare that they accept the general terms and conditions and that they waive their right of withdrawal, by ticking a specific box on the form. The information required by Articles 4 and 5 of Directive 97/7, in particular that concerning the right of withdrawal, is not shown directly to internet users, who may however view it by clicking on a link on the contract sign-up page. The conclusion of a subscription contract with Content Services is impossible if the box has not been ticked.
- 19 After placing his order, the internet user concerned receives an email from Content Services containing a link to a web address, with a user name and password. Moreover, that email tells the internet user that, after entering the user name and password, he will have immediate access to the content of the website and that he must keep the access data to the site in a safe place.
- 20 That email does not contain any information on the right of withdrawal. Information on that right can be obtained only via the link sent in that email.
- 21 The internet user then receives an invoice from Content Services for access to the content of the website for 12 months, for EUR 96. The invoice reiterates that the internet user concerned has waived his right of withdrawal and that, therefore, he no longer has the option to cancel the subscription contract.
- 22 The action in the main proceedings was brought by the Bundesarbeitskammer, a body which is responsible for the protection of consumers with its registered office in Vienna (Austria), which challenges Content Services' business practice on the ground that it infringes several provisions of European Union and domestic law in regard to consumer protection.
- 23 Content Services the unsuccessful party before the Handelsgericht Wien (Commercial Court, Vienna), appealed against the decision of that court before the Oberlandesgericht Wien (Higher Regional Court, Vienna).

- 24 The Oberlandesgericht Wien states that, in the present case, information on the right of withdrawal is not contained in the confirmation email itself and can be obtained only via a link sent in the email. A website can be modified at any time and, consequently, is not available to the consumer on a lasting basis.
- 25 Considering that an interpretation of the provisions of Directive 97/7 was necessary in order to resolve the dispute before it, the Oberlandesgericht Wien decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘Is the requirement in Article 5(1) of [Directive 97/7] to the effect that a consumer must receive confirmation of the information specified there in a durable medium available and accessible to him, unless the information has already been given to him on conclusion of the contract in a durable medium available and accessible to him, satisfied where that information is made available to the consumer by means of a hyperlink on the trader’s website which is contained in a line of text that the consumer must mark as read by ticking a box in order to be able to enter into a contractual relationship?’

The question referred for a preliminary ruling

- 26 By its question, the referring court asks, in essence, whether Article 5(1) of Directive 97/7 must be interpreted as meaning that a business practice consisting of making the information referred to in that provision accessible to the consumer only via a hyperlink on a website of the undertaking concerned meets the requirements of that provision.
- 27 It is clear from the order for reference that, before the conclusion of a distance contract, consumers can access information relating, inter alia, to the right of withdrawal only by clicking on a link which refers the consumer to a section of Content Services’ website. It is also clear from that order for reference that, after placing their order, those consumers receive an email from Content Services which does not contain any information on that right, but in which there is a link to Content Services’ website from which certain information on the right of withdrawal can be obtained.
- 28 Pursuant to Article 5(1) of Directive 97/7, the consumer must receive written confirmation or confirmation on another durable medium available and accessible to him of the relevant information, in good time unless the information has already been given to him prior to conclusion of the contract in writing or on any other such medium.
- 29 It follows from that provision that, where a business makes certain information available to the consumer prior to conclusion of the contract, other than in writing or on a durable medium available and accessible to that consumer, the business is obliged to confirm the relevant information in writing or on any other such medium.
- 30 In the case in the main proceedings, the question is whether, as part of the business practice adopted by Content Services, the relevant information is given to the consumer on a durable medium prior to the conclusion of the contract or the confirmation of that information is later received by the consumer via such a medium.
- 31 First, it should be examined whether, in the context of that business practice, the relevant information is ‘given’ to the consumer or ‘received’ by him, within the meaning of Article 5(1) of Directive 97/7.
- 32 In that regard, it must be stated that neither Directive 97/7 nor the documents relevant for its interpretation, such as the travaux préparatoires, provide clarification of the exact scope of the concept of ‘receive’ and ‘given’ in Article 5(1) of the directive. Therefore, the meaning of those terms

must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (see, to that effect, Case C-336/03 *easyCar* [2005] ECR I-1947, paragraphs 20 and 21).

- 33 As regards the usual meaning in everyday language, it should be noted, as the Commission did, that the terms 'receive' and 'given', used in that provision, refer to a process of transmission, the first from the point of view of the consumer and the second from that of the supplier. In a process of transmission of information, it is not necessary for the recipient of the information to take any particular action. By contrast, where a link is sent to a consumer, he must act in order to acquaint himself with the information in question and he must, in any event, click on that link.
- 34 As regards the context in which the terms in question are used, it should be recalled that Article 5(1) of Directive 97/7 seeks to ensure the communication to the consumer of the information necessary to the proper performance of the contract and, above all, to the exercise of his consumer rights, in particular his right of withdrawal. As the Italian Government states, that provision contains a series of requirements intended to protect consumers, who are the weak parties in contractual relations concluded at a distance.
- 35 It should also be noted in that regard that, whereas the European Union legislature opted, in Article 4(1) of Directive 97/7, in the vast majority of the linguistic versions, for a neutral formulation, according to which the consumer is to be 'provided' with the relevant information, it chose, by contrast, a term with greater implications for the business in Article 5(1) of that directive, according to which the consumer must 'receive' confirmation of that information. That term expresses the idea that, regarding the confirmation of information to consumers, passive conduct by those consumers is enough.
- 36 The purpose of Directive 97/7 is to afford consumers extensive protection, by giving them a number of rights in relation to distance contracts. The objective of the European Union legislature is, as is apparent from recital 11 in the preamble to the directive, to avoid a situation where the use of means of distance communication leads to a reduction in the information provided to the consumer.
- 37 In those circumstances, it must be held that, where information found on the seller's website is made accessible only via a link sent to the consumer, that information is neither 'given' to that consumer, nor 'received' by him, within the meaning of Article 5(1) of Directive 97/7.
- 38 Secondly, it must be examined whether a website the information of which is accessible to consumers via a link provided by the seller must be regarded as a 'durable medium', within the meaning of Article 5(1) of Directive 97/7.
- 39 In that regard, it should be stated that that provision gives an alternative, namely that the relevant information must be received by the consumer 'in writing' or 'on another durable medium'.
- 40 It can be inferred that the European Union legislature provided for two functionally equivalent approaches and, therefore, required that such media be equivalent.
- 41 In those circumstances, as is clear from the observations submitted to the Court by the Austrian, Belgian and Greek Governments, in the context of new technologies, a substitute for paper form may be regarded as capable of meeting the requirements of the protection of the consumer so long as it fulfils the same functions as paper form.
- 42 It follows that a durable medium, within the meaning of Article 5(1) of Directive 97/7, must ensure that the consumer, in a similar way to paper form, is in possession of the information referred to in that provision to enable him to exercise his rights where necessary.

- 43 Where a medium allows the consumer to store the information which has been addressed to him personally, ensures that its content is not altered and that the information is accessible for an adequate period, and gives consumers the possibility to reproduce it unchanged, that medium must be regarded as 'durable' within the meaning of that provision.
- 44 Such an approach is confirmed by the definition of 'durable medium' given by the European Union legislature in other legislative texts, in particular in Article 2(f) of Directive 2002/65, Article 2(12) of Directive 2002/92 and Article 3(m) of Directive 2008/48. Although those directives do not apply in the present case, there is nothing to indicate, as the Advocate General noted in point 36 of his Opinion, that they refer to a concept different from that used in Directive 97/7. That finding is all the more applicable to Directive 2011/83 which replaces Directive 97/7 as of 13 June 2014, and Article 2(10) thereof, which defines 'durable medium' according to the criteria noted in the previous paragraph.
- 45 The same approach was followed by the Court of the European Free Trade Association (EFTA) in Case E-4/09 *Inconsult Anstalt v Finanzmarktaufsicht* [2010] EFTA Court Report, p. 86, to interpret the concept of 'durable medium' under Directive 2002/92.
- 46 There is nothing in the file to indicate that the seller's website, to which the link sent to the consumer connects, allows that consumer to store information which is personally addressed to him in such a way that he can access it and reproduce it unchanged during an adequate period without the seller being able to amend the content unilaterally.
- 47 Content Services refers to a 2007 report of the European Securities Markets Expert Group (ESME) which distinguishes between 'ordinary websites' and 'sophisticated websites' and which considers that some sophisticated websites can constitute a durable medium.
- 48 Content Services states that technical progress and rapid change to new technologies makes it possible to develop websites which can ensure that information, without coming under the control of the consumer, can be stored, accessed and reproduced by the consumer during an adequate period.
- 49 Leaving aside the question whether the use of such an advanced website can meet the requirements of Directive 97/7, it is not disputed, and Content Service itself recognises, that it does not use such a site for the activity in question in the main proceedings.
- 50 It should be held, therefore, that a website such as that in question in the main proceedings, the information on which is accessible to consumers via a link provided by the seller, cannot be regarded as a 'durable medium' within the meaning of Article 5(1) of Directive 97/7.
- 51 Having regard to all of the foregoing considerations, the answer to the question referred is that Article 5(1) of Directive 97/7 must be interpreted as meaning that a business practice consisting of making the information referred to in that provision accessible to the consumer only via a hyperlink on a website of the undertaking concerned does not meet the requirements of that provision, since that information is neither 'given' by that undertaking nor 'received' by the consumer, within the meaning of that provision, and a website such as that at issue in the main proceedings cannot be regarded as a 'durable medium' within the meaning of Article 5(1).

Costs

- 52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Third Chamber) hereby rules:

Article 5(1) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts must be interpreted as meaning that a business practice consisting of making the information referred to in that provision accessible to the consumer only via a hyperlink on a website of the undertaking concerned does not meet the requirements of that provision, since that information is neither ‘given’ by that undertaking nor ‘received’ by the consumer, within the meaning of that provision, and a website such as that at issue in the main proceedings cannot be regarded as a ‘durable medium’ within the meaning of Article 5(1).

[Signatures]