

Case C-536/20

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:

22 October 2020

Referring court:

Lietuvos Aukščiausiasis Teismas (Lithuania)

Date of the decision to refer:

21 October 2020

Appellant on a point of law:

UAB Tiketa

Other parties in the appeal on a point of law:

M. Š.,

VšĮ Baltic Music

Subject matter of the action in the main proceedings

The case concerns a dispute with regard to the refund of the amount paid by a consumer for tickets for an event and compensation for the non-pecuniary damage suffered as a result of the cancellation of the event.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of the provisions of Directive 2011/83 on the concept of a trader; third paragraph of Article 267 of the Treaty on the Functioning of the European Union

Questions referred

1. Is the concept of a trader defined in Article 2(2) of Directive 2011/83 to be construed as meaning that a person acting as an intermediary when a consumer

purchases a ticket may be regarded as a trader bound by the obligations set out in Directive 2011/83 and, accordingly, as a party to the sales contract or service contract against whom the consumer may file a claim or bring an action?

1.1. Is it relevant for the interpretation of the concept of a trader defined in Article 2(2) of Directive 2011/83 whether the person acting as an intermediary when a consumer purchases a ticket has, before the consumer is bound by a distance contract, provided that consumer, in a clear and comprehensible manner, with all information on the main trader as laid down in Article 6(1)(c) and (d) of Directive 2011/83?

1.2. Is the fact of intermediation to be deemed to have been disclosed in the case where the person involved in the process of the ticket purchase, before the consumer is bound by a distance contract, provides the name and legal form of the main trader as well as the information that the main trader assumes full responsibility for the event, its quality and content and information provided thereon and indicates that it itself acts only as a ticket distributor and is a disclosed agent?

1.3. May the concept of a trader defined in Article 2(2) of Directive 2011/83 be construed as meaning that, given the legal relationship of twofold service (ticket distribution and event organisation) between the parties, both the ticket vendor and the event organiser can be deemed to be traders, that is to say, parties to the consumer contract?

2. Is the requirement to provide information and to make that information available to the consumer in plain and intelligible language, as laid down in Article 8(1) of Directive 2011/83, to be construed and applied in such a way that the obligation to inform the consumer is considered to be fulfilled properly where such information is provided in the intermediary's rules on the provision of services made available to the consumer on the website tiketa.lt before the consumer makes the payment confirming that he or she has become acquainted with the intermediary's rules on the provision of services and undertaking to respect them as part of the terms and conditions of the transaction to be concluded by means of a so-called 'click-wrap' agreement, that is to say, by actively ticking a specific box in the online system and clicking on a specific link?

2.1. Is it relevant for the interpretation and application of this requirement that such information is not provided on a durable medium and that there is no subsequent confirmation of the contract that contains all the information necessary under Article 6(1) of Directive 2011/83 on a durable medium as required under Article 8(7) of Directive 2011/83?

2.2. Under Article 6(5) of Directive 2011/83, does that information provided in the intermediary's rules on the provision of services form an integral part of the distance contract irrespective of whether that information is not provided on a

durable medium and/or there is no subsequent confirmation of the contract on a durable medium?

Provisions of EU law cited

Article 169 of the Treaty on the Functioning of the European Union ('TFEU')

Article 38 of the Charter of Fundamental Rights of the European Union ('the Charter')

Articles 1, 2(2), 6(1)(c) and (d) and 6(5), 8(1) and 8(7)(a) 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')

Article 2(b) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('the Unfair Commercial Practices Directive')

Provisions of national law cited

Civil Code of the Republic of Lithuania ('the Civil Code')

Paragraph 3 of Article 6.228¹ ('Concept of a consumer contract and other notions'):

'3. "Entrepreneur" shall mean a natural or legal person or another organisation, or a unit thereof, seeking to conclude or concluding contracts for purposes of its trade, business, craft or profession, including persons acting on behalf or for the benefit of the entrepreneur. A legal person may be deemed to be an entrepreneur irrespective of the legal form of its constituent parties.'

Article 2.133 ('Legal effects of a transaction concluded by an agent'):

- '1. A transaction concluded by one person (agent) in other person's (principal's) name by disclosing thereby the fact of agency and without exceeding the rights conferred, shall establish, alter and cancel directly the civil rights and obligations of the principal.*
- 2. The rights of an agent may also be inferred from the circumstances under which the agent acts (seller in retail trade, cashier, etc.). In the event that the conduct of a person gives reasonable grounds for third parties to think*

that he or she, acting as a principal, has appointed the other person to be his or her agent, contracts concluded by that person in the principal's name shall be binding on the principal.

3. *In the event that, when concluding a transaction, an agent fails to provide the information that he or she is acting in the principal's name and in his or her interests, the principal shall acquire the rights and assume the duties arising from the transaction only where the other party to the transaction was in a position to understand from the circumstances of its conclusion that that transaction was concluded with an agent, or where the identity of the person with whom the transaction was concluded was of no importance to that party.*

[...]

Paragraph 24 of Article 2 ('Key concepts of this Law') of the Law of the Republic of Lithuania on the protection of consumer rights (the version applicable in the present case is that which was in force from 11 November 2017 to 1 August 2018; 'the Law on Consumer Protection'):

'24. "Entrepreneur" shall mean a natural or legal person or another organisation, or a unit thereof, seeking to conclude or concluding contracts for purposes of its trade, business, craft or profession, including persons acting on behalf or for the benefit of the entrepreneur. A legal person may be deemed to be an entrepreneur irrespective of the legal form of its constituent parties.'

Brief summary of the facts and procedure

- 1 The applicant, M. Š., purchased, online from the company Tiketa, tickets for a show organised by Baltic Music ('the event organiser'). Tiketa is engaged in the distribution of tickets for events (concerts, shows and other events) organised by third parties. Tiketa does not itself engage in event-organising activities.
- 2 Tiketa's website contained the information that the event was being organised by Baltic Music and that Baltic Music was the event organiser which assumed full liability for the event and its quality and content as well as for any information provided concerning the event. Tiketa itself was mentioned as the ticket distributor acting as a disclosed agent ['atsiskleidęs tarpininkas'; literally, 'disclosed intermediary'] (although national law normally uses the concept of 'atstovas' (agent) whenever a contract is concluded in the name of, or on behalf of, another person).
- 3 The event information that was publicly accessible did not state anything further about who was a party to the contract or about the refund procedure for tickets if the event were to be cancelled. Information on the service provider and on ticket refunds is provided in the rules on the provision of services published on Tiketa's website. Neither those rules nor the confirmation of the contract entered into that

would feature the information contained in those rules were provided to the consumer on a durable medium. A portion of the rules on the provision of services (including the information that, if the event were to be cancelled, the event organiser would assume full responsibility for ticket refunding) was indeed included on the ticket generated as soon as the applicant had paid for it.

- 4 When he arrived for the event, M. Š. learned that it would not be taking place. He therefore filed a claim with Tiketa and requested a refund of the ticket price and travel expenses incurred as well as compensation for non-pecuniary damage. Tiketa replied that it was not responsible for the cancellation of the event and advised the consumer to contact Baltic Music. The latter completely ignored the claims.
- 5 M. Š. thereupon brought an action and requested that the defendants Tiketa and Baltic Music be jointly and severally ordered to pay compensation for the pecuniary and non-pecuniary damage suffered. The court of first instance partially upheld the action and awarded to the applicant a portion of the amounts claimed from the company Tiketa. Tiketa unsuccessfully lodged an appeal. Tiketa subsequently appealed on a point of law to the referring court [Lietuvos Aukščiausiasis Teismas; the Supreme Court of Lithuania].

Principal arguments of the parties in the main proceedings

- 6 Tiketa argues that it is a publicly disclosed agent providing ticket-distribution services on behalf of the event organiser. It claims that the purchase of tickets has to be classified as the conclusion of a contract between M. Š. and the event organiser and that, at the moment when the contract is concluded, it, Tiketa, represents the event organiser. Tiketa takes the view that it is not responsible for any circumstances relating to the event, including its cancellation.
- 7 Furthermore, Tiketa maintains that it fulfils the obligation to inform the consumer by providing information in the rules on the provision of services published online. Before making payment, the consumer confirms that he or she has become acquainted with the rules and undertakes to respect them as part of the terms and conditions of the transaction by means of a ‘click-wrap’ agreement, that is to say, by actively ticking a specific box in the online system and clicking on a specific link.

Brief summary of the reasons for the referral

- 8 The present Chamber faces questions concerning (a) the interpretation of the concept of a trader and (b) the fulfilment of the trader’s obligation to inform the consumer.

The interpretation of the concept of a trader

- 9 The present proceedings concern what should be the appropriate classification of the legal relationship between the parties, the intermediary's legal status and its obligations towards the consumer.
- 10 In its case-law, the Court of Justice has explained that the notion of the term 'trader' is to be construed particularly broadly as referring to any natural or legal person who carries out a gainful activity (judgment of 4 October 2018, *Kamenova*, C-105/17, EU:C:2018:808, paragraph 30). The national courts examining the case have also relied on a broad notion of the term 'trader'.
- 11 The present Chamber is unsure whether the definition of a trader covers both the entrepreneur acting on his own behalf, who is deemed to be contractually bound under national contract law, and a person acting on behalf of another person, who is not generally regarded as being a party to the contract. A comparison of various linguistic versions of Article 2(2) of Directive 2011/83 (English, French, German and Lithuanian) gives rise to reasonable doubts concerning the Lithuanian translation of the notion of a trader (in Lithuanian, '*įskaitant kiekvieną kitą asmenį*' [literally: '*including any other person*'], and in English '*including through any other person*') and its proper transposition. That said, the referring court takes the view that a comparative analysis of the various linguistic versions does not make it possible to define the exact scope of application of the concept of a trader.
- 12 In accordance with a systematic and teleological interpretation of an autonomous concept of EU law, the objective of ensuring a high level of consumer protection (Article 169 TFEU, Article 38 of the Charter, Article 1 of Directive 2011/83) implies that an intermediary in a transaction may also be deemed to be a trader. The Court of Justice does not exclude this possibility in its case-law either.
- 13 When interpreting the concept of a trader in the broader context of consumer protection, the Court of Justice has held that the term 'trader' defined both in Article 2(b) of the Unfair Commercial Practices Directive and in Article 2(2) of Directive 2011/83 must be interpreted uniformly. In order to be regarded as a trader within the meaning of Article 2(2) of Directive 2011/83, a natural or legal person must be acting "for purposes relating to his trade, business, craft or profession" or in the name or on behalf of a trader' (judgment of 4 October 2018, *Kamenova*, C-105/17, EU:C:2018:808, paragraphs 29 and 36; judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, C-59/12, EU:C:2013:634, paragraphs 36 and 37).
- 14 The definition given in Article 2(b) of the Unfair Commercial Practices Directive leads to an assumption that a trader acting in his own name and a person acting in the name or on behalf of a trader are alternative entities coming within the scope of the definition of 'a trader'. The Court of Justice case-law cited therefore provides a basis for taking the view that the scope *ratione personae* of Directive

2011/83 covers both a person acting for purposes relating to his own trade, business, craft or profession and a person acting in the name or on behalf of a trader.

- 15 At the same time, the present Chamber is unsure whether the interpretation of the notion of a trader has to be linked to the disclosure of agency. Article 6 of Directive 2011/83 stipulates that, before a consumer is bound by a distance contract, the trader must provide the consumer with information in a clear and comprehensible manner, including the address and identity of the trader on whose behalf he is acting and the geographical address of the place of business to which the consumer may address any complaints. This gives rise to the following reasonable question: is it relevant for the interpretation of the notion of a trader whether a person acting in the name or on behalf of a trader has provided the consumer with that information on the main trader? In other words, can a consumer (a purchaser) file claims arising from a consumer contract against an intermediary only in the case where the latter has failed to disclose the fact of agency properly and has given the consumer the false impression that the intermediary is acting as the seller-owner of the goods in question (a party to the consumer contract)? (this is the position taken by the Court of Justice in its judgment of 9 November 2016, *Wathelet*, C-149/15, EU:C:2016:840; see paragraph 34 thereof).
- 16 The present Chamber also poses the question of whether the legal relationship which has arisen between the parties to the proceedings might be classified as the provision of a twofold service (ticket distribution and event organisation), meaning that both the ticket vendor and the event organiser can be deemed to be traders, that is to say, parties to the consumer contract. The referring court takes the view that in such a case the legal relationship between the purchaser, the ticket vendor and the organiser is to be classified as comprising two contracts: (1) a contract for services between the ticket purchaser (the consumer) and the event organiser concluded through the agent (Tiketa) whereby the organiser undertakes to stage the event in accordance with the conditions set out in the ticket; and (2) a contract between the intermediary (Tiketa) and the ticket purchaser under which Tiketa sells tickets to the purchaser and undertakes to provide the essential information listed in Article 6 of Directive 2011/83.

The fulfilment of the trader's obligation to inform the consumer

- 17 The present Chamber is also unsure how the fulfilment of the obligation to inform the consumer imposed on the trader by Directive 2011/83 affects the legal classification of the parties' relationship and whether the proper fulfilment of the obligation to inform the consumer is in all cases inextricably linked to the requirement that the consumer be provided with confirmation of the contract and pre-contractual information on a durable medium.
- 18 It must be assumed that the obligation to inform is fulfilled properly where (1) all the information listed in Article 6(1)(a) to (t) of Directive 2011/83 is provided and

(2) that information is provided in a clear and comprehensible manner. As the event information made publicly accessible on Tiketa's website contained only a portion of the required information, the question arises as to whether, with a view to ensuring effective consumer protection, it is sufficient if, before concluding a distance contract, the trader provides detailed information, including information on the service provider and ticket refunds, only in the rules on the provision of services.

- 19 This manner of providing pre-contractual information also raises a question as to its compliance with the requirement of transparency. The obligation of transparency has two essential dimensions: clarity, which must apply to the outward manner in which the information is put before the consumer, and thus to the way in which the information is read and understood in the environment within which the transaction is carried out; and comprehensibility, which refers to the specific content of the information, which must inform the consumer of the legal consequences of his choices (see Opinion of Advocate General Pitruzzella of 28 February 2019 in *Amazon EU*, C-649/17, EU:C:2019:165, point 107).
- 20 In this regard, the present Chamber is faced with the reasonable question as to whether the provision of information on ticket refunds in the rules on the provision of services is to be viewed as a proper way to ensure that the consumer unequivocally understands which person is a party to the contract concluded and against whom he can file claims or bring an action in the event of unsatisfactory performance of the contract.
- 21 Furthermore, it has not been established in the present proceedings that such information had been provided on a durable medium, and there was no subsequent confirmation of the contract such as to contain all the information required under Article 6(1) of Directive 2011/83 on a durable medium.
- 22 According to the case-law of the Court of Justice, the term 'durable medium' means any instrument which enables the payment service user 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 (judgment of 25 January 2017, *BAWAG*, C-375/15, EU:C:2017:38, paragraph 40).
- 23 According to the case-law of the Court of Justice, a durable medium must ensure that the consumer is in possession of the information referred to in Article 6(1) of Directive 2011/83 to enable him to exercise his rights where necessary. The mere provision of that information on the entrepreneur's website does not satisfy the requirements for a durable medium (see judgments of 5 July 2012, *Content Services*, C-49/11, EU:C:2012:419, paragraphs 42 to 44, and of 9 November 2016, *Home Credit Slovakia*, C-42/15, EU:C:2016:842, paragraph 35).
- 24 Finally, the present Chamber seeks to establish whether the provision in Article 6(5) of Directive 2011/83 provides a basis for taking the view that the

rules on the provision of services published on the website of UAB Tiketa become an integral part to the distance contract, and, accordingly, whether the provisions of those rules may be deemed to be fair only if the information given therein has been provided to the consumer on a durable medium.

WORKING DOCUMENT