

Anonymised version

Translation

C-266/19 – 1

Case C-266/19

Request for a preliminary ruling

Date lodged:

29 March 2019

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

7 March 2019

Applicant:

EIS GmbH

Defendant:

TO

BUNDESGERICHTSHOF (Federal Court of Justice, Germany)

ORDER

[...]

in the case of

EIS GmbH, [...]

applicant, defendant in the counterclaim and appellant in the appeal on a point of
law,

[...]

v

TO, [...]

EN

defendant, applicant in the counterclaim and respondent in the appeal on a point of law,

[...]

[Or. 2]

Further to the hearing held on 20 December 2018 [...], the First Civil Chamber of the Bundesgerichtshof (Federal Court of Justice)

has made the following order;

- I. The proceedings are stayed.
- II. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling for the purpose of interpreting Article 6(1)(h) and 6(4) of, in conjunction with Annex I.A to, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (OJ 2011 L 304, p. 64).
 1. Is a telephone number ‘available’ within the meaning of the instructions for completion for model instructions on withdrawal set out in Annex I.A to Directive 2011/83/EU if the trader specifies the telephone number within the legal notice or clearly and explicitly displays it on the homepage of his website?
 2. Is a telephone number ‘available’ within the meaning of the instructions for completion for model instructions on withdrawal set out in Annex I.A to Directive 2011/83/EU if, although the trader uses the telephone connection for commercial purposes, he does not use it to enter into distance contracts and therefore does not operate it for the purpose of terminating distance contracts in the form of an acceptance of notices of withdrawal either?

[Or. 3]

Grounds:

- 1 I. By letter from its lawyer of 29 December 2014, the applicant warned the defendant, with whom it competes in the sale of erotic products over the internet, about the use of incorrect instructions on withdrawal and about advertising using a test result. In the warning, it called on the defendant to sign a cease and desist undertaking, coupled with a penalty clause, and to reimburse the costs of the warning letter in the amount of EUR 612.80.
- 2 On 8 January 2015, the defendant signed a cease and desist undertaking, coupled with a penalty clause. By letter from his lawyer of 12 January 2015, he then in turn issued to the applicant a warning in which he complained that it, in turn, had not specified a telephone number in the instructions on withdrawal on its website.

He likewise estimated the lawyers' costs of his warning letter at EUR 612.80 and exercised, with his claim for reimbursement of costs, his right of set-off against the applicant's claim for reimbursement of expenses from its warning letter of 29 December 2014.

- 3 The applicant then brought an action seeking a declaration that the defendant was not entitled to assert the claims for injunctive relief and reimbursement of costs asserted by the warning letter of 12 January 2015. In addition, it requested that the costs of its warning letter of 29 December 2014 be paid. In so doing, the applicant argued that it did specify the telephone number used by it in the legal notice of its website. That telephone number, it stated, was also displayed in the lower area of that website's homepage.
- 4 By the counterclaim, the defendant asserted the claim for injunctive relief pursued via the warning letter of 12 January 2015.
- 5 The applicant then declared that there was no need to adjudicate on its request seeking a declaration that that claim for injunctive relief did not exist. **[Or. 4]**
- 6 The Landgericht (Regional Court) dismissed the action and allowed the counterclaim. The appellate court essentially dismissed the applicant's appeal on the merits.
- 7 By way of the appeal on a point of law, for which the appellate court granted leave and which the defendant seeks to have dismissed, the applicant is continuing the pursuit of its requests – which were unsuccessful at the previous instances – in relation to the action and counterclaim.
- 8 II. The success of the applicant's appeal on a point of law depends on whether the instructions on withdrawal used on the applicant's website and objected to by the defendant infringe the first sentence of Paragraph 312d (1) of the Bürgerliches Gesetzbuch (Civil Code; 'the BGB') and Article 246a, Paragraph 1(2)(1) and the second sentence of Paragraph 1(2) of, in conjunction with Annex 1 to, the Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Law to the Civil Code; 'the EGBGB') and was therefore anti-competitive within the terms of Paragraph 3 and Paragraph 4(11) of the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition; 'the UWG'), old version. This will depend on the interpretation of Article 6(1)(h) and 6(4) of, in conjunction with Annex I.A to, Directive 2011/83/EU on consumer rights (hereinafter Directive 2011/83/EU). For that reason, prior to a decision on the appeal on a point of law, the proceedings must be stayed and a preliminary ruling obtained from the Court of Justice of the European Union pursuant to the first paragraph, point (b), and the third paragraph of Article 267 TFEU.
- 9 1. Pursuant to Paragraph 312g(1) of the BGB, the consumer has a right of withdrawal pursuant to Paragraph 355 in the case of off-premises contracts (Paragraph 312b of the BGB) and in the case of distance contracts (Paragraph 312c of the BGB). Pursuant to the first sentence of Paragraph 312d(1)

of the BGB and Article 246a, Paragraph 1(2)(1), of the EGBGB, the trader must inform the consumer of the conditions, time limit and procedures for exercising a right of withdrawal pursuant to Paragraph 355(1) of the BGB, to which he is entitled pursuant to Paragraph 312g(1) thereof. Pursuant to the second sentence of Article 246a, Paragraph 1(2), of the EGBGB, the trader may fulfil these information requirements by supplying the model instructions on withdrawal in text form, correctly filled in, which are provided in Annex 1. The model instructions on withdrawal contain the following text: ‘To exercise the right of withdrawal, you must inform us (2) **[Or. 5]** of your decision to withdraw from this contract by an unequivocal statement (e.g. a letter sent by post, fax or e-mail).’ Point 2 of the instructions for completion reads: ‘Insert your name, geographical address and, where available, your telephone number, fax number and e-mail address.’

- 10 The aforementioned provisions serve to transpose Article 6(1)(h) and 6(4) of, in conjunction with Annex I.A to, Directive 2011/83/EU into German law and must therefore be interpreted in accordance with those provisions. In this connection, it must be borne in mind that, pursuant to Article 4 and recital 7, Directive 2011/83/EU is oriented towards full harmonisation of the aspects of consumer protection covered by it. Therefore, the Member States must not maintain or introduce more or less stringent provisions in this area [...]. The provisions of the directive in question here are essentially the same as the equivalent provisions of German law and read as follows:
- 11 Pursuant to Article 6(1)(h) of Directive 2011/83/EU, before the consumer is bound by a distance or off-premises contract, the trader must inform the consumer, where a right of withdrawal exists, of the conditions, time limit and procedures for exercising that right in accordance with Article 11(1) of the directive. Pursuant to the first sentence of Article 6(4) of Directive 2011/83/EU, this information may be provided by means of the model instructions on withdrawal set out in Annex I.A. Pursuant to the second sentence of Article 6(4) of Directive 2011/83/EU, the trader will have fulfilled those information requirements if he has supplied these instructions to the consumer, correctly filled in. The model instructions on withdrawal contain the following text: ‘To exercise the right of withdrawal, you must inform us (2) of your decision to withdraw from this contract by an unequivocal statement (e.g. a letter sent by **[Or. 6]** post, fax or e-mail).’ Point 2 of the instructions for completion in Annex I.A reads: ‘Insert your name, geographical address and, where available, your telephone number, fax number and e-mail address.’
- 12 2. In the present dispute, the applicant used the model instructions on withdrawal in order to fulfil the information requirements. It did not enter a telephone number in the place provided for that purpose on the information form, even though, according to the findings of the appellate court, it indisputably has a telephone connection which it uses for commercial purposes. According to the findings of the appellate court, the applicant argued in this regard that it had specified a telephone number within its legal notice; the telephone number used

by it was also clearly and explicitly displayed in the lower area of its website's homepage. In the grounds of appeal on a point of law, the applicant also referred to its argument, which was asserted at first instance and has not been contested by the defendant, that it does not enter into contracts over the telephone; it takes the view that it therefore cannot make the telephone connection available for the purpose of terminating distance contracts in the form of an acceptance of notices of withdrawal either.

- 13 (a) The question therefore arises as to whether a telephone number is 'available' within the meaning of the instructions for completion for model instructions on withdrawal set out in Annex I.A to Directive 2011/83/EU if the trader specifies the telephone number within the legal notice or clearly and explicitly displays it on the homepage of his website (first question referred). The present Chamber takes the view that this question should be answered in the affirmative.
- 14 A trader who specifies a telephone number within the legal notice or clearly and explicitly displays it on the homepage of his website gives the consumer the impression that he can make contact with the trader and make representations to him via that telephone number. If such a trader does not make it clear, by providing an appropriate [Or. 7] indication, that that telephone number is not intended for the acceptance of notices of withdrawal, he must be bound by the impression created by him that the telephone number can also be used to give notice of withdrawal. Such a telephone number is thus 'available' within the meaning of the instructions for completion for model instructions on withdrawal set out in Annex I.A to Directive 2011/83/EU and must therefore be entered in the place intended for that purpose on the model instructions on withdrawal.
- 15 (b) The question further arises as to whether a telephone number is 'available' within the meaning of the instructions for completion for model instructions on withdrawal set out in Annex I.A to Directive 2011/83/EU if, although the trader uses the telephone connection for commercial purposes, he does not use it to enter into distance contracts and therefore does not make it available for the purpose of terminating distance contracts in the form of an acceptance of notices of withdrawal either (second question referred). The present Chamber takes the view that this question should also be answered in the affirmative.
- 16 A telephone number is 'available' within the meaning of the instructions for completion for model instructions on withdrawal set out in Annex I.A to Directive 2011/83/EU if the trader uses that telephone number for commercial purposes. The fact that the trader does not use a telephone used for commercial purposes to enter into distance contracts does not justify the trader not making the telephone number available for the acceptance of [notices of] withdrawal.
- 17 The considerations on the basis of which, in the 'callback system' order for reference, the present Chamber considered it to be doubtful whether those communication methods that are used exclusively for purposes other than

contacting consumers when entering into distance contracts are also to be regarded as available in the undertaking within the meaning of Article 6(1)(c) of Directive 2011/83/EU ([...][**Or. 8**][...]Case C-649/17) do not militate against the assessment made above.

- 18 In that order for reference, the present Chamber assumed that the fact that, when starting to sell by means of distance selling, the trader in that case would in fact be required to change his operational organisation and possibly employ additional employees in order also to be able to handle queries from consumers, in connection with entering into distance contracts, via the telephone or fax connections that had previously served exclusively for communication for commercial purposes and communication with authorities militated against such an interpretation of the element ‘gegebenenfalls’ (‘where available’). The assumption of such an extensive information requirement would inevitably lead to an encroachment on the trader’s freedom of operational organisation protected pursuant to Article 16 and Article 17(1) of the Charter of Fundamental Rights of the European Union. At least in the situation in which, when entering into distance contracts, the trader used other communication methods that, in themselves, satisfied the consumer’s need to be able to contact the trader quickly and communicate with him efficiently within the meaning of Article 6(1)(c) of Directive 2011/83/EU, it would run counter to the objective of that directive, expressed in recital 4 thereof, of striking the right balance between a high level of consumer protection and the competitiveness of enterprises if the expression ‘gegebenenfalls’ (‘where available’) were to be understood as meaning that the trader must provide information in relation to every communication method already available in his undertaking, irrespective of whether he used those methods to market his products via distance contracts [...].
- 19 The problem addressed by the present Chamber in that respect relates to the general pre-contractual information requirements governed in Article 6(1)(c) of Directive 2011/83/EU, which, in the event of possible queries from consumers in connection with entering into distance contracts, must be fulfilled by employees trained specifically [**Or. 9**] for that purpose. By contrast, the present dispute is concerned merely with the acceptance of notices of withdrawal in the applicant’s undertaking and the documentation thereof. These activities do not generally require a higher degree of expenditure or effort in the undertaking at which the notice of withdrawal is directed than in cases in which the withdrawal is effected by letter or by sending back the product with an accompanying notice of withdrawal. The concerns that prompted the present Chamber to submit its request for a preliminary ruling in [...] [Case C-649/17] with regard to the question of whether those communication methods that have previously been used by the trader exclusively for other purposes, such as communication with other traders or authorities, are to be regarded as available in the undertaking therefore do not obtain at all in the situation to be assessed in the present case.

[...]