

Case C-380/19

Request for a preliminary ruling

Date lodged:

15 May 2019

Referring court:

Oberlandesgericht Düsseldorf (Higher Regional Court of Düsseldorf, Germany)

Date of the decision to refer:

9 May 2019

Applicant and appellant:

Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband e.V.

Defendant and respondent:

Deutsche Apotheker- und Ärztebank eG

[...]

HIGHER REGIONAL COURT OF DÜSSELDORF

ORDER

In the case of

Bundesverband der Verbraucherzentralen und Verbraucherverbände —
Verbraucherzentrale Bundesverband e.V.

applicant and appellant,

[...]

v

Deutsche Apotheker- und Ärztebank eG,

defendant and respondent,

[...]

the 20th Civil Chamber of the Higher Regional Court of Düsseldorf at the hearing of 12 March 2019 [...] **[Or. 2]** [...]

made the following order:

I.

The proceedings are stayed.

II.

The Higher Regional Court of Düsseldorf refers the following questions concerning the interpretation of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Official Journal 2013, L 165, p. 63) ('the Directive') to the Court of Justice of the European Union for a preliminary ruling:

1. Does the information obligation under Article 13(2) of the Directive, to provide the information pursuant to Article 13(1) in the general terms and conditions, already arise when the trader makes the general terms and conditions available for download on his website, on which no contracts are concluded?
2. If Question 1 is answered in the affirmative: Does the trader meet his obligation to provide the information in the general terms and conditions in such a case if he provides the information not in the file made available for download, but elsewhere on the company's website?
3. Does the trader meet his obligation to provide the information in the general terms and conditions if he provides the consumer with – in addition to a document containing the general **[Or. 3]** terms and conditions – a list of prices and services also drawn up by the trader in a separate document containing the information pursuant to Article 13(1) of the Directive?

Grounds

A)

- 1 The applicant is the umbrella association of all 16 consumer advice centres and 25 further consumer- and social-oriented organisations in Germany. It is included in the list of qualified entities under Paragraph 4 of the Unterlassungsklagegesetz (Injunction Action Law). The defendant is a cooperative bank.
- 2 The defendant operates a website under the address www.apobank.de. It is not possible to conclude contracts on the website. In the website's legal notice, the defendant provides information, in a manner not objected to by the applicant in

this respect, on its willingness or obligation to take part in a dispute resolution procedure before a consumer conciliation body. The defendant also provides the option of downloading the general terms and conditions as a PDF document. This document does not contain any information on the willingness or obligation to take part in a dispute resolution procedure before a consumer conciliation body.

- 3 If the defendant wishes to include its general terms and conditions in a contract, the consumer receives, in addition to the document containing the general terms and conditions, a list of prices and services also drawn up by the defendant, on the reverse of which it provides information on its willingness to take part in dispute resolution procedures.
- 4 The applicant is of the opinion that this business practice is in breach of Paragraph 36(2) No 2 of the Verbraucherstreitbeilegungsgesetz (Consumer Dispute Resolution Law; VSBG), as the information should be provided in the general terms and conditions.
- 5 The Regional Court dismissed the action by which the applicant claimed that the defendant should be ordered, on pain of specified judicial enforcement measures, to desist from [Or. 4] the practice, in the scope of business dealings with consumers, of not providing information in the general terms and conditions used as to whether there is a willingness or obligation to take part in a dispute resolution procedure before a consumer conciliation body, and to reimburse the applicant with its pretrial costs. As grounds for its decision, the Regional Court essentially stated that the business practice objected to by the applicant was not in breach of Paragraph 36(2) VSBG. This required the provision of the information under Paragraph 36(1) VSBG when general terms and conditions were used. The publication of the general terms and conditions on the website did not constitute use, because use required one contracting party to provide the other with the general terms and conditions upon conclusion of a contract. Furthermore, the provision of a separate information sheet together with the general terms and conditions upon conclusion of a contract satisfied the requirements of Paragraph 36(2) No 2 VSBG. This is because it was a matter of the individual case to assess whether and what general terms and conditions would be used. Those general terms and conditions could also consist of several sets of clauses. The information on the dispute conciliation body could also constitute a general condition by itself. Finally, the defendant had also satisfied its obligation to provide information as the operator of a website under Paragraph 36(2) No 1 VSBG. Under Article 13(2) of the Directive, the website was the primary location for the publication of the information.
- 6 The applicant challenges that decision with its appeal, by which it maintains its claim at first instance. It argues that use within the meaning of Paragraph 36(2) No 2 does not require a specific conclusion of contract. The only decisive factor was whether the trader even had general terms and conditions. The publication on the website therefore already established at that time an obligation to provide information in the general terms and conditions. The information should also be

provided to those consumers who had not yet had dealings with the defendant concerning a specific conclusion of contract. Therefore, the provision of the information together with the general terms and conditions was not sufficient. The reference to the information on the website failed to recognise that the obligation was to provide information on the website and [Or. 5] in the general terms and conditions simultaneously. At first instance, it argued that the provision of a separate information sheet with the general terms and conditions was not sufficient because, according to the Directive, the information was to be provided in the general terms and conditions. Finally, the information in the general terms and conditions themselves was also significant because the consumers would attach particular importance to them. The consumers would keep or securely store them, to be able to access them precisely in the event of a dispute.

- 7 The defendant disputes this and defends the judgment at first instance as being correct.

B)

- 8 The provisions of German law that are relevant to the assessment of the dispute are worded as follows:

Paragraph 36 of the Gesetz über alternative Streitbeilegung in Verbrauchersachen (Law on alternative dispute resolution in consumer matters; VSBG) — General obligation to provide information:

(1) A trader who maintains a website or uses general terms and conditions shall, in an easily accessible, clear and comprehensible manner,

1. inform the consumer of the extent to which he is willing or obliged to take part in dispute resolution procedures before a consumer conciliation body and
2. if the trader has committed himself to taking part in a dispute resolution procedure before a consumer conciliation body, or if he is obliged to take part on the basis of legal provisions, he shall refer the consumer to the competent consumer conciliation body; the reference must contain information on the address and website of the consumer conciliation body and a declaration by the trader that he will take part in a dispute resolution procedure before that consumer conciliation body.

(2) The information under subparagraph 1 must

1. appear on the trader's website, if the trader maintains a website, [Or. 6]
2. be provided together with his general terms and conditions, if the trader uses general terms and conditions.

- (3) A trader who employed ten or fewer persons on 31 December of the previous year is exempted from the obligation to provide information under subparagraph 1 number 1.
- 9 The success of the applicant's appeal depends on the response to the questions referred, since the provision of Paragraph 36 VSBG, which transposes Article 13 of the Directive, is to be interpreted in accordance with the Directive. According to its wording, Paragraph 36(2) VSBG stipulates that the information be provided 'together with' the general terms and conditions, if the trader uses general terms and conditions. The wording of the Directive differs from this since, under Article 13(2) of the Directive, the information is to be provided, if applicable, in the general terms and conditions. The formulation that the information must be provided in the general terms and conditions — and specifically not merely together with the use thereof — also corresponds to other language versions of the Directive. For example, the English version reads 'if applicable, in the general terms and conditions' and the French version reads 'le cas échéant, dans les conditions générales'.
- 10 In the present case, this first of all raises the question of how 'if applicable' is to be interpreted, that is to say, when a trader within the meaning of Paragraph 36 VSBG 'uses' general terms and conditions. In that respect, the Regional Court has interpreted the term within the meaning of the German Civil Code, according to which the user uses general terms and conditions by providing them to the other contracting party upon conclusion of a contract. On the other hand, it is reasonable to interpret the obligation under Article 13(2) of the Directive as meaning that the very existence of general terms and conditions already gives rise to the need to provide information on dispute resolution therein. That follows from the comparison with the other case of the obligation to provide information, which also concerns the mere presence of a website.
- 11 If it follows from the foregoing that making the general terms and conditions available on the website for download already triggers the obligation to provide information, this raises the question of how 'in' the general terms and conditions is to be understood [**Or. 7**] within the meaning of the Directive. That is the purpose of the second question referred. The defendant has indisputably met its obligation as the operator of a website to provide information on dispute resolution. It is, however, in question whether that information also constitutes information in the general terms and conditions, where the general terms and conditions are made available for download. As correctly pointed out by the applicant at first instance, this is undermined by the fact that the consumer will download the general terms and conditions as intended and precisely will not find the information therein.
- 12 The final question raised, independently of the foregoing, is whether the information within the meaning of the Directive is provided 'in' the general terms and conditions if a separate information sheet is in each case enclosed therewith. In this respect, the Regional Court rightly pointed out that the use of multi-part

general terms and conditions or various general terms and conditions is possible and customary and the additional information sheet then also constitutes part of the general terms and conditions. On the other hand, the applicant's view means that the information must be provided in every part of the general terms and conditions. However, that is supported by the fact that the consumer will usually keep the general terms and conditions with particular care and will assume that they contain information on the willingness to take part in an alternative dispute resolution. This guarantee is not provided to the same extent in the case of a list of prices and services that is usually subject to more frequent changes.

[...]

WORKING DOCUMENT