

Case C-179/21

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:

23 March 2021

Referring court or tribunal:

Bundesgerichtshof (Germany)

Date of the decision to refer:

11 February 2021

Appellant on a point of law:

absoluts-bikes and more- GmbH & Co. KG

Respondent in the appeal on a point of law:

the-trading-company GmbH

Subject matter of the main proceedings

Injunctive relief under competition law due to incomplete information concerning a guarantee when offering goods on the internet

Subject matter and legal basis of the reference

The request for a preliminary ruling under Article 267 TFEU concerns the interpretation of Article 6(1)(m) of Directive 2011/83/EU in so far as it relates to the existence and scope of information requirements concerning a manufacturer's guarantee.

Questions referred for a preliminary ruling

1. Does the mere existence of a manufacturer's guarantee trigger the information requirement under Article 6(1)(m) of Directive 2011/83/EU?

2. If Question 1 is answered in the negative: Is the information requirement under Article 6(1)(m) of Directive 2011/83/EU triggered by the mere mention of a manufacturer's guarantee in the trader's offering or is it triggered only if the mention of such a guarantee is readily apparent to the consumer? Is there also an information requirement if it is readily apparent to the consumer that the trader provides access to only the manufacturer's information concerning the guarantee?

3. Must the information on the existence and conditions of a manufacturer's guarantee as required under Article 6(1)(m) of Directive 2011/83/EU contain the same details as a guarantee under Article 6(2) of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12) or are fewer details sufficient?

Provisions of EU law relied on

Article 169 TFEU;

Article 38 and the second sentence of Article 52(1) of the Charter of Fundamental Rights of the European Union;

Recitals 4, 5 and 7 as well as Article 2, point 14, Article 4, Article 5(1)(e) and (3) and Article 6(1)(m) of Directive 2011/83;

Article 6(2) of Directive 1999/44.

Provisions of national law relied on

Paragraphs 3, 3a and 8 of the Gesetz gegen den unlauteren Wettbewerb (Law on unfair competition; 'the UWG'),

Paragraphs 312a(2), 312d(1), first sentence, 434(1) and 479(1) of the Bürgerliches Gesetzbuch (Civil Code; 'the BGB'),

Article 246(1), point 5, and (2) and Article 246a(1)(1), first sentence, point 9 of the Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Law to the Civil Code; 'the EGBGB').

Succinct presentation of the facts and procedure in the main proceedings

- 1 The parties are competitors in the distribution of pocket knives by way of online trading.
- 2 The defendant and appellant on a point of law ('the defendant') offered a pocket knife of the Swiss manufacturer Victorinox for sale on the internet platform Amazon. The Amazon page offering the knife for sale did not itself contain any

information regarding a guarantee provided by the defendant or a third party for that knife, but provided – under the subheading ‘Further technical information’ – a link labelled ‘Operating instructions’. Clicking on that link would open a document stored on a server of the operator of the internet platform Amazon, which reproduced an extensive, two-page product information sheet designed and written by the manufacturer of the knife. The second page of the document contained the following reference to the ‘Victorinox guarantee’:

The Victorinox guarantee covers any defects in material and workmanship for an unlimited period (2 years for electronics). Damage caused by normal wear and tear or by improper use is not covered by the guarantee.

- 3 The applicant and respondent in the appeal on a point of law (‘the applicant’) takes the view that the defendant thus failed to provide sufficient information about the guarantee provided for the knife. It therefore sought an injunction against the defendant.
- 4 The action, which was unsuccessful at first instance, was upheld by the court ruling on the appeal on the merits. By the appeal on a point of law, for which the court ruling on the appeal on the merits granted leave and which the applicant claims should be dismissed, the defendant seeks the restoration of the judgment of the regional court.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 5 The court ruling on the appeal on the merits considered the action to be well-founded and held that there was a claim for injunctive relief pursuant to Paragraphs 8, 3 and 3a of the UWG, read in conjunction with the first sentence of Paragraph 312d(1) of the BGB and Article 246a(1)(1), first sentence, point 9 of the EGBGB. That court stated that, in accordance with its spirit and purpose, the seller’s duty to provide information applies even if – as in the present case – the goods offering contains a reference, in whatever form, to the existence of a guarantee.
- 6 The success of the appeal on a point of law brought before the referring court hinges on whether the applicant is entitled to the injunctive relief sought by it.
- 7 In order for that to be the case, it is first necessary that the defendant had a duty to provide information pursuant to the first sentence of Paragraph 312d(1) of the BGB, read in conjunction with Article 246a(1)(1), first sentence, point 9 of the EGBGB.
- 8 The first sentence of Paragraph 312d(1) of the BGB provides that, in the case of distance contracts, the trader is obliged to provide the consumer with the information prescribed in Article 246a of the EGBGB. In accordance with Article 246a(1)(1), first sentence, point 9 of the EGBGB, the trader is obliged to provide the consumer with information regarding, where applicable, the existence

and the conditions of after-sale customer assistance, after-sales services and guarantees.

- 9 The abovementioned provisions serve to transpose Article 6(1)(m) of Directive 2011/83 and must therefore be interpreted in accordance with that provision. When interpreting the German provisions, it must be borne in mind that, in accordance with Article 4 and recital 7, Directive 2011/83 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.
- 10 The information requirement under Article 6(1)(m) of Directive 2011/83 exists not only in the case of a commercial guarantee provided by the trader himself or herself, but also where the guarantee originates from the manufacturer of the product. According to the definition in point 14 of Article 2 of Directive 2011/83, ‘commercial guarantee’ means any undertaking by the trader or a producer (the guarantor) to the consumer, in addition to his legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract. Accordingly, not only the trader but also the manufacturer can be the guarantor.
- 11 The answer to the question, which is a matter of debate in the German case-law and legal literature, as to whether the mere existence of a manufacturer’s guarantee triggers the information requirement under Article 6(1)(m) of Directive 2011/83 depends on the meaning of the term ‘where applicable’ in Article 6(1).
- 12 The wording of Article 6(1)(m) of Directive 2011/83 allows both interpretations, as the term ‘where applicable’ could mean either ‘in the event of the existence of a guarantee’ or ‘depending on the form taken by the trader’s offering’.
- 13 The context of the provision might militate in favour of the view that the guarantee must be mentioned in the trader’s offering.
- 14 Guarantees are referred to in Article 6(1)(m) of Directive 2011/83 in connection with after-sales services. Since information about after-sales services is required only if they are to become part of the contract or are in any case offered by the seller as additional services subject to a charge at the time of the conclusion of the contract, it could also be the case for guarantees that they must be mentioned in the offering.
- 15 Furthermore, the trader’s information requirements under Article 6(1) of Directive 2011/83 relate, in principle, only to circumstances directly related to the contract, not to legal relationships between the consumer and third parties. Article 6(1)(m) of Directive 2011/83 could therefore also be interpreted restrictively to the effect that the trader must at least implicitly connect the after-sales services and

guarantees to the contract by referring to them during the contract negotiations, for instance, or by indicating the existence of a guarantee in some way in his or her goods offering.

- 16 The regulatory objective of Article 6(1)(m) of Directive 2011/83 does not clearly militate in favour of one or the other interpretation.
- 17 The fact that, according to Article 1 of Directive 2011/83, read in the light of recitals 4, 5 and 7 thereof, the directive pursues the purpose of ensuring a high level of consumer protection by guaranteeing consumer information and safety in transactions with traders militates in favour of allowing the mere existence of a manufacturer's guarantee to suffice. Furthermore, in EU policies, the protection of consumers is enshrined in Article 169 TFEU and Article 38 of the Charter of Fundamental Rights of the European Union. The consumer should be in a better position to compare offers – including cross-border offers – on the basis of comprehensive information and to weigh up the pros and cons of the contract in order then to make a considered decision.
- 18 On the other hand, consumer protection does not necessarily require a trader to point out circumstances which may be positive for the buyer, such as a manufacturer's guarantee, but from which the trader himself or herself does not benefit in competition.
- 19 Furthermore, when interpreting Article 6(1)(m) of Directive 2011/83, it must be borne in mind that the fundamental rights of traders must not be disproportionately restricted.
- 20 In accordance with recital 4 of Directive 2011/83, it is necessary to strike the right balance between a high level of consumer protection and the competitiveness of enterprises, while respecting the trader's freedom to conduct a business as guaranteed by Article 16 of the Charter of Fundamental Rights of the European Union. According to the second sentence of Article 52(1) thereof, subject to the principle of proportionality, limitations to the freedom to conduct a business may be made only if they are necessary and genuinely meet other objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.
- 21 In that respect, it is assumed in favour of traders that a seller must remain free to assess independently whether, in his or her communication with the customer, the manufacturer's guarantee represents an advantage that is worth the effort of including in the presentation of the offering, and to offer the object of sale potentially without referring to the existence of a manufacturer's guarantee, in the exercise of his or her contractual freedom.
- 22 If, on the other hand, the seller's information requirement is deemed to exist solely by virtue of the fact that the manufacturer of the object of sale provides a guarantee, sellers would have to research, for each product sold, whether a manufacturer's guarantee exists and, if so, under what conditions – a task that may

involve a considerable amount of effort. They would also have to monitor constantly such guarantees for any changes and incorporate them into their consumer information. Moreover, several manufacturers' guarantees could even apply in parallel in the case of goods made up of individual components, for instance, or in the case of services.

- 23 Sellers would also run a considerable liability risk if their information concerning the manufacturer's guarantee were no longer up-to-date. As a general rule, the existence of a manufacturer's guarantee constitutes an essential characteristic of the object of sale pursuant to Paragraph 434(1) of the BGB. If the seller's offering refers to a manufacturer's guarantee which in fact does not exist, no longer exists or does not exist to the extent stated, this constitutes, in principle, a material defect pursuant to Paragraph 434(1), second sentence, point 2, and third sentence of the BGB.
- 24 This is countered by the argument that, with regard to the manufacturer's guarantee, the trader will generally only have to provide information concerning a further guarantee. According to that argument, such an information requirement is therefore still practicable and does not unreasonably overburden the trader.
- 25 When interpreting Article 6(1)(m) of Directive 2011/83, it must also be borne in mind that the question of the seller's information requirement in relation to a manufacturer's guarantee arises in the same way for contracts for the sale of consumer goods by way of physical outlets. In respect of such contracts also, with the exception of transactions for everyday goods, the consumer must be informed of guarantees pursuant to Paragraph 312a(2) of the BGB, read in conjunction with Article 246(1), point 5, and (2) of the EGBGB, which serves to transpose Article 5(1)(e) and (3) of Directive 2011/83. The question of how a retailer for example is supposed to provide, with a reasonable amount of effort, information about the various conditions of manufacturers' guarantees for each individual product offered arises all the more so in the context of trading by way of physical outlets.
- 26 Against this background, the present Chamber is inclined to interpret Article 6(1)(m) of Directive 2011/83 as meaning that the mere existence of a manufacturer's guarantee does not trigger the information requirement.
- 27 In the event that Question 1 is answered in the negative, the question arises as to whether the mere mention of a manufacturer's guarantee in the trader's offering triggers the information requirement under Article 6(1)(m) of Directive 2011/83 or whether that requirement is triggered only if the mention of such a guarantee is readily apparent to the consumer. It is also unclear whether an information requirement also exists if it is readily apparent to the consumer that the trader provides access to only the manufacturer's information concerning the guarantee.

- 28 In accordance with the case-law of the courts of instance, if traders advertise using a manufacturer's guarantee, they are subject to an information requirement under Article 6(1)(m) of Directive 2011/83.
- 29 It is unclear, however, whether traders are subject to such an information requirement even if they do not highlight the manufacturer's guarantee in their advertising. It is not unequivocally clear from Article 6(1)(m) of Directive 2011/83 in which form and to what extent that guarantee must be mentioned in order to trigger the information requirement, if such a mention is required.
- 30 In the present case, it could be assumed, in line with the view taken by the court that ruled on the appeal on the merits, that the mere mention of the existence of a manufacturer's guarantee in the goods offering without any emphasis for advertising purposes and in whatever form is sufficient to establish the requirement to refer to the conditions of that guarantee.
- 31 On the other hand, the establishment of an information requirement could require that the existence of a manufacturer's guarantee is mentioned in a manner that is readily apparent to the consumer, which is doubtful in a case where the mention appears on the second page of a document accessed via a link entitled 'Operating instructions'.
- 32 The question also arises as to whether the trader is subject to an information requirement if it is clear to the consumer that the details regarding the existence of a manufacturer's guarantee originate not from the trader, but from the manufacturer.
- 33 If there is an information requirement under Article 6(1)(m) of Directive 2011/83, the question finally arises as to what the content of the information must be.
- 34 According to one view, which was also shared by the court that ruled on the appeal on the merits, the normative content of Paragraph 479(1) of the BGB can be used to determine the scope of the information requirement.
- 35 According to Paragraph 479(1), second sentence, of the BGB, a guarantee statement must contain a reference to the consumer's statutory rights and to the fact that those rights are not limited by the guarantee, and must also contain the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor. This provision serves to implement Article 6(2) of Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees.
- 36 According to another view, the pre-contractual information under Article 6(1)(m) of Directive 2011/83 does not have to include all the details that must be contained in the guarantee statement itself pursuant to Article 6(2) of Directive 1999/44. The question of what information is required instead is assessed differently by proponents of that view.