

Case C-249/21

Request for a preliminary ruling

Date lodged:

21 April 2021

Referring court:

Amtsgericht Bottrop (Germany)

Date of the decision to refer:

24 March 2021

Applicant:

Fuhrmann-2-GmbH

Defendant:

B.

[...] **Amtsgericht Bottrop (Local Court, Bottrop, Germany)**

Order

In the matter of
Fuhrmann-2-GmbH v B.

the Local Court, Bottrop,
on 24 March 2021,
[...]

ordered as follows:

- I. The proceedings are stayed.
- II. The following question is referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of the second subparagraph of Article 8(2) 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):

Is the second subparagraph of Article 8(2) of Directive 2011/83/EU to be interpreted as meaning that the question whether a button or a similar function – the activation of which forms part of the ordering process of a distance contract to be concluded by electronic means within the meaning of the first subparagraph of that provision and which is not labelled with the words ‘order with obligation to pay’ – is labelled with a corresponding unambiguous formulation within the meaning of that provision, indicating that placing the order entails an obligation to pay the trader, is to be answered solely by reference to the labelling of the button or of the similar function? **[Or. 2]**

Grounds:

I.

The applicant is the owner of the Hotel Goldener Anker in Krummhörn-Greetsiel (Germany). The rooms of the hotel are rented out via, *inter alia*, the website of the hotel reservation portal Booking.com.

[...] [T]he following sequence of events is undisputed: on 19 July 2018, the defendant visited the website Booking.com and entered his desired destination Krummhörn-Greetsiel, the desired period, from 28 May 2019 to 2 June 2019, and the desired number of rooms (four double rooms). The vacant hotel rooms corresponding to that request were then displayed to the defendant. Among the search results displayed were rooms at the applicant’s Hotel Goldener Anker. The defendant then clicked on that hotel, whereupon the available rooms were displayed to the defendant together with further information on the facilities, price, etc. of the Hotel Goldener Anker for the selected period. The defendant selected four double rooms in that hotel and clicked on ‘I’ll reserve’. The defendant then entered his personal details and the names of his fellow travellers. After that, the defendant clicked on a button labelled with the words ‘Complete Booking’.

The defendant did not appear at the Hotel Goldener Anker on 28 May 2019.

By letter dated 29 May 2019, the applicant charged the defendant – setting a deadline of five working days – cancellation costs (in accordance with its general terms and conditions) in the amount of EUR 2 240.00. No payment was made.

The applicant takes the view that the defendant – through the intermediary of Booking.com – concluded a contract for accommodation with the applicant for its Hotel Goldener Anker for the travel period from 28 May 2019 to 2 June 2019. In particular, the labelling chosen by Booking.com for the ‘Complete Booking’ button fulfils the special obligations towards consumers in electronic commerce and, in particular, towards the defendant in accordance with the second sentence

of Paragraph 312j(3) of the Bürgerliches Gesetzbuch (German Civil Code; ‘the BGB’), read in conjunction with the first sentence thereof.

The applicant has brought proceedings against the defendant, claiming, in particular, payment of a cancellation fee of EUR 2 240.00 for not taking up his reservation. **[Or. 3]**

II.

1.

[...] [statements regarding the stay of proceedings] [...]

2.

The success of the action hinges on whether a contract between the applicant and the defendant has come into being. A contract will have come into being pursuant to Paragraph 312j(4) of the BGB in the present case only if the obligations under Paragraph 312j(3) have been fulfilled. In the present case, the ‘booking’ was made via a button labelled with the words ‘Complete Booking’.

Paragraph 312j(4) of the BGB, which transposes the third sentence of the second subparagraph of Article 8(2) of Directive 2011/83/EU into German law, provides that a contract pursuant to Paragraph 312j(2) of the BGB comes into being only if the trader fulfils his or her obligation under Paragraph 312j(3) of the BGB.

a) Since the parties do not dispute that the contract at issue is a distance contract to be concluded between a trader and a consumer by electronic means, the conclusion of the contract at issue falls within the scope of Paragraph 312j(2) of the BGB and Article 8 of Directive 2011/83/EU.

b) However, the parties are in dispute as to whether the obligations under Paragraph 312j(3) of the BGB – which transposes the second sentence of the second subparagraph of Article 8(2) of Directive 2011/83/EU into German law – have been complied with in the present case. In accordance with that provision, the trader is required to structure the ordering situation in such a way that the consumer expressly confirms with his or her order that he or she undertakes to make a payment (first sentence of Paragraph 312j(3) of the BGB), whereby, in accordance with the second sentence of Paragraph 312j(3) of the BGB, in cases where the order is placed via a button, that obligation on the part of the trader is fulfilled only if that button is labelled in an easily legible manner only with the words ‘order with obligation to pay’ or a corresponding unambiguous formulation.

In the context of the second sentence of Paragraph 312j(3) of the BGB, the question whether the labelling of a button with the words ‘confirm booking’, that is to say, a formulation comparable to the expression used in the present case, **[Or. 4]** satisfies the requirements of the law is assessed differently in the

commentary in the legal literature. While *Schirmbacher* [...] takes the view that the expression using the words ‘confirm booking’ is a corresponding unambiguous formulation, *Wendehorst* [...], by contrast, considers that such an expression is not correspondingly unambiguous.

In an unpublished decision placed on the case file by the applicant (judgment of 31 January 2019, case reference: 16 0 284/17), the *Landgericht Berlin* (Regional Court, Berlin) shares the view taken by *Schirmbacher* and justifies this, in essence, by stating that the labelling of the button must be assessed by ‘taking into account the overall circumstances, in particular the structuring of the rest of the ordering process, or with a view to determining the type of transaction to be concluded’.

The adjudicating court takes the view that the taking into account of the overall circumstances would be permissible only if this were in line with Article 8(2) of Directive 2011/83/EU.

In view of the wording of the directive, the court has considerable doubts as to whether that is the case. This is because the second sentence of the second subparagraph of Article 8(2) of Directive 2011/83/EU requires the button or similar function to be labelled with a formulation ‘indicating that placing the order entails an obligation to pay the trader’. The adjudicating court takes the view that it must therefore be apparent from the labelling of the button itself that in activating the button the consumer triggers, in a legally binding manner, an obligation to pay that is incumbent on him or her – even though this is not unambiguously expressed in the wording of the second sentence of Paragraph 312j(3) of the BGB, which transposes the second sentence of the second subparagraph of Article 8(2) of Directive 2011/83/EU into German law.

A preliminary ruling by the Court of Justice of the European Union is required to clarify the question as to whether and to what extent circumstances surrounding an ordering or booking process may also be taken into account in the question as to the unambiguous nature of the labelling with regard to the establishment of a claim for payment made against the consumer.

That question is material to the decision to be given in the present dispute.

In so far as circumstances beyond the actual button – such as the circumstances of the ordering process before the button is activated – could also establish the unambiguous nature of the labelling, the court concluded, proceeding on the basis of the reasoning of the *Regional Court, Berlin*, that the existence of a requirement to provide consideration for the service that is the subject of the [Or. 5] applicant’s claim results from the overall circumstances of the ordering process, since, on the basis of the prices displayed in the preceding ordering steps, an average consumer cannot reasonably expect a free-of-charge yet at the same time binding ‘booking’ of a hotel room. Accordingly, the obligation under the second sentence of Paragraph 312j(3) of the BGB would be regarded as having been

fulfilled, with the result that the provision of Paragraph 312j(4) of the BGB would not preclude the effective establishment of a binding commitment on the part of the defendant.

However, in so far as it is not permissible to take into account circumstances beyond the button and it must be directly apparent from the labelling of the button that the service relationship entered into entails a requirement to provide consideration, the court considers the view taken by *Wendehorst* in the legal literature to be preferable, since the labelling of the button with the words 'Complete booking' in the present case does not express with sufficient clarity the fact that, in activating the button, the consumer now directly makes a binding declaration of intent to conclude a contract for consideration. This is because, in the view taken by the adjudicating court, the term 'booking', according to common parlance, does not necessarily entail the assumption of an obligation to pay consideration, but is often also used as a synonym for an advance order or reservation for no consideration. Accordingly, the obligation under the second sentence of Paragraph 312j(3) of the BGB would have to be regarded as having not been fulfilled, with the consequence that, owing to Paragraph 312j(4) of the BGB, a binding commitment on the part of the defendant would not be established.

[...]

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