

Case C-133/22

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:

28 February 2022

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

10 February 2022

Defendant, counterclaimant and appellant in the appeal on a point of law:

LACD GmbH

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

BB Sport GmbH & Co. KG

Subject matter of the main proceedings

Consumer rights – Directive 2011/83/EU – Aspects concerning contracts for the sale of goods – Directive 2019/771/EU – Guarantee statement – Requirements – Any other requirements not related to conformity set out in the guarantee statement – Any other requirements not related to conformity – Circumstances specific to the consumer – Finding based on objective circumstances

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Can any other requirements not related to conformity set out in the guarantee statement within the meaning of Article 2, point 14, of Directive 2011/83/EU and any other requirements not related to conformity within the meaning of Article 2,

point 12, of Directive (EU) 2019/771 apply where circumstances specific to the consumer, in particular his or her subjective attitude towards the item purchased (in this case, the consumer's personal satisfaction with the item purchased), have a bearing on the guarantor's obligation, without it being necessary that those personal circumstances relate to the condition or features of the item purchased?

2. If Question 1 is answered in the affirmative:

Must it be possible to establish the absence of requirements based on the circumstances specific to the consumer (in this case, the consumer's satisfaction with the goods purchased) in the light of objective circumstances?

Provisions of European Union law relied on

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, point 14

Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC ('Directive 2019/771'), Article 2, point 12

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 ('Directive 1999/44'), Article 6(1) and (2)

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 ('Unfair Commercial Practices Directive') ('Directive 2005/29'), Article 3(2) and (4), Article 7(5), recital 10, third sentence, and recital 15

Provisions of national law relied on

Bürgerliches Gesetzbuch (Civil Code, 'the BGB'), in particular Paragraph 443(1) and Paragraph 479(1), second sentence

Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition, 'the UWG'), in particular Paragraphs 3, 3a, 8(1), first sentence, and 11

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant sells sports and fitness goods via its online shop. Up until at least 2013, the defendant, which distributes ‘LACD’ brand sports and fitness products via retailers and online merchants, attached hangtags to its T-shirts on which the following text was printed:

‘LACD Warranty

Every LACD product comes with our own lifetime guarantee. If you are not completely satisfied with any of our products, please return it to your specialist dealer from whom you purchased it. Alternatively, you can return it to “LACD” directly but remember to tell us where and when you bought it.’

- 2 In August 2018, the applicant purchased two of the defendant’s T-shirts from the online merchant ‘OUTDOOR WORKS’ using a test shopper.
- 3 The applicant claims that the hangtags attached to the T-shirts carried the ‘LACD Warranty’, but that the information did not fulfil the statutory requirements for a guarantee statement.
- 4 The applicant filed for an injunction requiring the defendant to cease and desist. The defendant defended the action and raised a plea of statute-barred limitation (Paragraph 11 of the UWG).
- 5 The Landgericht (Regional Court) dismissed the action. The Court of Appeal upheld the action.
- 6 By its appeal on a point of law, for which leave was granted by the Court of Appeal, the defendant is seeking reinstatement of the judgment by which the Regional Court dismissed the action. The applicant contends that the appeal on a point of law should be dismissed.

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

- 7 1. The dispute concerns the question of whether the defendant’s promise on the hangtags is a guarantee statement. If it is, it does not fulfil the statutory requirements laid down in Paragraph 479(1), second sentence, of the BGB and is an unfair commercial practice within the meaning of Paragraph 3(1) and Paragraph 3a of the UWG. In that case, the defendant could be ordered to cease and desist (Paragraph 8(1) of the UWG).
- 8 2. The EU law applicable to this case and the national law transposing it were amended after the defendant’s contested practice in August 2018 and delivery of the judgment on the appeal. Directive 1999/44 was repealed and replaced with effect from 1 January 2022 by Directive 2019/771, which applies to contracts

concluded on or after 1 January 2022. Paragraph 479(1) of the BGB was recast with effect from 1 January 2022 under the Gesetz zur Regelung des Verkaufs von Sachen mit digitalen Elementen und anderer Aspekte des Kaufvertrags (Law regulating the sale of goods with digital elements and other aspects of the contract of sale, Federal Law Gazette I, p. 2133).

- 9 3. Paragraph 479 of the BGB lays down the requirements for guarantee statements. The version which applied up to 31 December 2021 transposed Article 6(2) of Directive 1999/44 and the version which has applied since 1 January 2022 transposes Article 17(2), third sentence, of Directive 2019/771 and regulates specific aspects of unfair commercial practices in the form of information requirements (see Article 3(4) and recital 10, third sentence, of Directive 2005/29). Paragraph 443(1) of the BGB served up to 31 December 2021 to transpose the definition of guarantee in Article 1(2)(e) and Article 6(1) of Directive 1999/44 into German law for the purposes of Paragraph 479(1) of the old version of the BGB. Since 1 January 2022, it has been based on the definition of commercial guarantee in Article 2, point 12, of Directive 2019/771 for the purposes of Paragraph 479(1) of the new version of the BGB. In its current version, which entered into force on 13 June 2014, Paragraph 443(1) of the BGB also serves to transpose the definition of commercial guarantee in Article 2, point 14, of Directive 2011/83.
- 10 4. As the T-shirts with the hangtags were supplied to a test shopper instructed by the applicant, the Chamber assumes that the purchase of the T-shirts qualifies as a sale of consumer goods within the meaning of Article 1(1) and (2)(a) to (c) of Directive 1999/44 or a sales contract between a consumer and a seller within the meaning of Article 3(1) and Article 2, points 1 to 3, of Directive 2019/771.
- 11 5. The statement printed on the hangtags need only include the information required for a guarantee statement by Article 6(2) of Directive 1999/44 or Article 17(2), third sentence, of Directive 2019/771 and included in Paragraph 479(1), second sentence, of the BGB if it is a guarantee within the meaning of Paragraph 479(1) and Paragraph 443(1) of the BGB. The Chamber questions whether the defendant's assurance that the buyer can return the product purchased if they are not completely satisfied with it is such a guarantee.
- 12 a) The Chamber is in no doubt as to the fact that, if Paragraph 443(1) of the BGB is interpreted in conformity with the directives, the consumer's satisfaction with the product purchased does not represent part of the nature of the item purchased which can be guaranteed within the meaning of Paragraph 443(1), first instance, of the BGB. Under German law, the nature of an item means all the factors inherent in the item itself, as well as all the relationships between the item and the environment that affect its repute in the public perception.
- 13 In the opinion of the Chamber, the same follows from the concept of specifications in Article 1(2)(e) of Directive 1999/44 and in Article 2, point 12, of Directive 2019/771, according to which only those circumstances which have an

objective bearing on the consumer product or goods form part of the specification of the consumer product or goods that can substantiate a guarantee; the consumer's subjective requirements for an item sold in conformity with the contract do not suffice.

- 14 (1) Although, based on the wording of the provisions of the directives, the information of the seller or producer in the guarantee statement or relevant advertising has a bearing on the guarantee, that does not mean that every item can be guaranteed. On the contrary, the guarantor's statement must contain the information that the consumer product meets certain specifications or has certain properties, from which it follows that the information must relate to properties or conditions of the item itself.
- 15 (2) It follows from the correlation between the rules enacted in Directive 1999/44 and the rules enacted in Directive 2019/771 that the specifications that can substantiate a guarantee relate to circumstances that can substantiate a defect in the item purchased and thus relate to the product purchased itself.
- 16 Article 2(2)(a) and (d) of Directive 1999/44 refers to the specifications of the goods as a criterion for their conformity with the contract and, according to the first sentence of recital 21, Directive 1999/44 includes rules on guarantees because, for certain categories of goods, it is current practice for sellers and producers to offer guarantees on goods against any defect which becomes apparent within a certain period, from which it follows that the specifications concern the condition of the item purchased according to the contract.
- 17 The same follows from Article 2, point 12, of Directive 2019/771, which states that a guarantee may cover both specifications of the goods and any other requirements not related to conformity. This additional criterion suggests that the specifications which substantiate the guarantee relate in fact to the item purchased and determine its conformity. That is not precluded by the fact that, according to Article 6 of Directive 2019/771, subjective requirements for conformity may render the goods non-conform, as the criteria listed in the contract concern objective circumstances relating to the item purchased itself.
- 18 b) The referring court has doubts, in the light of EU law, as to whether the consumer's satisfaction with the item purchased falls under 'any other requirements not related to conformity' within the meaning of Paragraph 443(1), second instance, of the BGB/Article 2, point 14, of Directive 2011/83 or 'any other requirements not related to conformity' (Article 2, point 12, of Directive 2019/771) which are covered by a guarantee and therefore trigger the information requirements under Paragraph 479(1), second sentence, of the BGB.
- 19 (1) The national legislature included the criterion 'any other requirements not related to conformity' in the version of Paragraph 443(1) of the BGB that entered into force on 13 June 2014 in order to transpose the definition of commercial guarantee in Article 2, point 14, of Directive 2011/83. At the same time, it took

the decision to create a standard definition of guarantee in order to transpose, first, Article 1(2)(e) of Directive 1999/44 and, second, Article 2, point 14, of Directive 2011/83. For that purpose, it extended the national definition of guarantee beyond the requirements of Article 1(2)(e) of Directive 1999/44, thereby extending the scope of the information requirements enacted in the old version of Paragraph 479(1), second sentence, of the BGB.

- 20 (2) (aa) However, inasmuch as the criterion ‘any other requirements not related to conformity’ has no basis in Directive 1999/44, the interpretation is predicated on national law. There is no need in principle to interpret a national rule which lies outside the scope of a directive in conformity with the directive (judgment of 16 July 1998, *ICI*, C-264/96, EU:C:1998:370, paragraph 34). However, regard must be had to the decision taken by the national legislature during the transposition of Directive 2011/83 to create a standard definition of guarantee by making a standard interpretation predicated on the definition of guarantee in Article 2, point 14, of Directive 2011/83. It is for that purpose that a ruling by the Court is required on the interpretation of the criterion ‘any other requirements not related to conformity’ in Article 2, point 14, of Directive 2011/83, in order to ensure the definition in national law is in keeping with EU law.
- 21 (bb) An interpretation of the criterion ‘any other requirements not related to conformity’ in keeping with EU law is also required for the purpose of establishing whether the definition of guarantee in Paragraph 443(1) of the BGB has also served since 1 January 2022 to transpose Article 2, point 12, of Directive 2019/771. The criterion ‘any other requirements not related to conformity’ in Article 2, point 12, of Directive 2019/771 is identical in content to the criterion ‘any other requirements not related to conformity’ in Article 2, point 14, of Directive 2011/83.
- 22 (3) The question that arises is whether ‘any other requirements not related to conformity’ can apply where circumstances specific to the consumer, in particular his or her subjective attitude towards the item purchased (in this case, the consumer’s personal satisfaction with the item purchased) have a bearing on the obligation of the guarantor, without it being necessary that those personal circumstances need not relate to the condition or features of the item purchased. That is the subject matter of Question 1.
- 23 (aa) It is not absolutely clear from the wording of the provisions of the directives whether the requirements must be based on objective properties of the item purchased or may also concern the consumer’s subjective attitude towards the product purchased. The first meaning might be supported by the fact that the goods must fulfil those requirements. The second meaning might be suggested by the fact that the requirements may follow from the guarantor’s specifications. Any such specifications may, in principle, concern both the item purchased itself and the buyer’s personal attitude towards the item purchased.

- 24 (bb) Nor does an unequivocal interpretation follow from the correlation between the rules. The criterion ‘any other requirements not related to conformity’ in Article 2, point 14, of Directive 2011/83 or the criterion ‘any other requirements not related to conformity’ in Article 2, point 12, of Directive 2019/771 is listed as an additional criterion covered by the guarantee in addition to the ‘specifications’. On the one hand, that does not preclude an interpretation that the requirements concern circumstances which, like the nature of the item, relate to objective properties of the item purchased, but which, like features of its nature that occur in the future, for example, do not substantiate a defect. On the other hand, that criterion may be understood as a delimitation criterion, meaning that, unlike a specification, the requirements need not relate to objective properties of the item purchased, but may, like the buyer’s personal dissatisfaction with the product purchased, also concern circumstances specific to the buyer and thus relate both to the item and to the person.
- 25 The fact that the EU legislature has used the term ‘requirements’ in Articles 6 and 7 of Directive 2019/771 does not support an unequivocal interpretation in either sense. That may mean that both objective requirements (Article 7) and subjective requirements (Article 6) determine the conformity of the goods. Although the subjective requirements likewise relate to features of the item purchased, that does not automatically suggest that the requirements for the item purchased must have the same reference point within the framework of the definition of guarantee in Article 2, point 12, of Directive 2019/771 (and the definition of guarantee in Article 2, point 14, of Directive 2011/83).
- 26 (cc) The aim of the rules enacted by Directives 2011/83 and 2019/771 might suggest a broad interpretation of the criterion ‘any other requirements not related to conformity’ that includes circumstances specific to the buyer. They, like Directive 1999/44, serve to achieve a high level of consumer protection (recital 65, first sentence, of Directive 2011/83; recital 10, fourth sentence, of Directive 2019/771; recital 1 of Directive 1999/44). Even where the consumer’s dissatisfaction or other circumstances specific to them have a bearing on the guarantee claim, consumers require the information stipulated in the directives in order to know the scope of their statutory rights and establish whether they have a guarantee claim, what rights they have by reason of the guarantee and how those rights can be asserted.
- 27 (4) Inasmuch as circumstances specific to the consumer (in this case, the consumer’s satisfaction with the goods purchased) are requirements which may be covered by a guarantee within the meaning of Article 2, point 14, of Directive 2011/83 and Article 2, point 12, of Directive 2019/771, the question arises as to whether it must be possible to establish the absence of such subjective requirements based on objective circumstances. That is the subject matter of Question 2.
- 28 The Chamber is inclined to answer that question in the negative. A guarantee claim also exists where the seller or producer is unable to verify, based on

objective circumstances, whether the goods fall below the buyer's subjective requirements. However, that makes it easier for consumers to use a guarantee claim as a pretext for asserting their rights under the guarantee. That means, in the final analysis, that they can exercise the rights under the guarantee at their discretion, even where the preconditions to a guarantee claim (in this case, the consumer's personal dissatisfaction with the item purchased) are not actually fulfilled. However, the guarantor does not appear to warrant protection in that regard. It is still at liberty to link its obligation with regard to the guarantee claim to quantifiable preconditions, such as a clear statement of reasons as to why the consumer is dissatisfied with the item purchased.

- 29 6. The answers to the questions referred will enable judgment to be given.
- 30 a) If the defendant's promise on the hangtags attached to its T-shirts is not a guarantee statement within the meaning of Paragraph 443(1) of the BGB, the defendant has not infringed Paragraph 479(1), second sentence, of the old version of the BGB and is therefore not in breach of any market conduct rules within the meaning of Paragraph 3a of the UWG, in which case the proceedings have reached the stage at which final judgment can be given and the Chamber would have to set aside the judgment on appeal inasmuch as it found against the defendant, and dismiss the applicant's appeal.
- 31 b) If, on the other hand, the defendant's assurance that the customer can return the product purchased if dissatisfied with it is a guarantee of any other requirements not related to conformity within the meaning of Paragraph 443(1), second instance, of the BGB, its information would not fulfil the information requirements enacted under Section 479(1), second sentence, of the BGB, in which case, the defendant would be guilty of an unfair commercial practice within the meaning of Paragraph 3(1) of the UWG, which is penalised as a breach of law under Paragraph 3a of the UWG on the grounds of infringement of the market conduct rule laid down in Paragraph 479(1), second sentence, of the old version of the BGB and imminent infringement of Paragraph 479(1), second sentence, of the new version of the BGB. Directive 2005/29/EC would not preclude any such penalty under the law on unfair practices: the contractual information requirements enacted in Paragraph 479(1), second sentence, of the BGB do not fall within the scope of Article 7(5) or recital 15 of Directive 2005/29, as they are not requirements in relation to commercial communication in that sense. 'Commercial communication' means any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession (judgment of 14 July 2016, *Verband Sozialer Wettbewerb*, C-19/15, EU:C:2016:563, paragraphs 25 and 26). If it does not promote the goods or the image of a company, commercial communication does not as a rule include information requirements that serve other purposes or have to be fulfilled during the conclusion or performance of a contract.

- 32 That notwithstanding, recital 15, sixth sentence, of Directive 2005/29 permits penalties for infringements of national contractual information requirements, even where, as with the provision of Paragraph 479(1), second sentence, of the old version of the BGB on information requirements for a guarantee for any other requirements not related to conformity, they go beyond the minimum requirements under EU law. Such penalties are possible both within the framework of the consumer's contractual claims and under the law on unfair practices as a breach of law under Paragraph 3a of the UWG. As, according to Article 3(2) of Directive 2005/29, the contractual information requirements fall outside the scope of the directive, it cannot give rise to any blocking effect.

WORKING DOCUMENT