Case C-400/22

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:

16 June 2022

Referring court:

Landgericht Berlin (Germany)

Date of the decision to refer:

2 June 2022

Defendants and appellants:

VT

UR

Applicant and respondent:

Conny GmbH

Subject matter of the main proceedings

Consumer protection, distance contract to be concluded by electronic means, trader's information requirements

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Is it compatible with the second subparagraph of Article 8(2) of Directive 2011/83/EU if a national provision (in the present case, Paragraph 312j(3), second sentence, and (4) of the BGB in the version in force from 13 June 2014 to 27 May 2022) is to be interpreted as meaning that its scope, like that of the second subparagraph of Article 8(2) of Directive 2011/83/EU, also covers a case in which

the consumer is not unconditionally obliged to pay the trader at the time of the conclusion of the contract by electronic means, but only under certain further conditions – for example, exclusively in the event that a legal action which the trader has been instructed to bring is subsequently successful, or in the event that formal notice is subsequently given to a third party?

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 (OJ 2011 L 304, p. 64), in particular the second subparagraph of Article 8(2)

Provisions of national law relied on

Bürgerliches Gesetzbuch (German Civil Code; 'the BGB'), in particular Paragraph 312j

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant is a limited liability company authorised to provide debt recovery services under German law. Acting under assigned rights, it asserts claims of the tenant of a dwelling of the defendant landlord on the basis of an alleged infringement of the provisions on the limitation of rent levels (Paragraph 556d of the BGB).

2 Since 15 November 2018, the defendant and the abovementioned tenant have been parties to a tenancy agreement for a dwelling with a surface area of 64.18 m², which is located in an area with a tight housing market, as provided for in the Berliner Mietenbegrenzungsverordnung (Berlin Regulation on the limitation of rent levels) of 28 April 2015. The contractually agreed basic net rent is EUR 756.45 per month, whereas the average rent for comparable dwellings in the relevant area of Berlin between 15 November 2018 and the point at which the matter was brought before the applicant was only EUR 375.84.

3 The applicant, via an internet site operated by it, offers residential tenants the possibility to instruct it to enforce claims against their landlord by clicking a button labelled 'weiter' (continue), 'Mietsenkung beauftragen' (instruct us to seek a rent reduction), or 'Mietendeckelersparnis retten' (recover rent ceiling saving), in particular to assert claims for information, for repayment of overpaid rent and for a declaration that the agreement on the amount of rent is invalid in so far as it exceeds the maximum permissible rent level.

4 Point 2 of the applicant's general terms and conditions, on which the instruction by the tenant was based, provides, inter alia:

> '2.1 You instruct us, after having gone through the steps of the rent calculator on our website …
>
> By clicking on the button "Auftrag verbindlich erteilen" (place binding order), or, at the latest, by sending to us (for example by email or by post) any documents which may have been provided by us (declaration of assignment or power of attorney), you make a binding offer to conclude an agency agreement, against payment, for the enforcement of claims, together with any ancillary claims, and for the assignment of claims. We accept your offer by way of an express declaration (for example by email) or by sending a letter of complaint to the landlord, by which we assert the claims against him or her. Upon request, you can sign a separate deed or confirmation of assignment or power of attorney and send us the original. …'

5 Moreover, point 3 of the general terms and conditions reads as follows:

> '3.1 We shall receive (i) remuneration in the amount of one third (33.33%) of the amount of annual rent saved, that is to say, the savings across 4 months (hereinafter referred to as "commission"), and, as soon as we send formal notice to the landlord, (ii) remuneration in the amount to which a lawyer would be entitled under the provisions of the Rechtsanwaltsvergütungsgesetz (Law on the remuneration of lawyers) …
>
> …
>
> 3.3 In the event that we are unsuccessful in our efforts, the commission shall not apply. …'

6 The tenant of the dwelling in question registered on the website operated by the applicant, ticked a box agreeing to the applicant's general terms and conditions, and clicked on the 'order button' provided. Subsequently, on 16 January 2020, the tenant signed a form entitled 'Confirmation, grant of power of attorney, assignment and approval', which had been provided by the applicant, and which states, inter alia:

> 'We hereby confirm and reiterate, purely by way of precaution, the assignment … of the claims …, the claim for repayment of overpaid rent[,] limited to the four months' rent due after the complaint. Purely by way of precaution, we hereby approve, with retroactive effect, all legal acts undertaken and all declarations made in that respect …'

7 That form does not contain any reference to an obligation to pay on the part of the tenant.

8 By letter of 21 January 2020, the applicant, relying on the fact that the tenant had instructed and authorised it, claimed that the defendants had infringed the provisions on the limitation of rent levels (Paragraph 556d et seq. of the BGB), and asserted various claims seeking information and repayment.

9 By its action, the applicant seeks to obtain information on the rent payable by the previous tenant, on rent increases agreed with the previous tenant, on the carrying out of refurbishment work prior to the commencement of the tenancy and on the question whether the tenancy established with the tenant is the first letting following extensive refurbishment. It also seeks repayment of EUR 305.75 in overpaid rent for the month of April 2020 and reimbursement of EUR 813.39 in pre-litigation legal costs.

10 The action was successful before the Amtsgericht (Local Court, Germany). The Local Court found, in particular, that the rent demanded exceeds the maximum permissible rent level to the extent claimed by the applicant.

11 By their appeal brought before the referring court, the defendants seek the dismissal of the action in its entirety. They argue, inter alia, that the applicant infringed the requirements of the second sentence of Paragraph 312j(3) of the BGB and Article 8 of Directive 2011/83 due to the use of an insufficiently labelled order button.

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

12 The referring court takes the view that the success of the appeal hinges on whether the configuration of the order button used by the applicant infringes the second sentence of Paragraph 312j(3) of the BGB. This must be determined on the basis of the interpretation of the relevant provision of EU law, namely the second subparagraph of Article 8(2) of Directive 2011/83. The complaints directed at other aspects of the dispute, raised by the defendants in their appeal, have no prospect of success.

Assessment of the dispute in accordance with the BGB

13 The relevant subparagraphs of Paragraph 312j of the BGB, in the version applicable in the present case, read as follows:

‘(2) In the case of an e-commerce consumer contract for a service provided by the trader for consideration, the trader shall provide the consumer with the items of information under points 1, 4, 5, 11 and 12 of the first sentence of Article 246a(1) of the Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Law to the Civil Code) in a clear, comprehensible and prominent manner directly before the consumer places his or her order.

(3) In the case of a contract as provided for in subparagraph 2, the trader shall configure the ordering situation in such a way that the consumer, when placing his

or her order, explicitly acknowledges that he or she assumes an obligation to pay. Where the order is placed by means of a button, the obligation of the trader referred to in the first sentence shall be fulfilled only if the button is labelled in an easily legible manner only with the words "order with obligation to pay" or a corresponding unambiguous formulation.

(4) Contracts as provided for in subparagraph 2 shall be formed only if the trader fulfils his or her obligation under subparagraph 3.'

14 Those provisions are in principle applicable to the applicant's business model. In that respect, the referring court shares the view taken by the Bundesgerichtshof (Federal Court of Justice, Germany), which initially considered that business models that are 'manifestly not associated with a hidden cost trap' are not covered by Paragraph 312j(3) and (4) of the BGB, but which then promptly rejected that consideration (judgment of 19 January 2022, file reference VIII ZR 122/21). That view is in line with the case-law of the Court of Justice, in accordance with which all traders, and not only those who use 'subscription or cost traps', fall within the scope of the second subparagraph of Article 8(2) of Directive 2011/83 (see, most recently, judgment of 7 April 2022, *Fuhrmann-2*, C-249/21, EU:C:2022:269, paragraph 20 et seq.).

15 If the second sentence of Paragraph 312j(3) of the BGB is applicable in this specific case, it is clear that the applicant did not fulfil the requirements of that provision. This is because it is apparent from the case file that the tenant instructed the applicant by pressing a button labelled 'Mietsenkung beauftragen' (instruct us to seek a rent reduction) or 'Mietendeckelersparnis retten' (recover rent ceiling saving). It is common ground that the button was not labelled with the words 'order with obligation to pay' or a corresponding unambiguous formulation. However, only in that way would the applicant have fulfilled the requirements of the second sentence of Paragraph 312j(3) of the BGB and the second subparagraph of Article 8(2) of Directive 2011/83, which is to be taken as the basis for the interpretation of the former provision in conformity with EU law (see judgment of 7 April 2022, *Fuhrmann-2*, C-249/21, EU:C:2022:269, paragraph 26).

16 In accordance with the case-law of the Federal Court of Justice based on Paragraph 312j(4) of the BGB, the conclusion of the contract is entirely ineffective in such a case. By contrast, some authors in the legal literature take the view that, in accordance with the third sentence of the second subparagraph of Article 8(2) of Directive 2011/83, that provision of the BGB must be interpreted as meaning that the consumer is merely 'not bound' by the contract and the order, with the result that it must be assumed that the contract is provisionally ineffective.

17 Even if the latter view were to be followed, the contract would not have been effectively concluded in the present case, since the applicant did not at any time inform the tenant of the dwelling in question of the payment obligations under the

contract in a manner that complied with the requirements of the second sentence of Paragraph 312j(3) of the BGB. Furthermore, the tenant did not at any time approve or confirm, even impliedly, the contract which might have been only provisionally ineffective.

18 Nor does the declaration of assignment of 16 January 2020 constitute such approval or confirmation, since the tenant made that declaration exclusively at the behest of the applicant in order thereby to comply with their alleged duty to cooperate, laid down by Point 2.1(2) of the applicant's general terms and conditions in breach of the second sentence of Paragraph 312j(3) of the BGB. The assignment declared in that manner is structured together with the instruction by the tenant as a single transaction. It is therefore also ineffective. A different assessment cannot enter into consideration, since it would amount to legitimising 'confirmation traps' by virtue of the fact that subsequent acts of performance by the consumer would be regarded as an implied approval, confirmation or even carrying out afresh of the transaction previously initiated by electronic means in a manner contrary to the second subparagraph of Article 8(2) of Directive 2011/83. However, this would mean that the consumer's obligation to pay would not arise for him or her expressly, but merely from the 'circumstances' of the conclusion of the contract (see judgment of 7 April 2022, *Fuhrmann-2*, C-249/21, EU:C:2022:269, paragraph 30).

Doubts in relation to EU law

19 According to the first sentence of the second subparagraph of Article 8(2) of Directive 2011/83, the trader is to ensure that the consumer, when placing his or her order, explicitly acknowledges that the order implies an obligation to pay. The referring court takes the view that it is unclear whether that provision applies to the present case. Specifically, the question arises as to whether a distance contract to be concluded by electronic means also 'implies' an 'obligation to pay', within the meaning of that provision, where consideration is owed only under certain further conditions – such as exclusively in the event of a successful outcome or in the uncertain event that formal notice is subsequently given to a third party.

20 In the context at issue, the Federal Court of Justice interprets the second subparagraph of Article 8(2) of Directive 2011/83 – and Paragraph 312j(3) and (4) of the BGB – as meaning that the 'protective purpose is, on an exceptional basis, not affected' and that the trader is therefore not obliged vis-à-vis the consumer to label the order button with the words 'order with obligation to pay' if 'consideration is owed only under certain conditions, namely exclusively in the event of a successful outcome' (see judgments of 19 January 2022, VIII ZR 123/21, paragraph 55, and of 30 March 2022, VIII ZR 358/20, paragraph 58).

21 By contrast, other German courts, as well as the legal literature, attribute a considerably broader scope to the second subparagraph of Article 8(2) of Directive 2011/83. They take the view that that provision also covers transactions in respect of which the requirement to provide consideration follows only

indirectly from the conclusion of the contract or is linked to the existence of further conditions or actions by the consumer.

22 The referring court is inclined to the latter view. That view is supported by the very wording of the provision in question, according to which the obligation to use such a button exists where the order 'implies' an obligation to pay on the part of the consumer. However, the conclusion of a contract initiated by electronic means 'implies' an obligation to pay if the arising of that obligation is not inevitable, but merely possible and not entirely excluded.

23 Such an interpretation is also supported by the purpose of the second subparagraph of Article 8(2) of Directive 2011/83 since, as evidenced by Article 1 and recitals 4, 5 and 7 of that directive, the latter seeks to provide a high level of consumer protection by ensuring that consumers are informed and secure in transactions with traders. That view is also in line with the settled case-law of the Court of Justice (see, most recently, judgment of 7 April 2022, *Fuhrmann-2*, C-249/21, EU:C:2022:269, paragraphs 21 and 30). However, it would not be compatible with the guarantee of that high level of consumer protection if the protection afforded by Directive 2011/83 were to benefit only those consumers whose subsequent obligation to pay is already established at the time of the conclusion of the contract, but were at the same time to be denied to those consumers in respect of whom the obligation to pay does not yet definitively exist at the time of the conclusion of the contract, but instead depends on the subsequent fulfilment of further conditions, over which consumers often do not even have any influence. This is because, in the event that such conditions are fulfilled, those consumers are obliged to pay even if they had not been expressly informed in advance of their obligation to pay.

24 Lastly, considerations of practicability also do not preclude a broad interpretation of the second subparagraph of Article 8(2) of Directive 2011/83. In so far as the Federal Court of Justice stated that a broad interpretation could 'cause confusion [for the consumer] … contrary to … the objective of the law and the directive transposed by it … because the service … is not intended to be subject to a charge in every case, but the formulation with which the button is labelled does not express this' (see judgment of 19 January 2022, VIII ZR 123/21, paragraph 55), this does not justify a different assessment. On the one hand, reasons of mere practicability are not, as a matter of general principle, capable of influencing the interpretation of EU law in a manner contrary to its wording or its spirit and purpose. On the other hand, it is in any event possible for the trader to inform the consumer with sufficient clarity, outside the button, that an obligation to pay exists not without exception, but only in the regular case presented by the trader on his or her website. This eliminates any ambiguity that would be capable of causing 'confusion' on the part of the consumer as a result of the button being labelled with overly broad wording. In fact, 'confusion' would be likely to arise only among consumers who, in the event that a relevant condition is fulfilled, find themselves exposed to a trader's payment claims, the arising of which was not known to them, or in any event not sufficiently known to them, at the time of

instruction due to the fact that the order button was not labelled in a manner complying with the requirements of the second subparagraph of Article 8(2) of Directive 2011/83.