



# Reports of Cases

OPINION OF ADVOCATE GENERAL  
TANCHEV  
delivered on 20 September 2018<sup>1</sup>

**Case C-430/17**

**Walbusch Walter Busch GmbH & Co. KG**

**v**

**Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV**

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Consumer protection — Articles 6(1) and 8(4) of Directive 2011/83/EU — Information requirements for distance and off-premises contracts — Scope of Article 8(4) of Directive 2011/83 and modification to information obligations for contracts concluded through a means of distance communication which allows limited space or time to display information — Advertising leaflet referring to a hyperlink for particulars concerning the right of withdrawal — Obligation to provide model withdrawal form set out in Article 6(1)(h) and Annex I B of Directive 2011/83 — Article 16 of the Charter and freedom to conduct a business — Freedom of expression and information in the context of advertising under Article 11 of the Charter).

## I. Introduction

1. In essence this case concerns the meaning to be afforded to the phrase ‘a means of distance communication which allows limited space or time to display the information’ in Article 8(4) of Directive 2011/83/EU,<sup>2</sup> and thus the circumstances in which the requirements of Article 6(1) of Directive 2011/83 are modified with respect to information that traders are to provide to consumers before the latter can be bound by a distance, or off-premises, contract.

2. Directive 2011/83 repealed and replaced both Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises,<sup>3</sup> and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts,<sup>4</sup> thereby simplifying and updating the rights protected

<sup>1</sup> Original language: English.

<sup>2</sup> Directive 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.

<sup>3</sup> OJ 1985 L 372, p. 31.

<sup>4</sup> OJ 1997 L 144, p. 19.

by these directives into a single measure of maximum harmonisation.<sup>5</sup> This resulted in Article 8(4) of Directive 2011/83, so that the Court is asked to interpret for the first time the phrase ‘means of distance communication which allows limited space or time to display the information’ as it applies to distance contracts.

3. More specifically, a trader who has placed advertising leaflets in magazines for the sale of waterproof coats (which include a detachable post card for placing orders) argues that it is entitled to rely on Article 8(4) of Directive 2011/83. In consequence, it is contended that the trader is only required to inform consumers prior to entering into distance contracts for the sale of the coats of the existence of their right to withdraw, rather than the further details set out in Article 6(1)(h) of Directive 2011/83. This interpretation of Article 8(4) of Directive 2011/83 is contested by the *Zentrale zur Bekämpfung des unlauteren Wettbewerbs eV* (‘Office for the Prevention of Unfair Competition’) in Germany, which instituted a legal challenge in that Member State which forms the subject of the main proceedings.

4. In the event that the trader can rely on Article 8(4) of Directive 2011/83, the main proceedings will also concern whether details concerning the right of withdrawal must be provided by the trader in the leaflet itself, or whether provision of the address on the internet where such details can be found is sufficient. The same issue will arise with respect to the model withdrawal form that appears in Annex I B of Directive 2011/83 and which is referred to in Articles 6(1)(h) and 11(1) of Directive 2011/83.

## II. Legal framework

### A. EU law

#### 1. *Charter of Fundamental Rights of the European Union*

5. Article 11 of the Charter is entitled ‘Freedom of expression and information’. Paragraph 1 states:

‘Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.’

6. Article 16 of the Charter is entitled ‘Freedom to conduct a business’ and states:

‘The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.’

7. Article 38 of the Charter is entitled ‘Consumer protection’ and states:

‘Union policies shall ensure a high level of consumer protection.’

<sup>5</sup> See Weatherill, S., ‘The Consumer Rights Directive: how and why a quest for “coherence” has (largely) failed’, 49 (2012) *Common Market Law Review*, 1279, p. 1290. However, as stated in recital 2 of Directive 2011/83, Member States are to be allowed to maintain or adopt national rules in relation to certain aspects. Directive 2011/83 also includes more modest amendments to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95, p. 29, and 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.

2. *Directive 2011/83*

8. Article 1 of Directive 2011/83 is entitled ‘Subject matter’ and states:

‘The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts concluded between consumers and traders.’

9. Article 6(1)(a) to (h) of Directive 2011/83 state:

‘1. Before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner:

- (a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;
- (b) the identity of the trader, such as his trading name;
- (c) the geographical address at which the trader is established and the trader’s telephone number, fax number and email address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting;
- (d) if different from the address provided in accordance with point (c), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints;
- (e) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price shall include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated shall be provided;
- (f) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate;
- (g) the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader’s complaint handling policy;
- (h) where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Article 11(1), as well as the model withdrawal form set out in Annex I(B);’

10. Article 8(1) and (4) to (7) of Directive 2011/83 state:

‘1. With respect to distance contracts, the trader shall give the information provided for in Article 6(1) or make that information available to the consumer in a way appropriate to the means of distance communication used in plain and intelligible language. In so far as that information is provided on a durable medium, it shall be legible.

...

4. If the contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader shall provide, on that particular means prior to the conclusion of such a contract, at least the pre-contractual information regarding the main characteristics of the goods or services, the identity of the trader, the total price, the right of withdrawal, the duration of the contract and, if the contract is of indeterminate duration, the conditions for terminating the contract, as referred to in points (a), (b), (e), (h) and (o) of Article 6(1). The other information referred to in Article 6(1) shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1 of this Article.

5. Without prejudice to paragraph 4, if the trader makes a telephone call to the consumer with a view to concluding a distance contract, he shall, at the beginning of the conversation with the consumer, disclose his identity and, where applicable, the identity of the person on whose behalf he makes that call, and the commercial purpose of the call.

6. Where a distance contract is to be concluded by telephone, Member States may provide that the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his written consent. Member States may also provide that such confirmations have to be made on a durable medium.

7. The trader shall provide the consumer with the confirmation of the contract concluded, on a durable medium within a reasonable time after the conclusion of the distance contract, and at the latest at the time of the delivery of the goods or before the performance of the service begins. That confirmation shall include:

- (a) all the information referred to in Article 6(1) unless the trader has already provided that information to the consumer on a durable medium prior to the conclusion of the distance contract; and
- (b) where applicable, the confirmation of the consumer’s prior express consent and acknowledgment in accordance with point (m) of Article 16.’

11. Article 11 of Directive 2011/83 is entitled ‘Exercise of the right of withdrawal’. Article 11(1) states:

‘Before the expiry of the withdrawal period, the consumer shall inform the trader of his decision to withdraw from the contract. For this purpose, the consumer may either:

- (a) use the model withdrawal form as set out in Annex I(B); or
- (b) make any other unequivocal statement setting out his decision to withdraw from the contract.

Member States shall not provide for any formal requirements applicable to the model withdrawal form other than those set out in Annex I(B).’

**B. National law**

12. Paragraph 355 of the Bürgerliches Gesetzbuch (Civil Code, ‘the BGB’) is entitled ‘Right of withdrawal in consumer contracts’. Paragraph 355(1) of the BGB states:

‘If a consumer is given, by statute, a right of withdrawal according to this provision, then the consumer and the trader are no longer bound by their declarations of intention to conclude the contract if the consumer withdraws from his declaration of intention within the period specified. The withdrawal is effected by a declaration being made to the trader. The declaration must unambiguously reflect the consumer’s decision to withdraw from the contract. The withdrawal does not have to provide any grounds. Dispatch of the withdrawal in good time is sufficient to comply with the time limit.’

13. Paragraph 312d of the BGB is entitled ‘Information requirements’. Paragraph 312d(1) of the BGB states:

‘In the case of off-premises contracts and of distance contracts, the trader is obliged to inform the consumer according to the stipulations of Article 246a of the Introductory Law to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuche, “EGBGB”). Unless the parties to the contract have expressly agreed otherwise, the information the trader provides by way of fulfilling this obligation shall become part of the contract’s subject matter.’

14. Paragraph 312g of the BGB is entitled ‘Right of withdrawal’. Paragraph 312g(1) of the BGB states:

‘In the case of off-premises contracts and of distance contracts, the consumer has a right of withdrawal pursuant to Paragraph 355.’

15. Article 246a of the EGBGB is entitled ‘Information requirements for off-premises contracts and distance contracts other than financial services contracts. Paragraph 1 thereof is entitled ‘Information requirements’ and states:

‘…

(2) If the consumer is entitled to a right of withdrawal pursuant to Paragraph 312g(1) of the BGB, the trader is obliged to inform the consumer

1. about the conditions, the deadlines and the procedure for exercising the right of withdrawal pursuant to Paragraph 355(1) of the BGB as well as the model withdrawal form set out in Annex 2,

…’

16. Paragraph 3 of Article 246a of the EGBGB is entitled ‘Facilitated information requirements in the case of limited display options’ and states:

‘If a distance contract is to be concluded by means of a distance communication medium which provides only limited space or time for the information to be provided to the consumer, the trader is obliged to provide the consumer with at least the following information by means of this distance communication medium:

…

4. If applicable, the existence of a right of withdrawal and

…

The further information according to Paragraph 1 must be made available to the consumer in a suitable manner in accordance with Paragraph 4(3).’

17. Paragraph 4 of Article 246a of the EGBGB is entitled ‘Formal requirements for the fulfilment of the information requirements’. It states:

‘(1) The trader must provide the consumer with the information specified in Paragraphs 1 to 3 in a clear and comprehensible manner before the consumer submits his contract declaration.

...

(3) In the case of a distance contract, the trader must provide the consumer with the information in a manner adapted to the means of the distance communication medium used. Insofar as the information is provided on a durable medium, it must be legible and the trader must be named. Notwithstanding the first sentence, the trader can make the information specified in the second sentence of Paragraph 3 accessible to the consumer in a suitable manner.’

### **III. The facts in the main proceedings and the question referred for a preliminary ruling**

18. The Office for the Prevention of Unfair Competition, Frankfurt am Main, is the plaintiff in the main proceedings and the respondent in the appeal (‘the plaintiff’). The appeal is being heard in Germany before the Bundesgerichtshof (Federal Court of Justice; ‘the referring court’).

19. In 2014, Walbusch Walter Busch, the defendant in the main proceedings and the appellant before the referring court (‘the defendant’) distributed as a supplement to various magazines and newspapers a six-panel fold-out advertising leaflet measuring 19 x 23.7 cm (‘the leaflet’). The bottom half of the right-hand panel of the leaflet contained a detachable mail order coupon. Both the front and back of the mail order coupon made reference to the statutory right of withdrawal. The defendant’s telephone number, fax number, web address and postal address were given in a column alongside the front of the mail order coupon, under the heading ‘So bestellen Sie bei ...’ (How to order from ...), with its telephone number and web address appearing under the heading ‘Bestellservice’ (Ordering Service) at the foot of the front and back of the leaflet when folded. When entered into an internet browser, the web address brought up the homepage of the defendant’s website. The instructions on withdrawal and the model withdrawal form were accessible via the link to the general terms and conditions that was provided under the heading ‘Rechtliches’ (legal matters).

20. The plaintiff objects to the leaflet because it does not contain proper instructions on withdrawal and the model withdrawal form is not attached to it, but is rather accessible via a website. Following the unsuccessful issue of a letter of formal notice, the plaintiff brought an action for a prohibitory injunction and recovery of the costs of the pre-judicial letter of formal notice in the amount of EUR 246.10 plus interest.

21. That action, brought before the Landgericht (Regional Court) was, in essence, successful. However, the appeal court varied that judgment in part and stated, inter alia, that the defendant was ordered to refrain, in the course of business, from enabling consumers to conclude distance contracts for the purchase of goods via a print medium, without directly providing on the print medium itself specific information on: the conditions, time limit and procedures for exercising the right of withdrawal, in particular the name and address of the person to whom the notice of withdrawal must be addressed, and without attaching the model withdrawal form to the print medium.

22. By the appeal on a point of law to the referring court, the defendant maintains its claim that the action should be dismissed in its entirety. The plaintiff contends that the appeal on a point of law should be dismissed.

23. According to the referring court, the success of the appeal on a point of law depends on the interpretation of Article 6(1)(h) and Article 8(4) of Directive 2011/83. The referring court states that the first question that arises has to do with the criterion for assessing whether a means of distance communication (in this instance the leaflet containing a mail order coupon) allows limited space or time to display information, as provided in the first sentence of Article 8(4) of Directive 2011/83. Does the answer to that question depend on (1) whether (in the abstract) the means of distance communication allows limited space or time by its very nature or (2) whether (in the particular case) it offers limited space or time in the design selected for it by the trader (Question 1).

24. The referring court also queries whether the trader's freedom to design their advertising as they wish and the freedom to conduct a business as protected by Article 16 of the Charter is pertinent to resolution of the legal problems arising in the main proceedings, along with technical constraints inherent in the nature of the means of the distance communication in question. The referring court further queries whether consumer interests would be better protected if they do not receive comprehensive information on exercising the right to withdrawal and on the model withdrawal form until after the distance contract has been concluded.

25. The additional issue arises as to whether it is compatible with Article 8(4) and Article 6(1)(h) of Directive 2011/83 for the information on the right of withdrawal to be restricted to an indication of the existence of the right of withdrawal in the case, as provided for in Article 8(4) of Directive 2011/83, where there is limited scope for displaying such information. Should the answer to this question be influenced by the need to avoid disproportionate restriction on the freedom to advertise? The referring court notes, *inter alia*, that pursuant to recital 4 of Directive 2011/83, the Directive seeks to guarantee that the right balance is struck between a high level of consumer protection and the competitiveness of enterprises.

26. Finally, in the event that, where there is limited scope for displaying information, and the information on the right of withdrawal must not be restricted to an indication of the existence of that right, the further question arises as to whether Article 8(4) and Article 6(1)(h) of Directive 2011/83 make it a mandatory requirement in all cases, including in the case where there is limited scope for displaying information, for the model withdrawal form set out in Annex I B to Directive 2011/83 to be attached to the means of distance communication before a distance contract is concluded (Question 3)?

27. The proceedings were stayed, and the following questions referred to the Court:

- (1) For the purposes of applying Article 8(4) of Directive 2011/83, does the answer to the question whether a means of distance communication (in this instance, an advertising leaflet containing a mail order coupon) allows limited space or time to display information depend on whether
- (a) (in the abstract) the means of distance communication allows only limited space or time by its very nature
  - or
  - (b) (in the particular case) it offers limited space or time in the design selected for it by the trader?
- (2) Is it compatible with Article 8(4) and Article 6(1)(h) of Directive 2011/83 for information on the right of withdrawal to be restricted to an indication of the existence of a right of withdrawal, in the case, as provided for in Article 8(4) of Directive 2011/83, where there is limited scope for displaying that information?

(3) Do Article 8(4) and Article 6(1)(h) of Directive 2011/83 make it a mandatory requirement in all cases, including in the case where there is limited scope for displaying information, for the model withdrawal form set out in Annex I B to Directive 2011/83 to be attached to the means of distance communication before a distance contract is concluded?

28. Written observations were submitted to the Court by the plaintiff, the Governments of Germany, Finland and Poland, and the Commission. The plaintiff, Germany, and the Commission made submissions at the hearing that took place on 7 June 2018, as did the defendant.

#### IV. Summary of written observations

29. With regard to *the first question*, Poland states that a literal interpretation of Article 8(4) of Directive 2011/83 provides no resolution to the problem posed, and points out that, according to established case-law, in interpreting a provision of EU law, account must be taken of not only its terms, but also its context and the objectives pursued by the rule of which it forms a part.<sup>6</sup>

30. The plaintiff, Finland, Poland and the Commission contend, with respect to *the first question* that it is the abstract nature of the means of distance communication that is determinative in the light, inter alia, of the fact that Directive 2011/83 aims at providing a high level of consumer protection. In other words, they support the first alternative supplied by the referring court.

31. All four further argue that this interpretation is also consistent with recital 36 of Directive 2011/83, which states that, in the case of distance contracts, information requirements ‘should be adapted to take into account the technical constraints of certain media’.<sup>7</sup> The plaintiff states that recital 36 refers, for example, to the limited presentation opportunities on mobile phone screens. Thus, the EU legislator wanted to emphasise the technical restrictions inherent in certain forms of media.

32. The plaintiff and the Commission take the view that any infringement of the defendant’s fundamental rights are proportionate, and that they are to be guaranteed, in any event, in the context of consumer protection, which is protected by Article 38 of the Charter.

33. Finland and the Commission argue that if the ‘means of distance communication’ referred to in Article 8(4) referred to the means selected by the trader in the particular case, the trader could circumvent the obligations contained in Article 6(1) of Directive 2011/83 by virtue of the means of distance communication chosen. Article 6(1) of Directive 2011/83 would be liable to be deprived of legal certainty and its *effet utile*.

34. The Commission adds that the rule established by Article 8(4) of Directive 2011/83 aims at situations in which media feature technical constraints that exclude the insertion of longer texts, such as the limitation of the number of characters that can be displayed on a mobile phone or constraints such as time on a television advertising spot. In such cases, Directive 2011/83 authorises giving the consumer access to part of this information via a hyperlink or via the mention of a free telephone number where it can be obtained. If such constraints disappear due to progress in technology, Article 8(4) of Directive 2011/83 no longer applies.

<sup>6</sup> Poland refers to judgment of 17 March 2016, *Liffers* (C-99/15, EU:C:2016:173, paragraph 14 and the case-law cited).

<sup>7</sup> My emphasis.

35. The Commission contends that limitation on the liberty of the trader, which translates as an obligation to always choose a means of advertising that is sufficient to include all the information on withdrawal from the contract and other obligatory information, is justified by consumer protection and is not disproportionate. The same applies in the context of Article 16 of the Charter. Further, the obligations imposed by Article 6(1) of Directive 2011/83 only apply to distance contracts as defined by Article 2(7) of Directive 2011/83.

36. The Commission further relies on the ruling of the Court in *Canal Digital Denmark*,<sup>8</sup> contending that certain paragraphs of this ruling interpreting a provision similar to Article 8(4) of Directive 2011/83 that appears in Directive 2005/29/EC<sup>9</sup> supports its case.<sup>10</sup>

37. The plaintiff adds that Article 8(7)(a) of Directive 2011/83 does not alter its proposed response to the first question. It obliges traders to provide the consumer with the confirmation of the contract concluded on a durable medium within a reasonable time after the conclusion of the distance contract, and at the latest at the time of the delivery of the goods or before the performance of the service begins, including the information in Article 6(1) of Directive 2011/83, unless already provided on a durable medium. If Article 8(7)(a) were interpreted otherwise, Article 8(4) would be superfluous.

38. Finally, the plaintiff, Finland and the Commission argue that Article 8(4) is an exception that is to be interpreted strictly.

39. With regard to the *second question*, the plaintiff, Finland, Poland and the Commission contend that it is not sufficient to limit the information provided to the simple existence of a right of withdrawal, without it being necessary to communicate the supplementary information on the means for exercising this right that appears in Article 6(1)(h) of Directive 2011/83.

40. The plaintiff notes that the first sentence of Article 8(4) of Directive 2011/83 indicates clearly that in all cases certain minimal information must be communicated. This provision refers to Article 6(1)(h) of Directive 2011/83, according to which this minimal information means ‘the conditions, time limit and procedures for exercising that right’. Thus, by Article 8(4) of Directive 2011/83, the EU legislator envisaged an explicit and concrete regime for provision of information that must be supplied irrespective of technical constraints (see Article 8(4) of Directive 2011/83 and the words ‘on that particular means’). Finland and Poland take a similar position.

41. The plaintiff further states that the mention in the order for reference to freedom to conduct a business must, in this context, be treated in the same way as it was with respect to fundamental rights and Question 1; the interests of consumer protection must prevail.

42. Finland adds, in the context of the *second question*, that no support can be gleaned from Article 8(7)(a) of Directive 2011/83, which provides for certain information to be provided by traders later on ‘durable medium’, for the provision of pre-contractual information to be confined to the existence of the right to withdraw. Finland also argues that the information provided to a consumer considering a distance contract is of fundamental importance, given that it is on this basis that the consumer decides whether or not to be bound by it.

<sup>8</sup> Judgment of 26 October 2016 (C-611/14, EU:C:2016:800).

<sup>9</sup> *Directive 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’)*, OJ 2005 L 149, p. 22.

<sup>10</sup> See further below, points 65 and 66.

43. As for the *third question*, the plaintiff and the Commission argue that, due to Article 6(1)(h) of Directive 2011/83, the model form for withdrawal from the contract is to be communicated to the consumer even when Article 8(4) applies. However *Finland*, with some support from Poland, contends that the withdrawal form itself does not form part of the ‘information’ on the right of withdrawal referred to in Directive 2011/83, so it does not have to be provided before a consumer is bound by a contract concluded at a distance.

44. *Germany* proposes a solution to the questions referred that is different to that of the plaintiff, Finland, Poland and the Commission. With respect to the *first question*, Germany contends, inter alia, that the concrete form of communication chosen by the trader is determinative in deciding whether the contract concluded at a distance falls within Article 8(4) of Directive 2011/83, so that the reduced information obligation provided for by Articles 8(4) and 6(1)(h) of Directive 2011/83 applies to the leaflet in issue in the main proceedings.

45. Germany argues that neither the wording of Article 8(4) or the recitals of Directive 2011/83 support limiting the provision to certain means of communication at a distance. The modes of communication referred to in recital 36 are merely examples.

46. Germany contends that the objective pursued by Directive 2011/83 does not oblige traders to always supply comprehensive information on the right to withdraw before the conclusion of the contract. Directive 2011/83 aims at providing a high level of consumer protection and to create a firm legal framework, for consumers as much as traders. This objective is equally secured by Article 8(7)(a) of Directive 2011/83. Realistically, it cannot be excluded that many consumers do not keep advertising leaflets after they place their orders. It is therefore essential to communicate detailed information on the right of withdrawal at the latest at the moment of delivery to ensure that consumers are aware of the right. Article 8(7)(a) of Directive 2011/83 guarantees full respect of the rights of consumers.

47. The imposition of obligations going beyond the reduced information requirements envisaged by Article 8(4) of Directive 2011/83 restricts freedom of traders to conduct a business under Article 16 of the Charter without supplying any advantage to consumers. Pursuant to Article 52(1) of the Charter, the freedom of the trader to choose a means of advertising cannot be restricted disproportionately. If the means of communication chosen by the trader is of no bearing to the application of Article 8(4) of Directive 2011/83, there is a risk that traders will not be able to use certain forms of advertising because the type of advertising will sink into the background due to the mass of obligatory information. Germany also emphasises the second sentence of Article 8(4) of Directive 2011/83, which states that the ‘other information referred to in Article 6(1) shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1 of this Article.’

48. With regard to the *second question*, Germany takes the view that, when a means of distance communication is used ‘which allows limited space or time to display the information’ within the meaning of Article 8(4) of Directive 2011/83, then traders are only obliged to inform consumers of the existence of the right to withdraw, and that this does not prejudice a high level of protection for consumers. Any more onerous obligation with regard to the information to be supplied to consumers on the right of withdrawal would be a disproportionate restriction on the right to advertise.

49. In the light of the volume of the information on the right of retraction to communicate to consumers, the objective of Directive 2011/83 described above, and the interest of consumers and traders, Germany takes the view that an amelioration of the amount of information is appropriate when there are limited presentational possibilities.

50. Germany refers to recital 4 of Directive 2011/83, which states, *inter alia*, that a balance is to be struck between a high level of consumer protection and the competitiveness of enterprises. The exception in Article 8(4) of Directive 2011/83 takes account of reduced space and time imposed by techniques of communication at a distance and also reacts against disproportionate restrictions on the freedom of traders to advertise. Here too Germany notes that, in any case, it is Article 8(7)(a) of Directive 2011/83 that is essential for consumers.

51. Finally, with regard to the *third question*, Germany argues that, when there is limited space and time to display information, the right of withdrawal can be confined to the existence of this right, and it is not always necessary to attach to the means of distance communication the model withdrawal form set out in Annex I B of Directive 2011/83.

## V. Assessment

### A. Overview

52. The heart of this case lies in Question 1, and whether objective or subjective criteria apply when a Member State court decides whether a ‘contract is concluded through a means of distance communication which allows limited space or time to display the information’ under Article 8(4) of Directive 2011/83.

53. I have reached the conclusion that, as a matter of EU law, the first alternative proposed by the referring court applies to the interpretation of Article 8(4) of Directive 2011/83. That is, in determining whether the leaflet in issue containing a small coupon is a ‘means of distance communication which allows limited space or time to display the information’ depends on whether (in the abstract) the means of distance communication allows only limited space or time by its very nature. As can be seen from the analysis that follows, this objective approach reflects the meaning of Article 8(4) of Directive 2011/83, rather than the subjective analysis inherent in considering whether, in the particular case, the means of communication in issue offers limited space or time in the design selected for it by the trader, which was the second alternative referred to in Question 1.

54. The referring court has asked that Question 2, on the content of the right of withdrawal on the model withdrawal form in Annex I B, be answered only if the second alternative referred to in Question 1 is adopted. I will answer Questions 2 and 3 only in the event that the Court disagrees with my proposed answer to Question 1.

55. Before so doing, I will make some preliminary remarks.

### B. Preliminary remarks

56. It is important to first underscore that the modification in Article 8(4) of Directive 2011/83 to the information requirements imposed by Article 6(1) thereof is one that appertains only to the *means* by which traders provide consumers the information detailed in Article 6(1) of Directive 2011/83 before such consumers can be bound by a distance or off-premises contracts, but not the *content* of what is to be communicated. As stated in recital 35 of Directive 2011/83, the information to be provided by the trader to the consumer should be mandatory. The information that is not referred to in Article 8(4) of Directive 2011/83 as falling within the modification created by this provision is simply to be provided, pursuant to the last sentence of Article 8(4), by the trader to the consumer ‘in an appropriate’ way in accordance with Article 8(1) of Directive 2011/83. Given the reference to Article 6(1) of Directive 2011/83 in Article 8(1) of Directive 2011/83, this is to occur before the consumer is bound by the distance or off-premises contract.

57. The decision of the EU legislature to craft an exception as to means rather than content is consistent with the guarantee of a high level of consumer protection in all EU policies under Article 38 of the Charter, and supported in Articles 12, 114(3) and 169 TFEU. Moreover, given the rising prevalence of consumer contracts concluded at a distance, made possible by the ascent of digital technologies, securing the *effet utile* of Directive 2011/83 is confronted with increasingly complex challenges.

58. Further, a significant part of the case for the defendant has been based on freedom to conduct a business under Article 16 of the Charter.<sup>11</sup> It sometimes overlaps with freedom of expression and information in the context of advertising which is protected by Article 11 of the Charter,<sup>12</sup> and which the court has had occasion to consider with respect to packaging and labelling.<sup>13</sup> This right is equally pertinent when restrictions are imposed by law with respect to publicity and marketing, and the means and conditions under which consumers are able to place orders for goods and services, as is the case in the main proceedings.

59. However, it is important to emphasise that when Article 16 of the Charter is raised in a context in which consumer protection is relevant, account must also be taken of Article 38 of the Charter,<sup>14</sup> irrespective of whether Article 38 is a principle, and thus limited under Article 52(5) of the Charter to a role in the interpretation of EU legislation, or a provision conferring subjective rights.<sup>15</sup> Article 38 of the Charter plays the same role when Article 11 of the Charter is relevant with respect to freedom of expression and information in the context of advertising.<sup>16</sup>

### C. The answer to questions 1 and 2

#### 1. Analysis of Question 1

60. As pointed out in the written observations of Poland, the wording of Article 8(4) of Directive 2011/83 provides no indication as to whether or not the leaflet in issue in the main proceedings amounts to a ‘means of distance communication which allows limited space or time to display the information’ under that article. Nor are documents relevant to the origins of Article 8(4) of

11 With respect to this right, see judgments of 14 March 2017, *G4S Secure Solutions* (C-157/15, EU:C:2017:203); of 26 October 2017, *BB construct* (C-534/16, EU:C:2017:820); of 20 December 2017 *Global Starnet* (C-322/16, EU:C:2017:985); of 20 December 2017, *Polkomtel* (C-277/16, EU:C:2017:989); of 30 June 2016, *Lidl* (C-134/15, EU:C:2016:498); of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324); of 21 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972); of 17 December 2015, *Neptune Distribution* (C-157/14, EU:C:2015:823); of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43); of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28); and of 12 July 2012, *Association Kokopelli* (C-59/11, EU:C:2012:447).

12 See e.g. *Neptune Distribution* *ibid.*

13 At paragraph 147 of the judgment of the Court of 4 May 2016, *Philip Morris Brands* (C-547/14, EU:C:2016:325), it was held that ‘Article 11 of the Charter affirms the freedom of expression and information. That freedom is also protected under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which applies, in particular, as is clear from the case-law of the European Court of Human Rights, to the dissemination by a business of commercial information, including in the form of advertising. Given that the freedom of expression and information laid down in Article 11 of the Charter has — as is clear from Article 52(3) thereof and the Explanations Relating to the Charter as regards Article 11 — the same meaning and scope as the freedom guaranteed by the Convention, it must be held that that freedom covers the use by a business, on the packaging and labelling of tobacco products, of indications such as those covered by Article 13(1) of Directive 2014/40 (judgment of 17 December 2015, *Neptune Distribution*, C-157/14, EU:C:2015:823, paragraphs 64 and 65).’ See also the Opinion of Advocate General Jääskinen in *Google Spain and Google* (C-131/12, EU:C:2013:424, points 120 to 125).

14 See judgment of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43, paragraph 63). It is interesting to note that in paragraph 62 of *McDonagh*, the Court held that ‘when several rights protected by the European Union legal order clash, such an assessment must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and striking a fair balance between them (see, to that effect, judgments of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, paragraphs 65 and 66, and of 6 September 2012, *Deutsches Weintor*, C-544/10, EU:C:2012:526, paragraph 47).’

15 See my Opinion in *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:303, point 64). The influence of the right to consumer protection is demonstrated by the fact that its absence as an objective in a given measure of EU legislation can be determinative of its interpretation. See e.g. judgment of 21 May 2015, *El Majdoub* (C-322/14, EU:C:2015:334, paragraphs 36 to 38).

16 Judgment of 17 December 2015, *Neptune Distribution* (C-157/14, EU:C:2015:823).

Directive 2011/83, such as the *travaux préparatoires*, of any great assistance,<sup>17</sup> but I note that the Commission's Guidance Document concerning Directive 2011/83 states at page 33 that 'Article 8(4) should apply primarily to contracts concluded using technologies such as SMS, which impose technical limits on the amount of information that can be sent.'<sup>18</sup>

61. However, the context and purpose of Articles 6(1) and 8(4) of Directive 2011/83 are more telling.

62. With respect to purpose, as pointed out in the written observations of Finland and the Commission, if the 'particular case' criteria were used with respect to the design selected by the trader, the second alternative mentioned by the referring court in Question 1, this would leave the issue of the circumstances in which the exception provided for in Article 8(4) of Directive 2011/83 applies in the hands of traders, and *their* choice of means for advertising and offering distance contracts. This would be inconsistent with the aim appearing in recital 2 for Directive 2011/83 to 'lay down standard rules for the common aspects of distance and off-premises contracts' and the establishment of a 'single regulatory framework based on clearly defined legal concepts' as provided for in recital 7. It would also result in diminution of the *effet utile* of Article 8(4) of Directive 2011/83, and would be antithetical to the rule that derogations from European Union rules for the protection of consumers are to be interpreted strictly.<sup>19</sup>

63. Further, I agree that the purpose of Article 8(4) of Directive 2011/83, as reflected in recital 36, is to secure the provision for consumers of all of the information required by Article 6(1) of Directive 2011/83, even if new technologies employed by traders to advertise and offer distance contracts renders its communication difficult. Recital 36 mentions the need to adapt information requirements 'to take into account the technical constraints of *certain media*, such as the restrictions on the number of characters on certain mobile telephone screens' (my emphasis). The locus of Directive 2011/83 on the (objective) means of communication used is also reflected in recital 20 which confirms that the definition of distance contract covers the exclusive use of means of distance communication such as 'mail order, internet, telephone or fax'.

64. With regard to context, as I have mentioned in a previous Opinion, context in the interpretation of EU measures covers a number of different points of reference. It encompasses comparison with legislation that preceded the measure in issue but which that measure has repealed. It encapsulates EU legislation that is related to or linked in some substantive way with the measure in question. And it also appertains to the context of the provision concerned in relation to the other provisions of the EU instrument in which it is housed and the broad architecture of the latter.<sup>20</sup>

65. In this respect, the Commission's reliance on the Court's ruling in *Canal Digital Danmark*,<sup>21</sup> is potentially of relevance.<sup>22</sup> There the Court was asked, inter alia, whether Article 7(1) and (3) of the Unfair Commercial Practices Directive were to be interpreted as meaning that, for the purposes of assessing whether a commercial practice must be considered as a misleading omission, consideration should be given to the context in which that practice takes place, in particular the limitations of time

17 See, in the context of distance contracts, judgment of 5 July 2012, *Content Services Limited* (C-49/11, EU:C:2012:419, paragraph 32). With respect to the *travaux préparatoires* that are relevant to the main proceedings, I note however that reference is sometimes made to 'technological developments' in pertinent preparatory documents. See e.g. Commission, Green Paper on the Review of the Consumer Acquis (OJ 2007 C 61, p. 1, p. 3). See similarly Council of the European Union, Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council on consumer rights – Annexes – of 8 October 2008, Doc. SEC(2008) 2547, p. 4.

18 [https://ec.europa.eu/info/sites/info/files/crd\\_guidance\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0.pdf)

19 Judgment of 15 April 2010, *E. Friz* (C-215/08, EU:C:2010:186, paragraph 32 and the case-law cited).

20 *Pinckernelle* (C-535/15, EU:C:2016:996, point 40 and the case-law cited).

21 Judgment of 26 October 2016 (C-611/14, EU:C:2016:800).

22 As pointed out at point 36 of the Opinion of Advocate General Mengozzi in *Content Services* (C-49/11, EU:C:2012:126), definitions provided for the same concept in directives other than the one in issue can be 'helpful' to the interpretation process.

and space imposed by the communications medium used. Article 7(1) of the Unfair Commercial Practices Directive states that account must be taken, in assessing whether a commercial practice is unfair, of its factual context and ‘of all its features and circumstances and the limitations of the communication medium’.

66. While I am unable to agree that any of the paragraphs in *Canal Digital Danmark* relied on by the Commission support the objective over the subjective approach to answering Question 1,<sup>23</sup> at paragraph 42 of *Canal Digital Danmark*, in considering the meaning of ‘limitations of space and time related to the communication medium used’, the Court referred to the time constraints ‘that may apply to certain communication media, such as television commercials’.<sup>24</sup> I note therefore that the subjective choice of the trader in the particular case did not appear to be relevant to the interpretation of Article 7(1) of the Unfair Commercial Practices Directive, but rather the objective qualities of certain media.

67. In addition to this, there is no provision in Directive 97/7, one of the predecessor directives to Directive 2011/83, that is suggestive of an attenuation of its requirements with respect to traditional forms of distance communication between traders and consumers such as via catalogues and magazines with leaflets of the kind in issue in the main proceedings. Provision of such a measure in the successor directive, here Directive 2011/83, would be inconsistent with a high level of consumer protection, and would require clear language.

68. I therefore agree with observations made by the Commission at the hearing to the effect that the ruling of the Court in *Verband Sozialer Wettbewerb*<sup>25</sup> addressed a configuration of an advertisement on paper that bore no resemblance to the main proceedings and thus, on the basis of these distinctive facts, is of no assistance in answering Question 1. The reliance placed by the defendant on this ruling is misplaced.

69. In *Verband Sozialer Wettbewerb* the Court was asked whether Article 7(4)(b) of the Unfair Commercial Practices Directive must be interpreted as meaning that the information relating to the geographical address and the identity of the trader must be included in a print medium advertisement for specific products, where those products were purchased by consumers via a website, given in the advertisement, of the undertaking which was the author of that advertisement and that information was readily accessible on or via that website.

70. The Court held that the extent of the information relating to the geographical address and the identity of the trader which had to be communicated, by a trader, in an invitation to purchase, had to be assessed on the basis of the context of that invitation, the nature and characteristics of the product and the medium of communication used.<sup>26</sup>

71. The Court then added that where ‘an online sales platform is advertised in print medium and where, in particular, a large number of sales options offered by various traders are presented in that advertisement, there may be limitations of space within the meaning of Article 7(3) of Directive 2005/29’.<sup>27</sup>

72. However, there is nothing in the case file to suggest that the leaflet in issue in the main proceedings referred to offers from more than one trader or made reference to various websites via a platform.

<sup>23</sup> At the hearing the Commission referred to paragraphs 80, 58 and 63. In its written observations the Commission refers to paragraphs 62 and 63.

<sup>24</sup> My emphasis.

<sup>25</sup> Judgment of 30 March 2017 (C-146/16, EU:C:2017:243).

<sup>26</sup> *Ibid.*, paragraph 28 and the case-law cited.

<sup>27</sup> *Ibid.*, paragraph 29.

73. Finally, as argued by the plaintiff, advertising media produced in traditional forms of communications, as is the case in the main proceedings, are often directed at societal groups, such as older people, who are unaccustomed to going to the internet to acquire access to the supplementary terms of the contract proposed.

74. Recital 34 of Directive 2011/83 reflects protection of such groups as an aim of that directive. Its second sentence states that ‘the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee.’ This context too points toward rejection of the trader’s selection of design and medium in determining whether ‘a means of distance communication ... allows limited space or time to display the information’ under Article 8(4) of Directive 2011/83, binding as it would all societal groups to engage with the internet to secure information traders are bound to provide pursuant to Article 6(1) of Directive 2011/83.

## 2. Analysis of Question 2

75. By the second question, the referring court asks whether, once Article 8(4) of Directive 2011/83 applies, it is sufficient for a trader to advise a consumer prior to the conclusion of a contract at a distance of the existence of the right of withdrawal and nothing more.

76. As stated above, I answer the second question only in the event that the Court disagrees with my conclusions with respect to the first, and that the modification to the information requirements set out in Articles 6(1) and 8(4) of Directive 2011/83 apply to the leaflet in issue in the main proceedings.

77. With respect to Question 2, I agree with the position taken by the plaintiff, Finland, Poland and the Commission. The wording of Article 8(4) of Directive 2011/83 requires more than notification of the existence of the right of withdrawal. It states that the trader ‘shall provide’ a list of information, and this includes ‘the *conditions* for terminating the contract’<sup>28</sup> as referred to in, inter alia, Article 6(1)(h) of Directive 2011/83.

78. As pointed out in the written observations of Finland, the information envisaged by Articles 6(4) and 8(1) of Directive 2011/83 which has to be furnished to a consumer before a contract is concluded is, under the case-law of the Court, of fundamental importance.<sup>29</sup> The Court has already held in the context of one of the predecessor directives to Directive 2011/83, namely Directive 97/7, that ‘where information found on the seller’s website is made accessible only via a link sent to the consumer, that information is neither “given” to that customer, nor “received” by him, within the meaning of Article 5(1) of Directive 97/7’.<sup>30</sup> This is consistent with the answer here proposed to Question 2.

79. Like Finland and the plaintiff,<sup>31</sup> I reject arguments to the effect that Article 8(7) of Directive 2011/83, and the obligation on traders to provide the information appearing in Article 6(1) of Directive 2011/83 to consumers ‘with the confirmation of the contract concluded, on a durable medium within a reasonable time after the conclusion of the distance contract, and at the latest at the time of the delivery of the goods or before the performance of the service begins’ is of relevance to the obligation imposed under Directive 2011/83 for traders to provide details on the right to withdraw from a distance contract before consumers are bound.

<sup>28</sup> My emphasis.

<sup>29</sup> Finland refers to the ruling of the Court of 20 September 2017, *Andriiciuc and Others* (C-186/16, EU:C:2017:703, paragraph 48 and the case-law cited). See on the importance of the right to withdrawal, the Opinion of Advocate General Mengozzi in *Content Services* (C-49/11, EU:C:2012:126, point 28).

<sup>30</sup> Judgment of 5 July 2012, *Content Services* (C-49/11, EU:C:2012:419, paragraph 37).

<sup>31</sup> I acknowledge that the plaintiff addressed arguments with respect to Article 8(7)(a) of Directive 2011/83 in the context of Question 1.

80. In Article 8(7) of Directive 2011/83, the emphasis is on ‘confirmation’ of what has been provided before conclusion of the contract and ‘durable media’, as Directive 2011/83 allows for provision of the relevant information prior to contract on non-durable media. Traders are exempted from the obligation in Article 8(7)(a) of Directive 2011/83 only if the relevant information has ‘already’ been provided on a durable media. This is clear from the use of the word ‘unless’ in this same provision. Recital 23 is also pertinent, indicating as it does that the purpose of supply of the information on durable media is storage. Moreover, as argued by the plaintiff, if the interpretation proposed by Germany were accepted, Article 8(4) of Directive 2011/83 would be superfluous.

81. I underscore, however, that if the Court were to agree with my recommendations with respect to the answer to Question 1, the defendant will be required to provide in the leaflet the model withdrawal form provided for in Article 11(1) and Annex I B of Directive 2011/83 in any event, because the main proceedings will likely fall outside of the modification to information requirements provided by Directive 2011/83.

### 3. *Pertinence of fundamental rights to questions 1 and 2*

82. The approach proposed to answering questions 1 and 2 generates interference with the fundamental rights of defendants because it obliges them to choose a design in which the information obligations imposed by Directive 2011/83 can be met, and in such a way that all the information is provided to the consumer in a ‘clear and comprehensible manner’ in conformity with Article 6(1) of Directive 2011/83 and recital 34. This includes details of the right to withdrawal and not only its existence. If my proposal to answering Question 1 is accepted, it will also include an obligation to provide the model withdrawal form in Annex I B to Directive 2011/83 in the leaflet in issue in the main proceedings.

83. All this restricts the ability of the defendant to freely use the economic, technical, and financial resources available to it, as protected by Article 16 of the Charter.<sup>32</sup> It also interferes with freedom of expression and information in the context of advertising under Article 11 of the Charter because the trader is obliged to convey specific information.

84. However, according to the established case-law, the freedom to conduct a business under Article 16 of the Charter is not absolute. It may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.<sup>33</sup> Further, Article 16 of the Charter must be considered in relation to its social function.<sup>34</sup>

85. Moreover, the fundamental rights protected by Articles 11 and 16 of the Charter are not absolute. Both provisions are subject to justified limitations under Article 52(1) of the Charter.<sup>35</sup> It states that any ‘limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others’.

<sup>32</sup> Judgment of 30 June 2016, *Lidl* (C-134/15, EU:C:2016:498, paragraph 27 and the case-law cited).

<sup>33</sup> E.g. judgment of 26 October 2017, *BB construct* (C-534/16, EU:C:2017:820, paragraph 36 and the case-law cited).

<sup>34</sup> E.g. judgment of 17 December 2015, *Neptune Distribution* (C-157/14, EU:C:2015:823, paragraph 66 and the case-law cited); e.g. judgment of 30 June 2016, *Lidl* (C-134/15, EU:C:2016:498, paragraph 30 and the case-law cited).

<sup>35</sup> See most recently with respect to freedom to conduct a business the judgment of 12 July 2018, *Spika and Others* (C-540/16, EU:C:2018:565, paragraph 36) and the judgment of 26 October 2017, *BB construct* (C-534/16, EU:C:2017:820, paragraph 37). See also e.g. judgment of 30 June 2016, *Lidl* (C-134/15, EU:C:2016:498, paragraph 31). For the application of Article 52(1) of the Charter to freedom of expression see judgment of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraph 149).

86. The requirement for the limitation to be ‘prescribed by law’ is met by Articles 8(4) and 6(1) of Directive 2011/83. Nor is the essence of either Article 16 or 11 of the Charter imperilled because Directive 2011/83 does not oblige traders to make recourse to specified means of distance communication. Traders are not compelled to use traditional advertising leaflets in paper form. They are simply required to comply with the full text of Article 6(1) of Directive 2011/83 if they do. It is analogous to controlling information about a product in a clearly defined area.<sup>36</sup>

87. It is recognised in the Court’s case-law that a high level of consumer protection is a legitimate objective of general interest, the achievement of which is sought by the European Union.<sup>37</sup> Thus, the crux of the disagreement between the parties with respect to Article 52(1) lies in whether the principle of proportionality has been respected in pursuit of this objective.<sup>38</sup>

88. In that regard, it is settled case-law that ‘the principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.’<sup>39</sup>

89. I agree with arguments made in the Commission’s written observations to the effect that the limitation on the liberty of the trader translates into an obligation to always choose a means of advertising that is sufficient to include all the information on withdrawal. It is difficult to see how maintaining the obligations contained in Article 6(1) of Directive 2011/83 with respect to traditional paper advertising leaflets is inappropriately adapted to achieving this goal, or how it imposes a burden on traders going beyond what is necessary. General affirmations, such as those that appear in the written observations of Germany, with respect to the volume of information required by Article 6(1) of Directive 2011/83, is not enough,<sup>40</sup> and the assertion made by the defendant at the hearing that requiring traders to spend more than 20 to 30 per cent of advertising space with respect to distance contracts on information obligations triggers the application of Article 8(4) of Directive 2011/83 is both arbitrary and unsupported by the text of Directive 2011/83.

90. An advertising leaflet in paper does not labour under technical constraints. In the circumstances of the main proceedings in which a single product sold by a single trader is being advertised on a conventional paper leaflet including a detachable mail order coupon, the leaflet can simply be made bigger to ensure that the information is provided in ‘a clear and comprehensible manner’ as required by Article 6(1) of Directive 2011/83. Contrary to arguments made by the defendant at the hearing, I am unable to agree that the EU legislator envisaged ‘weight’ as being one of the constraints envisaged by Article 8(4) of Directive 2011/83, given that this provision refers to ‘limited space or time’.

91. As the Commission points out in its written observations, the information requirements set by Directive 2011/83 apply to distance and off-premises contracts only. They therefore do not go beyond what is necessary to achieve the goal of guaranteeing consumer protection with respect to contracts concluded at a distance, and in which the consumer is not able to inspect the goods concerned or pose questions on a shop floor prior to the conclusion of the contract. As argued by Finland, the trader has a reinforced obligation in the case of distance contracts because the consumer cannot evaluate in person the products in question before making a decision to buy them. This is reflected in recital 37.

<sup>36</sup> Judgment of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraph 151).

<sup>37</sup> Judgment of 17 December 2015, *Neptune Distribution* (C-157/14, EU:C:2015:823, paragraph 73). See also e.g. judgment of 30 June 2016, *Lidl* (C-134/15, EU:C:2016:498, paragraph 32).

<sup>38</sup> For a detailed analysis of the principle of proportionality in the context of freedom to conduct a business see the Opinion of Advocate General Bobek in *Lidl* (C-134/15, EU:C:2016:169, points 40 to 62).

<sup>39</sup> Judgment of 30 June 2016, *Lidl* (C-134/15, EU:C:2016:498, paragraph 33 and the case-law cited).

<sup>40</sup> C.f. in this regard judgment of 30 March 2017, *Verband Sozialer Wettbewerb* (C-146/16, EU:C:2017:243).

92. Finally, the EU legislature has a broad discretion in areas involving political, economic, and social choices and in which it is called upon to undertake complex assessments and evaluation. Thus, in circumstances such as those arising in the main proceedings, the interference with the defendant's rights under Article 16 of the Charter would have to be manifestly disproportionate<sup>41</sup> before it could not be justified by Article 52(1) of the Charter. It has not been demonstrated that this is the case.

#### 4. *The answer to questions 1 and 2*

93. I therefore propose the following answer to questions 1 and 2:

- (1) For the purposes of applying Article 8(4) of Directive 2011/83, the answer to the question whether a means of distance communication (in this instance, an advertising leaflet containing a mail order coupon) allows limited space or time to display information depends on whether (in the abstract) the means of distance communication allows only limited space or time by its very nature.
- (2) In the event that Question 1 is answered to the effect that it is the means of distance communication in the particular case, as selected by the trader, that is pertinent to determining the material scope of Article 8(4) of Directive 2011/83, it is incompatible with Article 8(4) and Article 6(1)(h) of Directive 2011/83 for information on the right of withdrawal to be restricted to an indication of the existence of a right of withdrawal.

#### **D. *Proposed answer to Question 3***

94. I answer this question only in the event that, contrary to the proposals set out at above, Question 1 is answered to the effect that it is the means of distance communication in the particular case, in that it offers limited space and time in the design selected for it by the trader, that determines the material scope of Article 8(4) of Directive 2011/83.

95. There is disagreement on the answer to Question 3 in the following respects.

96. On the one hand, the plaintiff and the Commission argue that, due to the terms of Directive 2011/83, the model form for withdrawal from the contract is to be communicated to the consumer even when Article 8(4) applies. The plaintiff states that this is reflected in the formulation used in Annex I B of Directive 2011/83, which refers to 'this form' as that which has to be notified to the trader who has advertised.

97. The Commission contends that, pursuant to Article 6(1)(h) of Directive 2011/83, before a consumer can be bound by a distance or off-premises contract, the trader must provide the consumer, in a clear and comprehensible manner, where a right of withdrawal exists, with the conditions, time limit and procedures for exercising that right in accordance with Article 11(1), *as well as* the model withdrawal form set out in Annex I B.<sup>42</sup> Thus, pursuant to the wording of this provision, both of these arms of a trader's obligations are applicable for means of distance communication which allow limited space or time for the display of information. The Commission notes that the model withdrawal form in Annex I B is brief, and moreover that Article 8(1) of Directive 2011/83 allows traders to make the information provided for in Article 6(1) of Directive 2011/83 available in a way appropriate to the means of distance communication used. This provides supplementary flexibility to the trader.

<sup>41</sup> Opinion of Advocate General Kokott in *Poland v Parliament and Council* (C-358/14, EU:C:2015:848, points 87 and 89 and the case-law cited). See also discussion at point 42 of the Opinion of Advocate General Bobek in *Lidl* (C-134/15, EU:C:2016:169).

<sup>42</sup> Emphasis in Commission's submissions.

98. On the other hand, Finland, with some support from Poland, and from Germany, contends that the withdrawal form itself does not form part of the ‘information’ on the right of withdrawal referred to in Directive 2011/83, so it does not have to be provided before a consumer is bound by a contract concluded at a distance once Article 8(4) applies. It is rather a document pursuant to which the consumer can inform the trader of his or her wish to withdraw from the contract. If the legislator wished to include the model withdrawal form, it would have expressly set this out in Article 8(4) of Directive 2011/83. The model withdrawal form is not ‘information’ which will influence the decision of the purchaser on whether or not to purchase what is offered by way of a distance contract.

99. Finland also refers to Article 8(5) of Directive 2011/83, and the fact that the Directive 2011/83 is applicable to telephone sales. This shows that the legislature did not intend to include the model withdrawal form because the sending of the form by telephone is technically impossible. Finland notes that the model withdrawal form can be sent later on a durable medium under Article 8(7) of Directive 2011/83. Poland provides the example of a distance contract concluded by telephone as a technique of communication in which inclusion of the model withdrawal form would not be possible.

100. I have come to the conclusion that, when Article 8(4) of Directive 2011/83 does apply, traders are not obliged to provide the model withdrawal form in Annex I B to Directive 2011/83 prior to the conclusion of a distance contract.

101. While I acknowledge that, unsurprisingly, the Commission’s Guidance Document on Directive 2011/83<sup>43</sup> supports the position it has taken in the main proceedings, by for example stating that, with respect to telephone calls, the content of the form should be explained to the consumer orally,<sup>44</sup> there are no express words in Directive 2011/83 to this effect. In other words, there is no provision in Directive 2011/83 concerning means of communication on which it is impossible or difficult to provide the model withdrawal form. This context suggests that it may not have been the intention of the EU legislator to oblige traders to provide the form in such circumstances.

102. More generally, requiring traders to provide the model withdrawal form, even when Article 8(4) of Directive 2011/83 applies, may be inconsistent with the origins of this provision and those of Article 6(1) of Directive 2011/83, which refer to the need to avoid the unnecessary burdening of traders.<sup>45</sup>

103. Finally, pursuant to Article 11(1)(b) of Directive 2011/83, the consumer has the option of withdrawing from a distance contract by making an unequivocal statement to this effect. Consumers are not bound to use the model withdrawal form in Annex I B. This supports the argument of Finland that the word ‘information’ in Directive 2011/83 can be read as not including the means by which a consumer chooses to withdraw from a distance contract. Thus, the solution I am suggesting does not prejudice a high standard of consumer protection.

104. I therefore propose answering the third question as follows.

(3) In the event that Question 1 is answered to the effect that it is the means of distance communication in the particular case, as selected by the trader, that is pertinent to determining the material scope of Article 8(4) of Directive 2011/83, the model withdrawal form set out in Annex I B to Directive 2011/83 does not have to be attached to the means of distance communication before a distance contract is concluded.

<sup>43</sup> [https://ec.europa.eu/info/sites/info/files/crd\\_guidance\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0.pdf)

<sup>44</sup> *Ibid.*, page 34.

<sup>45</sup> See, beneath the heading ‘Information requirements’, Note from the Presidency, Working Party on Consumer Protection and Information of 13 May 2009, 9833/09, CONSOM 113, JUSTCIV 122, CODEC 720, p. 11.

## VI. Conclusion

105. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

- (1) For the purposes of applying Article 8(4) 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 85/557/EEC and Directive 97/7/EC of the European Parliament and of the Council, the answer to the question whether a means of distance communication (in this instance, an advertising leaflet containing a mail order coupon) allows limited space or time to display information depends on whether (in the abstract) the means of distance communication allows only limited space or time by its very nature.
- (2) In the event that Question 1 is answered to the effect that it is the means of distance communication in the particular case, as selected by the trader, that is pertinent to determining the material scope of Article 8(4) of Directive 2011/83, it is incompatible with Article 8(4) and Article 6(1)(h) of Directive 2011/83 for information on the right of withdrawal to be restricted to an indication of the existence of a right of withdrawal.
- (3) In the event that Question 1 is answered to the effect that it is the means of distance communication in the particular case, as selected by the trader, that is pertinent to determining the material scope of Article 8(4) of Directive 2011/83, the model withdrawal form set out in Annex I B to Directive 2011/83 does not have to be attached to the means of distance communication before a distance contract is concluded.