



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

14 May 2020*

(Reference for a preliminary ruling – Consumer protection – Directive 2011/83/EU – Article 6(1)(c) and (h) and (4) – Annex I(A) – Right of withdrawal – Information to be supplied by the trader relating to the conditions, time limit and procedures for exercising the right of withdrawal – Requirement for the trader to state his or her telephone number ‘where available’ – Scope)

In Case C-266/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), by decision of 7 March 2019, received at the Court on 29 March 2019, in the proceedings

EIS GmbH

v

TO,

THE COURT (Sixth Chamber),

composed of M. Safjan (Rapporteur), President of Chamber, C. Toader and N. Jääskinen, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- EIS GmbH, by A. Rinkler, Rechtsanwalt,
- the European Commission, by C. Valero and M. Kellerbauer, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 6(1)(c) and (h) and (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 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64), read in conjunction with Annex I(A) to that directive.
- 2 The request has been made in proceedings between EIS GmbH, a German online sales company, and TO, one of its competitors, concerning the request made by TO, trading as a natural person, to EIS to cease and desist its commercial practice of not indicating its telephone number on its website in the information relating to the consumer's right of withdrawal.

Legal context

European Union law

- 3 Recitals 4, 5, 7 and 34 of Directive 2011/83 state:
 - '(4) ... The harmonisation of certain aspects of consumer distance and off-premises contracts is necessary for the promotion of a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises ...
 - (5) ... The full harmonisation of consumer information and the right of withdrawal in distance and off-premises contracts will contribute to a high level of consumer protection and a better functioning of the business-to-consumer internal market.
 - ...
 - (7) Full harmonisation of some key regulatory aspects should considerably increase legal certainty for both consumers and traders. Both consumers and traders should be able to rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Union. The effect of such harmonisation should be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area. Those barriers can only be eliminated by establishing uniform rules at Union level. Furthermore consumers should enjoy a high common level of protection across the Union.
 - ...
 - (34) The trader should give the consumer clear and comprehensible information before the consumer is bound by a distance or off-premises contract, a contract other than a distance or an off-premises contract, or any corresponding offer. ...'

- 4 Under Article 1 of that directive, entitled 'Subject matter':

'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.’

5 Chapter III of that directive, entitled ‘Consumer information and right of withdrawal for distance and off-premises contracts’, consists of Articles 6 to 16 of the directive.

6 Article 6 of that directive, entitled ‘Information requirements for distance and off-premises contracts’, provides:

‘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:

...

(c) the geographical address at which the trader is established and the trader’s telephone number, fax number and e-mail 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;

...

(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);

...

4. The information referred to in points (h), (i) and (j) of paragraph 1 may be provided by means of the model instructions on withdrawal set out in Annex I(A). The trader shall have fulfilled the information requirements laid down in points (h), (i) and (j) of paragraph 1 if he has supplied these instructions to the consumer, correctly filled in.

5. The information referred to in paragraph 1 shall form an integral part of the distance or off-premises contract and shall not be altered unless the contracting parties expressly agree otherwise.

...’

7 Article 11 of Directive 2011/83, entitled ‘Exercise of the right of withdrawal’, provides, in paragraph 1:

‘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.

...’

8 Annex I to that directive, entitled ‘Information concerning the exercise of the right of withdrawal’, consists of point A, entitled ‘Model instructions on withdrawal’, and point B, entitled ‘Model withdrawal form’.

9 Annex I(A) sets out the instructions which the trader must follow in order to communicate to the consumer the model instructions relating to his or her right of withdrawal and, more particularly, the following instruction:

‘Insert your name, geographical address and, where available, your telephone number, fax number and email address.’

10 Annex I(B) contains a section worded as follows:

‘To [here the trader’s name, geographical address and, where available, his fax number and e-mail address are to be inserted by the trader].’

German law

11 Paragraph 312d of the Bürgerliches Gesetzbuch (Civil Code; ‘the BGB’), entitled ‘Information requirements’, provides, in subparagraph 1:

‘In the case of off-premises contracts and distance contracts, the trader shall be required to inform the consumer in accordance with the provisions of Paragraph 246a of [the Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Act to the Civil Code)]. Unless the parties to the contract have expressly agreed otherwise, the information supplied by the trader in order to satisfy that requirement shall form an integral part of the contract.’

12 Paragraph 246a of the Introductory Act to the Civil Code (‘the EGBGB’), entitled ‘Requirements relating to off-premises contracts and distance contracts, with the exception of contracts relating to financial services’, provides, in subparagraph 1:

‘(1) The trader shall be required, pursuant to Paragraph 312d(1) of the BGB, to make the following information available to the consumer:

...

2. his identity, such as his trading name, the address at which he is established, his telephone number, fax number and email address, where available, and, where applicable, the address and identity of the trader on whose behalf he is acting,

...

(2) If the consumer has a right of withdrawal pursuant to Paragraph 312g(1) of the BGB, the trader shall be required to inform the consumer of:

1. the conditions, time limit and procedure for exercising the right of withdrawal in accordance with Paragraph 355(1) of the BGB and with the model withdrawal form set out in Annex 2,

...

The trader may satisfy those information requirements by submitting the model withdrawal instruction set out in Annex 1, correctly filled in and in the form of a text.

(3) The trader shall also be required to inform the consumer

1. that the consumer does not have the right of withdrawal under Paragraph 312g(2) points 1, 2, 5 and 7 to 13 of the BGB, according to which the consumer may not revoke his declaration of intent,

...'

13 In the words of Paragraph 3(1) of the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition), in the version applicable to the dispute in the main proceedings ('the UWG'):

'Unfair commercial practices are unlawful'

14 Paragraph 4(11) of the UWG provides:

'An act of unfair competition is committed by, in particular, anyone who

...

11. is in breach of a legal requirement which is, inter alia, intended to regulate conduct on the market in the interest of market operators.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 On 29 December 2014, EIS sent a formal notice to TO, its competitor in the sale of erotic items on the internet, requiring it to cease and desist its commercial practice consisting, in particular, in communicating incorrect information concerning the consumer's right to exercise the right of withdrawal after the conclusion of a contract. In the context of that formal notice, EIS ordered TO to send it a *strafbewehrte Unterlassungserklärung* (an undertaking subject to a penalty for non-compliance), whereby TO would undertake to cease that practice, subject to a penalty.

16 On 8 January 2015, TO sent such an undertaking to EIS. By letter of 12 January 2015, TO, in turn, sent EIS a formal notice requiring it to cease and desist its commercial practice consisting in not indicating the telephone number on its website in the information relating to the consumer's right of withdrawal.

17 EIS brought an action before the Landgericht Arnberg (Regional Court, Arnberg, Germany), seeking a declaration that TO was not entitled to request it to cease the commercial practice referred to in the formal notice of 12 January 2015. By means of a counterclaim, TO requested that EIS be ordered to cease the practice referred to in that formal notice.

18 By judgment of 9 July 2015, the Landgericht Arnberg (Regional Court, Arnberg) dismissed EIS's action and allowed TO's counterclaim.

19 By judgment of 10 August 2017, the Oberlandesgericht Hamm (Higher Regional Court, Hamm, Germany) in essence dismissed the appeal brought by EIS against that judgment.

- 20 EIS appealed on a point of law to the referring court, the Bundesgerichtshof (Federal Court of Justice, Germany), against the judgment delivered on appeal.
- 21 The referring court considers that the outcome of the dispute in the main proceedings depends on whether the information relating to the consumer's right of withdrawal which EIS provides on its website infringes the first sentence of Paragraph 312d(1) of the BGB and point 1 of the first sentence and the second sentence of Paragraph 246a(1) of the EGBGB, read in conjunction with Annex 1 to the EGBGB, and whether, consequently, that information is anti-competitive, within the meaning of Paragraph 3 and Paragraph 4(11) of the UWG. In that regard, it observes that those provisions transpose into German law Article 6(1)(h) and (4) of Directive 2011/83, read together with Annex I(A) to that directive, and that they must therefore be given an interpretation consistent with those provisions.
- 22 In the present case, as may be seen from the order for reference, EIS used the model instructions on withdrawal, set out in Annex I(A) to Directive 2011/83. However, EIS did not indicate its telephone number, although it had a telephone line which it used for commercial purposes. Nonetheless, EIS displayed its telephone number within the legal notice on its website and, clearly and legibly, in the legal information in the lower area of the homepage of its website.
- 23 The referring court states that EIS maintains that, since it does not conclude contracts by telephone, it is not required to make a telephone line available to consumers in order to enable them to rely, where appropriate, on their right of withdrawal with regard to distance contracts.
- 24 In those circumstances, the referring court seeks to ascertain whether a telephone number is 'available' within the meaning of the instructions for completion for model instructions on withdrawal in accordance with Annex I(A) of Directive 2011/83, where the trader states his or her telephone number in the legal notice or where he or she presents it clearly and legibly on the home page of his or her website. In that regard, the referring court considers that if the trader does not clearly state that that number is not meant to be used in order to make declarations relating to withdrawal from the contract, the telephone number must be regarded as being 'available', within the meaning of Annex I(A) of Directive 2011/83.
- 25 Furthermore, the referring court considers that the fact that the trader does not make use of the telephone number used for the activity of his or her undertaking in order to conclude distance contracts does not preclude the availability of that telephone number to receive declarations of withdrawal from consumers.
- 26 In addition, the referring court makes clear that the present case concerns solely the question of the receipt of consumer declarations concerning the exercise of their right of withdrawal, unlike the case in which the Bundesgerichtshof (Federal Court of Justice) referred a number of questions to the Court on the interpretation of Article 6(1)(c) of Directive 2011/83 and which gave rise to the judgment of 10 July 2019, *Amazon EU* (C-649/17, EU:C:2019:576), relating to the pre-contractual information requirements.

27 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- '(1) Is a telephone number “available” within the meaning of the instructions for completion for model instructions on withdrawal set out in Annex I(A) to Directive 2011/83 if the trader specifies the telephone number within the legal notice or clearly and explicitly displays it on the homepage of his website?
- (2) Is a telephone number “available” within the meaning of the instructions for completion for model instructions on withdrawal set out in Annex I(A) of Directive 2011/83 if, although the trader uses the telephone connection for commercial purposes, he does not use it to enter into distance contracts and therefore does not operate for the purpose of terminating distance contracts in the form of an acceptance of notices of withdrawal either?

Consideration of the questions referred

- 28 By its questions, which it is appropriate to examine together, the referring court seeks to ascertain, in essence, first, whether Article 6(1)(c) of Directive 2011/83 must be interpreted as meaning, in a situation in which a trader’s telephone number appears on his or her website and is used for the commercial purposes of his or her undertaking, that that number must be considered to be ‘available’, within the meaning of that provision, and, second, whether Article 6(1)(c) and (h) and (4) of that directive, read in conjunction with Annex I(A) thereto, must be interpreted as meaning that the trader, who provides the consumer, before the latter is bound by a distance or off-premises contract, with the instructions relating to the procedures for exercising the right of withdrawal, using for that purpose the model instructions set out in Annex I(A), is required to state a telephone number, in such a way as to enable the consumer to communicate, where relevant, his or her decision to make use of that right.
- 29 As a preliminary point, it should be borne in mind that, in the words of Article 6(1)(c) of Directive 2011/83, before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader is to provide the consumer, in a clear and comprehensible manner, with information concerning the geographical address at which the trader is established and his or her telephone number, fax number and email address, where available, to enable the consumer to contact the trader quickly and communicate with him or her efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he or she is acting.
- 30 As is apparent from Article 6(1)(h) of that directive, where a right of withdrawal exists, the trader is required to provide the consumer, before the contract is concluded, with information concerning the conditions, time limit and procedure for exercising that right, in accordance with Article 11(1) of that directive, and the model withdrawal form set out in Annex I(B) thereto.
- 31 In accordance with Article 6(4) of Directive 2011/83, the information referred to in points (h) to (j) of Article 6(1) may be provided by means of the model instructions on withdrawal set out in Annex I(A) to that directive. It is also stated that the trader is to be deemed to have fulfilled the information requirements laid down in Article 6(1)(h) to (j) if he or she has supplied those instructions to the consumer, correctly filled in.

32 Annex I(A) to Directive 2011/83 contains, inter alia, the instructions which the trader must follow in order to communicate to the consumer the model instructions relating to his or her right of withdrawal and, more particularly, the following instruction:

‘Insert your name, geographical address and, where available, your telephone number, fax number and email address.’

33 In that regard, it follows, in essence, from the judgment of 10 July 2019, *Amazon EU* (C-649/17, EU:C:2019:576), that Article 6(1)(c) of Directive 2011/83 must be interpreted as, first, precluding national legislation under which traders are required, before they conclude a distance or off-premises contract referred to in Article 2(7) and (8) of that directive with a consumer, to provide, in all circumstances, their telephone number. Second, that provision does not imply an obligation for traders to establish a telephone line to allow consumers to contact them and requires that number to be communicated only where those traders already have that means of communication with consumers.

34 In particular, the Court held, in that judgment, that although Article 6(1)(c) of Directive 2011/83 does not determine the precise nature of the means of communication which must be established by traders, that provision necessarily requires traders to put at the disposal of all consumers a means of communication which allows the latter to contact them quickly and to communicate with them efficiently (judgment of 10 July 2019, *Amazon EU*, C-649/17, EU:C:2019:576, paragraph 46).

35 An unconditional obligation to provide consumers, in all circumstances, with a telephone number in order to allow consumers to contact traders seems to be disproportionate, in particular in the economic context of the functioning of certain undertakings, in particular small undertakings, which might seek to reduce their operating costs by organising sales or the provision of services at a distance or off-premises (judgment of 10 July 2019, *Amazon EU*, C-649/17, EU:C:2019:576, paragraph 48).

36 It follows from the case-law of the Court cited in paragraphs 33 to 35 of this judgment that a trader who concludes a contract with a consumer via a website and who does not use the telephone for that purpose, although having a telephone line for the purposes of managing other aspects of the activity of his or her undertaking, is not in principle required to communicate the number allocated to that telephone line to that consumer where he or she decides to make use of the model instructions in Annex I(A) to Directive 2011/83, which are intended to make it easier for that consumer to exercise his or her right of withdrawal.

37 However, in a situation in which the trader’s telephone number appears on his or her website in such a way that it suggests to an average consumer, that is to say a reasonably well-informed and reasonably observant and circumspect consumer (judgment of 11 September 2019, *Romano*, C-143/18, EU:C:2019:701, paragraph 54 and the case-law cited), that that trader uses that number for the purposes of his or her contacts with consumers, that number must be considered to be ‘available’ for the purposes of contacting that trader, within the meaning of Article 6(1)(c), of Directive 2011/83. That is the case, in particular, where the telephone number is stated on the website in a section entitled ‘Contact’.

38 Since, in the case referred to in the preceding paragraph, the trader’s telephone number must be considered to be ‘available’, within the meaning of Article 6(1)(c), of Directive 2011/83, and since that trader decides to include on his or her website the model instructions relating to the exercise

of the consumer's right of withdrawal, reproduced in Annex I(A) to that directive, that telephone number must be considered to be 'available' within the meaning of the latter provision as well and must appear among those instructions.

- 39 That interpretation is consistent with the objectives of Directive 2011/83. It follows from Article 1, read in the light of recitals 4, 5 and 7, that that directive aims to ensure a high level of consumer protection by ensuring that consumers are provided with information and by ensuring certainty in transactions with traders.
- 40 Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 6(1)(c) of Directive 2011/83 must be interpreted as meaning that, in a situation in which a trader's telephone appears on his or her website in such a way as to suggest, to an average consumer, that is to say a reasonably well-informed and reasonably observant and circumspect consumer, that that trader uses that telephone number for the purposes of his or her contacts with consumers, that telephone number must be considered to be 'available' within the meaning of that provision. In such a case, Article 6(1)(c) and (h) and (4) of that directive, read in conjunction with Annex I(A) thereto, must be interpreted as meaning that a trader who provides a consumer, before the latter is bound by a distance contract or off-premises contract, with the instructions relating to the procedure for the exercise of the right of withdrawal, making use for that purpose of the model instructions set out in Annex I(A), is required to mention the same telephone number in those instructions, in such a way as to enable that consumer to communicate to the trader his or her decision to make use of that right by means of that telephone number.

Costs

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

Article 6(1)(c) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council must be interpreted as meaning that, in a situation in which a trader's telephone appears on his or her website in such a way as to suggest, to an average consumer, that is to say a reasonably well-informed and reasonably observant and circumspect consumer, that that trader uses that telephone number for the purposes of his or her contacts with consumers, that telephone number must be considered to be 'available' within the meaning of that provision. In such a case, Article 6(1)(c) and (h) and (4) of that directive, read in conjunction with Annex I(A) thereto, must be interpreted as meaning that a trader who provides a consumer, before the latter is bound by a distance contract or off-premises contract, with the instructions relating to the procedure for the exercise of the right of withdrawal, making use for that purpose of the model instructions set out in Annex I(A), is required to mention the same telephone number in those instructions, in such a way as to enable that consumer to communicate to the trader his or her decision to make use of that right by means of that telephone number.

[Signatures]