



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

28 September 2023*

(Reference for a preliminary ruling – Consumer protection – Directive 2011/83/EU – Point 14 of Article 2 – Directive (EU) 2019/771 – Point 12 of Article 2 – Commercial guarantee – Specifications or any other requirements not related to the conformity of the goods sold, set out in the guarantee statement or in the relevant advertising – Undertaking by a guarantor in respect of the consumer’s satisfaction with the goods purchased – Verification that the consumer is not satisfied)

In Case C-133/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 10 February 2022, received at the Court on 28 February 2022, in the proceedings

LACD GmbH

v

BB Sport GmbH & Co. KG,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, M. Safjan, N. Piçarra (Rapporteur), N. Jääskinen and M. Gavalec, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- LACD GmbH, by S. Kuhn, Rechtsanwalt,
- BB Sport GmbH & Co. KG, by C. Rohnke, Rechtsanwalt,
- the European Commission, by M. Noll-Ehlers, I. Rubene and N. Ruiz García, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 9 March 2023,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of point 14 of Article 2 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64) and point 12 of Article 2 of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ 2019 L 136, p. 28).
- 2 The request has been made in proceedings between LACD GmbH and BB Sport GmbH & Co. KG concerning the lawfulness of a statement attached to the products marketed by LACD.

Legal context

European Union law

Directive 2011/83

- 3 Recitals 4, 5 and 7 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, while ensuring respect for the principle of subsidiarity.
 - (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. ...’
- 4 According to Article 1 of that directive, its purpose 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 Point 14 of Article 2 of that directive defines the concept of ‘commercial guarantee’ as ‘any undertaking by the trader or a producer (the guarantor) to the consumer, in addition to his legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract’.
- 6 Article 6 of that directive, entitled ‘Information requirements for distance and off-premises contracts’, provides, in paragraph 1 thereof:

‘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:

...

(m) where applicable, the existence and the conditions of after sale customer assistance, after-sales services and commercial guarantees;

...’

Directive 2019/771

- 7 In accordance with Article 1 of Directive 2019/771, the purpose of that directive ‘is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection’.
- 8 Point 12 of Article 2 of that directive defines the concept of a ‘commercial guarantee’ as ‘any undertaking by the seller or a producer (the guarantor) to the consumer, in addition to the seller’s legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract’.
- 9 Article 24 of that directive provides, in paragraph 2 thereof, that the provisions of that directive are not to apply to contracts concluded before 1 January 2022.

German law

- 10 Under Paragraph 443(1) of the Bürgerliches Gesetzbuch (Civil Code), in the version applicable to the dispute in the main proceedings (‘the Civil Code’), the specific undertaking by the seller, manufacturer or another third party, set out in a statement or in advertising made before or on the date of the conclusion of the contract of sale, constitutes a guarantee in addition to the guarantee of conformity, the purpose of which is to reimburse the purchase price, to replace or repair the goods sold or to provide any other service in connection with those goods if they do not meet the specifications or any other requirements not related to conformity set out in that guarantee statement or in that advertising.

- 11 Paragraph 479(1) of that code provides, first, that a guarantee statement, within the meaning of Paragraph 443 of that code, must be worded in plain, intelligible terms and, secondly, lists the elements which that statement must include.

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

- 12 LACD distributes, via retailers and online merchants, LACD brand sports and fitness products. At least until 2013, it attached hangtags to its t-shirts on which the following text was printed ('the LACD statement'):

'LACD Warranty

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

- 13 In August 2018, BB Sport, which sells sports and fitness products, purchased online through a 'mystery' shopper ('*Testkäuferin*') two LACD brand t-shirts to which hangtags bearing the LACD statement were attached.
- 14 Taking the view that the information on those hangtags did not meet the statutory requirements applicable to a guarantee statement, within the meaning of Paragraphs 443 and 479 of the Civil Code, BB Sport brought an action before the Landgericht München I (Regional Court, Munich I, Germany), seeking an injunction prohibiting LACD from attaching such hangtags to its clothing products. After that court dismissed that action, BB Sport lodged an appeal before the Oberlandesgericht München (Higher Regional Court, Munich, Germany), which upheld it.
- 15 LACD then brought an appeal on a point of law (*Revision*) before the Bundesgerichtshof (Federal Court of Justice, Germany), the referring court, which considers that the outcome of the dispute in the main proceedings depends on the interpretation of point 14 of Article 2 of Directive 2011/83 and point 12 of Article 2 of Directive 2019/771, in so far as the application for an injunction prohibiting an unfair business practice based on the risk of recurrence, such as that submitted in the main proceedings, can be upheld only if the conduct of which the respondent in the main proceedings is accused is contrary to the competition law in force at the time of not only the facts but also the decision on the appeal on a point of law.
- 16 That court notes at the outset that the finding of breach, by LACD, of the information requirements provided for in Paragraph 479(1) of the Civil Code presupposes that the undertaking to take back the clothing product sold if the consumer is not satisfied, set out in the LACD statement, is a 'guarantee' within the meaning of Paragraph 443(1) of that code – a provision which transposed into German law the concept of 'guarantee' referred to in 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) and which, since 1 January 2022, has its basis in point 12 of Article 2 of Directive 2019/771.
- 17 The referring court considers that, even if 'the consumer's satisfaction with the product purchased' does not fall under the 'specifications of the goods sold', it could, nevertheless, constitute 'any other requirements not related to conformity', within the meaning of

Paragraph 443(1) of the Civil Code. It explained that that second criterion was added to that provision with effect from 13 June 2014 in order to transpose into German law the concept of ‘commercial guarantee’ set out in point 14 of Article 2 of Directive 2011/83.

- 18 According to that court, neither the wording nor the context of point 14 of Article 2 of Directive 2011/83 or of point 12 of Article 2 of Directive 2019/771 unambiguously supports the inference that the absence of ‘the consumer’s satisfaction with the product purchased’ constitutes a ‘requirement not related to conformity set out in the guarantee statement’, for the purposes of those provisions, proof of which may lead to the reimbursement of the price paid or the replacement or servicing of that product in any way, without it being necessary for that non-satisfaction to stem from the condition or features of that product.
- 19 Nevertheless, in so far as the objective of providing a high level of consumer protection pursued by Directives 2011/83 and 2019/771 supports such an interpretation, that court raises the question of how that absence of ‘the consumer’s satisfaction with the product purchased’ must be proved in order to give effect to the ‘commercial guarantee’ within the meaning of point 14 of Article 2 of Directive 2011/83 and of point 12 of Article 2 of Directive 2019/771.
- 20 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
 - ‘(1) Can any other requirements not related to conformity set out in the guarantee statement within the meaning of point 14 of Article 2 of Directive [2011/83] and any other requirements not related to conformity within the meaning of point 12 of Article 2 of Directive [2019/771] apply where circumstances specific to the consumer, in particular his or her subjective attitude towards the item purchased (in this case, the consumer’s personal satisfaction with the item purchased), have a bearing on the guarantor’s obligation, without it being necessary that those personal circumstances relate to the condition or features of the item purchased?
 - (2) If Question 1 is answered in the affirmative:

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

The request for the oral part of the procedure to be reopened

- 21 Following the delivery of the Opinion of the Advocate General on 9 March 2023, LACD, by document lodged at the Court Registry on 6 April 2023, asked the Court to order the reopening of the oral part of the procedure, pursuant to Article 83 of the Rules of Procedure of the Court of Justice. In support of that request, LACD submits, first, that the Advocate General disregarded the fact that it does not operate an online shop. Secondly, LACD emphasises that the interpretation of point 12 of Article 2 of Directive 2019/771 requested by the referring court is relevant.
- 22 It should be noted that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his or her involvement. The Court is not bound either by the Advocate General’s Opinion or by the reasoning on which it is based. Furthermore, neither the

Statute of the Court of Justice of the European Union nor the Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion. Consequently, an interested party's disagreement with the Opinion of the Advocate General cannot in itself constitute grounds justifying the reopening of the oral part of the procedure (judgment of 21 October 2021, *Beeren-, Wild-, Feinfrucht*, C-825/19, EU:C:2021:869, paragraphs 24 to 26 and the case-law cited).

- 23 In the present case, since, as stated in paragraph 21 above, LACD merely disputes certain passages of the Advocate General's Opinion and submits observations on the content thereof, there is no need to order the reopening of the oral part of the procedure.

Consideration of the questions referred

- 24 As a preliminary point, to the extent that the referring court requests the interpretation of point 12 of Article 2 of Directive 2019/771, it should be noted that that directive, in accordance with Article 24(2) thereof, is not to apply to contracts concluded before 1 January 2022. It is apparent from the order for reference that the contract concerning the sale of the t-shirts at issue in the main proceedings was concluded in August 2018.
- 25 In those circumstances, it is appropriate to examine together the two questions by which the referring court asks, in essence, whether point 14 of Article 2 of Directive 2011/83 must be interpreted as meaning that the concept of 'commercial guarantee' includes, as 'any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract', an undertaking made by a guarantor to the consumer concerned in respect of circumstances specific to the consumer, such as his or her personal satisfaction with the goods purchased, and, if so, in what way those circumstances must be proved in order to give effect to that commercial guarantee.
- 26 Point 14 of Article 2 of Directive 2011/83 defines the concept of 'commercial guarantee' as 'any undertaking by the trader or a producer (the guarantor) to the consumer, in addition to his legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract'.
- 27 In that regard, it should be noted, first of all, that nothing in the wording of point 14 of Article 2 of Directive 2011/83 excludes from its scope an undertaking by a guarantor concerning 'the consumer's satisfaction with the product purchased', in that consumer's subjective estimation.
- 28 That provision refers to 'any undertaking' by the guarantor to the consumer concerned 'in addition to his legal obligation relating to the guarantee of conformity'. Furthermore, as the Advocate General observed in point 30 of his Opinion, the neutral and general expression 'any other requirements' can include the non-satisfaction of the consumer's subjective expectations vis-à-vis the goods purchased, irrespective of any objective consideration related to the features or properties of those goods.
- 29 Next, the provision of information on the 'commercial guarantee' is among the requirements of that directive aiming to ensure that the consumer concerned is provided with pre-contractual information, as is apparent, in particular, from Article 6(1)(m) of Directive 2011/83. That article

thus requires all traders to provide the consumer concerned, in a clear and comprehensible manner, before that consumer is bound by a distance contract, an off-premises contract, or any corresponding offer, with information concerning, where applicable, the existence and conditions of commercial guarantees.

- 30 An interpretation of point 14 of Article 2 of Directive 2011/83 whereby the concept of ‘commercial guarantee’ includes an undertaking by a trader in respect of ‘the satisfaction of the consumer concerned with the product purchased’ is consistent with the objective pursued by that directive of providing a high level of consumer protection by ensuring that consumers are informed and secure in transactions with traders, as set out in Article 1 of that directive, read in the light of recitals 4, 5 and 7 thereof. That interpretation allows the consumer, on the one hand, to become aware of the trader’s undertaking and better to understand, from the outset, the conditions of the contract that he or she intends to conclude so as to make an informed decision on whether or not to conclude such a contract and, on the other hand, to obtain from that trader the reimbursement of the price paid by means of a mere statement of non-satisfaction, which raises his or her level of protection with regard to that trader.
- 31 Furthermore, the undertaking by a trader to take back the goods purchased if the consumer concerned is not satisfied is an expression of that trader’s freedom to conduct a business, enshrined in Article 16 of the Charter of Fundamental Rights of the European Union, which must also be respected when interpreting Directive 2011/83 in the light of the objective, stated in recital 4 thereof, of ensuring the right balance between a high level of consumer protection and the competitiveness of enterprises (see, to that effect, judgment of 5 May 2022, *Victorinox*, C-179/21, EU:C:2022:353, paragraph 39 and the case-law cited).
- 32 Lastly, the question of whether any failure of the goods purchased to satisfy the consumer concerned must be established objectively can only be answered in the negative, as the Advocate General observed in point 48 of his Opinion. The failure to satisfy the consumer’s subjective expectations as regards such goods cannot, by definition, be subject to objective verification. A mere statement to that effect by the consumer must, therefore, be regarded as sufficient.
- 33 In light of the foregoing considerations, the answer to the questions referred is that point 14 of Article 2 of Directive 2011/83 must be interpreted as meaning that the concept of ‘commercial guarantee’ includes, as ‘any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract’, an undertaking made by a guarantor to the consumer concerned in respect of circumstances specific to the consumer, such as his or her personal satisfaction with the goods purchased, without it being necessary to verify objectively whether those circumstances exist in order to give effect to that commercial guarantee.
- 34 In view of the fact that, as stated in paragraph 15 of the present judgment, the referring court indicates that it will also have to take into consideration point 12 of Article 2 of Directive 2019/771 for the purpose of assessing the lawfulness of the LACD statement, it must be added that the interpretation of point 14 of Article 2 of Directive 2011/83 given in the preceding paragraph of the present judgment is valid for the interpretation of point 12 of Article 2 of Directive 2019/771, in so far as the concept of ‘commercial guarantee’ is defined in almost identical terms in those two provisions and, like Directive 2011/83, Directive 2019/771 aims to ensure a high level of consumer protection, as is apparent from Article 1 thereof.

Costs

- 35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Third Chamber) hereby rules:

Point 14 of Article 2 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council

must be interpreted as meaning that the concept of ‘commercial guarantee’ includes, as ‘any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract’, an undertaking made by a guarantor to the consumer concerned in respect of circumstances specific to the consumer, such as his or her personal satisfaction with the goods purchased, without it being necessary to verify objectively whether those circumstances exist in order to give effect to that commercial guarantee.

[Signatures]