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Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

7 April 2022 (\*)

(Reference for a preliminary ruling – Consumer protection – Directive 2011/83/EU – Article 8(2) – Distance contracts concluded by electronic means – Information requirements for the trader – Activation of a button or a similar function in order to place the order with an obligation to pay – Unambiguous formulation corresponding to the words ‘order with obligation to pay’ – Taking account only of the words on the button or similar function for the purposes of assessing the ‘corresponding’ nature of such a formulation)

In Case C-249/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Bottrop (Local Court, Bottrop, Germany), made by decision of 24 March 2021, received at the Court on 21 April 2021, in the proceedings

**Fuhrmann-2-GmbH**

v

**B.,**

THE COURT (Eighth Chamber),

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

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Fuhrmann-2-GmbH, by C. Ewen, Rechtsanwalt,

– the European Commission, by I. Rubene and M. Kellerbauer, acting as Agents,  
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,  
gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 8(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).

2 The request has been made in proceedings between Fuhrmann-2-GmbH and B. concerning the formation or non-formation of a contract between them for accommodation.

## **Legal context**

### *European Union law*

3 Recitals 4, 5, 7 and 39 of Directive 2011/83 are worded as follows:

‘(4) In accordance with Article 26(2) TFEU, the internal market is to comprise an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured. 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) ... [T]he 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.

...

(39) It is important to ensure for distance contracts concluded through websites that the consumer is able to fully read and understand the main elements of the contract before placing his order. To that end, provision should be made in this Directive for those elements to be displayed in the close vicinity of the confirmation requested for placing the order. It is also important to ensure that, in such situations, the consumer is able to determine the moment at which he assumes the

obligation to pay the trader. Therefore, the consumer's attention should specifically be drawn, through an unambiguous formulation, to the fact that placing the order entails the obligation to pay the trader.'

4 Article 1 of that directive provides:

'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 Article 2 of that directive states:

'For the purpose of this Directive, the following definitions shall apply:

...

(7) "distance contract" means any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;

...'

6 Article 3(1) of that directive provides:

'This Directive shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer. It shall also apply to contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis.'

7 Article 6(1) of Directive 2011/83 reads as follows:

'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;

...

(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;

...

(o) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;

(p) where applicable, the minimum duration of the consumer's obligations under the contract;

...'

8 Article 8 of that directive, entitled 'Formal requirements for distance contracts', provides in paragraph 2:

'If a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the information provided for in points (a), (e), (o) and (p) of Article 6(1).

The trader shall ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall be labelled in an easily legible manner only with the words "order with obligation to pay" or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. If the trader has not complied with this subparagraph, the consumer shall not be bound by the contract or order.'

### ***German law***

9 Paragraph 312j(3) and (4) of the Bürgerliches Gesetzbuch (German Civil Code; 'the BGB') provides:

'(3) In the case of [an e-commerce consumer] contract [for a service provided by the trader for consideration], the trader must configure the ordering situation in such a way that the consumer, when placing his or her order, explicitly acknowledges that he or she assumes an obligation to pay. Where the order is placed by means of a button, the obligation of the trader referred to in the first sentence is fulfilled only if the button is labelled in an easily legible manner only with the words "order with obligation to pay" or a corresponding unambiguous formulation.

(4) [E-commerce consumer] contracts [for a service provided by the trader for consideration] shall be formed only if the trader fulfils his or her obligation under subparagraph 3.'

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

10 Fuhrmann-2 is a company governed by German law and the proprietor of the Goldener Anker hotel in Krummhörn-Greetsiel (Germany). The rooms of that hotel can be rented, inter alia, through the [www.booking.com](http://www.booking.com) website, a platform through which, inter alia, accommodation may be booked online.

11 On 19 July 2018, B., a consumer, visited that website to search for hotel rooms in Krummhörn-Greetsiel for the period from 28 May 2019 to 2 June 2019. The search results displayed included rooms in the Goldener Anker hotel. B. then clicked on the image corresponding to that hotel, whereupon the available rooms were displayed together with additional information relating, inter alia, to the facilities and prices offered by that hotel for the selected period. Having

decided to book four double rooms at that hotel, B. clicked on the ‘I’ll reserve’ button and entered his personal details and the names of the individuals accompanying him, before clicking on a button labelled with the words ‘complete booking’.

12 B. did not appear at the Goldener Anker hotel on 28 May 2019.

13 By letter of 29 May 2019, Fuhrmann-2 invoiced B., in accordance with its general terms and conditions, for cancellation fees of EUR 2 240, setting him a time limit of five working days for settlement of that sum. B. did not pay the sum claimed.

14 Fuhrmann-2 brought an action for recovery of that sum before the referring court, the Amtsgericht Bottrop (Local Court, Bottrop, Germany). In support of its action, Fuhrmann-2 argues that B. concluded a contract with it, via the website [www.booking.com](http://www.booking.com), for accommodation in several of its hotel rooms for the period from 28 May 2019 to 2 June 2019. It maintains in particular that the words ‘complete booking’, which the operator of that website chose to put on the booking button, satisfies the obligation laid down in Paragraph 312j(3) of the BGB, which requires the trader to display in an easily legible manner on the button for placing orders the words ‘order with obligation to pay’ or a corresponding unambiguous formulation. In those circumstances, Fuhrmann-2 claims, B. is obliged to pay it a cancellation fee in the amount of EUR 2 240.

15 The referring court states that the success of the legal action brought by Fuhrmann-2 hinges on whether, in the light of the words ‘complete booking’ on the booking button of the [www.booking.com](http://www.booking.com) website, the obligation laid down in Paragraph 312j(3) of the BGB, which transposes into German law the second subparagraph of Article 8(2) of Directive 2011/83, can be considered to have been satisfied. If so, that would mean, in accordance with Paragraph 312j(4) of the BGB, that a contract for accommodation was validly formed between the parties and that Fuhrmann-2 is justified in claiming the cancellation fee.

16 The referring court explains that another German court has ruled that it is appropriate to take into account the overall circumstances of the ordering process and, in particular, the configuration of that process for the purpose of determining whether words such as those used by the operator of the [www.booking.com](http://www.booking.com) website constitute an unambiguous formulation corresponding to the words ‘order with obligation to pay’, referred to in the second subparagraph of Article 8(2) of Directive 2011/83.

17 In view of the wording of that provision, the referring court is doubtful, however, about the approach taken by that German court and inclines to the view that it must be apparent from the wording on the button itself that, by activating it, the consumer is aware that he or she is assuming a legally binding obligation to pay. In the context of the latter approach, the referring court considers that the term ‘booking’ in the expression ‘complete booking’ is not necessarily associated in everyday language with the obligation to pay financial consideration, but is often also used as a synonym for ‘pre-order or reserve in advance free of charge’. Consequently, it would have to be concluded that, in the present case, the obligation laid down in the second sentence of Paragraph 312j(3) of the BGB has not been satisfied.

18 In those circumstances, the Amtsgericht Bottrop (Local Court, Bottrop) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is the second subparagraph of Article 8(2) of Directive [2011/83] to be interpreted as meaning that the question whether a button or a similar function – the activation of which forms part of the ordering process of a distance contract to be concluded by electronic means within the meaning of

the first subparagraph of that provision and which is not labelled with the words “order with obligation to pay” – is labelled with a corresponding unambiguous formulation within the meaning of that provision, indicating that placing the order entails an obligation to pay the trader, is to be answered solely by reference to the labelling of the button or of the similar function?”

### **Consideration of the question referred**

19 By its question, the referring court seeks to ascertain, in essence, whether the second subparagraph of Article 8(2) of Directive 2011/83 must be interpreted as meaning that, for the purpose of determining – in the context of an ordering process relating to the conclusion of a distance contract by electronic means – whether a form of words displayed on the ordering button or on a similar function, such as the formulation ‘complete booking’, is a formulation ‘corresponding’ to the words ‘order with obligation to pay’, within the meaning of that provision, only the words that appear on that button or that similar function should be taken into account, or whether the overall circumstances of the ordering process should also be taken into consideration.

20 It should be noted, as a preliminary point, that distance contracts are defined, under Article 2(7) of Directive 2011/83, as ‘any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded’. It follows from this that a service contract concluded between a trader and a consumer on an online accommodation booking platform, such as that at issue in the main proceedings, falls under the definition of ‘distance contract’ and accordingly, since none of the exclusions provided for in Article 3(2) to (4) of Directive 2011/83 applies, falls within the scope of that directive, as defined in Article 3(1) thereof.

21 It must also be borne in mind that, as is apparent from Article 1 of Directive 2011/83, read in the light of recitals 4, 5 and 7 thereof, that directive seeks to provide a high level of consumer protection by ensuring that consumers are informed and secure in transactions with traders. Moreover, the protection of consumers within EU policies is set out in Article 169 TFEU and in Article 38 of the Charter of Fundamental Rights of the European Union (judgment of 10 July 2019, *Amazon EU*, C-649/17, EU:C:2019:576, paragraph 39).

22 It is in the light of that objective that Article 8 of Directive 2011/83 imposes a number of formal requirements for distance contracts on traders, as the heading of that provision indicates. Paragraph 2 of that article thus lays down various requirements for traders where, as is the case in the main proceedings, the distance contract is concluded by electronic means and entails an obligation on the part of the consumer to pay.

23 According to the first subparagraph of Article 8(2) of Directive 2011/83, the trader must make the consumer aware in a clear and prominent manner, directly before the consumer places his or her order, of the information provided for in Article 6(1)(a), (e), (o) and (p) of that directive and concerning, in essence, the main characteristics of the goods or services, the total price, the duration of the contract and, where applicable, the minimum duration of the obligations assumed by the consumer.

24 The second subparagraph of Article 8(2) of Directive 2011/83 provides that the trader must ensure that the consumer, when placing his or her order, explicitly acknowledges that the order implies an obligation to pay. That provision makes clear that where a button or similar function must be activated in order for the order to be placed, the button or similar function must be labelled

in an easily legible manner only with the words ‘order with obligation to pay’ or a corresponding unambiguous formulation indicating that the placing of the order entails an obligation for the consumer to pay the trader, failing which that consumer is not to be bound by the contract or order.

25 It is apparent from the three preceding paragraphs of the present judgment that where a distance contract is concluded by electronic means through an ordering process and entails an obligation on the part of the consumer to pay, the trader must, first, provide that consumer, directly before the placing of the order, with the essential information relating to the contract and, secondly, explicitly inform that consumer that, in placing the order, he or she is bound by an obligation to pay.

26 As regards the latter obligation, it is apparent from the clear wording of the second sentence of the second subparagraph of Article 8(2) of Directive 2011/83 that the ordering button or similar function must be labelled in an easily legible and unambiguous manner with words indicating that the placing of the order places the consumer under an obligation to pay the trader. While that provision mentions the formulation ‘order with obligation to pay’, it is also apparent from the wording of the provision that that formulation serves as an example and that the Member States are permitted to allow traders to use any other corresponding formulation, provided that it is unambiguous as regards the creation of that obligation.

27 Consequently, where, as in the present case, national legislation transposing that provision does not, like the directive itself, contain specific examples of corresponding formulations, traders are free to use any words of their choice, provided that it is entirely clear from those words that, as soon as the consumer activates the ordering button or similar function, he or she is bound by an obligation to pay.

28 Furthermore, it is equally clear from the wording of the second sentence of the second subparagraph of Article 8(2) of Directive 2011/83, read in conjunction with the term ‘explicitly’ in the first sentence of the second subparagraph of Article 8(2) thereof, that it is the button or similar function that must be labelled with the formulation referred to in that provision, and therefore that, in view also of what is stated in the preceding paragraph of the present judgment, only the words that appear on that button or similar function must be taken into account for the purpose of determining whether the trader has fulfilled its obligation to ensure that the consumer, when placing his or her order, explicitly acknowledges that the order implies an obligation to pay.

29 That interpretation is supported by recital 39 of Directive 2011/83, the last two sentences of which make clear that the consumer’s attention must specifically be drawn, through an unambiguous formulation and thus without any reference to an overall assessment of the circumstances, to the fact that placing the order entails an obligation on his or her part to pay, so that the consumer is thus able to determine precisely the moment at which he or she assumes that obligation.

30 That interpretation is also borne out by the objective of Directive 2011/83, which is to guarantee a high level of consumer protection as regards information, as is apparent from paragraph 21 of the present judgment. Indeed, it must be noted that the completion of an ordering process entailing a consumer’s obligation to pay is a fundamental step, in that it implies that the consumer has agreed to be bound not only by the distance contract but also by that obligation. Consequently, it would effectively undermine that objective if, when activating a button or similar function, the consumer were required to infer from the circumstances of that process that he or she was giving a binding undertaking to pay, although the words appearing on that button or similar

function are not such as to enable the consumer to identify such consequences with absolute certainty.

31 Furthermore, although the Court has ruled that, in interpreting the provisions of Directive 2011/83, it is necessary to ensure, as is stated in recital 4 of that directive, the right balance between a high level of consumer protection and the competitiveness of undertakings, while respecting the undertaking's freedom to conduct a business, as set out in Article 16 of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment of 10 July 2019, *Amazon EU*, C-649/17, EU:C:2019:576, paragraph 44 and the case-law cited), it must be held that such a balancing exercise is not relevant in this case, given that the formulation or alteration of words on an electronic ordering button or function does not entail a significant burden that might harm the competitiveness of the traders concerned or their freedom to conduct a business.

32 In view of the considerations set out in paragraph 26 of the present judgment, it is for the referring court to ascertain whether, in the case in the main proceedings, the formulation 'complete booking' may be regarded, in the German language, in the light only of the words used in that formulation and regardless of the overall circumstances of the booking process, as corresponding to the words 'order with obligation to pay' referred to in the second subparagraph of Article 8(2) of Directive 2011/83. While that verification is solely a matter for the referring court, the Court of Justice, when giving a preliminary ruling on a reference, may, in appropriate cases, nonetheless give clarifications to guide the national court in its decision (judgment of 3 February 2021, *FIGC and Consorzio Ge.Se.Av.*, C-155/19 and C-156/19, EU:C:2021:88, paragraph 59 and the case-law cited).

33 In that regard, the referring court will in particular have to verify whether the term 'booking' is, in the German language, both in everyday language and in the mind of the average consumer who is reasonably well informed and reasonably observant and circumspect, necessarily and systematically associated with the creation of an obligation to pay. If it is not, the expression 'complete booking' would have to be held to be ambiguous, meaning that it could not be regarded as a formulation corresponding to the words 'order with obligation to pay' referred to in the second subparagraph of Article 8(2) of Directive 2011/83.

34 In the light of the foregoing considerations, the answer to the question referred is that the second subparagraph of Article 8(2) of Directive 2011/83 must be interpreted as meaning that, for the purpose of determining – in the context of an ordering process relating to the conclusion of a distance contract by electronic means – whether a form of words displayed on the ordering button or on a similar function, such as the formulation 'complete booking', is a formulation 'corresponding' to the words 'order with obligation to pay', within the meaning of that provision, only the words that appear on that button or that similar function should be taken into account.

### **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 (Eighth Chamber) hereby rules:

**The second subparagraph of Article 8(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, for the purpose of determining – in the context of an ordering process relating to the conclusion of a distance contract by electronic means – whether a form of words displayed on the ordering button or on a similar function, such as the formulation ‘complete booking’, is a formulation ‘corresponding’ to the words ‘order with obligation to pay’, within the meaning of that provision, only the words that appear on that button or that similar function should be taken into account.**

[Signatures]

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\* Language of the case: German.

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