



MARCIN TRZEBIATOWSKI*

**WHEN HOSTESS MAKES A DIFFERENCE IN OFF-PREMISES CONTRAC.
COMMENTARY TO ORDER OF THE CJEU
OF 17.12.2019, C-465/19, B&L ELEKTROGERÄTE**

Introduction

Court of Justice of the European Union (CJEU) order¹ caused some stir in the practice of contracts with consumers. It changed the current approach to the concept of this contract regarding the “business premises”. Such a change was adopted in a special situation, i.e. in the event of the conclusion of a sales contract at the exhibition stand of the fair immediately after the trader, through his staff, made contact with a consumer in the common space of multiple stands in the exhibition hall. Confirmation that in this situation, there was an off-premises contract preserving the consumer’s right of withdrawal. The singularity of the situation constituting the factual background for issuing the above order inclines to its closer analysis. It is especially about the significance of this decision for similar cases of concluding a contract with the consumer.

* Dr. habil., Associate Professor, The John Paul II Catholic Univeristy of Lublin; e-mail: marcin.trzebiatowski@kul.lublin.pl, <https://orcid.org/0000-0001-5097-3618>.

¹ ECLI:EU:C:2019:1091.

1. Factual and legal elements of the case preceding the order of the CJEU

1.1. Facts

GC and his wife were at a trade fair in one town in Germany and were in the aisle of one of the fair's exhibition halls, near to stand of company B&L Elektrogeräte, when one of its employees (i.e. a hostess) addressed them, i.a. in the aisle, in order to encourage them to purchase a vacuum cleaner. At such an invitation, Mr. and Mrs. C went into the stand and entered into a sales contract. Later, GC informed that company that he no longer wished to remain in that contract because he took the view that he had the right of withdrawal and that he had not been informed of that right when he entered into that contract. This company brought GC before the court, referring in this case, seeking to have GC ordered to pay the amount agreed in the contract.

1.2. Legal context

The initial legal ground for this case was the German Act implementing the Consumer Rights Directive.² On such base, a request for a preliminary ruling concerns the interpretation of the above EU law has been made.

It is about Directive 2011/83.³ Art. 9 (1) of that directive stipulates that – in general – the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those foreseen in Art. 13 (2) and Art. 14.

Art. 2 of Directive 2011/83, headed “Definitions”, provides in (8) (a) and (c) and in (9) that:

² Act of 20.9.2013 implementing the Consumer Rights Directive and amending the Law regulating estate agencies, Federal Journal of Laws 2013 I, p. 3642.

³ Directive 2011/83/EU of the European Parliament and of the Council of 25.10.2011 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 L 304, 22.11.2011, p. 64–88), current consolidated version: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02011L0083-20180701> [access: 20.04.2020].

- 'off-premises contract' means any contract between the trader and the consumer: (a) concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader; [...] (c) concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer;
- 'business premises' means: (a) any immovable retail premises where the trader carries out his activity on a permanent basis; or (b) any movable retail premises where the trader carries out his activity on a usual basis.

Additionally, recitals 21 and 22 of that directive bring explanations as follows, i.a.:

- In an off-premises context, the consumer may be under potential psychological pressure or may be confronted with an element of surprise, irrespective of whether or not the consumer has solicited the trader's visit. The definition of an off-premises contract should also include situations where the consumer is personally and individually addressed in an off-premises context, but the contract is concluded immediately afterwards on the business premises of the trader or through a means of distance communication;
- Business premises should include premises in whatever form (such as shops, stalls or lorries) which serve as a permanent or usual place of business for the trader. Market stalls and fair stands should be treated as business premises if they fulfil this condition. Retail premises where the trader carries out his activity on a seasonal basis, for instance, during the tourist season at a ski or beach resort, should be considered as business premises as the trader carries out his activity in those premises on a usual basis. Spaces accessible to the public, such as streets, shopping malls, beaches, sports facilities and public transport, which the trader uses on an exceptional basis for his business activities as well as private homes or workplaces should not be regarded as business premises.

1.3. Statement of the referring court

According to current case law,⁴ the referring court considered that the stand at that trade fair should be regarded as “business premises” within the meaning of Art. 2 (9) of Directive 2011/83. The stand, which was located in one of the fair’s exhibition halls, was an open, not closed, space, and that consumers, who stand still in the middle of an aisle in an exhibition hall near a trader’s stand, must expect to be approached by the trader.

However, the court indicated that the aisle in question could manifestly not be regarded as the trader’s business premises since it did not serve to enable it to conduct business but rather gave access to all the traders’ stands in that hall. The court wonders whether, since recital 22 of Directive 2011/83 clarifies that a public space which the trader uses on an exceptional basis does not, in principle, constitute “business premises” within the meaning of Art. 2 (9) of that directive, the factual situation at issue in the main proceedings does not, in fact, correspond to the situation referred to in that recital. Otherwise, where a sales contract is concluded when the consumer trader are, respectively, outside and inside the business premises, which corresponds to the factual situation at issue in the case before it, that contract is an “off-premises contract” within the meaning of Art. 2 (8) (c) of the directive.

In those circumstances, this court decided to refer the following question to the CJEU for a preliminary ruling:

Does an off-premises contract within the meaning of Article 2 (8) (c) of Directive 2011/83, with the consequence of entailing a right of withdrawal according to Article 9 of the directive, arise if a trader at a trade fair who is in or in front of a sales stand that is deemed to constitute business premises within the meaning of Article 2 (9) of directive solicits a consumer who is standing in the aisle in front of the sales stand in an exhibition hall at a consumer trade fair without communicating with the trader, and the contract is subsequently concluded in the sales stand?

⁴ In court’s opinion such interpretation was presented by the CJEU in the judgment of 7.8.2018, C-485/17 *Verbraucherzentrale Berlin*, EU:C:2018:642.

2. Preliminary ruling of the CJUE

2.1. Form of the ruling

The issuing of the ruling in the present case in the form of order resulted from the application by CJEU of special provision from the Rules of Procedure of this Court. According to it, where the reply to the question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to this question admits of no reasonable doubt, the Court may at any time decide to rule by reasoned order.

2.2. The CJEU's previous case-law

The CJEU has stated that he has previously held that one of the objectives of Directive 2011/83 is set out, i.a., in recital 21 thereof, according to which, when he is outside the trader's business premises, the consumer may be under potential psychological pressure or may be confronted with an element of surprise, irrespective of whether or not the consumer has solicited the trader's visit. To that extent, the EU legislature also intended to include situations where the consumer is personally and individually addressed in an off-premises context, but the contract is concluded immediately afterwards on the trader's business premises. It follows that, while that legislature protected consumers, in respect of off-premises contracts, in cases in which, at the time the contract is concluded, the consumer is not in premises occupied on a permanent or usual basis by the trader, namely because he visits the premises spontaneously, that consumer can expect to be solicited by the trader so that, should the case arise, he could not subsequently properly claim that he was surprised by the trader's offer.⁵

Concerning, more specifically, a situation in which a trader carries out his activity on a stand at a trade fair, it should be recalled that, as stated in recital 22 of Directive 2011/83, market stalls and fair stands should be treated as business premises if they serve as a permanent or usual place of business for the trader. It also follows from that recital that, by contrast, also spaces accessible to the public, which the trader uses on an exceptional

⁵ Par. 33–34 of the judgement cited in fn 4.

basis for his business activities, should not be regarded as business premises.⁶

As a result, the CJEU held that Art. 2 (9) of Directive 2011/83 must be interpreted as meaning that a stand run by a trader at a trade fair, at which he carries out his activity for a few days each year, constitutes “business premises” within the meaning of that provision if – which is for the national court to ascertain – in the light of all the factual circumstances surrounding that activity, in particular the appearance of the stand and the information relayed on the premises of the fair itself, an average consumer could reasonably assume that the trader is carrying out his activity there and will solicit him in order to conclude a contract.

2.3. Reference of previous case-law to the present case

In the current case, circumstances confirmed, on the one hand, the referring court’s opinion that an exhibition stand run at a trade fair where the contract with the consumer was concluded to be “business premises” within the meaning of Art. 2 (9) of Directive 2011/83. But, on the other hand, the fact that the above contract was concluded immediately after the consumer, who was in the aisle common to the various stands present in an exhibition hall of the fair, had been personally and individually solicited by that trader, allowed CJEU that contract to be regarded as an “off-premises contract” within the meaning of Art. 2 (8) (c) of that directive.⁷

The following arguments determine this resolve⁸:

- the aisle common to the various stands present in the exhibition hall cannot be considered to be “business premises” within the meaning of Art. 2 (9) of Directive 2011/83, in so far as that aisle provided access to all the traders’ stands in that hall; that fact corresponds to the situation referred to in recital 22 of that directive, according to which spaces accessible to the public, such as streets and shopping malls, should not be regarded as “business premises”;
- when the consumer is in such places, away from the trader’s business premises, may be under potential psychological pressure or may be

⁶ Par. 41–42 of the judgement cited in fn 4.

⁷ Par. 26–28 of the order in question.

⁸ Par. 29–33 of the order in question.

- confronted with an element of surprise, irrespective of whether or not the consumer has solicited the trader's visit; it is because that the above situations according to recital 21 of Directive 2011/83 also include a situation where the consumer is personally and individually addressed in an off-premises context, but the contract is concluded immediately afterwards on the trader's business premises;
- that element of surprise is present in a situation such as that in the current case, where a consumer is in the hall of a trade fair – which is the space common to the various stands present in that hall, so that, against that background, only the stand of the trader in question constitutes its business premises – and where that consumer is addressed by that trader in order to conclude, immediately afterwards, a contract at its stand.

3. Assessment of the CJUE's ruling

3.1. Regarding the ruling's procedure

Apart from the legal considerations of issuing the ruling in question in the form of an order, there are also important factual circumstances that determined it. Both relate to persons involved in the procedure for making this order. It concerns the judge-rapporteur and the advocate general,⁹ who were the same persons, included in their functions in the issuing the judgment in case C-485/17, which constituted a reference point for substantive assessment carried out in this order.

3.2. Regarding the relationship between this case and case C-485/17

3.2.1. Specificity of the facts in case C-485/17

From a market perspective, both cases were linked to the sale of vacuum cleaners. However, what distinguishes the cleaners from those of earlier case was the fact that such products, as having ecological characteristics, were offered only at the trade fair such as the fair of "Green week"

⁹ The first in both cases was M. Safjan, and the second – H. Saugmandsgaard Øe.

held annually in Berlin. Therefore, the first case's uniqueness was that the seller of the vacuum cleaners did not run a stationary store at all, so it was typical or customary for him to appear at market stalls. Hence, there were several specific issues to consider, preceding the very determination of whether the exhibition stand is a business premises within the meaning of Art. 2 (9) of Directive 2011/83.

3.2.2. *The substance of case C-485/17*

In that case, the referring court considered that the wording of Directive 2011/83 does not indicate the criteria for determining the extent to which, in a specific case, the trader carries out his activity on retail premises "on a usual basis" within the meaning of Art. 2 (9) (b) of the directive. Therefore, in the circumstances of this case, regard could be had to, on the one hand, in the light of recital 22 of the directive, whether the trader utilises a certain sales method on a usual basis, that is to say, whether he regularly sells his products in retail premises or does so only occasionally. On the other hand, the effect of that approach is that the consumer who purchases goods offered at a trade fair by a trader who has a "permanent" shop in which he sells those goods on a usual basis and sells them only on an occasional basis at trade fairs would have the right of withdrawal. In contrast, a sale by another trader who sells his products regularly at trade fairs and does not have a permanent shop would not be regarded as having been made "off-premises" and, consequently, would not have the attendant such a right.

But there is still a third method of approach to this issue that the referring court considered appropriate. Namely, the way in which the trader organises his sales activities is not decisive in assessing whether the contract was concluded outside "business premises", within the meaning of Art. 2 (9) of Directive 2011/83. That assessment should be carried out in light of the nature of the product sold. In the case of a product typically sold at trade fairs, the consumer should have expected that such a product would be offered to him by visiting the trade fair in question. On the other hand, consumer protection should be afforded in respect of other types of goods that could not be expected to be offered at such a trade fair. This approach is based on the purpose of the right of withdrawal provided for in Directive 2011/83, which is to protect the consumer against the hasty conclusion of contracts in a situation in which the consumer is not expecting to make such a purchase or is placed under psychological pressure.

In the context of this approach are relevant to the expectations and perception of the consumer. In this respect, in turn, first, regard could be had to the consumer's expectations at the time of his decision to visit the trade fair, those expectations being based on information regarding the goods and services offered at the trade fair. And second, to interpret Art. 2 (9) of Directive 2011/83, regard could be had instead to the specific circumstances in which the contract is concluded at a trade fair.

As a consequence, this court asked the CJEU for a preliminary ruling:¹⁰

- 1) Does a trade fair stand in a hall which is used by a trader for the purpose of selling his products during a trade fair taking place for a few days each year constitute 'immovable retail premises' within the meaning of Article 2 (9) (a) of Directive 2011/83 or 'movable retail premises' within the meaning of Article 2 (9) (b) of the directive?
- 2) If it constitutes movable retail premises: Is the question of whether a trader carries out his activity 'on a usual basis' at trade fair stands to be answered by reference to:
 - (a) how the trader organises his activity or
 - (b) whether the consumer can expect to conclude a contract for the goods concerned at the trade fair in question?
- 3) If, in answer to the second question, the perception of the consumer is relevant [(question 2(b)): In connection with the question of whether the consumer can expect to conclude a contract for the goods concerned at the trade fair in question, must it be considered from the point of view of the public in general, by examining how the trade fair is presented to that public, or from the point of view of the consumer concerned, by examining how the trade fair actually appears to the consumer when he concludes the contract?].

3.2.3. *The ruling in case C-485/17 and its justification*

The CJEU stated in the first of the above questions, relying on Art. 2 (9) (a) and (b) of Directive 2011/83, that business premises may be immovable or movable retail premises where the trader's activity is carried out on a permanent basis or on a usual basis.¹¹

However, in the second of these issues, CJEU noted that:¹²

¹⁰ Par. 16–21 of the judgement cited in fn 4.

¹¹ Par. 23–25 of the judgement cited in fn 4.

¹² Cf. par. 26–40 of the judgement cited in fn 4.

- Directive 2011/83 does not define what is meant by the concepts of an activity carried out “on a permanent basis” or “on a usual basis”, nor does it contain any reference to national laws regarding the precise meaning of those words. In such a case, according to the Court’s settled case-law,¹³ those concepts must be regarded as autonomous concepts of EU law, which must be interpreted uniformly throughout the Member States. This interpretation has to be arrived at by taking into account the wording of the provision in question and its context and the objective pursued by the rules of which it forms part. And as a result, in the first place, it must be noted that the activity carried out by a trader on a stand such as that at issue in this case, which is set up at a trade fair for a few days each year, cannot be regarded as being carried out “on a permanent basis”, within the usual meaning of that expression. However, in the second place, it should be noted that, in its usual meaning, that expression “on a usual basis” may be understood as referring either to the fact that the activity in question is carried out with a certain regularity over time or that the activity is normally carried out on the premises concerned. Consequently, the meaning of that expression in everyday language does not, of itself, make it possible to give an immediate, unequivocal interpretation of it;
- Nevertheless, the provisions of Art. 2 (8) and (9) as well as of recital 21 Directive 2011/83, follows that while the EU legislature protected consumers, in respect of off-premises contracts, in cases in which, at the time the contract is concluded, the consumer is not in premises occupied on a permanent or usual basis by the trader, that is because it considered that, by visiting the premises spontaneously, the consumer can expect to be solicited by the trader so that, should the case arise, he could not subsequently properly claim that he was surprised by the offer made by the trader;
- Moreover, it should be recalled that the concept of “business premises” was previously to be found in Art. 1 (1) of Directive 85/577,¹⁴ which was replaced by Directive 2011/83. The fourth recital of Directive 85/577 stated that the special feature of contracts concluded

¹³ Judgment of the CJEU of 8.3.2018, C-395/16 *DOCERAM*, EU:C:2018:172, par. 20.

¹⁴ Council Directive 85/577/EEC of 20.12.1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, 31.12.1985, p. 31–33).

away from the business premises of the trader is that as a rule, it is the trader who initiates the contract negotiations, for which the consumer is unprepared or which he does not expect, and that the consumer is often unable to compare the offer with other offers. That recital also stated that this surprise element generally exists in contracts made at the doorstep and other forms of contract concluded by the trader away from his business premises. It is in the light of, i.a., above recital, the Court held in his jurisdiction that the concept of “business premises” within the meaning of that directive referred to premises in which the trader usually carries on his business and which are clearly identified as premises for sales to the public.¹⁵ As it is apparent from recital 22 of Directive 2011/83 that the directive also intends places in which there is no element of surprise if the consumer receives a business solicitation to be covered by the concept of “business premises”, the case-law established by that judgment concerning the interpretation of Directive 85/577 remains relevant for interpreting that concept within the meaning of current Directive;

- In the light of all these considerations, the expression “on a usual basis” within the meaning of Art. 2 (9) (b) of Directive 2011/83 must be understood as referring to the fact that the activity at issue being carried out on the premises in question is a normal activity. That interpretation is not called into question by the fact that Art. 2 (9) (a) of this directive refers, in respect of immovable premises, to business activities carried out not “on a usual basis” but “on a permanent basis” by the trader concerned. With regard to immovable premises, the very fact that the activity concerned is carried out on a permanent basis necessarily implies that the activity is “normal” or “usual” for a consumer. Since the activity carried out on such business premises must satisfy the requirement that it is a permanent activity, the consumer cannot be taken unawares by the type of offer made to him there.

¹⁵ Judgment of the CJEU of 22.4.1999, C-423/97 *Travel Vac*, EU:C:1999:197, par. 34–37, with conclusion (in par. 38) that a timeshare contract concluded, when a trader has invited a consumer to go in person to a specified place, which is different from the premises where the trader usually carries on his business and is not clearly identified as premises for sales to the public, in order to present his offer, must be considered to have been concluded during an excursion organised by the trader away from his business premises.

As for the final question referred, in order to ascertain, in a given situation, whether a stand at a trade fair must be classified as “business premises” within the meaning of Art. 2 (9) in connection with recital 22 of Directive 2011/83, CJEU assumed that regard must be had to the actual appearance of that stand in the eyes of the public. The crucial factor is whether, in the eyes of the average consumer, this stand is presented as a place where the trader occupying it carries out his activities, including seasonal activities, on a usual basis, with the result that such a consumer may reasonably expect, by visiting it, to be solicited by a trader. In this regard, it is relevant to the perception of a reasonably well-informed and reasonably observant and circumspect consumer.¹⁶ In that context, it is for the national court to assess the appearance given by the stand-in question to the average consumer by taking into consideration all the factual circumstances surrounding the trader’s activity and, in particular, the information relayed on the premises of the trade fair itself. The duration of the trade fair concerned is not, in itself, conclusive in that regard, because, as is apparent from recital 22 of Directive 2011/83, a premises where the trader carries out his activity on a seasonal basis may constitute “business premises” within the meaning of Art. 2 (9) of the directive. So a stand, such as that at issue, constitutes “business premises” in this meaning if, in the light of all the factual circumstances abovementioned, the average consumer could reasonably assume that the trader is carrying out his activity there and will solicit him in order to conclude a contract.¹⁷

3.3. Regarding the concept of off-premises contract

In statements of practitioners about the CJEU’s order presented here, it is aptly noted that this order is different from the judgment in case C-485/17.¹⁸ This difference, however, occurs not so much in the sphere of

¹⁶ By analogy, e.g. CJEU’s judgment of 26.10.2016, C-611/14 *Canal Digital Danmark*, EU:C:2016:800, par. 39.

¹⁷ Par. 41–45 of the judgement cited in fn 4.

¹⁸ J. Pieńczykowska, *Hostessa zaprosiła do stoiska? Można zrezygnować z zakupu bez podania przyczyny*, *Dziennik Gazeta Prawna* 2020, no. 8 (of 14.01.2020), p. C7. After issuing that judgment, a general view was formulated on its basis, such as in the title of the blog article: D. Bugajski, *TSUE: sprzedaż na targach jest sprzedażą w lokalu przedsiębiorstwa (konsument nie ma prawa odstąpienia od umowy)*, entry of 5.09.2018, <https://prokonsumencki.pl/>

the assessment itself but in the reference point of this assessment. Both of these cases concerned the conclusion of the contract by the consumer at the exhibition stand at the fair. However, in this earlier case, it was essentially about determining when such a stand is a business premises within the meaning of the provisions of Directive 2011/83. That case, therefore, referred to the place of conclusion of the contract, which was an off-premises contract. However, the present case was intended to ascertain when the contract concluded at such a stand constituted an off-premises contract within the meaning of that directive. Therefore, this matter was related to the mode of concluding the above contract. This means that CJEU, explaining the qualifying conditions in the field of these terms, in the first of these cases did it in a positive way, indicating when there is a premise for the place of conclusion of such a contract, and in the second case it did it in a negative way, indicating when there is no premise for the mode of conclusion of this contract.

The opinion of the practice expressed against the commented order convinces about the validity of the above assessment. It shows the independence of the assessments made in the cases referred to. According to this opinion, whenever a sales contract was concluded after a person acting for the benefit of a given seller encouraged the consumer to conclude a contract in a public place, and immediately after that activity, such a contract will be treated as off-premises, even if it was finally concluded in a stationary store.¹⁹

The question, therefore, arises as to the importance of discussing the current CJEU's order, citing the circumstances and argumentation underlying the CJEU ruling in this earlier case. This significance lies in the fact that the considerations regarding the concept of business premises, conducted on the basis of Art. 2 (9) of Directive 2011/83, determine the application of Art. 2 (8) (c) of this directive, which provides for the recognition as a contract off-premises of the contract concluded in the business premises of the trader with the simultaneous physical presence of the trader and the consumer, but immediately after when the consumer was personally and individually addressed in a place that is not such a premises. And the conclusions that came to the practice after the judgment

obowiazki-informacyjne-sprzedawcy/tsue-sprzedaz-na-targach-jest-sprzedaza-w-lokalu-przedsiębiorstwa-konsument-nie-ma-prawa-odstąpienia-od-umowy/ [access: 20.04.2020].

¹⁹ J. Pieńczykowska, *Hostessa zaprosiła do stoiska?...*, citing the opinions of lawyers.

in case C-485/17 – like, e.g. in Germany, where it echoed the most, show that it is primarily up to the entrepreneur whether his exhibition stand can be considered as business premises and what spatial dimension will be assigned to that premises. The point is that, in the light of that judgment, in order to determine such premises, the trader should not only try to provide appropriate information about the very nature of his exhibition stand at the trade fair, including verbal information (i.e. announcements) as well as written (i.e. inscriptions, banners, roll-ups, display racks, posters, advertising pops or standings), and thus ensure clear and unambiguous identification of this stand as a place where, among others, contracts are concluded with clients. He should also properly designate the area of his stand so that it is possible to determine from which moment the customer is still outside the business premises, and from which he is already within its boundaries.²⁰ In addition, this earlier CJEU judgment confirmed that the benchmark for determining whether such identification was effective was the model commonly used in EU consumer law, which is the opinion of the average consumer. As stated in the referred judgment, it is only “the eyes of the average consumer” that can assess whether such places cease to have the character of “spaces accessible to the public”, listed in recital 22 of Directive 2011/83, and constitute the trader’s points to normal customer service (no matter permanent or usual), i.e. “places in which there is no element of surprise if the consumer receives a business solicitation”.²¹

Besides, there is an even more far-reaching relevance context of the relation between the judgment in case C-485/17 and the discussed order of CJEU. This context is clearly visible against the background of German case-law based on the first judgment and made yet before that order. This

²⁰ Cf. e.g. M. Böse, *EuGH: Nicht immer Widerrufsrecht bei Kauf auf einer Messe*, Monatsschrift für Deutsches Recht-Blog, entry of 14.8.2018, <https://blog.otto-schmidt.de/mdr/2018/08/14/eugh-nicht-immer-widerrufsrecht-bei-kauf-auf-einer-messe/> [access: 20.04.2020]. Among other opinions in the German literature on the CJEU decision in case C - 485/17, see E. Feldmann, *Ein Messestand ist ein Geschäftsraum, wenn der durchschnittlich informierte Verbraucher damit rechnen kann, dass er vom Unternehmer angesprochen wird*, *Verbraucher und Recht* 2018, no. 11, p. 432–434; D. Klocke, *Messe- und Marktstände in der Verbraucherrechterichtlinie: die Rechtssache Unimatic*, *Zeitschrift für das Privatrecht der Europäischen Union – GPR* 2019, no. 1, p. 26–29.

²¹ However, this approach is considered flawed as it creates too much uncertainty for both traders and consumers. So critical K. Wiese, *Konsumentenkie prawo odstąpienia od umowy zawartej na targach*, *Monitor Prawniczy* 2019, no. 7, p. 396–399.

case-law has consolidated a position favourable to traders, which usually takes the commercial nature of exhibition fairs.²² This approach properly freed the trader from the obligation of commercial identification specified in the abovementioned judgment or at least significantly weakened this obligation. It was essentially based on examining the type of fair and only in rare or even exceptional cases – regarding stands with a “purely” informative, promotional or advertising purpose – it assumed that these fairs or specific stands were just such that the consumer who visited them would not expect concluding an agreement at the fair with the trader running his stand there. Hence, the resolving passed in order of CJEU is a significant *novum* for German practice and forces it to withdraw from the approach at issue.

This “added value” brought by the discussed order of CJEU is all the greater because the mode of concluding the contract verified in it, resulting in the phenomenon of an off-premises contract, is not limited, contrary to appearances, to the situation that occurred in the case resolved by this order. This situation, in which a hostess or another person acting on behalf of or for the benefit of the trader, urges the consumer in a public place to conclude a contract with him may occur in many places, which are already indicated in the recitals of the Directive 2011/83. Therefore, such a contract will also occur if a consumer who arrives from a street or square to a shopping centre receives a promotional leaflet or discount card for a given store located in this centre and, after entering into it, concludes a contract in that store. The same will happen if the consumer visiting the court is – e.g. at the entrance to the court – asked by another person who will hand him a leaflet advertising legal services by a law firm located in the vicinity of the court, which will cause him to go to this firm and order her to deal with a specific legal matter. Similarly, when as a result of receiving a leaflet with the offer of language courses, a student or other person passing through the park next to the school buildings will take advantage of this offer, signing up for this course almost immediately after that occurrence.

²² Cf. judgement of the Federal Supreme Court of 10.4.2019 r., VIII ZR 82/17 concerning the conclusion of a contract for the sale of built-in kitchens at the multi-branch trade fair held every two years in Rosenheim, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=95319&pos=0&anz=1> [access: 20.04.2020].

However, these last two examples show what even more far-reaching doubts arise in connection with the classification of the contract as off-premises in the situations referred to in that order of CJEU. Such doubts concern several specific conditions characterising such an agreement. First of all, this is a dilemma, which means that in the case of an off-premises contract, the contract is to be concluded as a result of “addressing” the consumer and at the same time in “personal” as well as “individual” way. Particularly problematic is the first main premise, which can generally be associated with the submission of an offer.²³ In addition, it is also a problem, which means that the conclusion of the consumer’s contract with the trader took place “immediately” after such a contact. There is a question mark that, in order to solve this problem, the general rule set out in recital 21 of Directive 2011/83, is sufficient or at least sufficiently clear, unambiguous and thus effective, in the light of which the condition of “immediacy” would not be fulfilled if the conclusion of the contract – as follows from the aforementioned recital – occurred after “the consumer has had time to reflect before concluding the contract” upon its content, or even “only at a later point in time”. However, should this temporal limit rather not be determined by the consumer’s condition, consisting of freeing himself from psychological pressure or an element of surprise or – as it is defined in the jurisprudence – “embarrassing confusion”? Finally, the question arises as to whether the conclusion of the contract must be covered by the content of “addressing”, in the sense of contact between the consumer and the trader, i.e. whether the concluded contract resulting from such an event must agree as to the subject with what the contact was about. It would seem that such dignity is necessary, although it would not have to be understood strictly.

In view of the above observations, it can be safely stated that CJEU’s order presented here is certainly an important step forward in recognising the legal conditions in which the contract is concluded outside the business premises, i.e. the circumstances determining the existence of such a contract. Nevertheless, it is also a step after which, despite this, there is still a considerable distance to a full explanation of the characteristics of this contract, which consists of many further of the aforementioned

²³ Cf. e.g. W.J. Kocot, J.M. Kondek, *Nowe zasady zawierania umów z udziałem konsumenta*, cz. I, Przegląd Prawa Handlowego 2014, no. 11, p. 4–14.

circumstances, and even of a more complicated or in any case more diverse nature than the mode of conclusion of the contract itself.

Conclusions with reference to practice under Polish law

The commented order of CJEU is of paramount importance, especially for legal transactions in our country. In Polish law, the issue resolved in this order is regulated in Art. 2 (2) and (3) of the Act on consumer rights,²⁴ concerning, in turn, the terms of the off-premises contract and business premises. There is no significant case law in the question of the concept of “business premises”. However, opinions in the literature on this subject are divergent.²⁵

This state of affairs is not only because the contract's conclusion for the sale of household appliances, including exactly such vacuum cleaners, as referred to in both CJEU rulings presented here, took place in Poland, usually at the consumer's home.²⁶ If they took place outside the consumer's home, this was possibly the case at temporary stands in shopping centres or supermarkets. These were situations in which, after inviting the consumer by the staff of this stand to get acquainted with such devices, to try them on-site or to tasting dishes or beverages produced with them, a contract of sale of these products was signed with him. And it should be added that such cases – although they have not been resolved by the Polish Supreme Court – were, however, reflected in the judgments of common courts. These courts often took the side of the consumer, qualifying such a contract as an off-premises contract. They considered that the consumers, encouraged to conclude contracts in the hypermarket's shopping and service arcade, were not focused on this kind of “unusual” commercial contact. Such a place could by no means be compared to a market, a fair, or a marked bazaar, where it is conducted trade usually,

²⁴ Act of 30.5.2014 on consumer rights (consolidated text: Journal of Laws 2020, Pos. 287).

²⁵ Cf. e.g. D. Lubasz, in: *Ustawa o prawach konsumenta. Komentarz*, ed. D. Lubasz, M. Namysłowska, Warszawa 2015, Commentary to Article 2, item 27–37.

²⁶ Cf. e.g. the judgment of the Regional Court in Grudziądz of 16.10.2015, I C 1583/15, [http://orzeczenia.grudziadz.sr.gov.pl/content/\\$N/151025150000503_I_C_001583_2015_Uz_2015-12-11_001](http://orzeczenia.grudziadz.sr.gov.pl/content/$N/151025150000503_I_C_001583_2015_Uz_2015-12-11_001) [access: 20.04.2020].

i.e. where customers usually go shopping. Therefore, the courts justified it by the very purpose of the provisions of the Act on the protection of certain consumer rights in force at that time (implementing Directive 85/557 into Polish law), namely: by consumer protection in a situation when he is “surprised” by an offer that he does not expect in a particular place and circumstances.²⁷ It can therefore be concluded that the CJEU order – although already issued in the new legal status – is a serious argument for maintaining such a pro-consumer line of jurisprudence.

Nevertheless, the significance of this order of CJEU is manifested by its impact on economic turnover in Poland in the respect of organisation of concluding contracts with consumers by traders. The expected reaction of traders, taking into account the unfavourable right of the consumer to withdraw from the contract concluded outside their business premises, should be cautious, i.e. deliberate use of sending proposals to consumers to conclude the contract through persons acting in their interest or on their behalf in public places. It is particularly about hiring hostesses for this purpose. Even if such persons appear in the so-called public communication routes neighbouring or located in close proximity to a permanent or even usually customer service point, establishing contact with or “addressing” the consumer there, which will result in the conclusion of a contract with him in a short time, will make it an off-premises contract. Entrepreneurs must therefore reckon with the fact that in the above circumstances, a hostess or similar person will undoubtedly “make a difference” in the nature of such a contract, making its continued existence dependent on the consumer’s discretion.

²⁷ A. Janowski, *Można zrezygnować z zakupów poza lokalem przedsiębiorstwa*, Gazeta Podatkowa 2010, no. 668 (of 2.06.2010), referring to the judgment of the Regional Court in Łódź of 12.12.2006, XVIII C 200/06 (unpublished), upheld by the District Court in Łódź in judgment of 19.3.2007, III Ca 383/07 (unpublished), regarding the sale of kitchen robots on a portable, only provisionally constructed and short-term functioning stand. For more on the case covered by the abovementioned judgments in the decision of the President of the Office of Competition and Consumer Protection of 15.10.2010, No. RŁO 29/2010, [https://decyzje.uokik.gov.pl/bp/dec_prez.nsf/43104c28a7a1be23c1257eac006d8dd4/ba5476b1a0de4458c1257ec6007b9004/\\$FILE/R%C5%81O_29_2010%20z%20dnia%2015.10.pdf](https://decyzje.uokik.gov.pl/bp/dec_prez.nsf/43104c28a7a1be23c1257eac006d8dd4/ba5476b1a0de4458c1257ec6007b9004/$FILE/R%C5%81O_29_2010%20z%20dnia%2015.10.pdf) [access: 20.04.2020].

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Summary

A consumer off-premises contract still raises doubts, even in terms of basic concepts. In the context of Directive 2011/83, a problem arose how to understand a “public place” in which the contact established by the trader with the consumer in a personal and individual way, which directly results in the conclusion of a contract, makes it an off-premises contract. It was about the contact made by the hostess in the aisle of exhibition fairs leading to trade stands. Until now, it seemed that the consumer had to take into account the offers of traders right from the threshold of the market hall. The CJEU considered that in this case the contract was concluded off-premises. This decision has a significant impact on German

practice, which was going in a different direction, as well as on Polish practice, in which there is no relevant case law.

Key words: off-premises contract, business premises, consumer, exhibition, stand at a trade fair, aisle of the fair's exhibition hall

**KIEDY HOSTESSA „ROBI RÓŻNICĘ” W UMOWIE POZA LOKALEM
PRZEDSIĘBIORSTWA. KOMENTARZ DO POSTANOWIENIA TSUE
Z 17.12.2019 R., C-465/19, B&L ELEKTROGERÄTE**

Streszczenie

Konsumentcka umowa poza lokalem przedsiębiorstwa budzi nadal wątpliwości, i to nawet w zakresie pojęć podstawowych. Na tle dyrektywy 2011/83 powstał problem, jak rozumieć „miejsce publiczne”, w którym kontakt nawiązany przez przedsiębiorcę z konsumentem w sposób osobisty i indywidualny, a skutkujący bezpośrednio zawarciem umowy, powoduje, że jest ona umową poza lokalem przedsiębiorstwa. Chodziło o kontakt nawiązany przez hostesę w alei targów wystawienniczych prowadzącej do stoisk handlowych. Dotąd wydawało się, że konsument już z przekroczeniem progu hali targowej musi liczyć się z ofertami handlowców. TSUE uznał, że w tym przypadku umowa została zawarta poza lokalem przedsiębiorstwa. Rozstrzygnięcie to ma istotny wpływ na praktykę niemiecką, która zmierzała w innym kierunku, jak i na praktykę polską, w której brak relewantnego orzecznictwa

Słowa kluczowe: umowa poza lokalem przedsiębiorstwa, lokal przedsiębiorstwa, konsument, wystawa, stoisko na targach, aleja wystawienniczej hali targowej

**КОГДА ХОСТЕС «ИЗМЕНЯЕТ СИТУАЦИЮ» В ДОГОВОРЕ
ЗАКЛЮЧЕННЫМ ВНЕ МЕСТОНАХОЖДЕНИЯ ПРЕДПРИЯТИЯ.
КОММЕНТАРИЙ К РЕШЕНИЮ СУДА ЕВРОПЕЙСКОГО СОЮЗА
ОТ 17.12.2019, C-465/19, B&L ELEKTROGERÄTE**

Резюме

Потребительский договор вне местонахождения предприятия по-прежнему вызывает сомнения, даже с точки зрения основных понятий. На фоне Директивы 2011/83 возникла проблема того, как понимать «общественное место», в котором договор, устанавливаемый продавцом с потребителем на личном и индивидуальном уровне и приводящий непосредственно

к заключению договора, делает его договором вне вне местонахождения предприятия. Речь шла о договоре, установленном хостесом в выставочном переулке, ведущем к выставочным стендам. До сих пор казалось, что потребитель должен учитывать предложения трейдеров, когда он переступает порог выставочного зала. Суд Европейского Союза установил, что в данном случае договор был заключен вне помещения предприятия. Это решение существенно повлияло на практику Германии, которая развивалась в ином направлении, а также на практику Польши, в которой отсутствует релевантная судебная практика.

Ключевые слова: внешний договор, коммерческое помещение, потребитель, выставка, выставочный стенд, выставочный переулок выставочного зала

