

Case Details

Case Details

National ID	12 U 38/01
Member State	Germany
Common Name	link
Decision type	Other
Decision date	29/11/2001
Court	Oberlandesgericht (Appellate court, Frankfurt)
Subject	
Plaintiff	
Defendant	
Keywords	

Directive Articles

Distance Selling Directive, [Article 10, 2](#).

Headnote

1. The assessment of whether a concrete reason exists to justify telephone marketing to a business is to be determined by reference to the perspective of the person making the call, who has not yet had any business dealings with the person being called and therefore this assessment depends on externally recognisable matters.
2. On the issue of whether telephone marketing to businesses is contrary to good morals, the general clause of § 1 UWG (Gesetz gegen den Unlauteren Wettbewerb – Act Against Unfair Competition) is to be interpreted widely, in order to correspond with the European law guideline of Directive 97/7/EC, according to which telephone advertising to businesses is generally permissible without restriction.

Facts

The respondent provides inter alia high speed internet access to businesses, for which it seeks to attract new customers by telephone marketing. Following a call by the respondent to X, which maintains an internet site (homepage), on which it offers files for its customers to download, the applicant association to combat unfair competition seeks an order prohibiting the respondent from telephone marketing.

The respondent submits that it only makes telephone contact with small or medium sized businesses who maintain their own homepage on which they offer time consuming downloads from other providers. They presume that, in relation to the businesses with which they make telephone contact, they are placed at a disadvantage by the former monopoly Y in respect of customer contact to raise interest in their products by means of telephone introduction.

The Landgericht (district court) declined to issue an interlocutory injunction. The applicant appealed against this decision.

Legal issue

In its reasoning the Senate referred to the settled case law of the BGH (Bundesgerichtshof – Federal Supreme Court), according to which sales initiatives contravene good morals if they offend the sensibilities of a sensible average businessperson or are frowned upon generally and are regarded as intolerable.

The Senate further stated that for the permissibility of telephone marketing to businesses a general business connection to its business activities is not sufficient. Moreover, there must also be a concrete reason ascertainable from the area of interest of the telephoning party. This is to be determined by reference to the perspective of the caller, who has not yet had any business dealings with the firm being contacted and therefore this assessment depends on externally recognisable matters. In the present case, such a concrete reason exists, as the firm being contacted is a small business, which could profit from the internet offer of the respondent, of which it would probably not have become aware without telephone contact.

The Senate further argued that due to the cross border nature of telephone marketing a European law assessment is also appropriate. Accordingly, the permissibility of telephone marketing is to be interpreted widely, because telephone advertising to businesses is only subject to restraints in Germany and Austria. It follows from the Distance Contracts Directive 97/7/EC, which allows telephone marketing to consumers where there is no clear objection by the consumer (Art. 10 (2) Directive 97/7), that telephone marketing to businesses in Europe is permissible, so long as no special circumstances dictate otherwise. The general clause of § 1 UWG must be interpreted widely, as conduct permissible according to European law cannot contravene good morals.

Decision

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