

Case law

Case Details

National ID: 6 U 2/90

Member State: Germany

Common Name: link

Decision type: Other

Decision date: 27/06/1990

Court: Oberlandesgericht (Appellate court, Karlsruhe)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

Doorstep Selling Directive, [Article 1, 1.](#)

Headnote

1. If an association applies its members' contributions to the provision of services, which, according to the charitable purpose of the association, it typically provides for its members, then membership of such an association can be neither an exchange relationship within the meaning of § 1 (1) HWiG (Haustürwiderrufsgesetz – Doorstep Selling Act) nor a circumvention of statutory requirements according to § 5 HWiG.

Facts

The applicant is a consumer protection association. The respondent is a charitable association active in the area of air rescue. The respondent association has active, passive and so-called sustaining members. The yearly contribution for the latter amounts to 60 DM. Following an emergency call in an emergency call centre, the respondent hires an aircraft and carries out the rescue operation. Anyone can avail themselves of the respondent's services, not only the sustaining members. The respondent concludes a group insurance policy at its own expense with P GmbH for its sustaining members. The insurance company carries the costs of a medically necessary air rescue. In any event, however, the respondent bills the patient. The respondent recruits sustaining members through field representatives. These visit people at their homes without appointment, explain to them the respondent's services and try to recruit them as sustaining members. The membership begins with the date of signature on the membership form. The claimant submitted that through this marketing practice the respondent breached the HWiG and thereby also § 1 UWG (Gesetz gegen den unlauteren Wettbewerb – Act Against Unfair Competition), because the membership form did not contain the notification of the right of withdrawal required by § 2 (1), 3rd sentence HWiG; an exchange contract is concluded between the respondent and the sustaining member. Against payment in the form of a yearly contribution, the sustaining member is factually offered certain services free of charge in cases of emergency. The applicant was unsuccessful in both instances.

Legal issue

Membership of the association does not in principle fall under § 1 HWiG (= Art. 1 Doorstep Selling Directive), as this provision only encompasses exchange relationships under the law of obligations, which are concluded in the context of or following a typical "situation in which the consumer is taken by surprise" as defined by statute. It is however questionable whether § 1 is applicable, either directly or via the prohibition of transactions to circumvent statutory requirements, in all such "association memberships" whereby a genuine membership does not come into question or where this only serves to mask what is in reality intended as an exchange of services for money. Even if the association does ultimately provide non-gratuitous services to its members in return for the monetary contribution, then the assessment should not attach too much weight to such services which the association would typically provide for its members according to its charitable purpose, as it would otherwise depend on membership of the association in contradiction of the aforementioned principle of general application of the HWiG.

The Senate further argued that the present case concerned such an application of members' contributions for the association's charitable purposes, as e.g. the non-gratuitous provision of the emergency call centre, setting up an emergency telephone number for the sustaining member as well as the deployment of resources in emergency management. Furthermore, the association's non-gratuitous services would be provided in cases of medical emergency for all persons independent of their status as sustaining members and the recipient, even the sustaining member, would be billed in any event. As an additional service to sustaining members, the association merely concluded a separate group insurance policy to cover the cost of providing emergency services and patient transport for sustaining members at its own expense, which corresponded to approximately 10% of the amount of the sustaining members' contributions. The respondent neither concluded an insurance contract with the sustaining member nor did the member receive an entitlement to services from the association upon occurrence of the event insured. The member was in any event liable for the claims made against him by the association, the member was responsible for settling the claim with the insurance company himself. Thus the membership at issue grounded neither an exchange relationship within the meaning of § 1 (1) HWiG nor a circumvention of statutory requirements according to § 5 HWiG.

Decision

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