

Case law

Case Details

National ID: link

Member State: Spain

Common Name: "Telefónica España S.A" v Doña Maria Dolores A.S.

Decision type: Other

Decision date: 15/12/2000

Court: Audiencia Provincial (Appellate court, Vizcaya)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

Distance Selling Directive, [Article 5, 1.](#)

Headnote

The supplier has to send immediately to the consumer written evidence of the contract, or at the latest at the time of the delivery of the good or the beginning of the execution of the contract, or evidence in any other durable medium where all clauses of that contract must appear. The burden of proof lies with the supplier that wrote the contract agreed on the phone.

Facts

The company "Telefónica S. A." brings a lawsuit against a consumer that owes three months of unpaid bills for its services. "Telefónica" claims that a contract was agreed on the phone with the defendant the 18th July 1996, but this contract was never formalized in writing for (this is the version of "Telefónica") the defendant failed to return a copy to be signed. Nevertheless, "Telefónica" had no problem carrying out its services for the defendant until the time the lawsuit was brought. The defendant, on her part, claims that she never agreed any kind of contract with Telefónica, neither verbally nor in writing, and that the ones who did (using her bank account number) were the lodgers that were renting at that time a flat of her property, who eventually left without paying the phone bills, and whose whereabouts were unknown, causing her some economical damage. The court accepts Doña María Dolores' appeal and rejects the claim of 998,745 ptas (6,002.57 €) on calls, made most of them to México.

Legal issue

The court revokes the judgment in the first instance because it considers that "Telefónica S. A." has not presented sufficient evidence to prove that the contract was agreed on the phone with the defendant. Telefónica states that the contract was agreed on the phone and that the document that should have been signed by the defendant once it was sent to her, was never returned. According to the court, arts. 3.1 and 5 of the Royal Decree 1906/1999 of 17th December, regulating the phone or electronic contracts with standard terms, should be applied. It is down to Telefónica to confirm that they really signed a contract with the right person. Confirmation that it has not taken place as it appears due to the failure to comply with the aforementioned articles. These establish that the supplier has to send immediately to the consumer, and at the latest at the time of the delivery of the goods or at the start of the execution of the contract, written justification, or in any other durable medium, of the contract where all its clauses must be provided, being down to the supplier the burden of proof.

The court considers that a computer file with data, as the one provided by Telefónica, is not the right way to present evidence according to art. 5.2 of the Royal Decree 1906/1999. Moreover, the fact that the claimant had the bank account number of the defendant is irrelevant as proof since it could have been provided by a person other than the consumer defendant.

Until the date of the lawsuit it is not recorded that "Telefónica" had made any charge to the defendant's account: if there really was such provision of services since July 1996, she would have been charged before for the setting up of the service and other expenses that the provider charges as a minimum rate. This would have allowed the defendant to become aware of the existence of the alleged provision of services.

For all this the court rejects the claims of the company against the consumer and states categorically: "If Telefónica (or any other big company) is ready to agree contracts and set up phones with hardly any checks, a risk is being taken such as a third party taking advantage of the system and defrauding; and under no circumstances can be the consequences of such aggressive contracting systems down to the consumers or the individuals".

Decision

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