

Case Details

Case Details

National ID	4 Ob 98/04x
Member State	Austria
Common Name	Verein für Konsumenteninformation gegen ONE
Decision type	Other
Decision date	25/05/2004
Court	Oberster Gerichtshof (Supreme court)
Subject	
Plaintiff	
Defendant	
Keywords	

Directive Articles

Unfair Contract Terms Directive, [Article 7](#)

Headnote

1. In class action proceedings (§§ 28 ff KSchG), it is typically regarded that a danger of repetition exists when the supplier, despite receiving a warning, fails to make a pledge to desist as per § 28 para 2 KSchG. A danger of repetition can only be ruled out if it is certain that the supplier is not using the unacceptable illegal or immoral terms (or equivalent terms) in his STCs.

Facts

The defendant "ONE" (ONE Ltd) ran an Austria-wide mobile phone network and based its contracts with customers on STCs. The Austrian Consumers' Association requested that ONE make a pledge under § 28 Abs 2 KSchG, secured against a penalty, to desist from using five clauses in its STCs. The request related in particular to a clause that entitled ONE to change or restrict the scope of its services (no. 3); to clauses in which ONE stated that it could offer no guarantee that the software would run without interruption or error, would be free of defects or be usable for a specific purpose (no. 4); and to clauses in which ONE stated that it was only liable for damage it had caused deliberately or through gross negligence and not for damage caused by minor negligence or for specific damage under the product liability law (no. 5). ONE did not make any pledge to desist. However, it did amend its STCs and, in the process of doing so, removed entirely some clauses, including those detailed in numbers 4 and 5.

The Austrian Consumers' Association brought a class action under § 28 KSchG, applying for an injunction against ONE to prevent it from using the aforementioned or equivalent clauses in its STCs for commercial transactions with consumers. The Association argued essentially that the clauses were in breach of the KSchG. ONE disputed this and argued, inter alia, that the new (amended) terms and conditions were also valid for existing customers. Thus, there was no danger of repetition.

The Court of First Instance partially upheld the claim; the Court of Appeal upheld it in its entirety. ONE's appeal to the OGH was unsuccessful.

Legal issue

The OGH stated at the outset that it must base its ruling on the provisions contained in the 2003 telecommunications law, which entered into force during the trial. This is because any changes to the law at any

stage of the trial must be taken into account. In accordance with § 25 of this new law, communication network and service operators were entitled to amend their STCs and the conditions governing their charges. However, if ONE consequently regarded clause no.3 as permissible, there was a counter-argument: that this clause would clearly entitle ONE to change or restrict the scope of its services. Thus, this clause was not limited merely to changes to the STCs. Rather, because in class action proceedings it is always necessary to interpret the facts of the case on a "worst case scenario for the consumer" basis, the clause could also entitle ONE to alter individual contracts. It was therefore in breach of § 6 para 2 line 3 KSchG.

With regard to clauses 4 and 5, which ONE had removed, the OGH examined the argument put forward by the company in its formal appeal; namely that because the clauses had been removed, there was no danger of repetition. The OGH contested this assertion by pointing to the fact that ONE had initially claimed that the clauses were not illegal when formally answering the claims made against it. Moreover, ONE had neither offered any settlement, nor made any pledge to desist, secured against a penalty, as per § 28 para 2 KSchG. Under this provision, there was no longer any danger that the unacceptably agreed terms would be used or referred to if the supplier, on receiving a warning from a body entitled under § 29 KSchG to file a class action lawsuit, makes a pledge to desist both within a reasonable timeframe and secured against an appropriate penalty (§ 1336 ABGB). This provision aimed to clarify that a body entitled to bring a class action under § 29 KSchG could issue a formal warning without running the risk of finding themselves in a disadvantageous position in subsequent legal proceedings. Gebe der Unternehmer die verlangte Unterlassungserklärung ab, so sei die Wiederholungsgefahr weggefallen; gebe er sie hingegen nicht ab, so indiziere dies im Allgemeinen die Wiederholungsgefahr. Aus § 28 Abs 2 KSchG sei demnach zu folgern, dass die Wiederholungsgefahr regelmäßig zu bejahen sei, wenn der Unternehmer trotz Abmahnung eine Unterlassungserklärung verweigert. Die Wiederholungsgefahr könnte nur verneint werden, wenn es geradezu ausgeschlossen wäre, dass der Unternehmer die beanstandeten gesetz- oder sittenwidrigen Bedingungen oder sinngleiche Klauseln in seine Geschäftsbedingungen aufnimmt. Davon könnte im vorliegenden Fall keine Rede sein. Wäre ONE tatsächlich entschlossen, in Zukunft auf derartige Bedingungen zu verzichten, so hätte das Unternehmen diesem Sinneswandel durch eine strafbewehrte Unterlassungserklärung oder gegebenenfalls durch einen vollstreckbaren Unterlassungsvergleich Ausdruck verleihen können und müssen.

Decision

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