

Case law

Case Details

National ID: link

Member State: Belgium

Common Name: Etat belge / S.A. Movitex

Decision type: Other

Decision date: 06/02/1996

Court: Hof van Beroep (NL)/Cour d'appel (FR) (Appellate court, Bergen)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

Distance Selling Directive, [Article 4, 1](#). Distance Selling Directive, [Article 4, 2](#). Distance Selling Directive, [Article 6, 1](#). Distance Selling Directive, [Article 6, 1](#).

Headnote

1. Demanding an additional payment when the consumer chooses to pay on the moment of the delivery or afterwards, does not constitute an infringement of (former) article 78, §2 Act of 14 July 1991 on trade practices and consumer information and protection ("TPA") (now article 80, §3 TPA), which states that no advance or payment can be demanded from the consumer before the end of the term of withdrawal, when this additional payment reflects the higher cost of this payment method.

2. A brochure is an offer when the three conditions thereto are fulfilled. The absence of indications on the modalities of payment does not alter the characterisation of the brochure as an offer.

3. (Former) article 79, §1 TPA (now article 78 TPA) indicates that in the event of a distant sale offering, the consumer has to be informed in an unequivocal, clear and understandable manner about, amongst other things, the price of the product or the service and the modalities of payment. If a brochure refers to the general conditions which require the consumer to telephone to a firm or visit a shop (of which the address is not even indicated) to find out what the additional costs of a specific method of payment are, the consumer is not informed in the correct way.

Facts

Movitex is a mail-order firm. In a mailing, sent to all of the clients in its database, Movitex advertised several of its products.

In this mailing, Movitex offered its clients three different methods of payment:

- payment at the time of placing the order;
- payment at the time of delivery, for which the consumer had to pay an additional sum of 55 francs (EUR 1,5);
- payment after the delivery.

In the event of payment after the delivery, the brochure referred to the general conditions which obliged the consumer to telephone to DAXON or visit a shop of that firm to find out what the additional costs of this method of payment were.

Legal issue

- The (former) article 78 §2 TPA (now article 80 §3 TPA) states: "without prejudice to the application of the Act of 12 June 1991 on consumer credit, no advance or payment can be demanded from the consumer before the end of the term of withdrawal as per §1".

Article 78, §2 TPA solely forbids to demand an advance or a payment before the end of the term of withdrawal. In the present case Movitex does not impose any obligation on the consumers in its mailing; the method and the moment of payment can be chosen freely by the consumer.

The additional costs which are demanded in the case of payment at the time of or after the delivery are without doubt an incentive for the consumer to pay immediately, but neither the incitement nor the immediate payment are contrary to the law.

Because the additional costs linked with the diverse methods of payment reflect the real costs of each method of payment – in fact, the real costs for Movitex even exceed the additional costs for the consumer substantially –, they do not constitute a sanction imposed on the consumer and hence his freedom of choice has not been affected.

Furthermore, (former) article 80 of the TPA (now article 82 §1 TPA) indicates that the burden of proof of, amongst other things, the consumer's confirmation and consent rests with the seller, in casu Movitex. In this respect it has to be taken into account that some consumers are not bona fide. Therefore, it is normal that Movitex arranges a method to obtain proof of the delivery. By requiring the signing of a receipt at the time of the delivery, Movitex protects itself against consumers who are not bona fide.

(Former) article 79 §1 TPA (now article 78 TPA) indicates that in the event of a distant sale offering, the consumer has to be informed in an unequivocal, clear and understandable manner about, amongst other things, the price of the product or the service and the modalities of payment. In the present case, diverse methods and moments of payment were provided for.

With regard to the possibility of payment after delivery, the consumer was obliged to telephone to DAXON or visit a shop of that firm to find out what the additional costs of this method of payment were. Article 79 §1 TPA requires however that (such) information is mentioned clearly and precisely in the offer.

The mailing constitutes an offer: the essential characteristics of the contract were specified; one of the parties has the intention to be bound by the sole acceptance by the other party and the offerer has brought the offering to the attention of the beneficiary thereof. The fact that the modalities of payment were

not accurately mentioned is not relevant: the modalities of payment are not essential to the contract.

As a result article 79 §1 of the TPA is infringed.

Decision

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