

Case law

Case Details

National ID: 268/07

Member State: Germany

Common Name: Consumer Association X /Mail Order Company X

Decision type: Other

Decision date: 07/07/2010

Court: BGH (Supreme court)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

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

Headnote

In case of a withdrawal from a distance selling contract the costs for the delivery of the goods are to be borne by the professional.

The defendant's appeal against the decision of the 15th civil Chamber of the court of appeal of Karlsruhe from 5 September 2007 was rejected.

The costs of the appeal as well as the costs for the procedure before the ECJ are to be paid by the defendant.

Facts

The claimant is a consumer protection association that is registered according to article 4 of the Law on injunctions (UKlaG, Unterlassungsklagengesetzes) with the Federal Office for Administration on the list of qualified institutions. The defendant runs a distance selling business. She bills her clients the fixed sum of 4.95€ for the delivery of the goods. With its claim, the claimant seeks an injunction prohibiting the defendant from billing or refusing to restate should they already have been paid, the costs of delivery of the goods, in the commerce with consumers that exercise their right of withdrawal or of return of the goods (articles 355 and 356 of the German Civil Code).

At first instance the claim succeeded. The court of appeal rejected the defendant's appeal. With her appeal admitted by the court of appeal, the defendant continues to seek the dismissal of the claims against her.

Legal issue

The appeal was rejected. The court of appeal had primarily detailed that the injunction sought by the claimant was justified. By billing the costs of delivery to consumers the defendant contravened consumer protection provisions in the sense of article 2 (1) of the Law on injunctions. On an interpretation compatible with the Directive, articles 312d (1) sentence 2, 356 (1), 357 (1) sentence 1, and 346 of the German Civil Code give the consumer a right to restitution of paid delivery costs.

The delivery costs in the case of a withdrawal are not explicitly regulated by German law. In particular, the delivery costs are not part of the restitution obligation contained in article 346 (1) of the German Civil Code. A restitution is not possible either by way of the duty to compensate for expenses contained in article 347 (2) sentence 2 of the German Civil Code.

According to the Directive 97/7/CE the consumer must be freed from the costs of delivery in case of a withdrawal from a distance selling contract. The Directive specifies that the consumer must only bear the costs of the return of the items and all payments made must be restituted. Therefore, the professional delivering the goods must bear or restate the delivery costs.

The court agrees with this judgment and the injunction can be granted. German law, however, does not provide a right to restitution of delivery costs. They are in principle not covered by the restitution obligation of article 346 either. To the question on interpretation of EU-law, whether "the provisions of article 6 (1) sentence 2 and (2) of the Directive 97/7/CE of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance selling contracts must be interpreted as meaning that they oppose a national provision that provides that the delivery costs may also be imposed on the consumer when he has withdrawn from the contract?", the ECJ ruled that the Directive opposes a national provision that permits the professional to impose on the consumer the costs of delivery when the latter has withdrawn from the contract.

Accordingly, article 346 (1) of the German Civil Code in conjunction with articles 312d and 355 of the German Civil Code must be interpreted as meaning that when the consumer withdraws from a distance selling contract he has a right to have the delivery costs restituted. It is furthermore not permitted to impose on the consumer the costs of delivery through the general business conditions when the consumer exercises his right of withdrawal or return under articles 355 and 356 of the German Civil Code.

Decision

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