

## Case law

### Case Details

**National ID:** 4Ob18/08p

**Member State:** Austria

**Common Name:** link

**Decision type:** Supreme court decision

**Decision date:** 28/05/2008

**Court:** Supreme Court (Vienna)

**Subject:**

**Plaintiff:**

**Defendant:**

**Keywords:** cessation of contract, Distance Selling Directive, false information, free, misleading price

### Directive Articles

Unfair Commercial Practices Directive, [Annex I, 20](#).

### Headnote

(1) It is misleading to create the impression on a website that a service is offered free of charge, while costs are charged in an unclear way and a binding contract is established after the registration process. Such practice may also infringe Annex I-20 of the UCP Directive.

(2) In general, misleading statements cannot qualify as "clear" and "comprehensible" information in the sense of article 4.2 of Directive 97/7/EC (Distance Selling Directive).

### Facts

The defendant offered services for mobile phone text messages and the prognosis of life expectancy on various websites. At first sight, these services seemed to be offered free of charge. However, after a complex registration process, a contract was established that could only be terminated within a period of 14 days. The consideration for the provision of these services was not clearly visible.

The plaintiff argued that:

(1) the defendant created the misleading impression to offer its services free of charge; and

(2) the defendant violated the obligation of prior information on the right of withdrawal, as stipulated in the Austrian Consumer Protection Act that implements Directive 97/7/EC.

### Legal issue

The court first considered that, from a well-informed and reasonable user's point of view, the defendant's offer contained false information, and could thus be deemed as a misleading commercial practice.

The court did not issue an explicit opinion regarding the question whether this behaviour infringed Annex I-20 of the UCP Directive, but only stated that even if this was not the case, the promotion would be misleading in the sense of §2 of the Austrian Unfair Competition Act (as described below).

The court further examined the interpretation of the terms "clear" and "comprehensible" as set out in Directive 97/7 (Distance Selling Directive), also in relation to the UCP Directive. The court interpreted these terms in compliance with Directive 97/7, and reasoned that the provision of information has to be performed in such a manner that the information can be recognised by a well-informed and reasonably observant consumer prior to the conclusion of the contract.

The court then concluded that a commercial practice that is deemed misleading and thus unfair, can in general not qualify as "clear" and "comprehensible" in the meaning of sec 5c para 2 of the Consumer Protection Act (implementing article 4 item 2 of the Directive 97/7/EC).

### Decision

(1) Is it misleading to give the impression on a website that a service is offered free of charge, while the charges are not clear and a binding contract is established after the registration process?

(2) Can misleading statements still qualify as "clear" and "comprehensible" information in the sense of article 4.2 of Directive 97/7EC (Distance Selling Directive)?

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### Legal Literature

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### Result

The defendant's second appeal was denied. The plaintiff's second appeal was, however, granted. The appealed decision was modified to completely re-establish the decision of first instance.