

Case law

Case Details

National ID: I ZR 170/10

Member State: Germany

Common Name: Betriebskrankenkasse

Decision type: Supreme court decision

Decision date: 18/01/2012

Court: Federal Court of Justice (Karlsruhe)

Subject:

Plaintiff: Zentrale zur Bekämpfung des unlauteren Wettbewerbs (Central Agency Combating Unfair Competition)

Defendant: Betriebskrankenkasse M.

Keywords: general scope of the UCP Directive, insurance policy

Directive Articles

Unfair Commercial Practices Directive, [Chapter 1, Article 2, \(d\)](#) Unfair Commercial Practices Directive, [Chapter 2, Article 5, 1](#).

Headnote

It is questionable whether Art. 5.1 combined with Art. 2 (d) of the UCP Directive can be applied to a public body with no intention of making profit. The court questions whether the interpretation of the European Court of Justice of Art. 101 and 102 TFEU can be applied to the interpretation of Art. 2 (b) and (d) of the UCP Directive. The court argues that the Directive aims at protecting the consumer from unfair commercial practices by the trader. Therefore, the perspective of the consumer might be decisive in considering whether the contested matter has direct reference to the market or not.

Facts

The plaintiff requested a cease and desist order of the statements posted on the website of the defendant in December 2008. At that time the defendant had published several statements on its website which the plaintiff deemed to be misleading for the insurance holder. The defendant posted on its website that in case of a termination the former insurance holder would be bound to the new compulsory health fund for 18 months, during which he shall miss out on the attractive offers of the defendant. The defendant also informed the reader/consumer that there might be charged an extra fee to the insurance holder for the new compulsory health fund. The defendant refused to sign a cease and desist declaration with penalty clause claiming that the UCP Directive was not applicable since a public body did not act with the intention of making profit. The Regional Court issued an order restraining the defendant from advertising with the objectionable statements. The appeal was rejected by the Higher Regional Court Celle (OLG Celle). The Higher Regional Court Celle allowed the appeal of its decision. The defendant sought the action to be dismissed. The Federal Court of Justice (BGH) stayed the proceedings and referred a question to the European Court of Justice (case C-59/12).

Legal issue

The court stayed the proceedings and referred the following question to the European Court of Justice: Is Art. 5.1 in combination with Art. 2 (d) of the UCP Directive to be interpreted in a way that the (misleading) information provided by a compulsory health insurance fund to its members regarding disadvantages resulting from changing the insurer constitutes a commercial practice?

Decision

Is Art. 5 Nr. 1 in combination with Art. 2 (d) of the UCP Directive to be interpreted in a way that the (misleading) information provided by a compulsory health insurance fund to its members regarding disadvantages resulting from changing of insurer, constitutes a commercial practice?

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Result

Referral to the European Court of Justice