

Case Details

Case Details

National ID	4 Ob 99/09a
Member State	Austria
Common Name	4 Ob 99/09a
Decision type	Supreme court decision
Decision date	23/02/2010
Court	Supreme Court
Subject	
Plaintiff	Unknown
Defendant	A1 Telekom Austria AG
Keywords	professional diligence, terms and conditions, unfair commercial practices, unfair terms

Directive Articles

Unfair Contract Terms Directive, [Article 4, 2](#). Unfair Commercial Practices Directive, [Chapter 2, Article 5](#)

Headnote

The use of inadmissible general terms and conditions is also unfair and an infringement of the Unfair Competition Act.

Facts

The plaintiff and the defendant are both Austrian mobile operators. The plaintiff requested a preliminary injunction because clauses of the defendant's general terms and conditions are of gross disadvantage for consumers and therefore unfair and misleading.

One clause contained a contractual penalty (deinstallation fee) in case of premature termination of the contract, which the appellate court considered as legal.

Another clause stated that a contractual penalty (deinstallation fee) will be payable when the minimum contractual period is already over. The appellate court considered this clause as void, as it is contra bonos mores, as an inadequate disadvantage for consumers.

Legal issue

The court decided that in this specific case the agreement on a contractual penalty within the general terms and conditions, if it applies when the contractual minimum period is already over, is a violation of Article 3.1. and 4.2. Directive 93/13 (implemented into Austrian law by § 879 Sec 3 General Civil Law Act) and therefore the clause is void.

Furthermore, the court had to decide if the use of inadmissible general terms and conditions (which constitutes a breach of law) may constitute an unfair practice as stated in Article 5 Directive 2005/29 (implemented into Austrian law by § 1 Sec 1 Cif 1 Unfair Competition Act) and entitle a competitor to a cease-and-desist order.

The court referred to the German doctrine and explained that the use of inadmissible general terms and conditions may be qualified as a violation of professional diligence in the sense of Article 5 of Directive 2005/29/EC, that, therefore, it is of competitive importance, and that it influences competition to the disadvantage of competitors significantly.

Decision

Does the use of inadmissible general terms and conditions constitute an unfair practice?

URL: <https://www.ris.bka.gv.at/Dokument.wxe?>

[Abfrage=Justiz&Dokumentnummer=JJT_20100223_OGH0002_0040OB00099_09A0000_000](https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20100223_OGH0002_0040OB00099_09A0000_000)

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Result

The appeal was partly successful and the decision of the appellate court was amended.
