Why this matters

The ASA did not uphold Boots' complaint. They said that the comparison was fair as it related to the online prices for both sellers and they understood why Tesco felt it was reasonable to compare their prices against Boots' online prices alone. The ASA pointed out that Tesco had come across instances where the Boots online prices were cheaper than the in-store prices, with the razor blades being the only instance where they have found the online price to be more expensive than the in-store price. Boots were not willing to confirm whether the price difference was an error, and they did not provide details to the ASA as to how often the online and in-store prices differed.

The ASA found that Tesco were justified in comparing Boots' online price with Tesco's online/in-store price. Details of the prices used by Tesco to make the comparison were contained in the small print of the advert and as a result the ASA did not feel that this would be regarded as misleading to consumers. They further stated that Tesco would not be required to insert the suggested disclaimer into their advert.

It seems that, as long as the prices quoted in such comparative adverts were accurate as at the date and location/sales channel detailed in the small print, the advertiser will not be obliged to check that their competitor's price of the products for every sales channel is the same or to detail the differences.

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Distance selling

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Who: European Court of Justice (ECJ) — Pia Messner (a consumer)
v. Stefan Krueger (an online merchant) (Case C-489/07)

Where: European Court of Justice, Luxembourg

When: 3 September 2009

Law stated as at: 30 September 2009

ECJ clampdown on distance sellers' cancellation charges

Article 6 of the Distance Selling Directive (Directive 97/7/EC) requires that consumers purchasing goods via distance selling must have a right to withdraw from such contracts and return the goods against reimbursement of the purchase price within 7 days of receipt of the goods.

What happened

Germany has transposed the Directive in its Civil Code. Under the relevant rules, consumers must be informed in writing (including e-mail) of their right of withdrawal. Depending on whether they are informed before the purchase, after the purchase or not at all, the period in which they may return the items is 2 weeks, 4 weeks or unlimited.

However, Sec. 357 (3) of the German Civil Code provides that if the consumer has used the purchased product (as opposed to merely inspecting and briefly testing it), before cancelling, the seller can demand from the consumer a payment in respect of the use he has had of the product before rejecting it.

In the case at hand, a consumer had bought a pre-owned laptop computer from an online merchant in December of 2005.

When the display failed in August of 2006, the consumer withdrew from the purchase, claiming she had never been notified in due form of her right of withdrawal.

'Average rent' claimed by seller for rejected laptop

The merchant refused to reimburse her for the purchase price of €278.00, claiming she was liable for a charge for using the laptop well exceeding that sum, calculated on the basis of the average rent for a comparable computer for a period of 8 months.

The case went up to the German Federal Court of Justice, which stayed the proceedings in order to obtain a preliminary ruling with regard to the compliance of Sec. 357 (3) German Civil Code with the Directive.

The ECJ held that a provision in national law that generally grants the seller a right to claim payment for pre-cancellation use violated the Directive. The purpose of the directive, according to the Court, was to give consumers the option to inspect goods purchased via distance selling and freely decide whether they wanted to keep them, and the possibility of a charge for use could deter the consumer from exercising this statutory right.

However, the Court also ruled that the Directive did not prevent national law from allowing a distance seller to make a charge for use where the consumer has acted in bad faith or would otherwise obtain an unjust enrichment. The relevant provisions in the German Civil Code will therefore have to be construed restrictively in the future.

The ruling makes it clear that national law cannot allow sellers to claim any payment from consumers exercising their right of withdrawal, except for the direct shipping cost associated with the return of the products as provided by Article 6 (2) of the Directive.

Why this matters

Although a usage charge is not something UK distance sellers can impose on consumers, Germany and probably other member states who did introduce this right now need to make changes to their distance sales laws.

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