Client Alert.

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Court Issues Guidance on European Consumers' Cancellation Rights Under Online Contract

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Under EU law, where a consumer purchases goods or services online or via mail order, the consumer has at least seven working days to cancel that purchase without penalty by notifying the seller. A recent judgment of the European Court of Justice confirms that, where a consumer invokes this cancellation right, the seller must reimburse all the payment made by the consumer in connection with the purchase in full, including any delivery charges. This new rule affects all online sellers, potentially including those based outside the EU.

WHAT IS THE CASE?

The case is *C-511/08 Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV*. This is a decision of the European Court of Justice ("**ECJ**") in an action which was originally brought by Verbraucherzentrale Nordrhein-Westfalen eV ("**VBZ**"), a consumer rights organisation, against Handelsgesellschaft Heinrich Heine GmbH ("**HHH**"), a mail order company, in respect of the standard terms and conditions that HHH imposed on its customers.

WHY IS THIS CASE IMPORTANT?

In the EU, sales of goods and services over a distance (*e.g.,* by telephone, e-mail, or through a website) are governed by Directive 97/7/EC[1] ("**Directive**"). Certain types of transactions are exempted, but the Directive obliges EU Member States to implement in their own national laws various provisions to give greater protection to consumers where goods and services are purchased in ways other than face-to-face [2].

One such provision is the consumer's right to a minimum seven-day cooling-off period: the Directive provides that a consumer has the right to withdraw from a contract concluded over a distance during this cooling-off period by giving notice to the seller, and be reimbursed for the money that he or she has paid.

This case clarifies that, where a consumer validly exercises his or her right to withdraw from a contract, he or she is entitled to be reimbursed all sums that were paid under that distance contact, including sums for items such as delivery and packaging that do not reflect the actual price of the goods sold. This case also serves as a reminder that the general tendency of ECJ, particularly when it comes to matters such as consumer protection, is to favour a liberal and purposive approach to the interpretation of European legislation.

This means that whilst the seller may charge the consumer for costs directly associated with the ***return*** of the product to the seller, costs which are ancillary to the ***sale*** of the products over a distance are not recoverable where the consumers

1 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, as amended.

2 The provisions of the Directive do not apply to certain types of transactions, e.g., automatic vending machines, transactions made by using public payphone, and transactions for financial services (which are governed by a separate regime under Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services).

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validly exercise their withdrawal rights.

EFFECT ON NON-EU ONLINE SELLERS

EU Member States are obliged to ensure that the Directive is implemented in their local national law in such a way that "*the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has close connection with the territory of one or more Member States*".

This essentially means that it is *not* possible for businesses to avoid the application of the local laws of the EU Member States that implement the Directive, by specifying the laws of a non-EU country as the governing law in the terms and conditions of sale. This will certainly be the case for businesses based within the EU (*e.g.*, an EU-based subsidiary of a U.S.-based business cannot avoid the Directive by stipulating, say, New York state law as the governing law in its online terms with EU-based consumers), but what about businesses based outside the EU?

At least in theory, it is possible for businesses established outside the EU to be brought within the scope of the Directive, in cases where the contract between the seller and the consumer which governs the sales of the goods/services in question has a "*close connection*" with one or more EU Member States. Thus, the implications of this judgment extend not just to businesses established within the EU, but also potentially to those businesses established outside the EU who, by virtue of having a "*close connection*" with the EU, come within the scope of the Directive.

However, what exactly is meant by "*close connection*" and how it can be established, is not clear. This is a point in respect of which there is no EU-wide case law, nor any sufficiently clear official guideline. Generally, the less actively a non-EU business targets EU consumers and markets their offerings to them, the less likely there will be a "*close connection*". But to err on the side of the caution, one should not assume that an online seller is outside the scope of the Directive (and the implications of this judgment) just because it is established outside the EU, or just because it is deemed to be out of the scope of the relevant national law of one particular EU Member State. More importantly, one must not assume that it is possible to "contract out" of the requirements of the Directive by stipulating a governing law other than the laws of an EU Member State[3].

Regardless of their location, businesses that sell products to EU consumers through e-mail, telephone, or websites will need to review their standard terms and conditions and consider how to revise any provision which states that any portion of the money paid by the consumer will not be refundable in the event of cancellation.

WHAT HAPPENED IN THIS CASE?

HHH is a German mail order company that sells shoes, clothing, accessories, and others goods over the Internet. At the relevant time, one of the provisions of HHH's standard terms and conditions provided that the customer had to pay a flat rate of €4.95 for delivery of goods, which was non-refundable if the customer withdrew from the contract. VBZ is a consumer association constituted under German law, which took offence at this provision.

VBZ brought proceedings against HHH in the German Regional Court, seeking an injunction to retrain HHH from charging

[3] In this context, note that under Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (the so-called "Rome I Regulation"), any choice of law stipulated in a consumer contract must not have "the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable" (see Article 6 of Rome I Regulation).

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its customers the €4.95 delivery charges where the customers have withdrawn from the sales contract in accordance with the relevant provisions of the German Civil Code, which implemented the Directive in Germany.

The Regional Court decided the matter in favour of VBZ. HHH appealed to the Higher Regional Court, but this appeal was dismissed. HHH then took the matter further by appealing to the German Federal Court of Justice, seeking to overturn the lower court's judgments. Before the Federal Court of Justice, HHH argued that the relevant German national law did not allow consumers the right to reimbursement of the *cost* of delivery that a seller incurs.

The explicit language contained in Articles 6(1) and 6(2) of the Directive provides that the only charge that a seller may impose on a consumer who validly exercises his or her right to withdraw from a distance contract is the direct cost of returning the goods. This language was not mirrored precisely in the relevant provisions of the German Civil Code. Furthermore, Article 6 of the German language version of the Directive was also drafted in such way that, in so far as the German language version was concerned, Article 6 could be interpreted such that it governed charges that may be levied on consumers *as a result* of the withdrawal, as opposed to the charges that may be levied because of the withdrawal.

The Federal Court of Justice rightly took the view that, to the extent that the German Civil Code was incompatible with the Directive, the German Civil Code had to be interpreted to give effect to the Directive, but the Federal Court of Justice was unsure as to how the Directive, and in particular Article 6, ought to be interpreted. Thus, the matter was referred to the ECJ.

The ECJ had no difficulty in concluding that Article 6 had to be interpreted so as to prevent a seller from charging the cost of delivery of goods to a consumer, where the consumer exercises his or her right to withdrawal during the cooling-off period. In so concluding, the ECJ held that:

- the phrase "*sums paid by consumer*" used in Article 6(2) should not be interpreted narrowly as solely relating to the price for the goods paid by the consumer but, rather, should be interpreted broadly to include "*all of the sums paid by the consumer under the contract, regardless of the reason for their payment*"; and
- the phrase "*The only charge that may be made to the consumer because of the exercise of his right of withdrawal*" used in both Articles 6(1) and 6(2) should not be interpreted narrowly as solely relating to the charges incurred as a consequence of the exercise of the withdrawal right, but rather, should be interpreted broadly to include "*all of the costs incurred by the conclusion, performance and termination of the contract which may be charged to the consumer if he exercises his right of withdrawal*".

The ECJ clearly took this approach because, in its view, the purpose of Article 6 of the Directive was not to discourage consumers from exercising their right to withdrawal, as that would be contrary to the objective of the Directive. The ECJ noted that "*If consumers also had to pay the delivery costs, such a charge, which would necessarily dissuade consumers from exercising their right of withdrawal, would run counter to the very objective of Article 6 of the directive*".

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