Telemarketing – Swiss Federal Supreme Court decision on the notion of "commercial relationship" in advertising calls

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Under Swiss law, telephone directories, in general, are public, but it is inadmissible to make advertising calls to persons if they have explicitly opted out of advertising communications by noting this in the telephone directory (“*Please, no advertising.”). This opt-out solution intends to protect persons who have expressed their desire not to receive advertising notifications from advertising communications made nevertheless – in short, the opt-out solution is intended to protect against excesses in (telephone) marketing. The legal basis for this is Article 3 paragraph 1 letter u of the Federal Law Against Unfair Competition (UCA), which stipulates that anyone who fails to comply with the note in the telephone directory expressing a customer’s wish not to receive advertising messages from persons he has "no commercial relationship" with, is acting unfairly and may be criminally liable to a custodial sentence of up to three years or to a fine. The exception allowing advertising calls when a commercial relationship exists, is based on the presumption that there is an interest in commercial communications in the specific context concerned.

On 9 December 2022, the Swiss Federal Supreme Court (FSC) published a leading judgment in which it clarified the scope of the key concept of "commercial relationship" (FSC 6B_978_2020). In essence, the FSC held that:

- The notion of commercial relationship must be interpreted in a restrictive manner to satisfy the law’s protective purpose, i.e., curbing telemarketing excesses.

- The commercial relationship must exist at the time of the advertising communication. The exception clause to Art. 3 para. 1 lit. u UCA does not apply to a former business relationship, as there is no after-effect.

- A commercial relationship within the meaning of Article 3 para. 1 lit. u UCA does not require an actual purchase. Rather, it is sufficient if advertising material or an offer has been explicitly requested.

- The duration of the relationship must be defined in such a way that the intention not to receive unsolicited telephone advertising – expressed with the asterisk (*) – does not

become evidently less effective. Pursuant to the FSC, a commercial relationship exists as long as a contractual relationship continues – e.g., during the term of a subscription. This relationship may also apply during the life of a durable capital good. The situation, however, is different for customers who have purchased a short term consumer good one or more times but who have not repurchased the product for a period corresponding to a multiple of the usual consumption period. In such cases, the commercial relationship established by the previous purchase is to be considered terminated.

- The FSC, however, takes a more nuanced view in the case of a commercial relationship based on a product order. Here, the relationship is almost never formally terminated, and the question thus arises as to how long the commercial relationship can last, if not regularly renewed. According to the recent FSC judgment, this question must be assessed in the light of the nature of the commercial relationship, the customer relationship and, if a contract has been concluded in the light of its content and form. Without clearly endorsing it, the FSC refers to literature on the subject, which advocates a time frame of one to five years (depending on the type of product); a period of maximally six months is being accepted for everyday consumer goods.

Based on these principles, the FSC concluded for the case under review that an advertising call seven years after the order for a food supplement, does not fall within the scope of the commercial relationship exception and therefore objectively constitutes a violation of Article 3 para. 1 lit. u UCA.

It should be noted that the discussed judgment was rendered in a criminal proceeding. While Article 3 para. 1 lit. u UCA can be invoked in both civil and criminal proceedings, private persons are more likely to file a criminal complaint because this option involves less cost risk and does not requires any considerable participation in the proceedings.

Companies using telemarketing strategies as part of their marketing tools should regularly review their "customer" lists to make sure that – to the extent persons who opted out from advertising calls are listed therein – there exists an actual commercial relationship as defined by the Federal Supreme Court.

Authors: Lara Dorigo (Partner), Michèle Burnier (Partner), Quentin de Reynier (Junior Associate)

No legal or tax advice

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Lara Dorigo

Partner
Attorney at law, LL.M. in Trade Regulation
Head IP & TMT

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 15
lara.dorigo@pestalozzilaw.com



Michèle Burnier

Partner
Attorney at law

Pestalozzi Attorneys at Law Ltd
Cours de Rive 13
1204 Geneva
Switzerland
T +41 22 999 96 00
michele.burnier@pestalozzilaw.com

