[DE] Illicit Decoding of Conditional Access Services

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According to Art. 3.1 of the Zugangskontrolldienstegesetz (Conditional Access Services Act - ZKDSG), which transposes Directive 1998/84/EC of the European Parliament and of the Council on the legal protection of services based on, or consisting of, conditional access of 20 November 1998, the manufacture, import and distribution for commercial purposes of illicit devices, ie technical procedures and devices designed or specially adapted to facilitate unauthorised access to protected services, are prohibited.

The Oberlandesgericht Frankfurt a.M. (Frankfurt Regional Appeals Court) recently decided that suppliers of such devices could not bypass this provision by claiming that they were to be used for purposes other than illicit decoding.

The dispute in question concerned a device which, despite contrary instructions from the manufacturer, was being recommended by dealers and Internet users and actually used for the decoding of pay-TV signals. However, was illicit did not depend on the purpose for which the manufacturer intended it to be used, but on that for which the average user intended to use it. Although the manufacturer's instructions were an important indication, the purpose for which it was used by customers could be determined by other circumstances, such as the technical knowledge of potential users, existing practices or advice from third parties. The court held that, in individual cases, these circumstances could even eclipse unlawful directions for use given by the manufacturer; manufacturers should not be allowed to evade liability by providing bogus instructions. The determining factor should always be whether the potential user of the device ultimately regarded the possible use for the purposes set out in Art. 2.3 of the ZKDSG as being the use intended by the manufacturer, or as a form of misuse that was not consistent with the manufacturer's intentions. The more obvious the possible illegal uses were, the more likely it was that the average user would intend to use a device for the illicit purposes described in Art. 2.3 of the ZKDSG.

Beschluss des Oberlandesgerichts Frankfurt a.M. vom 5. Juni 2003, Aktenzeichen 6 U 7/03

Decision of the Frankfurt Regional Appeals Court, 5 June 2003, case no. 6 U 7/03

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