

Case C-484/20

Request for a preliminary ruling

Date lodged:

1 October 2020

Referring court:

Oberlandesgericht München (Germany)

Date of the decision to refer:

1 October 2020

Defendant and Appellant:

Vodafone Kabel Deutschland GmbH

Applicant and Respondent:

Bundesverband der Verbraucherzentralen und
Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.

[...]

ORDER

In the proceedings

**Bundesverband der Verbraucherzentralen und Verbraucherverbände –
Verbraucherzentrale Bundesverband e. V., [...] Berlin**
– Applicant and Respondent –

[...]

v

Vodafone Kabel Deutschland GmbH, [...] Unterföhring
– Defendant and Appellant –

[...] **[Or. 2]**

on 1 October 2020, the Twenty-Ninth Civil Chamber of the Oberlandesgericht
München (Higher Regional Court of Munich, Germany) [...]

ordered as follows:

- I. The proceedings are [...] stayed.
- II. In relation to the interpretation of
 - Article 62(4) of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (hereinafter referred to as: Directive (EU) 2015/2366)

the following question is referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU:

- Is Article 62(4) of Directive (EU) 2015/2366 to be interpreted in such a way that it prevents a national regulation or practice, in the form of a transitional provision, that only allows the prohibition of charges for the use of payment instruments and payment services in accordance with the corresponding national implementing provision in relation to ongoing contractual obligations with consumers, if the underlying contractual obligation arose after 13 January 2018, but not if the underlying contractual obligation arose prior to 13 January 2018, where settlement of (other) payment transactions does not start until after 13 January 2018? **[Or. 3]**

Grounds:

The subject of the main parties' dispute before the referring court is whether the Defendant, as a cable network operator and internet service provider, is entitled to demand from consumers a 'standard direct payment charge of EUR 2.50 per payment in accordance with its General Terms and Conditions of Business, if these consumers do not provide the Defendant with a direct debit mandate but instead pay bills themselves by SEPA transfer, in so far as the underlying contractual obligation was established prior to the date of transposition of Directive (EU) 2015/2366 in national law on 13 January 2018, but the settlement of (other) payment transactions did not start until after this date.

1. Legal framework

a. EU law

The recitals in the preamble to Directive (EU) 2015/2366 read, in extracts, as follows:

(1) In recent years, significant progress has been achieved in integrating retail payments in the Union, in particular in the context of the Union acts on payments, in particular through Directive 2007/64/EC of the European Parliament and of the Council, Regulation (EC) No 924/2009 of the European Parliament and of the Council, Directive 2009/110/EC of the European Parliament and of the Council, and Regulation (EU) No 260/2012 of the European Parliament and of the Council. Directive 2011/83/EU of the European Parliament and of the Council has further complemented the legal framework for payment services by setting a specific limit on the ability of retailers to surcharge their customers for the use of a given means of payment.

(6) New rules should be established to close the regulatory gaps while at the same time providing more legal clarity and ensuring consistent application of the legislative framework across the Union. Equivalent operating conditions should be guaranteed, to existing and new players on the market, enabling new means of payment to reach a broader market, and [Or. 4] ensuring a high level of consumer protection in the use of those payment services across the Union as a whole. This should generate efficiencies in the payment system as a whole and lead to more choice and more transparency of payment services while strengthening the trust of consumers in a harmonised payments market.

(66) Different national practices concerning charging for the use of a given payment instrument ('surcharging') have led to extreme heterogeneity of the Union's payments market and have become a source of confusion for consumers, in particular in the e-commerce and cross-border context. Merchants located in Member States where surcharging is allowed offer products and services in Member States where surcharging is prohibited and surcharge the consumer. There are also many examples of merchants surcharging consumers at levels much higher than the cost borne by the merchant for the use of a specific payment instrument. Moreover, a strong rationale for revising surcharging practices is supported by the fact that Regulation (EU) 2015/751 establishes rules for interchange fees for card-based payments. Interchange fees constitute the main component of merchant charges for cards and card-based payments. Surcharging is the steering practice sometimes used by merchants to compensate for the additional costs of card-based payments. Regulation (EU) 2015/751 imposes limits on the level of interchange fees. Those limits will apply before the prohibition set out in this Directive. Consequently, Member States should consider preventing payees from requesting charges for the use of payment instruments for which the interchange fees are regulated in Chapter II of Regulation (EU) 2015/751.

(99) It is necessary to ensure the effective enforcement of the provisions of national law adopted pursuant to this Directive. Appropriate procedures should therefore be established by means of which it will be possible to

pursue complaints against payment service providers which do not comply with those provisions and to ensure that, where appropriate, effective, proportionate and dissuasive penalties are imposed. (...) [**Or. 5**]

Regulation (EU) No 2015/2366 provides for the following among other aspects:

Article 2

Scope

1. This Directive applies to payment services provided within the Union.
2. Titles III and IV apply to payment transactions in the currency of a Member State where both the payer's payment service provider and the payee's payment service provider are, or the sole payment service provider in the payment transaction is, located within the Union.

Article 4

Definitions

For the purposes of this Directive, the following definitions apply: (...)

- (9) 'payee' means a natural or legal person who is the intended recipient of funds which have been the subject of a payment transaction; (...)
- (14) 'payment instrument' means a personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used in order to initiate a payment order;

Article 62

Charges applicable

4. In any case, Member States shall ensure that the payee shall not request charges for the use of payment instruments for which interchange fees are regulated under Chapter II of Regulation (EU) 2015/751 and [**Or. 6**] for those payment services to which Regulation (EU) No 260/2012 applies.

Article 107

Full harmonisation

1. Without prejudice to Article 2, Article 8(3), Article 32, Article 38(2), Article 42(2), Article 55(6), Article 57(3), Article 58(3), Article 61(2) and (3), Article 62(5), Article 63(2) and (3), the second subparagraph of Article 74(1) and Article 86, in so far as this Directive contains

harmonised provisions, Member States shall not maintain or introduce provisions other than those laid down in this Directive.

Article 115

Transposition

1. By 13 January 2018, Member States shall adopt and publish the measures necessary to comply with this Directive. They shall immediately inform the Commission thereof.
2. They shall apply those measures from 13 January 2018.

Regulation (EU) No 260/2012 provides as follows:

Article 1

Subject matter and scope

1. This Regulation lays down rules for credit transfer and direct debit transactions denominated in euro within the Union where **[Or. 7]** both the payer's payment service provider and the payee's payment service provider are located in the Union, or where the sole payment service provider (PSP) involved in the payment transaction is located in the Union.

b. National law

Paragraph 270a of the Bürgerliches Gesetzbuch (German Civil Code) effective from 13 January 2018 pursuant to the Law of 17 July 2017 [...] reads:

Any agreement by which the debtor is obliged to pay a charge in order to use a SEPA Core Direct Debit, a SEPA B2B Direct Debit, a SEPA credit transfer or a payment card for payment shall be invalid. Sentence 1 shall apply to the use of payment cards for payment transactions with consumers only, if this is subject to Chapter II of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (OJ L 123, 19 May 2015, p. 1).

The transitional provision of Article 229, Paragraph 45 of the Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Law to the German Civil Code) annexed with effect from 13 January 2018 by the Law of 17 July 2017 [...] reads:

- (1) Contractual obligations that concern the execution of payment transactions and that arose on or after 13 January 2018 shall only be

governed by the German Civil Code and Article 248 in the version applicable from 13 January 2018 onwards.

- (2) Contractual obligations that concern the execution of payment transactions and that arose prior to 13 January 2018 shall be governed by the German Civil Code and Article 248 in the version applicable up to 13 January 2018, unless subparagraphs 3 and 4 contain provisions to the contrary. **[Or. 8]**
- (3) If, in the case of a contractual obligation within the meaning of subparagraph 2, the settlement of a payment transaction did not commence until 13 January 2018 or later, this payment transaction shall be governed only by the German Civil Code and Article 248 in the version applicable from 13 January 2018 onwards.
- (4) From this date, Paragraph 675f(3) of the German Civil Code in the version applicable from 13 January 2018 onwards shall also apply to contractual obligations within the meaning of subparagraph 2.
- (5) Paragraph 270a of the German Civil Code shall apply to all contractual obligations that arose on or after 13 January 2018.

2. Facts of the main proceedings

- a. The Applicant, a consumer protection organisation with a right of action under German law, filed a claim against the Defendant, a cable network operator and internet service provider, following a prior warning to cease using a provision in its General Terms and Conditions within the scope of commercial activities, except in respect of commercial operators, and invoking this provision within the scope of service contracts for telecommunications and cable network services; the provision in question reads: *'Standard direct payment charge: standard charge of € 2.50 per payment not made by direct debit.'*

Since the transposition of Directive (EU) 2015/2366 into German law on 13 January 2018, the Defendant has been making a distinction in its contracts between existing contracts and new contracts. In a description of prices and services in existing contracts that were concluded prior to 13 January 2018, the Defendant uses the aforementioned clause, which does not exclude SEPA credit transfers, for example. This clause is no longer included in the corresponding price list that applies for new contracts concluded from 13 January 2018 onwards.

The Defendant considers itself entitled to use the clause for existing contracts, since it believes that the prohibition on surcharges in accordance with Paragraph 270a of the German Civil Code only applies to ongoing contractual obligations that arose on or after 13 January 2018. It therefore

considers itself entitled to charge standard direct payment charges even after this date for **[Or. 9]** existing contracts that were concluded prior to that date, because it believes the distinct transitional provision of Article 229, Paragraph 45, subparagraph 5 of the Introductory Law to the German Civil Code focuses on contractual obligations arising on or after 13 January 2018, so retroactive application of Paragraph 270a of the German Civil Code would not be considered, even if payments were made from 13 January 2018 onwards.

The Applicant, on the other hand, holds the view that the prohibition on charging surcharges from 13 January 2018 also applies to existing contracts concluded prior to 13 January 2018. It claims that, since the intention of Article 62(4) of Directive (EU) 2015/2366 was to create the same conditions across the internal market from the reference date, the transposing provision in Paragraph 270a of the German Civil Code must apply irrespective of the duration of a contract and therefore also to ongoing contractual obligations that arose prior to 13 January 2018. It also claims that the transitional provision in Article 229, Paragraph 45, subparagraph 5 of the Introductory Law to the German Civil Code must be interpreted according to the underlying legal rationale in Article 229, Paragraph 45, subparagraph 3 of the Introductory Law, in such a way that contracts concluded prior to 13 January 2018 are nevertheless subject to the new law that applies from the reference date, even if payment transactions began on or after 13 January 2018.

- b. The referring court tends towards the view that the national regulation in Paragraph 270a of the German Civil Code transposing Article 62(4) of Directive (EU) 2015/2366 is also applicable if the ongoing contractual obligation underlying the payments was concluded prior to 13 January 2018, but the settlement of (other) payment transactions did not start until after this reference date, because, for example, fees for cable use and internet provision are chargeable at periodic, generally monthly, intervals, as in the present case.

It is relevant in this case that, according to the view of the referring court, Article 62(4) of Directive (EU) 2015/2366 only focuses on the use of payment instruments and payment services, for which it orders a prohibition of surcharges charged by payees in the course of full harmonisation for the period following the deadline for transposition on 13 January 2018. In contrast, the Directive does not make reference to the formation of the contractual obligation that forms the basis for the payments. **[Or. 10]**

The referring court therefore tends towards also applying the surcharge prohibition to existing contracts concluded prior to 13 January 2018, because, in accordance with recital (6) to the Directive, the intention is to ensure the consistent application of the legislative framework for payments across the European Union, to guarantee equivalent operating conditions for

both existing and new market players, and to guarantee a high level of consumer protection in the use of those payment services across the Union as a whole. In accordance with recital (66) to that directive, the different national practices concerning charging, which have led to extreme heterogeneity of the European Union's payments market and have become a source of confusion for customers, are to be harmonised by prohibiting payees from demanding charges for the use of certain payment instruments. This EU-wide harmonisation would be called into question if different surcharges for ongoing contractual obligations were also permissible in Member States in the future for an indefinite period of time, because it would supposedly depend on the time at which the contractual obligation was created under national law and not on the expiry of the transposition deadline in the Directive, that is, 13 January 2018.

The referring court currently considers the comprehensive application of the prohibition of surcharges on payments after 13 January 2018 as being called into question by the wording of the transitional provision in Article 229, Paragraph 45, subparagraph 5 of the Introductory Law, which only focuses on the creation of the contractual obligation [...]. [Viewpoints in the relevant literature] **[Or. 11]**

By the [...] question referred, the referring court asks the Court of Justice for its interpretation of Article 62(4) of Directive (EU) 2015/2366. This is because the referring court assumes in accordance with the meaning of the standard, that this standard must be afforded application free of constraints of time from 13 January 2018, so as to ensure a consistent regulation on charges for the EU-wide payments market from this date, irrespective of the question of when ongoing contractual obligations were created:

[...]