

Case C-5/20

Request for a preliminary ruling

Date lodged:

7 January 2020

Referring court:

Oberlandesgericht Düsseldorf (Germany)

Date of the decision to refer:

17 December 2019

Applicant, appellant and respondent:

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

Defendant, appellant and respondent:

Vodafone GmbH

[...]

OBERLANDESGERICHT DÜSSELDORF (GERMANY)

ORDER

In the case of

Bundesverband der Verbraucherzentralen und Verbraucherverbände —
Verbraucherzentrale Bundesverband e. V., [...] Berlin,

Applicant, appellant and respondent:

[...]

v

Vodafone GmbH, [...]

[...] Düsseldorf

Defendant, appellant and respondent,

[...]

Other party concerned:

Bundesnetzagentur für Elektrizität, Gas, Telekommunikation und Eisenbahnen,
[...] Bonn, **[Or. 2]**

the 20th Civil Chamber of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf (Germany)) [...] after hearing the parties on 17 December 2019,

made the following order:

I.

The proceedings are stayed.

II.

The Higher Regional Court, Düsseldorf, refers the following questions to the Court of Justice concerning the interpretation of Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ L 310, 26.11.2015, p. 1) ('the TSM Regulation')

for a preliminary ruling:

- (1) Is Article 3(1) of the TSM Regulation to be interpreted as meaning that the right of end-users to use terminal equipment of their choice via their internet access service also includes the right, where the internet access service is provided via terminal equipment (e.g., smartphone, tablet) connected directly to the public telecommunications network interface, to also use that internet access service with other terminal equipment (e.g., other tablet, smartphone) (tethering)?
- (2) If Question 1 is to be answered in the affirmative:

Is Article 3(1) and (2) of that regulation to be interpreted as meaning that there will be an impermissible limitation of the end-user's choice of terminal equipment where tethering is neither contractually prohibited nor **[Or. 3]** technically restricted, but is, on the basis of an agreement on data volumes used via tethering and unlike data volumes used without tethering, not covered by a zero-cost tariff but offset against a basic volume and calculated separately in the event that that basic volume is exceeded?

Grounds:

- 1 The applicant is the umbrella federation for all 16 consumer advice centres and 25 other consumer and socially-oriented organisations in Germany. It is included in the list of accredited institutions provided for in Paragraph 4 of the Unterlassungsklagegesetz (Law on prohibitory injunctions).
- 2 The defendant is a mobile communications service provider. It offers so-called ‘Vodafone Pässe’ (‘Vodafone Passes’) (‘Chat Pass’, ‘Social Pass’, ‘Music Pass’, ‘Video Pass’) for some of its mobile communications tariffs. Upon entering into a basic contract since October 2017, consumers may add one pass free of charge; an additional charge is payable for additional passes. Such passes allow consumers to use specific mobile communications services via apps selected by the defendant for those services without the related data volumes being counted towards the basic data volumes specified in their respective mobile communications tariff. In that regard, the defendant’s General Terms and Conditions state:
 - ‘(b) Data consumption upon usage via tethering (hotspot) ... is counted towards the tariff data volume.
 - (c) The Vodafone Pass is only valid domestically. Abroad, the use of the apps included in the pass is counted towards the inclusive tariff data volume.’
- 3 It is those clauses, together with other clauses that are of no interest here, that form the subject of the applicant’s objection. The applicant claims that those clauses are incompatible with Article 3 of the TSM Regulation (Clause (b)) and Article 6a of Regulation (EU) No 531/2012, as amended by Regulation (EU) No 2015/2120 (Roaming Regulation) (Clause (c)). The defendant disputes this.
- 4 As the responsible regulatory authority, the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation und Eisenbahnen (Federal Network Agency for Electricity, Gas, Telecommunications and Railway) (‘the Federal Network Agency’) stayed proceedings in connection with Clause (b), but issued a prohibition in respect of Clause [Or. 4] (c) due to an infringement of Article 6a of the Roaming Regulation. A ruling has not yet been given on the action for annulment brought against that prohibition by the defendant before the Verwaltungsgericht Köln (Administrative Court, Cologne (Germany)). In the meantime, by order of 18 November 2019 [...], the Administrative Court, Cologne, stayed the proceedings and made an extensive request to the Court of Justice for a preliminary ruling on the interpretation of the Roaming Regulation.
- 5 After hearing the Federal Network Agency, in so far as was relevant for the decision to refer, the Regional Court ordered the defendant to no longer include Clause (c) in mobile communications contracts and dismissed the action in respect of Clause (b).
- 6 As regards Clause (b), the Regional Court took the view that tethering is not contractually excluded and is also technically possible. Clause (b) does not

concern specific terminal equipment but merely makes the use of additional terminal equipment via tethering, regardless of its type or origin, economically less attractive. Furthermore, the SIM card with which the pass is used can also — in so far as it is technically possible — be inserted into other devices.

- 7 According to the Regional Court, Clause (c), on the other hand, is ineffective on the ground that it infringes Article 6a of the Roaming Regulation. The basic tariff and the pass constitute a single service as part of a regulated data roaming service; the Vodafone Pass can only be ordered together with the basic tariff; it cannot continue to exist independently after the termination of the contract for the basic tariff.
- 8 Both parties appealed against that decision in so far as they were adversely affected by it. The Federal Network Agency submitted its observations. The decision of the 20th Civil Chamber depends on the interpretation of the provisions specified in the questions referred. As regards Clause (c), in the light of the order for reference made by the Administrative Court, Cologne (see paragraph 4) concerning that Clause, the 20th Civil Chamber sees no need to make a fresh reference. **[Or. 5]**
- 9 Both questions referred concern the validity, to be measured on the basis of Article 3 of the TSM Regulation, of Clause (b) relating to tethering. Tethering is discussed by the parties in two situations:
- First, in a situation where the mobile communications device is used as a router and the data are transmitted from it to another device, by wireless means or by a cable.
 - Second, in a situation where the mobile communications device is linked to a mobile LTE router and the latter thus provides internet access via the mobile communications device.

First question:

- 10 The first question relates to the issue, to which the parties have given different answers, of whether or not Article 3(1) of the TSM Regulation provides at all for the use at the same time of multiple terminal equipment connected directly or indirectly to the public telecommunications network.
- 11 The applicant claims that Article 3(1) of the TSM Regulation also provides for the possibility of using multiple terminal equipment at the same time, as is apparent from the choice of the plural form [in German ‘Endgeräte’] (also in recital 4 of the TSM Regulation). In addition, recital 5 of the TSM Regulation refers to Article 1 of Directive 2008/63/EC, which states that terminal equipment means equipment directly or indirectly connected to the interface of a public telecommunications network. Such an interpretation is also supported by the BEREC Guidelines on the

Implementation by National Regulators of European Net Neutrality Rules (BoR (16) 127). Paragraph 27 thereof provides as follows:

For example, the practice of restricting tethering is likely to constitute a restriction on the use of terminal equipment connecting to the network

The applicant claims that special consideration should be given to those guidelines when interpreting the TSM Regulation since, in accordance with Regulation (EU) 2018/1971, the BEREC Guidelines are explicitly intended to ensure the harmonisation of regulatory practice within the European Union. The Federal Network Agency agrees in principle with this. **[Or. 6]**

- 12 The defendant contends, on the other hand, that Article 3 of the TSM Regulation does not provide for the right to be able to use any number of terminal equipment at the same time, including non-mobile enabled terminal equipment and third-party terminal equipment. The effect of such an interpretation would be that a large number of third parties would also be able, in practice, to benefit from the service of the mobile communications provider, which would lead to an unreasonable extension of its services. It is apparent from recital 5 that the terminal equipment concerned is only terminal equipment ‘connecting to the network’.

The second question:

- 13 If the first Question is to be answered in the affirmative, the further question arises of whether Clause (b) constitutes a ‘limitation’ within the meaning of Article 3(2) of the TSM Regulation.
- 14 The Regional Court took the view that that clause does not prohibit tethering, rather tethering is still possible, also from a technical point of view. That clause solely restricts tethering in economic terms.
- 15 On the other hand, the applicant claims that a ‘limitation’ simply consists of the refusal to grant economic advantages that would otherwise be granted. Any practice of making tethering economically less advantageous is sufficient.
- 16 According to the Federal Network Agency, a ‘limitation’ cannot be qualified as such only where there is a technical or contractual exclusion of tethering. It always depends on the effects of that exclusion. In that context, the Federal Network Agency refers to paragraph 45 (with further explanations in paragraphs 46 to 48) of the BEREC Guidelines, mentioned in paragraph 10, which are worded as follows:

When assessing whether an ISP limits the exercise of rights of end-users, NRAs should consider to what extent end-users’ choice is restricted by the agreed commercial and technical conditions or the commercial practices of the ISP. It is not the case that every factor affecting end-users’ choices should necessarily be considered to limit the exercise of end-users’ rights under Article 3(1). The

Regulation also foresees intervention in case such restrictions result in choice being materially reduced, but also in other cases that could qualify as a limitation of the exercise of the end-users' rights under Article 3(1).

In this case, account should be taken of the fact that Clause (b) does not concern specific terminal equipment, but additional terminal equipment of any type or origin [**Or. 7**]. In addition, users with a landline flat rate use that, and not mobile communications devices, for tethering.

[...]

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