

Anonymised version

Translation

C-612/23 – 1

Case C-612/23

Request for a preliminary ruling

Date lodged:

6 October 2023

Referring court:

Oberlandesgericht Düsseldorf (Germany)

Date of the decision to refer:

21 September 2023

Applicant, appellant and respondent:

Verbraucherzentrale Berlin e. V.

Defendant, appellant and respondent:

Vodafone GmbH

[...]

Delivered on 21 September
2023

[...]

**OBERLANDESGERICHT DÜSSELDORF (HIGHER REGIONAL COURT
DÜSSELDORF, GERMANY)**

ORDER

In the case of

Verbraucherzentrale Berlin e. V., [...] Berlin,

applicant, appellant and respondent:

[...]

Vodafone GmbH, [...] Düsseldorf,

defendant, appellant and respondent,

[...]

the 20th Civil Division of the Oberlandesgericht Düsseldorf (Higher Regional Court Düsseldorf) [...] has ordered as follows:

I.

The proceedings are stayed.

II.

The Oberlandesgericht Düsseldorf (Higher Regional Court Düsseldorf) refers the following question to the Court of Justice of the European Union concerning the interpretation of Article 30(5) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), as amended by Article 1(21) of Directive 2009/136/EC of the European Parliament and of the Council:

Must 'initial commitment period' be understood to mean only the contractual term of an initial contract or also that of a renewal contract based on new declarations of intent concluded and put into effect a considerable time before the expiry of the initial contract if, compared to the initial contract, it provides for a different exchange of benefits between the operator and the customer?

Grounds:

- 1 The applicant, a consumer protection association with standing to bring an action, complains about certain conduct by the defendant, a provider of telecommunications services in the field of, inter alia, mobile telephony, towards existing customers, such as that which occurred in the case of two customers, namely customer 1 and customer 2.
- 2 The customers had concluded an initial contract with the defendant with a fixed initial commitment period. A few months before the end of that initial contract in 2018, they requested a tariff change (in the case of customer 1, instead of 'Vodafone Red 2016 S', the tariff 'Vodafone Red L'; in the case of customer 2, instead of an unknown tariff, the tariff 'allnet-Flat Max'), combined with the – discounted – purchase of a new smartphone and a higher monthly rate, and approached one of the defendant's shops to that end.

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- 3 The ‘Supplementary agreement to the existing contract regarding Vodafone Services’ [...] subsequently drawn up by the defendant and signed by customer 1 under the same contract number did initially read:

‘You have decided to purchase a new discounted smartphone or tablet before the end of the commitment period and therefore to enter into a new contract. On ... [the first day after the expiry of the commitment period of the initial contract], a new commitment period of 24 months commences for your contract. (...)’

Under ‘Tariff’ it read:

‘The following tariff applies as before to the contract:

Red L with Basic Phone ...’,

thus, the ‘new’ tariff with the ‘new’ prices. According to another provision, an additional data volume available for ‘Red L’ only was to be set up as an option on the day the contract was signed. Customer 1 immediately received a new smartphone, the defendant started charging the new tariff with immediate effect. The defendant subsequently took the position that the contractual term of the ‘supplementary agreement’ of 24 months did not start upon signing, but only upon the expiry of the initial contract several months later.

- 4 The ‘contract renewal’ for customer 2 [...] read:

‘Start date of the contract: 13 August 2018

Contractual term: 26 month(s) ...’

13 August 2018 is the date customer 2 visited the shop. The new smartphone was handed over immediately, the tariff ‘allnet-Flat Max’ was charged by the defendant starting from that day. In response to the customer’s complaint that the contractual term exceeded 24 months, the defendant replied that the unexpired remaining term of the initial contract was to be added to the 24-month commitment period.

- 5 The applicant argued that this would bind the customer for a period of more than 24 months, contrary to the first sentence of Paragraph 43b of the Telekommunikationsgesetz (German Telecommunications Act; ‘the TKG’), in the version applicable at the time, and in any event contrary to Paragraph 309(9)(a) of the *Bürgerliches Gesetzbuch* (German Civil Code; ‘the BGB’) [on the invalidity of general terms and conditions that provide for a term of certain contracts which bind the other party for more than two years] in the version applicable at the time. It has therefore requested

‘that the defendant be ordered

I.

in future, in the context of commercial operations in telecommunications contracts with consumers, to [...] refrain from

1.

making agreements in the event of a change of contract according to which the new telecommunications contract has a commitment period of 24 months which only begins to run after the expiry of the commitment period of the previous telecommunications contract, [...] [here and below, references to annexes with the documentation in the two specific cases have been deleted] but where the activation of the new telecommunications contract is to take place before the end of the term of the previous telecommunications contract if that [...] results in the customer being contractually bound for more than 24 months.

in the alternative,

making agreements in the event of a change of contract according to which the new telecommunications contract has a term that binds the other party for two years and only begins to run only after the expiry of the commitment period of the previous telecommunications contract [...] but where the activation is to take place before the end of the term of the previous telecommunications contract, if that [...] results in the customer being contractually bound for more than 24 months, provided that those are not individual agreements.

and/or

2.

referring to a date for an end of the commitment period expressed in months in invoices and/or in confirmations of contract amendments to telecommunication contracts, which results in the consumer being contractually bound for more than 24 months, [...]

in the alternative

referring to a date for the end of the commitment period and/or to a commitment period expressed in months in invoices and/or in confirmations of amendments to telecommunications contracts, which results in a contractual term that binds the consumer for more than two years, provided that it is not an individual agreement, [...]

and/or

3.

relying on the fact that, in the event of changes to the contract before the expiry of the commitment period of the previous telecommunications contract, the remaining term of the previous telecommunications contract is added to the term

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of the contract of 24 months commencing with the new telecommunications contract [...].'

[...]

- 6 The defendant applied for the action to be dismissed. It argued that it was merely a case of a contract extension by mutual agreement, to which neither the first sentence of paragraph 43b of the TKG in the version applicable at the time nor Paragraph 309(9)(a) of the BGB were applicable. A review of the general terms and conditions was not necessary because the agreements in question were individual agreements.
- 7 By the contested judgment, the Landgericht (Regional Court, Germany) ruled against the defendant in accordance with the alternative claims under I.1. and I.2 [...]. It gave the following reasons: the acts complained of indeed did not infringe the abovementioned provisions; the prohibitions contained therein solely concerned the term of initial contracts, and not the term of subsequent contracts, which – despite changes to the content of the contract – is what the contracts at issue were. However, the agreements were general terms and conditions that were in breach of Paragraph 307 BGB [on the invalidity of general terms and conditions which unreasonably disadvantage the contracting party contrary to the requirements of good faith]; when examining whether they were unlawful, the interpretation in Paragraph 309(9)(a) of the BGB had to be taken into account.
- 8 Both parties appeal against that ruling to the extent that it is detrimental to them [...].
- 9 The civil division of the Oberlandesgericht Düsseldorf (Higher Regional Court Düsseldorf), in a first set of proceedings, upheld the applicant's appeal and dismissed that of the defendant. It proceeded on the basis [that] the defendant's conduct complained of infringes the abovementioned provisions, in particular when they are interpreted in the light of the relevant directives. The Bundesgerichtshof (Federal Court of Justice, Germany) set aside that judgment, because, on the basis of the documents submitted at the time, it could not be assumed that the modified exchange of benefits under [the] 'supplementary agreements' was to begin as from the day of the visit to the office; rather, the wording in the agreement concluded with customer 1 indicated that the exchange of benefits should not begin until the expiry of the initial contract. As regards customer 2, the [document submitted] was not the contract itself, but only the defendant's contract confirmation. It referred the matter back to the civil division of the Oberlandesgericht Düsseldorf for further clarification of the facts.
- 10 The civil division further clarified the facts of the case. [...]
- 11 [...] [On the question of when the modified exchange of benefits was to begin to apply in accordance with the agreements in question. The referring court assumes – in particular on the basis of the actual implementation of the agreements – that the 'supplementary agreement' and the 'contract extension' of

the defendant with its customers were intended to apply and be put into effect, according to the concurring will of both contracting parties, on the day of the customers' visit to the defendant's shop].

- 12 That is the background to the question referred for a preliminary ruling. According to the main applications, the action is justified on the merits if the conduct complained of infringed the first sentence of Paragraph 43b of the TKG in the version applicable at that time. That provision read as follows:

'The initial commitment period of a contract between a consumer and a provider of publicly available telecommunications services shall not exceed 24 months.'

That provision transposes Article 30(5) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, which read as follows:

'Member States shall ensure that contracts concluded between consumers and undertakings providing electronic communications services do not mandate an initial commitment period that exceeds 24 months.'

Recital 47 of Directive 2009/136/EC elaborates on that as follows:

'In order to take full advantage of the competitive environment, consumers should be able to make informed choices and to change providers when it is in their interests. It is essential to ensure that they can do so without being hindered by legal, technical or practical obstacles, including contractual conditions, procedures, charges and so on. That does not preclude the imposition of reasonable commitment periods in consumer contracts.'

Therefore, the first sentence of Paragraph 43b of the TKG was to be interpreted in conformity with the Directive.

- 13 It should be noted at the outset that the question from which point in time the period of 24 months begins, that is to say from the time of the conclusion of the contract or only from the time of the agreed start of the provision of services, does not arise in the proceedings at issue. According to the former view, the defendant's conduct would indeed be objectionable in any event, since the period between the time of conclusion of the contract and the agreed end of the contractual term is more than 24 months. However, such an infringement is not the subject of the applicant's claims.
- 14 Moreover, the provision of Article 105(1) of Directive (EU) 2018/1972 – replacing Article 30(5) of Directive 2002/22/EC – and the provision of Paragraph 56 of the updated version of the TKG, which has been in force since 1 December 2021 and which transposes that provision, do not play a direct role. Under German law, an action for an injunction based on conduct complained of

can only be granted if the conduct was already unlawful at the time in question. The current legal situation can therefore at most have an indirect significance if conclusions are to be drawn from the changes brought about by the new legal situation with regard to the previously applicable legal situation.

- 15 What is meant by ‘initial commitment period’ is controversial in Germany.
- 16 One view is that it refers only to the ‘initial contract’. The limitation of 24 months therefore applies only to the very first contract. If the contract is continued, that limitation does not apply. That applies both in the event that the contract – as provided for from the outset – is continued in the absence of a termination (in that respect, however, limitations result from [point 1(h) of the] Annex to Directive 93/13/EC and the transposing provision of Paragraph 309(9)(b) of the BGB and now from Article 105(3) Directive (EU) 2018/1972 and the transposing provision of Paragraph 56(3) of the TKG, updated version) as well as in the event that the extension of the contractual term is based on newly exchanged declarations of intent by the parties. According to that view, it shall also apply if the extension of the contract simultaneously contains changes to the contractual conditions regarding services and charges.
- 17 According to the second opinion, held by the civil division [...], ‘initial commitment period’ means any commitment period determined by new declarations of intent. As can be seen from recital 47 [of Directive 2009/136] (see paragraph 12 above), the consumer shall in any case [be offered] an opportunity to terminate the contract after the expiry of a reasonable commitment period (which the Directive sets at a maximum of 24 months), including for reasons of competition. The reason set out in recital 47 applies irrespective of whether the contract is an initial contract or a renewal contract. If the view expressed in paragraph 16 above were correct, there would be no clear guidelines on the duration of renewal contracts that are concluded through new declarations of intent, neither in the past nor now, if – as the defendant argues – [the] omission of the word ‘initially’ in the first sentence of Article 105(1) of Directive (EU) 2018/1972 compared to the predecessor provision is classified as a mere drafting error without any substantive significance. In addition, the view referred to in paragraph 16 above assesses the significance of contract amendments according to whether, under national law, it constitutes a mere extension of the contract (albeit with changes in the content of the contract) or a ‘novation’ (the conclusion of a new contract with complete termination of the old contract), thus making the interpretation of the directive dependent on national concepts. According to the view taken by the civil division, the term ‘initial commitment period’ must be understood in contrast to tacit extensions of the contractual period, which in the past were addressed in [point 1(h) of the] Annex to Directive 93/13/EEC and now also in Article 105(3) Directive (EU) 2018/1972. That would create a clear delimitation of the areas of regulation both under European Union law and national law [...]. The omission of the word ‘initially’ in the first sentence of Article 105(1) of Directive (EU) 2018/1972 compared to the predecessor

provision can, in the view of the civil division, be explained by the fact that the issue of tacit renewal is now directly regulated in the subsequent paragraphs.

- 18 According to the defendant, consumers require less protection in the case of a renewal contract because they are already aware of the reliability and the operational practice of the company. That argument does not apply in the case of a contract extension with a change in the performance obligations, which is the sole issue for decision here, quite apart from the fact that that consideration does not justify a commitment period longer than 24 months in view of recital 47 [of Directive 2009/136] (see paragraph 12 above).

[...]

WORKING DOCUMENT