Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 November 2015*

(Reference for a preliminary ruling — Directive 2002/22/EC — Electronic communications networks and services — Users' rights — Right of subscribers to terminate their contract without penalty — Changes to charges under terms of the contract — Increase in charges in line with increase in the consumer price index)

In Case C-326/14,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Oberster Gerichtshof (Supreme Court) (Austria), made by decision of 28 April 2014, received at the Court on 7 July 2014, in the proceedings

Verein für Konsumenteninformation

v

A1 Telekom Austria AG,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Third Chamber, acting as President of the Fourth Chamber, J. Malenovský, M. Safjan (Rapporteur), A. Prechal and K. Jürimäe, Judges,

Advocate General: P. Cruz Villalón,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 30 April 2015,

after considering the observations submitted on behalf of:

— Verein für Konsumenteninformation, by S. Langer, Rechtsanwalt,

— A1 Telekom Austria AG, by M. Hasberger, Rechtsanwalt,

— the Belgian Government, by J. Van Holm and M. Jacobs, acting as Agents,

— the European Commission, by G. Braun and L. Nicolae, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 July 2015,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 20(2) 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) (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) ('Directive 2002/22').

2 The request has been made in proceedings between the Verein für Konsumenteninformation (Consumer Information Association, 'the Association') and A1 Telekom Austria AG ('A1 Telekom Austria') concerning the latter's use of allegedly unlawful terms in consumer contracts.

Legal context

EU law

Directive 2002/22

3 Recitals 30 and 49 in the preamble to Directive 2002/22 state:

'(30) Contracts are an important tool for users and consumers to ensure a minimum level of transparency of information and legal security. … Specifically, consumers should enjoy a minimum level of legal certainty in respect of their contractual relations with their direct telephone service provider, such that the contractual terms, conditions, quality of service, condition for termination of the contract and the service, compensation measures and dispute resolution are specified in their contracts. … The measures to ensure transparency on prices, tariffs, terms and conditions will increase the ability of consumers to optimise their choices and thus to benefit fully from competition.

…

(49) This Directive should provide for elements of consumer protection, including clear contract terms and dispute resolution, and tariff transparency for consumers. …'

4 Under Chapter I of Directive 2002/22, entitled 'Scope, aims and definitions', Article 1 states:

'1. Within the framework of Directive 2002/21/EC [of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)], this Directive concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the Community of good quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market. The Directive also includes provisions concerning certain aspects of terminal equipment, including provisions intended to facilitate access for disabled end-users.

2. This Directive establishes the rights of end-users and the corresponding obligations of undertakings providing publicly available electronic communications networks and services. With regard to ensuring provision of universal service within an environment of open and competitive markets, this Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition. ...'

5 Chapter IV of Directive 2002/22, entitled 'End-user interests and rights', includes, inter alia, Article 20 of the directive, which states:

'1. Member States shall ensure that, when subscribing to services providing connection to a public communications network and/or publicly available electronic communications services, consumers, and other end-users so requesting, have a right to a contract with an undertaking or undertakings providing such connection and/or services. The contract shall specify in a clear, comprehensive and easily accessible form at least:

...

(d) details of prices and tariffs, the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained, payment methods offered and any differences in costs due to payment method;

...

2. Member States shall ensure that subscribers have a right to withdraw from their contract without penalty upon notice of modification to the contractual conditions proposed by the undertakings providing electronic communications networks and/or services. Subscribers shall be given adequate notice, not shorter than one month, of any such modification, and shall be informed at the same time of their right to withdraw, without penalty, from their contract if they do not accept the new conditions. Member States shall ensure that national regulatory authorities are able to specify the format of such notifications.'

6 Under Article 21(1) of Directive 2002/22:

'Member States shall ensure that national regulatory authorities are able to oblige undertakings providing public electronic communications networks and/or publicly available electronic communications services to publish transparent, comparable, adequate and up-to-date information on applicable prices and tariffs, on any charges due on termination of a contract and on standard terms and conditions in respect of access to, and use of, services provided by them to end-users and consumers in accordance with Annex II. Such information shall be published in a clear, comprehensive and easily accessible form. National regulatory authorities may specify additional requirements regarding the form in which such information is to be published.'

Austrian law

7 Paragraph 25 of the Law on Telecommunications 2003 (Telekommunikationsgesetz 2003) (BGBl. I, No 70/2003, 'the Law on Telecommunications'), is worded as follows:

'(1) Operators of communications networks or services must adopt standard terms and conditions of business describing, inter alia, the services offered, and lay down the charging regime applicable to those services. The general terms and conditions and the charging regime must be notified to the regulatory authority before the service begins to be provided and shall be made public an in appropriate manner.

(2) Before they come into effect, changes to the standard terms and conditions of business and the charging regime must be notified to the regulatory authority and announced appropriately. Changes that do not operate exclusively to the benefit of the subscriber must be announced and notified at least two months in advance. The provisions of the Law on consumer protection … and of the Civil Code shall otherwise remain unaffected.

(3) The substance of changes that do not operate exclusively to the benefit of the subscriber must be notified to him in writing, for example by being printed on a periodic statement of account, not less than one month before the change comes into effect. At the same time, the subscriber must be alerted to the point in time at which the changes are to come into effect and to the fact that he is entitled to terminate the contract at no cost up until that time. … Changes to the standard terms and conditions of business and charging regimes applied by operators of communications networks and services which become necessary following an order adopted by the regulatory authority on the basis of this provision and which do not operate exclusively to the benefit of users shall not entitle the subscriber to terminate the contract at no cost.

...

(5) Charging regimes must, at the very least, contain:

...

2. the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained,

...'

8 The Law on Federal Statistics 2000 (Bundesstatistikgesetz 2000) (BGBl. I, No 163/1999) lays down that the Austrian Institute for Statistics (Statistik Österreich) is responsible, inter alia, for compiling the consumer price index.

The dispute in the main proceedings and the question referred for a preliminary ruling

9 In accordance with the Austrian legislation, the Association is entitled to bring an action for an injunction prohibiting the use of standard terms and conditions of business which are contrary to statutory prohibitions or accepted principles of morality.

10 A1 Telekom Austria, a provider of telecommunications services in Austria, applies standard terms and conditions in its consumer contracts.

11 Those terms and conditions state inter alia: '[i]f the charging regime or an individual agreement makes provision for an index-linking mechanism', 'A1 [Telekom Austria] shall be entitled to raise charges for the following calendar year in accordance with the increase in the annual average of the consumer price index ["the CPI"]' and A1 [Telekom Austria] is, conjunctly 'obliged to pass on any fall in the CPI annual average and to lower the aforementioned charges in accordance with that fall. A1 [Telekom Austria] shall inform customers of the adjustments in writing'.

12 In accordance with those standard terms and conditions, '[w]here … a change does not operate exclusively to the benefit of the customer, A1 [Telekom Austria] shall announce that change publicly — unless it is to apply only to future customers — two months before it is due to come into effect. The substance of changes that do not operate exclusively to the benefit of the customer … shall be notified to the customer in writing, for example by being included on a bill, at least one month before the change is due to come into effect. The notification of the substance of the change shall include a reference to the right to terminate the contract at no cost and the requisite period of notice'.

13 Furthermore, the same terms and conditions state that '[c]hanges to charges arising from agreed indexation shall not entitle the customer to immediate termination without notice'.

14 The Association brought an action for an injunction prohibiting A1 Telekom Austria's use of the abovementioned terms in its standard terms and conditions before the Handelsgericht Wien (Commercial Court, Vienna).

15 According to the Association, an increase in charges by A1 Telekom Austria would be lawful only if the consumer is, as a result, granted an immediate right to terminate the contract.

16 The Handelsgericht Wien (Commercial Court, Vienna) having upheld the Association's action by judgment of 25 October 2012, A1 Telekom Austria brought an appeal against that judgment before the Oberlandesgericht Wien (Higher Regional Court, Vienna).

17 By judgment of 16 May 2013, the Oberlandesgericht Wien (Higher Regional Court, Vienna) amended the judgment of the Handelsgericht Wien in part. The Association and A1 Telekom Austria have both lodged an appeal in 'Revision' (on a point of law) before the referring court against the judgment of the Oberlandesgericht Wien.

18 Considering that the outcome of the main proceedings depended on the interpretation of Directive 2002/22, the Oberster Gerichtshof (Supreme Court, Austria) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is the right, provided for in Article 20(2) of … Directive [2002/22], for subscribers to withdraw from their contracts without penalty "upon notice of modifications in the contractual conditions" also to be provided for in the case where an adjustment to charges derives from contractual conditions which, from the time when the contract is first concluded, provide that future charges are to be adjusted (upwards or downwards) in accordance with changes in an objective consumer price index reflecting movements in the value of money?'

The question referred for a preliminary ruling

19 By its question, the referring court asks, in essence, whether Article 20(2) of Directive 2002/22 must be interpreted as meaning that a change in charges for the provision of electronic communications networks or services, resulting from the operation of a price adjustment clause contained in the standard terms and conditions applied by an undertaking providing such services, the term providing that such a change applies in accordance with changes in an objective consumer price index compiled by a public institution, constitutes a 'modification to the contractual conditions' within the meaning of that provision, which grants the subscriber the right to withdraw from the contract without penalty.

20 As a preliminary point, it should be recalled that Directive 2002/22 is intended to create a harmonised regulatory framework which secures, in the electronic communications sector, the delivery of universal service, that is to say, of a defined minimum set of services to all end-users at an affordable price. According to Article 1(1) of that directive, one of its objectives is to ensure the availability throughout the Community of good-quality publicly available services through effective competition and choice (see, to that effect, judgment in *Base and Others*, C-389/08, EU:C:2010:584, paragraph 32 and the case-law cited).

21 The provisions of Chapter IV of Directive 2002/22 are intended to protect end-user interests and rights.

22 In recital 30 in the preamble to Directive 2002/22, the EU legislature stated that contracts for services for connecting to a public communications network or publicly available electronic communications are an important tool for users and consumers to ensure a minimum level of transparency of information and legal security. In recital 49 in the preamble to that directive, the EU legislature also referred to tariff transparency for consumers. It is against that background that Article 20(1)(d) of the

directive lays down that the contract shall specify in a clear, comprehensive and easily accessible form, inter alia, details of prices and tariffs and the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained.

23 In addition, pursuant to Article 21(1) of Directive 2002/22, Member States are to ensure that national regulatory authorities are able to oblige undertakings providing public electronic communications networks and/or publicly available electronic communications services to publish transparent, comparable, adequate and up-to-date information on, inter alia, applicable prices and tariffs, on any charges due on termination of a contract and on standard terms and conditions in respect of access to, and the use of, services provided by them to end-users and consumers. Such information must be published in a clear, comprehensive and easily accessible form.

24 Article 20(2) of Directive 2002/22 also requires the Member States to ensure that subscribers have a right to withdraw from their contract without penalty upon notice of modification to the contractual conditions proposed by the undertakings providing electronic communications services. The Member States must ensure that subscribers be given adequate notice, not shorter than one month, of any such modification, and are informed at the same time of their right to withdraw, without penalty, from their contract if they do not accept the new conditions.

25 Having regard to those provisions, it can be concluded that the EU legislature recognised that undertakings providing electronic communications services may have a legitimate interest in being able to adjust the prices and charges for their services (see, by analogy, judgment in *RWE Vertrieb*, C-92/11, EU:C:2013:180, paragraph 46).

26 In the present case, as is clear from the order for reference and the question referred, the term at issue contained in A1 Telekom Austria's standard terms and conditions provides for an adjustment of charges in accordance with changes in an objective consumer price index compiled by a public institution, namely, the Austrian Institute for Statistics (Statistik Österreich).

27 It follows that price adjustments thus provided for in the contract, in so far as they are based on a clear, comprehensive and easily accessible price index, resulting from State decisions and mechanisms, cannot place end-users in a contractual situation any different from that which arises from a contract in which the term at issue is provided for in the standard terms and conditions of that contract.

28 Consequently, the operation of such a change in charges cannot be characterised as a modification to the contractual conditions, within the meaning of Article 20(2) of Directive 2002/22.

29 In the light of the foregoing considerations, the answer to the question referred is that Article 20(2) of Directive 2002/22 must be interpreted as meaning that a change in charges for the provision of electronic communications networks or services, resulting from the operation of a price adjustment clause contained in the standard terms and conditions applied by an undertaking providing such services, the term providing that such a change applies in accordance with changes in an objective consumer price index compiled by a public institution, does not constitute a 'modification to the contractual conditions' within the meaning of that provision, which grants the subscriber the right to withdraw from the contract without penalty.

Costs

30 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 20(2) 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, must be interpreted as meaning that a change in charges for the provision of electronic communications networks or services, resulting from the operation of a price adjustment clause contained in the standard terms and conditions applied by an undertaking providing such services, the term providing that such a change applies in accordance with changes in an objective consumer price index compiled by a public institution, does not constitute a 'modification to the contractual conditions' within the meaning of that provision, which grants the subscriber the right to withdraw from the contract without penalty.

[Signatures]