[DE] No Volume-Based Speed Caps for Flat-Rate Internet Customers

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In a ruling of 30 October 2013, the Landgericht Köln (Cologne District Court) decided that Deutsche Telekom AG was not allowed to cap transmission speeds when fixed-network Internet customers who had paid a “flat rate” subscription fee exceeded data limits. An action had been brought by the Verbraucherzentrale Nordrhein-Westfalen (North Rhine-Westphalia consumer advice centre), which is authorised as an eligible institution under Articles 3 and 4 of the Unterlassungsklagengesetz (Injunctions Act - UKlaG) to bring actions concerning the use of invalid general terms and conditions.

The court held that a clause in the service description that was supposed to apply to contracts concluded after 2 May 2013 for certain “Call&Surf Comfort” tariffs was invalid because it created an unreasonable disadvantage under the terms of Article 307(1) and (2)(2) of the Bürgerliches Gesetzbuch (Civil Code - BGB). The clause was also “surprising” in the sense of Article 305c(1) BGB.

The relevant clause of the general terms and conditions was not exempt from the review of subject-matter required under Article 307(3)(1) BGB, as Deutsche Telekom had argued. It did not describe the kind, extent or quality of the main service due, but limited or amended the main service promised elsewhere in the service description.

The clause restricted essential contractual rights in such a manner that there was a risk that the purpose of the contract would not be achieved, in the sense of Article 307(2)(2) BGB, as a result of which an unreasonable disadvantage was found. According to the court, the purpose of this contract was based on an interpretation of the term “flat rate”. At least in the fixed-network market, this was understood to mean a fixed price paid by the customer for Internet access at a certain broadband speed without any restrictions or hidden costs. The disadvantage was unreasonable because the substantial reduction in speed to less than 10% of the agreed minimum speed violated the balance between the value of the service and the price paid, jeopardising the purpose of the contract from the customer’s perspective. The court did not think the number of customers who would actually be affected by the restriction on the basis of their average monthly data consumption was relevant. Nevertheless, it expressly pointed out that such a bandwidth limit could affect not only so-called “power users”, but a

large number of other customers, particularly those who streamed television programmes and films.

The clause was also “surprising” and therefore invalid in the sense of Article 305c(1) BGB, firstly because it was incompatible with the overall concept of the contract and contradicted the relevant advertising claims, which meant it was an unusual clause. Secondly, the provision was found under the heading “Data volumes”, which made no mention of any speed caps. Since the average customer would not have expected such an unusual clause, it should have been emphasised typographically.

Urteil des LG Köln vom 30. Oktober 2013 (Az. 26 O 211/13)

http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2013/26_O_211_13_Teil_Anerkenntnis_und_Schlussurteil_20131030.html

Decision of the Cologne District Court of 30 October 2013 (case no. 26 O 211/13)