[DE] Price increase clause in Netflix terms and conditions is unlawful

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In a decision of 15 April 2021, the *Bundesgerichtshof* (Federal Supreme Court – BGH) rejected a complaint from Netflix about a court's refusal to hear its appeal against a lower-instance decision concerning the general terms and conditions of the video-on-demand service and certain advertising practices in Germany. As a result, the previous ruling of the *Berliner Kammergericht* (Berlin Court of Appeal) of 20 December 2019 (5 U24/19) became final, forcing Netflix, among other things, to amend the clause in its terms and conditions regarding price increases which, at least where its service in Germany was concerned, had been deemed unlawful.

Netflix International B.V., which has its headquarters in the Netherlands, also provides a subscription-based video streaming service in Germany. In 2017, customers subscribing to the service via the Netflix website, after entering their personal details, had to click on a button labelled "*MITGLIEDSCHAFT BEGINNEN KOSTENPFLICHTIG NACH GRATISMONAT*" (Start membership. Fee applies after free month). They also had to accept the company's terms and conditions, which contained the following rule: "Our subscription offer and prices for the Netflix service may change from time to time. However, you will be informed of any such changes at least 30 days before they enter into force." The *Verbraucherzentrale Bundesverband* (vzbv), the federation of Germany's 16 consumer organisations and 25 other consumer and socially oriented organisations, launched court proceedings against both the commercial nature of the order button and the price increase clause. It argued that the order button was primarily designed to advertise the free first month and was potentially misleading because it was not necessarily clear to consumers that clicking on it created a payment obligation. It also claimed that the price increase clause breached the requirement for company terms and conditions to be transparent because it did not explain what factors might lead to a price increase, leaving Netflix free to raise its prices whenever it chose to without any form of control. It concluded that both of these practices infringed consumer protection rules enshrined in German civil law (Article 312j(3) of the *Bürgerliches Gesetzbuch* (Civil Code – BGB) on obligations in electronic commerce and Articles 307(1) and 308(4) BGB on business terms and conditions). The Berlin Court of Appeal upheld the vbzv's complaint. It ruled that the order button for an online subscription should clearly and exclusively mention the consumer's obligation to pay and not contain any advertising that

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might divert attention away from it. Although price adjustment clauses were not, in principle, unlawful, they were if they allowed a company to increase an initially agreed price without any restriction above and beyond any increase in its own costs, and therefore not only to mitigate a fall in profits but to increase its profit margin. Such clauses were (only) admissible if price rises were linked to an increase in costs and if individual cost components and their weighting in the calculation of the overall price were disclosed, i.e. as a response to actual fluctuations in the cost of providing the video-on-demand service. Netflix appealed to the BGH against the court's decision not to allow its ruling to be appealed. The BGH's decision rejecting its application therefore only concerns procedural aspects: an appeal to the BGH is only possible in Germany if (among other things) the amount in dispute reaches a certain threshold, which it did not in this case. The *Kammergericht* had only set this at EUR 17,500 in relation to the price increase clause. According to the BGH, Netflix had failed to dispute this sum in time and with sufficient force in the prior proceedings. The arguments put forward by Netflix, one of the world's largest producers of audiovisual content in the form of films and TV series, whose method of setting subscription prices was therefore extremely complicated and depended in particular on fluctuating licensing costs, had been submitted too late.

While the decisions of the BGH and the lower-instance courts are primarily based on consumer protection and procedural law, they are also relevant to economic aspects of the audiovisual market surrounding Netflix, although they only concern the Netflix service in Germany. Although Netflix failed to assert the economic importance of the price adjustment clause in time, the clause is totally impractical for consumers, competitors and licensors, as well as Netflix itself.

Beschluss des BGH vom 15. April 2021

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=I%20ZR%2023/20&nr=118591

Federal Supreme Court decision of 15 April 2021

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