[DE] Federal Supreme Court rules on operating costs for broadband cable connections

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In a judgment of 18 November 2021, the 1st civil chamber of the *Bundesgerichtshof* (Federal Supreme Court – BGH), whose field of jurisdiction includes competition law, decided that residential tenancy agreements can bind a tenant to a paid broadband cable connection, provided by a landlord, for the entire duration of the agreement.

The proceedings had been instigated by the *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (Office Against Unfair Competition) against a landlord with more than 120 000 rental properties, around 108 000 of which are connected to a cable television network that carries television and radio channels as well as other services such as telephony and Internet. Under the tenancy agreements, the cost paid by the defendant to provide the radio and television service, via the cable network, is passed on to tenants in the form of operating costs. The tenants have no right to cancel the radio and television service provided to their homes during their tenancy agreement.

The plaintiff argued that an anti-competitive act had been committed in breach of Article 43b of the *Telekommunikationsgesetz* (Telecommunications Act – TKG) because the tenancy agreements did not contain any rule allowing cable subscriptions to be cancelled after a 24 month period and the defendant did not offer tenancy agreements under which the provision of cable connections was limited to a maximum of 12 months. The plaintiff called on the defendant to desist.

The court decided that the defendant had not breached Article 43b TKG by tying their tenants to the paid cable TV connection they provided. It was true that, by providing the connection, the defendant was providing a telecommunications service as defined in Article 3(24) TKG. In view of the large number of homes rented out by the defendant that were equipped with a cable TV connection, this service was also publicly available within the meaning of Article 3(17a) TKG.

However, the tenancy agreements between the defendant and their tenants did not mention a minimum term greater than 24 months (Art. 43b(1) TKG). The defendant also did not refuse to allow their tenants to sign tenancy agreements with a maximum term of 12 months (Article 43b(2) TKG). Rather, their tenancy

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agreements did not have a specific term and could be cancelled by tenants – in accordance with Article 573c(1)(1) of the *Bürgerliches Gesetzbuch* (Civil Code – BGB) – from the third working day of a calendar month to the end of the second month thereafter. Article 43b TKG therefore did not directly apply to the tenancy agreements used by the defendant. The application of Article 43b TKG to the defendant's relationship with their tenants was ruled out. The historical development of the relevant rules showed that the legislator had not intended for Article 43b TKG to apply to large housing companies that rented out homes equipped with cable TV connections and passed the cost of the connections to the tenants as operating costs. The same conclusion could be drawn from the forthcoming amendment of the TKG. According to the new Article 71(1)(1) and (3) TKG, which entered into force on 1 December 2021, consumers are allowed to cancel telecommunications services as part of a tenancy agreement after 24 months. However, under the transitional provision of Article 230(4) TKG, this rule will not be applicable until 1 July 2024 if the fee – as in the present case – is exclusively charged in the form of operating costs.

The *Telekommunikationsmodernisierungsgesetz* (Telecommunications Modernisation Act – TKModG) of 23 June 2021 (Federal Gazette I p. 1858) aims, *inter alia* (by amending the TKG and the *Betriebskostenverordnung* (Regulation on Operating Costs)), to abolish the so-called ancillary costs privilege currently enjoyed by landlords. As a result, tenants will, in future, be able to decide themselves whether and how they use a cable connection. The current practice of passing on the cost of existing cable equipment will need to end by 30 June 2024 (see Article 71(2)(1) and (3), and Article 230(4) of the amended TKG). It will not apply to any equipment installed after 1 December 2021. In contrast to the ancillary costs privilege, which still applies, the revised Article 72 TKG states that only fibre optic cable costs can be passed on to tenants – and only if a new, exclusively fibre cable infrastructure is installed and operated inside the building. These costs can also only be passed on for a maximum of five years.

Urteils des BGH (Az. I ZR 106/20)

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021215.html

Federal Supreme Court ruling (case I ZR 106/20)

Gesetz zur Umsetzung der Richtlinie (EU) 2018/1972 des Europäischen Parlaments und des Rates vom 11. Dezember 2018 über den europäischen Kodex für die elektronische Kommunikation (Neufassung) und zur Modernisierung des Telekommunikationsrechts (Telekommunikationsmodernisierungsgesetz)

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https://dserver.bundestag.de/brd/2021/0325-21.pdf

Act implementing Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (recast) and modernising telecommunications law (Telecommunications Modernisation Act)

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