Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

3 September 2020*

(Reference for a preliminary ruling — Roaming on public mobile communications networks within the European Union — Regulation (EU) No 531/2012 — Article 6a — Article 6e(3) — Roaming provider required to automatically apply the regulated roaming tariff — Application to consumer having opted for a specific roaming tariff prior to the entry into force of Regulation (EU) No 531/2012)

In Case C-539/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht München I (Regional Court, Munich I, Germany), made by decision of 4 June 2019, received at the Court on 15 July 2019, in the proceedings

Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV

v

Telefónica Germany GmbH & Co. OHG,

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, J. Malenovský and N. Wahl (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Telefónica Germany GmbH & Co. OHG, by H. Plassmeier, Rechtsanwalt,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

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

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 6a and Article 6e(3) of Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (OJ 2012 L 172, p. 10), as amended by Regulation (EU) No 2015/2120 of the European Parliament and of the Council of 25 November 2015 (OJ 2015 L 310, p. 1) ('Regulation No 531/2012').

2 The request has been made in proceedings between Telefónica Germany GmbH & Co. OHG, a telecommunications service provider which operates, inter alia, under the name 'O2', and the Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV (Federal Union of consumer organisations and associations, Germany) ('the Bundesverband') concerning an injunction brought by the latter against O2's practices relating to the arrangements for switching to the new regulated roaming tariff at European Union level, following the abolition, with effect from 15 June 2017, of retail roaming surcharges within the Union.

Legal context

Regulation No 531/2012

3 Within the meaning of Article 2(2)(r) of Regulation No 531/2012 the 'domestic retail price' is defined as follows:

'a roaming provider's domestic retail per-unit charge applicable to calls made and SMS messages sent (both originating and terminating on different public communications networks within the same Member State), and to data consumed by a customer; in the event that there is no specific domestic retail per-unit charge, the domestic retail price shall be deemed to be the same charging mechanism as that applied to the customer for calls made and SMS messages sent (both originating and terminating on different public communications networks within the same Member State), and data consumed in that customer's Member State.'

4 Article 6a of that regulation, entitled 'Abolition of retail roaming surcharges', provides:

'With effect from 15 June 2017, … roaming providers shall not levy any surcharge in addition to the domestic retail price on roaming customers in any Member State for any regulated roaming calls made or received, for any regulated roaming SMS messages sent and for any regulated data roaming services used, including MMS messages, nor any general charge to enable the terminal equipment or service to be used abroad, subject to Articles 6b and 6c.'

5 Article 6b of that regulation, entitled 'Fair use', is worded as follows:

'1. Roaming providers may apply … a "fair use policy" to the consumption of regulated retail roaming services provided at the applicable domestic retail price level, in order to prevent abusive or anomalous usage of regulated retail roaming services by roaming customers, such as the use of such services by roaming customers in a Member State other than that of their domestic provider for purposes other than periodic travel.

Any fair use policy shall enable the roaming provider's customers to consume volumes of regulated retail roaming services at the applicable domestic retail price that are consistent with their respective tariff plans.

2. Article 6e shall apply to regulated retail roaming services exceeding any limits under any fair use policy.'

6 Under Article 6c(1) of Regulation No 531/2012, entitled 'Sustainability of the abolition of retail roaming surcharges':

'In specific and exceptional circumstances, with a view to ensuring the sustainability of its domestic charging model, where a roaming provider is not able to recover its overall actual and projected costs of providing regulated roaming services in accordance with Articles 6a and 6b, from its overall actual and projected revenues from the provision of such services, that roaming provider may apply for authorisation to apply a surcharge. That surcharge shall be applied only to the extent necessary to recover the costs of providing regulated retail roaming services having regard to the applicable maximum wholesale charges.'

7 Article 6e of that regulation, entitled 'Provision of regulated retail roaming services', states in paragraphs 1 and 3:

'1. Without prejudice to the second subparagraph, where a roaming provider applies a surcharge for the consumption of regulated retail roaming services in excess of any limits under any fair use policy, it shall meet the following requirements (excluding VAT):

…

3. Roaming providers may offer, and roaming customers may deliberately choose, a roaming tariff other than one set in accordance with Articles 6a, 6b, 6c and paragraph 1 of this Article, by virtue of which roaming customers benefit from a different tariff for regulated roaming services than they would have been accorded in the absence of such a choice. The roaming provider shall remind those roaming customers of the nature of the roaming advantages which would thereby be lost.

Without prejudice to the first subparagraph, roaming providers shall apply a tariff set in accordance with Articles 6a and 6b, and paragraph 1 of this Article to all existing and new roaming customers automatically.

Any roaming customer may, at any time, request to switch to or from a tariff set in accordance with Articles 6a, 6b, 6c and paragraph 1 of this Article. When roaming customers deliberately choose to switch from or back to a tariff set in accordance with Articles 6a, 6b, 6c and paragraph 1 of this Article, any switch shall be made within one working day of receipt of the request, shall be free of charge and shall not entail conditions or restrictions pertaining to elements of the subscriptions other than roaming. Roaming providers may delay a switch until the previous roaming tariff has been effective for a minimum specified period not exceeding two months.'

8 Article 6f of that regulation, entitled 'Transitional retail roaming surcharges', provides:

'1. From 30 April 2016 until 14 June 2017, roaming providers may apply a surcharge in addition to the domestic retail price for the provision of regulated retail roaming services.

2. During the period referred to in paragraph 1 of this Article, Article 6e shall apply *mutatis mutandis*.'

9 Article 14 of Regulation No 531/2012, entitled 'Transparency of retail charges for roaming calls and SMS messages', provides in paragraph 3:

'Roaming providers shall provide all customers with full information on applicable roaming charges, when subscriptions are taken out. They shall also provide their roaming customers with updates on applicable roaming charges without undue delay each time there is a change in these charges.

Roaming providers shall send a reminder at reasonable intervals thereafter to all customers who have opted for another tariff.'

Regulation 2015/2120

10 Recitals 21 and 25 of Regulation 2015/2120 state:

'(21) [Regulation No 531/2012 in its original version] establishes the policy objective that the difference between roaming and domestic tariffs should approach zero. However, the ultimate aim of eliminating the difference between domestic charges and roaming charges cannot be attained in a sustainable manner with the observed level of wholesale charges. Therefore this Regulation sets out that retail roaming surcharges should be abolished from 15 June 2017, provided that the issues currently observed in the wholesale roaming markets have been addressed. In this respect, the [European] Commission should conduct a review of the wholesale roaming market, and should submit a legislative proposal based on the outcome of that review.

…

(25) In order to ensure a smooth transition from Regulation [No 531/2012 in its original version] to the abolition of retail roaming surcharges, this Regulation should introduce a transitional period, in which the roaming providers should be able to add a surcharge to domestic prices for regulated retail roaming services provided. That transitional regime should already prepare the fundamental change in approach by incorporating Union-wide roaming as an integral part of domestic tariff plans offered in the various domestic markets. Thus, the starting point of the transitional regime should be the respective domestic retail prices, which may be subject to a surcharge no greater than the maximum wholesale roaming charge applicable in the period immediately preceding the transitional period. Such a transitional regime should also ensure substantial price cuts for customers from the date of application of this Regulation and should not, when the surcharge is added to the domestic retail price, lead under any circumstances to a higher retail roaming price than the maximum regulated retail roaming charge applicable in the period immediately preceding the transitional period.'

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

11 Telefónica Germany is a provider of telecommunications services which offers, inter alia, mobile communications services under the name 'O2'.

12 Following the adoption of Regulation 2015/2120, O2 published on its website www.o2online.de information on the arrangements for switching to the new regulated roaming tariff at EU level, corresponding, in principle, to the service 'Roam like at home' ('RLAH'). More specifically, under the tab entitled 'General information' of that website, the following is set out:

'From 22 May 2017, all O2 customers can also switch to the regulated EU roaming tariff by SMS. To do so, please send an SMS with the word "YES" to 65544. You will then be automatically switched to the regulated tariff. You will receive a confirmatory SMS once the switch is complete.'

13 It is apparent from the tab entitled 'How do I get the regulated EU roaming tariff?' of that site that:

'You can basically switch to the regulated EU roaming tariff at any time quite simply via the O2 app. From 22 May 2017, all O2 customers can also switch to the regulated EU roaming tariff by SMS. To do so, please send an SMS with the word "YES" to 65544. You will then be automatically switched to the regulated tariff. You will receive a confirmatory SMS once the switch is complete.

If you are already on the regulated EU roaming tariff (also called "Roaming Basic" or "World Zones Pack" and "Mobile Internet International"), you will be switched by 15 June 2017 without any action on your part. Your current regulated roaming tariff will then be automatically transferred to the new regulated EU roaming tariff, which means that the domestic conditions governing your tariff (for calls, SMS and data) will also then apply to you in other EU countries from 15 June 2017.'

14 According to the Bundesverband, the arrangements for switching to the new regulated roaming tariff, such as stated on the O2 website, required, in essence, O2 customers who, prior to 15 June 2017, were charged a tariff other than the regulated roaming tariff ('the other tariff' or 'the alternative tariff') to send O2 a special notification to benefit from the new regulated roaming tariff, and in particular the RLAH, by sending an SMS and/or through the O2 app. The Bundesverband, taking the view that that practice was contrary in particular to Article 6a and Article 6e(3) of Regulation No 531/2012, brought an injunction against that practice before the referring court, the Landgericht München I (Regional Court, Munich I, Germany).

15 In that action, the Bundesverband claims that, under those provisions, the RLAH had to be automatically applied to all consumers from the date of entry into force of that regulation, namely 15 June 2017. According to the Bundesverband, O2 was therefore required to ensure that all of its customers automatically benefitted from the RLAH, irrespective of whether they had previously opted for the alternative tariff. Therefore, O2 could not require its customers who were charged according to the other tariff to indicate their intention to change the tariff in order to benefit from the RLAH.

16 Telefónica Germany maintains that, in the context of the application of Regulation No 531/2012, a distinction must be drawn between two types of roaming tariffs, namely the regulated tariff and the 'alternative' tariff. The regulated tariff is a standard tariff which, in principle, cannot be increased by comparison with the national retail tariff, whereas the alternative tariff may provide for conditions which depart from those of the national retail tariff. According to Telefónica Germany, that regulation required customers who were already invoiced in accordance with the regulated tariff before 15 June 2017 to be automatically entitled to the RLAH. In contrast, under Article 6e(3) of that regulation, the obligation to switch automatically to the RLAH did not apply to customers who were charged according to the alternative tariff on 15 June 2017.

17 The referring court takes the view that the question whether, from 15 June 2017, the new regulated roaming tariff had to be applied automatically to all customers is decisive for the outcome of the dispute in the main proceedings, in particular since, even after the final date of 15 June 2017, O2 had not allowed all customers who were subject to the alternative tariff to benefit from the new regulated roaming tariff.

18 In those circumstances, the Landgericht München I (Regional Court, Munich I) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are Articles 6a and 6e(3) of Regulation (EU) No 531/2012 to be interpreted as meaning that, as from 15 June 2017, mobile communications operators were required automatically to switch all customers to the regulated tariff under Article 6a of Regulation (EU) No 531/2012 regardless of whether those customers hitherto had a regulated tariff or a special, so-called alternative, roaming tariff?'

Consideration of the question referred

19 By its question, the referring court asks, in essence, whether Article 6a and Article 6e(3) of Regulation No 531/2012 must be interpreted as meaning that the new regulated roaming tariff referred to in Article 6a of that regulation applies automatically, with effect from 15 June 2017, not only to customers who already had a regulated roaming tariff, but also to customers who, until that date, had opted for another tariff.

20 In order to answer that question, it must be noted that, in accordance with the settled case-law of the Court, in interpreting a provision of EU law it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part (judgment of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and Others*, C-197/18, EU:C:2019:824, paragraph 48 and the case-law cited).

21 In the first place, it should be noted, at the outset, that it is apparent from the wording of Article 6a of Regulation No 531/2012 that the switch to the RLAH was to take place, in general, with effect from 15 June 2017, 'to roaming customers in any Member State', without that provision containing exceptions or provisos linked to those 'roaming customers' or, a fortiori, any provisos connected with whether those customers had until then been entitled to another tariff. The only provisos expressed in Article 6a of Regulation No 531/2012 derive from Article 6b, entitled 'Fair use', and from Article 6c, entitled 'Sustainability of the abolition of retail roaming surcharges', of that regulation, which set the framework within which roaming service providers may, respectively, apply a reasonable policy for using the RLAH and, exceptionally, apply roaming surcharges.

22 Next, the automatic nature of the switch to regulated roaming tariffs for all customers is confirmed by the wording of Article 6e(3) of Regulation No 531/2012.

23 First, the first paragraph of that provision allows roaming service providers to 'offer' and roaming customers to 'deliberately choose' a 'roaming tariff other than one set in accordance with Articles 6a, 6b and 6c … [which] they would have been accorded in the absence of such a choice'. Article 6e(3) of Regulation No 531/2012 thus establishes an 'opt-out' system, according to which, in essence, if a customer does not wish to benefit from the RLAH, he or she must expressly demonstrate it. That interpretation is, moreover, confirmed by the last sentence of the first paragraph of that provision, which provides that 'the roaming provider shall remind those roaming customers of the nature of the roaming advantages which would thereby be lost [if they had to choose a roaming tariff other than that set in accordance with Articles 6a, 6b and 6c of that regulation]'. Moreover, the wording of that provision does not lay down a temporal framework for its application, from which it may be inferred that such a choice of 'opt-out' could be made even before the deadline of 15 June 2017. Thus, in order to exercise such a choice before that date and to maintain another tariff after that date, roaming service providers were required to contact the customers concerned before that date to ask them whether they wished to retain their other tariffs, reminding them of 'the nature of the roaming advantages which would thereby be lost [by making that choice]'. Under that rule, if a customer replied in the negative or did not reply, he or she was automatically subject to the RLAH tariff.

24 Second, the second subparagraph of Article 6e(3) of Regulation No 531/2012 confirms that 'roaming service providers shall apply a [regulated roaming tariff] to all existing and new roaming customers automatically'. Therefore, the fact that that automatic application affects 'all customers', without distinction according to the profile of customers or the tariff which had applied to them until then, is unequivocal. To that effect, the introductory part of that second subparagraph ('without prejudice to the first subparagraph') serves to emphasise that the other tariff may continue to be offered even after the entry into force of the RLAH tariff, provided that the conditions of the first subparagraph of Article 6e(3) of Regulation No 531/2012 are met and, in particular, that the customer 'deliberately chose' it.

25 In the second place, as regards the context of Article 6a and Article 6e(3) of Regulation No 531/2012, it should be noted that those provisions were introduced by Regulation 2015/2120 for the abolition of retail roaming surcharges within the Union.

26 As is apparent from recital 21 of Regulation 2015/2120, the EU legislature found that, taking into account the observed level of wholesale charges, the removal of the difference between national and roaming charges, which was the ultimate objective of Regulation No 531/2012, as stated in recital 3 of that regulation in its original version, could not be achieved on a lasting basis, which was why it was decided to remove retail roaming surcharges from 15 June 2017.

27 The automatic nature of that switch to the RLAH is also apparent from recital 25 of Regulation 2015/2120, which provides for a 'transitional period, in which the roaming providers should be able to add a surcharge to domestic prices …', without however making any reference to the other tariff, or even to the possibility of making the application of the RLAH conditional on a corresponding declaration from customers to providers.

28 In that regard, it must be held that it is true that the original version of Regulation No 531/2012 was intended to fix, at Union level, the maximum retail price by means of a regulated 'eurotariff' charge and provided that that tariff applied automatically, from 1 July 2012, to all existing roaming customers, except for those who had already deliberately opted for a roaming tariff different from that which would have been granted to them in the absence of that choice. This is shown by recitals 48 and 77 of Regulation No 531/2012 in its original version and, as regards the 'euro-voice tariff', Article 8(2) and (3) of that regulation, concerning the 'euro-SMS tariff', Article 10(2) and (4) of that regulation and, as regards the 'euro-data tariff', Article 13(2) and (3) of that regulation.

29 However, all those provisions of the original version of Regulation No 531/2012 on the automatic application of the eurotariff were not only repealed, but, in addition, addressed a different *ratio legis* according to which the customer could benefit from another tariff which was lower than the eurotariff. Thus, in particular, Article 13(3) of Regulation No 531/2012 in its original version refers to a 'tariff which is demonstrably lower than the euro-data tariff'.

30 In contrast, in the case of the RLAH, there is in principle no price difference between the other roaming charge in the Union and the regulated roaming tariff.

31 Therefore, without excluding the possibility that the automatic switch to the RLAH might, in certain cases, as a result of a possible readaptation of the roaming contract, result in the withdrawal of certain advantages linked to the individual needs of a customer, the intention of the Union legislature to favour the automatic introduction of the RLAH with regard to all customers is unequivocal.

32 In the third place, that interpretation is borne out by the objective pursued by Regulation No 531/2012, which, as is apparent from Article 1(2) thereof and recital 21 of Regulation 2015/2120, is to 'achieve an internal market for mobile communication services and ultimately for there to be no differentiation between national and roaming tariffs'. Therefore, although the automatic switch to the RLAH for all

roaming customers fully complies with that objective, in contrast, the requirement that the RLAH be activated by means of an express expression of will ('opt-in') would be likely to run counter to that objective in situations where the other tariff remains higher than the national tariff.

33 In that regard, it must be pointed out that the 'opt-in' and 'opt-out' schemes cause equivalent inconvenience for customers, in so far as they both consist in inviting them to express their will to the roaming service provider. However, the EU legislature took the view that the scheme of automatic switching to the RLAH was the scheme that made it possible more effectively — in particular as a result of the fact that, in an opt-out system, silence amounts to approval of the RLAH — to attain the objective pursued by Regulation No 531/2012, consisting in the completion of the internal market for mobile communication services without differentiation between national and roaming tariffs.

34 In the light of the foregoing considerations, the answer to the question referred is that Articles 6a and 6e(3) of Regulation No 531/2012 must be interpreted as meaning that, as from 15 June 2017, roaming service providers were required to apply automatically to all their customers the regulated roaming tariff referred to, inter alia, in Article 6a of that regulation, irrespective of whether those customers had previously opted for a regulated roaming tariff or for an alternative tariff, unless they had, before the deadline of 15 June 2017, expressly indicated their choice to benefit from such an alternative tariff, in accordance with the procedure laid down in that regard in the first subparagraph of Article 6e(3) of that regulation.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action 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 (Eighth Chamber) hereby rules:

Articles 6a and 6e(3) of Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union, as amended by Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015, must be interpreted as meaning that, as from 15 June 2017, roaming service providers were required to apply automatically to all their customers the regulated roaming tariff referred to, inter alia, in Article 6a of that regulation, irrespective of whether those customers had previously opted for a regulated roaming tariff or for an alternative tariff, unless they had, before the deadline of 15 June 2017, expressly indicated their choice to benefit from such an alternative tariff, in accordance with the procedure laid down in that regard in the first subparagraph of Article 6e(3) of that regulation.

[Signatures]