

Case C-539/19

Request for a preliminary ruling

Date lodged:

15 July 2019

Referring court:

Landgericht München I (Germany)

Date of the decision to refer:

4 June 2019

Applicant:

Bundesverband der Verbraucherzentralen und
Verbraucherverbände — Verbraucherzentrale Bundesverband e.V.

Defendant:

Telefonica Germany GmbH & Co. OHG

Landgericht München I

(Regional Court, Munich I)

...

In the case of

**Bundesverband der Verbraucherzentralen und Verbraucherverbände, ... —
Verbraucherzentrale Bundesverband e.V., [...] 10969 Berlin**

- Applicant -

...

v

Telefonica Germany GmbH & Co. OHG, ... 80992 Munich

- Defendant -

...

concerning a claim [**Or. 2**]

the Landgericht München I

... issued on 4 June 2019 ... the following

Order:

- I. The proceedings are stayed pursuant to Paragraph 148 of the Zivilprozessordnung (Code of Civil Procedure; ZPO).
- II. The following question on the interpretation of 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 is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

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? [**Or. 3**]

Grounds:

- I. The applicant is asserting claims for injunctive relief under the law governing unfair competition against the defendant for alleged infringements of the provisions 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 ('the Roaming Regulation').
 1. The applicant is the umbrella association of all 16 consumer advice centres and 25 further consumer- and social-oriented organisations in Germany. Pursuant to Paragraph 2 of its statutes, the object of the applicant is to safeguard consumer interests, in particular by using appropriate measures to prevent infringements of the Gesetz gegen unlauteren Wettbewerb (Law Against Unfair Competition; UWG) and the Unterlassungsklagegesetz (Injunction Action Law) in conjunction with other consumer-protection laws.
 2. The defendant is a provider of telecommunications services. It provides consumers with, inter alia, the opportunity to conclude mobile communications contracts.

3. On its website www.o2online.de, the defendant published information on the regulated roaming tariff. Under the heading ‘General Information’, the defendant states the following:

‘From 22 May 2017, all O2 customers can 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.’ ... [Or. 4]

Under the heading ‘How do I get the regulated EU roaming tariff?’, the defendant goes on to state ...:

‘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.’

4. The applicant is of the opinion that, with its business practice of making the switch to a regulated roaming tariff for existing customers who had an alternative roaming tariff before 15 June 2017 conditional on consumers actively arranging that switch through an SMS or by means of the O2 app, the defendant is in breach of Articles 6a and 6e(3) of the Roaming Regulation. Pursuant to Article 6e(3), second subparagraph, of the Roaming Regulation, the conditions were to be automatically made available to the consumers when that regulation entered into force, that is to say, on 15 June 2017. An active switch on the part of the consumers, in order to be able to make use of ‘Roam Like At Home’, should not be required. The defendant was obliged automatically to switch to [Or. 5] ‘Roam Like At Home’ roaming, regardless of whether or not consumers had previously chosen a special roaming tariff. In fact, the defendant provides that consumers are to enjoy the benefits of the regulated roaming tariff only if they make a special declaration to the defendant. By so acting, it is

submitted, the defendant is in breach of Article 6e(3) of the Roaming Regulation.

The applicant therefore requests ... that the defendant be ordered, on pain of incurring statutory penalties, to cease and desist, within the scope of business activities on the internet relating to consumers within the scope of existing mobile communications contracts (apart from consumers with the 'Roaming Basic', 'World Zones Pack' and/or 'Mobile Internet International' tariffs), from making the use of the regulated roaming tariff (Roam Like At Home), in force as from 15 June 2017, conditional on consumers making a corresponding declaration to the defendant (in particular by sending an SMS with the word 'YES' to the number 65544 and/or making a switch via the O2 app).

5. The defendant takes issue with this and claims that, with the application of the Roaming Regulation, a distinction is to be made between two types of roaming tariffs: regulated roaming tariffs and alternative roaming tariffs. Regulated tariffs, it submits, are standard tariffs, with which no surcharges on the domestic end customer tariff may in principle be imposed. In addition, mobile communications operators can also provide alternative roaming tariffs, with conditions differing from the domestic end customer tariff. The Roaming Regulation indisputably requires automatic application of the 'Roam Like At Home' tariff for customers who were already on the regulated roaming tariff before 15 June 2017. However, the obligation to switch over automatically under Article 6e(3) of the Roaming Regulation does not apply [Or. 6] to customers who were on an alternative tariff on 15 June 2017.
- II. The question raised concerns the interpretation of secondary [EU] law. The clarification thereof is relevant to the ruling to be made in the present case, since the success of the form of order sought by the applicant ... depends on the interpretation of Articles 6a and 6e(3) of the Roaming Regulation, which regulates the abolition of end customer roaming surcharges. As the defendant has not yet switched all customers who were on an alternative tariff on 15 June 2017 to the 'Roam Like At Home' tariff, the suspected fault condition persists. It was not resolved for instance with the passing of the key date of 15 June 2017.
1. The applicant is entitled to make the ... claim for injunctive relief sought if Articles 6a and 6e(3) of the Roaming Regulation require an automatic switch-over of contracts to the regulated 'Roam Like At Home' tariff as contemplated in Article 6a of the Roaming Regulation not only for customers who already had a regulated tariff on 15 June 2017, but also for customers who were on a special, so-called alternative roaming tariff on the key date.

2. The question of whether the automatic switch-over to the regulated tariff under Article 6a of the Roaming Regulation concerns only contracts of customers who hitherto had a regulated tariff or whether Article 6e(3) of the Roaming Regulation requires an automatic switch-over of contracts also for those customers who were on a special, so-called alternative roaming tariff has — as far as can be ascertained — not yet been resolved by any of the higher courts. No opinions in the legal literature are to be found in this regard either. There are, however, diverging views expressed by the European Commission, on the one hand, and, on the other, by the Federal Government of the Federal Republic of Germany and the Federal Network Agency as the national regulatory authority within the meaning of Article 16 of the Roaming Regulation. **[Or. 7]**
- (a) The European Commission states the following on the website of the European Union under the heading ‘Roam Like At Home: Frequently Asked Questions’ [...]

‘8. I already have a particular roaming tariff plan which I have specifically chosen (for instance: I pay a bit more than the EU regulated roaming price in the EU, but I have very good prices when roaming in the US and Canada where I often travel). Can I keep it after 15 June 2017?’

Yes. Your operator will contact you ahead of 15 June 2017 and ask you if you want to keep your specific roaming tariff. If you confirm, you will keep it. If you reply negatively or do not reply, you will be switched automatically to the new roam like at home rules.’

The applicant’s representative subscribes to the view taken by the Commission and additionally states that, according to the wording of Article 6e(3) of Regulation (EU) No 531/2012, the regulated tariffs provided for in Articles 6a and 6b are specifically to be ‘automatically’ applied to ‘all existing and new roaming customers’. Therefore, absolutely no distinction is made between those ‘existing’ customers who used a regulated tariff before 15 June 2017 and those ‘existing’ customers who used an alternative tariff before 15 June 2017. This interpretation is also consistent with the spirit and purpose. The legislature envisages that consumers should fundamentally benefit from the regulated roaming tariff. Only if they actively opt for an alternative tariff should that tariff **[Or. 8]** be taken into consideration. The fact that consumers have opted for the alternative tariff when the regulated tariff was still much less attractive does not support the conclusion that this weighing-up decision would be made in the same way today.

- (b) By contrast, on 22 August 2017, the Federal Government responded to an inquiry as follows:

‘Mobile communications operators must automatically switch all customers who have a regulated tariff (formerly euro tariff) to the regulated RLAH (Roam Like at Home) tariff. Customers with alternative tariffs must be informed that, as from 15 June 2017, the regulated RLAH tariffs apply and it is possible to switch from an alternative tariff to the regulated RLAH at any time within one day and at no cost’

On its website, the Federal Network Agency also replies as follows to the question ‘Will my contract be automatically switched to Roam Like At Home on 15 June 2017?’:

‘This depends on whether you have opted for an alternative tariff or use a regulated tariff. If you use an alternative tariff, your mobile communications operator will inform you of the start of RLAH and the associated advantages. You can switch (back) to a regulated roaming tariff free of charge at any time.’

The view taken by the Federal Government and Federal Network Agency is shared by the defendant, which is of the opinion that, according to the wording and scheme of Article 6e(3) [Or. 9] of the Roaming Regulation, the obligation automatically to switch existing contracts applied only to regulated tariffs, and not to alternative tariffs. The existence of an obligation automatically to switch alternative tariffs is, it submits, also undermined by the spirit and purpose of the Regulation. Alternative roaming tariffs usually involve conditions which have been deliberately selected by the consumer on the basis of his individual use behaviour and are advantageous thereto in comparison with a regulated roaming tariff (for example because he is a frequent user in certain countries and has selected his roaming tariff in liner with that use). If the defendant were automatically to switch alternative roaming tariffs tailored to the individual needs of the customer to the regulated roaming tariff, the customer would be deprived of those specifically chosen advantages without his consent. The customer’s contractual freedom would thereby be adversely interfered with. However, the defendant’s customers on alternative tariffs are able to switch to the regulated tariff at any time within one working day. The defendant also reminds them of that possibility, as provided for in Article 14(3) of the Roaming Regulation. The fact that the legislature configured Article 6e(3) of the Roaming Regulation in relation to the alternative tariffs as an ‘opt-in’ provision and specifically did not want to compel mobile communications operators to make an automatic switch-over is also, it is submitted, made clear by the new Article 5a of the Roaming Regulation introduced in

December 2018.¹ The revision introduces, inter alia, a maximum charge for ‘regulated intra-EU communications’, which applies to regulated tariffs, but not to alternative tariffs. The new Article 5a(3) compels mobile communications operators automatically to switch an existing customer on an alternative tariff to a regulated tariff if the alternative tariff exceeds the maximum charge and the customer does not state that he would like to keep the alternative tariff. Article 5a(3) therefore contains an ‘opt-out provision’. If the legislature had intended, in Article 6e(3), likewise to establish an obligation for [Or. 10] mobile communications operators automatically to switch existing customers to alternative tariffs, it would also have provided an ‘opt-out provision’ here.

III. It is a matter for the Court of Justice to rule on which interpretation is to be followed, for which reason a preliminary ruling is sought ...

¹ Translator’s note: contrary to what the original German text states, the new Article 5a referred to appears to be that in Regulation (EU) 2015/2120 of 25 November 2015 (OJ 2015 L 310, p. 1), as amended by Regulation (EU) 2018/1971 of 11 December 2018 (OJ 2018 L 321, p. 1).