



Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 24 October 2013¹

Case C-616/11

T-Mobile Austria GmbH
v
Verein für Konsumenteninformation

(Request for a preliminary ruling from the Oberster Gerichtshof (Austria))

(Approximation of laws — Payment services — General prohibition of management charges for the use of a payment instrument — Contract between a digital telephony operator and private individuals)

I – Introduction

1. This request for a preliminary ruling concerns the power of the Member States to prohibit or limit the practice of surcharging which they have under Article 52(3) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC² ('the Directive').

2. By surcharging, undertakings impose on their customers costs for using a given payment instrument. In particular, the practice is designed to ensure that the customers bear the cost of using credit or debit cards.

3. The questions raised by the referring court seek to establish whether Article 52(3) of the Directive applies to mobile phone companies, whether a credit transfer constitutes a payment instrument within the meaning of the Directive and whether the general prohibition of surcharges in Austria is compatible with that Article.

II – The legal context

A – Union law

4. Article 1 of the Directive provides as follows:

'1. This Directive lays down the rules in accordance with which Member States shall distinguish the following six categories of payment service provider:

(a) credit institutions within the meaning of Article 4(1)(a) of Directive 2006/48/EC;

¹ — Original language: French.

² — OJ 2007 L 319, p. 1.

- (b) electronic money institutions within the meaning of Article 1(3)(a) of Directive 2000/46/EC;
- (c) post office giro institutions which are entitled under national law to provide payment services;
- (d) payment institutions within the meaning of this Directive;
- (e) the European Central Bank ('ECB') and national central banks when not acting in their capacity as monetary authority or other public authorities;
- (f) Member States or their regional or local authorities when not acting in their capacity as public authorities.

2. This Directive also lays down rules concerning transparency of conditions and information requirements for payment services, and the respective rights and obligations of payment service users and payment service providers in relation to the provision of payment services as a regular occupation or business activity.'

5. Article 4 of the Directive, entitled 'Definitions', provides as follows:

'For the purpose of this Directive:

...

3. "payment service" means any business activity listed in the Annex;

...

5. 'payment transaction' means an act, initiated by the payer or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligation between the payer and the payee;

...

7. "payer" means a natural or legal person who holds a payment account and allows a payment order from that payment account, or, where there is no payment account, a natural or legal person who gives a payment order;

8. "payee" means a natural or legal person who is the intended final recipient of funds which have been the subject of a payment;

9. "payment service provider" means bodies referred to in Article 1(1) and legal and natural persons benefiting from the waiver under Article 26;

10. "payment service user" means a natural or legal person making use of a payment service in the capacity of either payer or payee, or both;

...

16. "payment order" means an instruction by a payer or payee to his payment service provider requesting the execution of a payment transaction;

...

19. "authentication" means a procedure which allows the payment service provider to verify the use of a specific payment instrument, including its personalised security features;

...

23. “payment instrument” means any personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used by the payment service user in order to initiate a payment order;

...’

6. Within Title IV of the Directive, which concerns ‘Rights and obligations in relation to the provision and use of payment services’, the third subparagraph of Article 52 of the Directive, entitled ‘Charges applicable’, reads as follows:

‘3. The payment service provider shall not prevent the payee from requesting from the payer a charge or from offering him a reduction for the use of a given payment instrument. However, Member States may forbid or limit the right to request charges taking into account the need to encourage competition and promote the use of efficient payment instruments.’

7. The scope of Article 52(3) is commented upon in recital 42 as follows:

‘In order to promote transparency and competition, the payment service provider should not prevent the payee from requesting a charge from the payer for using a specific payment instrument. While the payee should be free to levy charges for the use of a certain payment instrument, Member States may decide whether they forbid or limit any such practice where, in their view, this may be warranted in view of abusive pricing or pricing which may have a negative impact on the use of a certain payment instrument taking into account the need to encourage competition and the use of efficient payment instruments.’

8. Within Title VI, entitled ‘Final provisions’, Article 86, entitled ‘Full harmonisation’, reads as follows:

‘1. Without prejudice to Article 30(2), Article 33, Article 34(2), Article 45(6), Article 47(3), Article 48(3), Article 51(2), Article 52(3), Article 53(2), Article 61(3), and Articles 72 and 88 insofar as this Directive contains harmonised provisions, Member States shall not maintain or introduce provisions other than those laid down in this Directive.

...’

B – *Austrian law*

9. According to the referring court, the Directive was implemented in Austrian law by means of the Zahlungsdienstgesetz (Payment Services Law, ‘ZaDiG’, BGBl (Bundesgesetzblatt, Federal Law Gazette) I 66/2009, which entered into force on 1 November 2009.

10. Paragraph 1(1) ZaDiG, entitled ‘Scope’, reads as follows:

‘This Federal Law lays down the conditions under which persons (payment service providers) may provide payment services in Austria as a business activity and regulates the rights and obligations of payment service providers and payment service users in relation to payment services provided for payment service users established in Austria or by payment service providers established in Austria, and access to payment systems.’

11. Paragraph 27(6) ZaDiG, ‘Charges applicable’, transposes into Austrian law Article 52(3) of the Directive and provides as follows:

‘The payment service provider shall not prevent the payee from offering the payer a reduction for the use of a given payment instrument. The payee is not permitted to charge for the use of a given payment instrument.’

III – The dispute in the main proceedings and the questions referred

12. T-Mobile Austria GmbH (‘T-Mobile Austria’) is a provider of mobile telephone services in Austria. On that basis it concludes contracts for telecommunications services with consumers, using for that purpose its general terms and conditions, which are regularly updated. The version in force in November 2009 contained the following clause (‘the contested clause’):

‘Article 23

...

1.2 All forms of payment are recognised in settlement of outstanding debts. In the case of payment by means of a credit transfer in paper form or by telebanking, however, we deduct a service charge — the amount is based on the tariff applicable in your case.’

13. Pursuant to that clause, customers who apply for and use the ‘Call Europe’ tariff must pay a surcharge of EUR 3 if they opt for ‘payment other than by direct debit or credit card’, which includes payment by means of a paper credit transfer or via online banking (telebanking).

14. In the main proceedings, the consumer association Verein für Konsumenteninformation seeks an injunction to restrain T-Mobile Austria from, first, including the contested clause in the contracts which it concludes with its customers and, secondly, making use of it in relation to existing contracts. In support of its action, the Verein für Konsumenteninformation claimed that the contested clause was contrary to the mandatory provision in the second sentence of Paragraph 27(6) ZaDiG.

15. T-Mobile Austria claimed that the action should be dismissed, first, because it, T-Mobile Austria, did not fall within the scope of the Directive and the ZaDiG, given that it was not a ‘payment service provider’ but a mobile telephone operator. It also contended that a transfer order form was not a ‘payment instrument’ within the meaning of Article 4.23 of the Directive, for want of any personalised security devices. Finally, the transposition of Article 52(3) of the Directive by the second sentence of Paragraph 27(6) ZaDiG was not consistent with the Directive because the Austrian legislature had failed to give reasons, on the grounds mentioned in Article 52(3), for prohibiting charges for using certain payment instruments.

16. The first-instance court granted the application by the Verein für Konsumenteninformation in its entirety and its judgment was upheld on appeal. The appeal court found that the paper transfer order was not a payment instrument within the meaning of Article 4.23 of the Directive, but held that Article 52(3) of the Directive did not require full harmonisation, so that it was in any case open to the national legislature to provide for a general prohibition of additional charges like that laid down in Paragraph 27(6) ZaDiG, covering both payment instruments within the meaning of the Directive and other methods of payment such as paper transfer orders as well. In addition, the appeal court found that the prohibition accorded with the objective, laid down in the last sentence of Article 52(3), of encouraging competition and the use of an efficient payment system.

17. T-Mobile appealed on a point of law against that judgment to the Oberster Gerichtshof (Austria), against whose decisions there is no judicial remedy under national law. Finding that the questions raised in the main proceedings had not yet been settled by the Court of Justice, the Oberster Gerichtshof stayed the proceedings and referred the following questions to the Court:

- (1) Is Article 52(3) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market to be interpreted as meaning that it is also applicable to the contractual relationship between a mobile phone operator, as payee, and that operator's private customer (the consumer), as payer?
- (2) Are a transfer order form signed by the payer in person and/or the procedure for ordering transfers based on a signed transfer order form and the agreed procedure for ordering transfers through online banking (telebanking) to be regarded as 'payment instruments' within the meaning of Article 4.23 and Article 52(3) of Directive 2007/64/EC?
- (3) Is Article 52(3) of Directive 2007/64/EC to be interpreted as precluding the application of provisions of national law which prohibit a payee from levying charges in general and from levying different charges for different payment instruments in particular?

IV – The procedure before the Court

18. The reference for a preliminary ruling was lodged at the Court on 30 November 2011. T-Mobile Austria, the Verein für Konsumenteninformation, the Austrian, French, German, Italian and Portuguese Governments and the European Commission lodged written observations. A hearing took place on 11 September 2013 at which the Verein für Konsumenteninformation, the Austrian and German Governments and the Commission submitted oral observations.

V – Legal assessment

A – The first question

19. By its first question, the referring court seeks to ascertain whether the right given to the Member States by the second sentence of Article 52(3) of the Directive to forbid or limit charges applies to the contractual relationship between a mobile phone operator and its customers.

1. Admissibility

20. The Verein für Konsumenteninformation considers that no reply need be given to that question, for a reply is not 'necessary', within the meaning of Article 267 TFEU, to enable the referring court to give judgment. The Verein considers that its standing to bring proceedings does not depend on whether Article 52(3) of the Directive is applicable to the contractual relationship between T-Mobile Austria and its customers and that such standing is conferred upon it, the Verein, by Austrian public law, which permits it to bring actions for an injunction for the protection of consumers.

21. That argument cannot be upheld. It is clear from the case-law of the Court of Justice that ‘the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone’,³ unless ‘it is quite obvious that the interpretation of Community law that is sought is unrelated to the actual facts of the main action or to its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it’.⁴

22. The argument put forward by the Verein für Konsumenteninformation is not covered by that exception. Furthermore, its submissions concerning its capacity to bring proceedings are hardly relevant to assessing the necessity for the question. Even if such capacity is conferred by Austrian public law, it may be helpful for the national court to know whether Article 52(3) of the Directive applies where the payee, in this case T-Mobile Austria, is a mobile telephone operator and, for that reason, may not fall within the scope of the Directive.

23. Therefore, the first question must be found admissible.

2. The substance of the case

24. According to T-Mobile Austria, a contractual relationship may be covered by the Directive only if it falls within the ambit *ratione materiae* of the Directive. On that basis, T-Mobile Austria considers that the contractual relationships entered into by mobile phone operators must be excluded from that ambit, including Article 52(3), for those operators are not payment service providers within the meaning of Article 1(1) of the Directive and do not provide payment services within the meaning of Article 4(3).

25. T-Mobile Austria concludes that, as its contractual relationships with its customers are not of the nature of a payment service, the Directive is not applicable to it, having regard to Article 2(1), which states that the Directive applies to ‘payment services provided within the [European Union]’.

26. On the other hand, the Verein für Konsumenteninformation, the Austrian, French, German, Italian and Portuguese Governments and the Commission are unanimous in considering that Article 52(3) of the Directive applies to the contractual relationships between T-Mobile Austria and its customers.

27. According to them, that is clear from the text of Article 52 which, first, prohibits the payment service provider from charging the payer or offering him a reduction for the use of a given payment instrument and, secondly, permits the Member States to forbid or limit the payee’s right to charge the payer for the use of a payment instrument, in order to encourage competition and promote the use of efficient payment instruments.

28. In my opinion, there is no doubt that T-Mobile Austria is a payee within the meaning of Article 52, which it does not dispute. According to Article 4(8), “payee” means ‘a ... legal person who is the intended recipient of funds which have been the subject of a payment transaction’. Therefore T-Mobile Austria, as the creditor of the payments made by its customers, is the payee within the meaning of Articles 4(8) and 52(3).

3 — Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 96.

4 — *Ibid.*, paragraph 67. See also Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22.

29. Nor is there any doubt that T-Mobile Austria's customers are payers within the meaning of the Directive, Article 4(7) of which defines them as 'natural or legal person[s] who hold a payment account and allow a payment order from that payment account, or, where there is no payment account, ... natural or legal person[s] who give a payment order'. Consequently, by making payments to T-Mobile Austria in respect of their mobile phone bills, its customers are 'payers' within the meaning of the Directive.

30. As the Commission points out, although the first sentence of Article 52(3) refers directly only to the relationship between the payment service provider and the payee, the former being unable to prevent the latter from imposing charges or offering a reduction to the payer 'for the use of a given payment instrument', that provision also regulates, by virtue of that fact, the relationship between the payee and the payer.

31. With regard to the second sentence of Article 52(3), it enables the Member States to prohibit or limit the right to impose charges, thereby permitting them to regulate directly the relationship between the payee, in this case T-Mobile Austria, and the payer, in this case its customer where, as stated in recital 42 to the Directive, 'in their view, this may be warranted in view of abusive pricing or pricing which may have a negative impact on the use of a certain payment instrument'.

32. It follows that, in the context of Article 52(3) of the Directive, the practice of charging for the use of a given payment instrument concerns in any case, and mainly, the relationship between the payee and the payer. Furthermore, as the Commission notes, I do not see how the Member States could effectively exercise their power under Article 52(3) if it involved only the relationship between the payee and its payment service provider.

33. I agree, therefore, with the view taken by the Verein für Konsumenteninformation, the Austrian, French, German, Italian and Portuguese Governments and the Commission.

34. Consequently, I propose that the Court's reply to the first question should be that Article 52(3) of the Directive applies to the contractual relationship between a mobile phone operator, as the payee, and its customer (consumer), as the payer.

B – *The second question*

35. The second question from the referring court is, in essence, whether 'a transfer order form signed by the payer in person and/or the procedure for ordering transfers based on a signed transfer order form' and the procedure for ordering transfers through online banking (telebanking) are to be regarded as 'payment instruments' within the meaning of Articles 4.23 and 52(3) of the Directive.

36. It is at the outset to be noted that there is a linguistic difference between the German and French versions of the Directive. Whereas the French version defines 'payment instrument' as 'tout dispositif personnalisé et/ou ensemble de procédures', the German version uses the adjective 'personalised' to describe both the device and the set of procedures ('jedes *personalisierte* Instrument and/oder jeden *personalisierten* Verfahrensablauf ...').⁵ Other versions, such as the English and the Greek, lend themselves to both readings.⁶

5 — Emphasis added.

6 — According to the English version, "payment instrument" means "any personalised device(s) and/or set of procedures" and according to the Greek version, "μέσο πληρωμών": κάθε εξατομικευμένος μηχανισμός ή/και σειρά διαδικασιών ...".

37. That said, the linguistic difference does not affect my assessment. Whether they are a ‘device’ or ‘set of procedures’, a transfer order in paper form and an online transfer order may be personalised: the former by the handwritten signature and the latter by the use of personalised security devices [for example, a PIN (personal identification number)]. In that way, both are able to meet the requirements of both the German and the French versions of the Directive.

38. The parties are divided on the question of whether duly signed transfer order forms and credit transfer orders via online banking are ‘payment instruments’ within the meaning of the Directive.

39. Regarding the duly signed transfer order form, the Verein für Konsumenteninformation, the Austrian, French, Italian and Portuguese Governments and the Commission assert that it is a ‘payment instrument’ within the meaning of Article 4.23 of the Directive, used, on the basis of an agreement between the provider and the user of payment services, for the execution of a payment transaction within the meaning of Article 4.16 of the Directive, that is to say, to initiate a transfer of funds. The requirement for personalisation is met when the payer in person signs the transfer form, which permits the authenticity of the origin of the payment order to be attributed to the user of the payment service.

40. On the matter of personalisation, the Commission observes that the wording of Article 4.23 of the Directive does not justify the conclusion that a personalised security device is necessary, in addition to the handwritten signature, for a duly signed transfer order to constitute a payment instrument within the meaning of the Directive.

41. The French Government adds that, in view of the Directive’s aim of creating a single market for payment services within the Union, it cannot reasonably be argued that the Union legislature intended to exclude from the definition of ‘payment instrument’ such a common means of payment as the transfer procedure.

42. On the other hand, T-Mobile Austria and the German Government object to that interpretation of Article 4.23 of the Directive. T-Mobile Austria considers that the existence of a ‘payment instrument’ presupposes a security device and that that requirement is not met simply by a handwritten signature on a transfer order form. According to T-Mobile Austria, the payment instrument must be personalised before it is signed, which means that it must be personalised even without a signature.

43. As for the German Government, it considers that a transfer order form is neither a device nor a set of procedures within the meaning of Article 4.23. It refers to several provisions of the Directive in which the term ‘payment instrument’ is used in a way that shows that it does not include transfer order forms.

44. The German Government refers, among other provisions, to Article 57 of the Directive, which states that a payment service provider ‘issuing’ a payment instrument to a payment service user must make sure that ‘the personalised *security features* of the payment instrument are not accessible to parties other than the payment service user’,⁷ and to Article 55(2), concerning the blocking of a payment instrument for objectively justified reasons related to the security of the payment instrument (for example, unauthorised or fraudulent use).

45. The German Government therefore considers that the use of the term ‘payment instrument’ rules out its application to transfer order forms which, according to the German Government, do not give rise to the issue of a payment instrument to the payment service user and do not necessitate the use of personalised security devices, as is the case with credit cards. In addition, cash payment forms cannot be blocked.

⁷ — Emphasis added.

46. At the hearing, the German Government maintained its position, T-Mobile Austria not being present, and explained that, in its view, a transfer order form is a payment order within the meaning of Article 4.16 of the Directive, but not a payment instrument within the meaning of Article 4.23.

47. Regarding the ordering of transfers through online banking (telebanking), the Verein für Konsumenteninformation, the Austrian, French, German, Italian and Portuguese Governments, and the Commission as well, submit that that has the characteristics of a payment instrument laid down in Article 4.23. In particular, it follows a specific procedure whereby a payment service user accesses an electronic 'platform'. Personalisation of such a procedure is generally ensured by the security and authentication devices. That is the case here, for the referring court confirms that the payer must enter a PIN in order to access the electronic platform and a TAN code (transaction number) which is necessary for authenticating the payment order.

48. On the other hand, T-Mobile Austria considers that the ordering of transfers online is not a payment instrument either.

49. In my opinion, the reply to the second question must be in the affirmative. The transfer, whether initiated by a duly signed transfer order form or by electronic means (what the referring court calls 'telebanking'), is covered by both Article 4.3 and Article 4.23 of the Directive.

50. It is true that the question from the referring court formally concerns, not the technique of credit transfer as a whole, but rather the signed transfer order form and making transfer orders online. However, a transfer order form signed and handed to the payment service provider or an online payment order will be less '[a] personalised device and/or set of procedures agreed between the payment service user and the payment service provider and used by the payment service user in order to initiate a payment order'⁸ than the payment order itself, that is to say, 'an instruction by a payer ... to his payment service provider requesting the execution of a payment transaction'.⁹

51. However, it seems to me that, above and beyond the wording used by the referring court, the question is whether the series of steps for enabling a transfer of funds to be made, that is to say, the completion and handwritten signature of the transfer order form and the act of handing it to the payment service provider or the ordering of a transfer on line constitutes a 'payment instrument' within the meaning of the Directive.

52. Having said that, it appears to me that the Directive does indeed apply to credit transfers, whether initiated by a transfer order form bearing the payer's handwritten signature or online. Article 4.3 defines 'payment services' as 'any business activity listed in the Annex', point 3 of which cites 'execution of payment transactions, including credit transfers on a payment account with the user's payment service provider or with another payment service provider; ... execution of credit transfers, including standing orders'.

53. Secondly, the credit transfer meets the requirements of Article 4.23 of the Directive, for it constitutes a set of procedures, using either electronic means or a paper medium, that enable a payment service user and a payer to order his payment service provider, often a bank, to transfer funds from his account to the account opened by the payee with its own payment service provider.

54. The fact that a credit transfer is recognised as a payment instrument is confirmed by the ECB's practice of listing credit transfers among the payment instruments of the Single European Payments Area (SEPA).¹⁰

8 — Article 4.23 of the Directive.

9 — Article 4.16 of the Directive.

10 — See the internet sites www.ecb.europa.eu/paym/pol/activ/instr/html/index.en.html and www.ecb.europa.eu/paym/sepa/about/instruments/html/index.en.html.

55. That conclusion is also supported by the recent so-called Impact Assessment of 24 July 2013 accompanying the proposal for a directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, Directive 2013/36/EU and Directive 2009/110/EC and repealing Directive 2007/64/EC [COM(2013) 547 final, 'the Proposal for a directive'].¹¹

56. On several occasions, the Impact Assessment, which at present is available only in English, characterises credit transfers as payment instruments: for example, 'payment cards, followed by credit transfers and direct debits, are the most popular non-cash payment instruments in the EU'.¹²

57. At this stage it should be remembered that Article 52(3) of the Directive concerns the payee's right to add a surcharge, that is to say, the payee's right to require the paying customer to meet the costs incurred as a result of the latter's choice of a particular payment instrument.

58. As the Impact Assessment observes, surcharging is very common when payment cards are used,¹³ which is repeated in recital 63 of the Proposal for a directive,¹⁴ but the fact that the phenomenon of surcharging applies mainly to the use of payment cards and even the possibility that Article 52(3) of the Directive was drafted on the basis of that observation are not sufficient to exclude other payment instruments, such as transfers, from its scope.

59. In any case, the German Government's argument that a signed transfer order form is not a payment instrument, unlike an online transfer, is not persuasive. As the Commission said at the hearing, it is illogical to treat differently the two methods of using the same payment instrument, namely: the credit transfer.

60. Therefore the reply to the second question must be that a credit transfer initiated either by a transfer order form bearing the payer's handwritten signature or by telebanking must be considered a payment instrument within the meaning of Articles 4.23 and 52(3) of the Directive.

C – The third question

61. By its third question, the referring court wishes to know whether the second sentence of Article 52(3) of the Directive authorises Austria to prohibit surcharges generally by means of Paragraph 27(6) ZaDiG and, in particular, to make no distinction between the different payment instruments.

62. On that question, the Verein für Konsumenteninformation, supported by the Austrian, French, German, Italian and Portuguese Governments and the Commission, considers that the general ban on surcharging imposed by Paragraph 27(6) ZaDiG correctly transposes Article 52(3) of the Directive in question.

63. First, that provision is claimed to promote the use of payment instruments efficient from the payer's point of view because the payee is prohibited from imposing additional charges, while permitting it to offer reductions to encourage the use of instruments which appear to be more efficient from its point of view.

11 — According to the Commission's statements at the hearing, one reason for the Proposal for a directive is the need to harmonise the practice of the Member States concerning the prohibition of surcharges. The Impact Assessment shows that 14 Member States have banned surcharging generally, 12 permit it and one, Denmark, prohibits it only in connection with the use of debit cards.

12 — Impact Assessment, p. 7, SWD(2013) 288 final.

13 — Impact Assessment, p. 131.

14 — "Surcharging is in practice limited to card-based payments ...".

64. Secondly, it is argued that the provision encourages competition by increasing transparency on charges because surcharges connected with the use of a payment instrument make it more difficult for consumers to compare the prices offered on the market.

65. In addition, the German Government and the Commission consider that the second sentence of Article 52(3) of the Directive grants broad discretion as to whether to ban or limit surcharging generally in order to encourage competition, promote the use of efficient means of payment and prevent unfair charging by the payee.

66. In the first place, T-Mobile Austria submits that Article 52(3) does not permit the Member States to impose a general ban, but only to prohibit charging for the use of a particular payment instrument.

67. In the second place, T-Mobile Austria points out that Article 52(3) requires any such ban to take into account the need to encourage competition and promote the use of efficient payment instruments. However, a general ban does not differentiate between efficient and inefficient means of payment. On that point, T-Mobile Austria adds that recital 42 to the Directive states that the Member States may decide to prohibit surcharging where, in their view, this may be warranted in view of abusive, or unfair, pricing or pricing which may have a negative impact on the use of a certain payment instrument, which is not the case with regard to the contested clause.

68. In the third place, T-Mobile Austria alleges that interpretation of the Directive in the light of the freedom to choose an occupation, the right to engage in work and the right to property (Articles 15 and 17 of the Charter of Fundamental Rights of the European Union) should authorise the charging of the additional costs entailed by inefficient payment procedures such as cash payment forms.

69. For my part, I agree with the position taken by the Verein für Konsumenteninformation, the Austrian, French, German, Italian and Portuguese Governments and the Commission.

70. Like the German Government and the Commission, I consider that the wording of Article 52(3) of the Directive confers upon the Member States broad discretion as to whether, and how, they wish to exercise the option to prohibit or limit surcharging. The second sentence of Article 52(3) clearly provides that ‘Member States may forbid or limit the right to request charges’, the only limitation being that such a measure must ‘take into account the need to encourage competition and promote the use of efficient payment instruments’.

71. Recital 42 in the preamble to the Directive confirms that the Union legislature’s intention was to confer that broad discretion upon the Member States. According to recital 42, ‘Member States may decide whether they forbid or limit [surcharging] where, *in their view, this may be warranted* in view of abusive pricing or pricing which may have a negative impact on the use of a certain payment instrument’.¹⁵

72. The Member States may, therefore, forbid or limit the practice of surcharging, even generally, in order to encourage competition, promote the use of efficient payment instruments or prevent unfair pricing.

¹⁵ — Emphasis added.

73. T-Mobile Austria lays stress on the phrase ‘*given* payment instrument’¹⁶ in the first sentence of Article 52(3) in order to argue that a general ban on surcharging is not possible. On that basis, T-Mobile Austria claims that the Directive gives the Member States the right to forbid or limit surcharging only in relation to specific payment instruments and on condition that every prohibition or limitation is decided upon ‘taking into account the need to encourage competition and promote the use of efficient payment instruments’.

74. In my view, it is logical for the first sentence of Article 52(3) to refer to ‘a given payment instrument’, for there could be no question of forbidding a payment service provider to prevent a payee from surcharging only if the payee wishes to surcharge in respect of all payment instruments. However, clearly the corollary is that those words are not used in the second sentence of Article 52(3), as the Member States are free to determine the scope of the ban or limitation (for example, certain payment instruments only) of surcharging.

75. At the hearing the Austrian Government alluded to the reasons that impelled the Austrian legislature to prohibit surcharging generally. The explanatory memorandum to Paragraph 27(6) ZaDiG mentions the aims of transparency and encouraging competition.¹⁷ Although it is for the referring court to confirm the finding of the appeal court, namely, that the general ban on surcharging ‘took sufficient account’ of the considerations of general interest referred to by Article 52(3) of the Directive,¹⁸ it seems to me that the Austrian legislature respected the limits to the discretion conferred upon it by Article 52 and recital 42 to the Directive. Regarding the objectives of general interest set out in Article 52(3), a few additional observations may be helpful.

76. The Impact Assessment showed that the practice of surcharging has often led to ‘abusive’ pricing by certain merchants, namely, surcharges disproportionately high compared to the cost incurred by the merchant for the transaction, particularly where consumers could not avoid surcharges by choosing another payment instrument.¹⁹

77. According to the same Assessment, it appears that surcharging was also used to generate higher income rather than to recover from the payer the actual cost that the payment service provider charged the payee when a payment instrument was used.²⁰

78. It was in order to prevent abuses of that kind and to overcome the enormous difficulty of establishing a true balance between the actual costs and the costs claimed that the option of purely and simply prohibiting surcharges was given to the Member States by Article 52(3).²¹

16 — Emphasis added.

17 — Available on the Parliament’s internet site http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_00207/fname_159443.pdf (‘Explanatory Memorandum’, p. 34).

18 — See paragraph 16 above, end.

19 — Impact Assessment, p. 158.

20 — *Ibid.*, p. 135.

21 — As it stands at present, the Proposal for a directive removes on the one hand the right of the Member States to ban or limit surcharges but, on the other, provides that charges are not to exceed the costs borne by the payee for the use of the specific payment instrument (Article 55(3) of the Proposal for a directive). In addition, the proposal bans surcharges for the use of payment instruments for which interchange fees will be regulated by a new directive (Article 55(4)) on interchange fees for card-based payment transactions (Proposal for a regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions, COM(2013) 550/3). At the hearing the Commission explained that, whereas the Proposal for a directive bans surcharging over and above the actual costs, it contains no provision enabling the payer to verify that the costs debited to him do not exceed those born by the payee, which, in my opinion, would lead to many disputes. This is illustrated by the dispute in the present case concerning the EUR 3 surcharge imposed on a payment by credit transfer.

79. In the present case, the question arose whether the EUR 3 surcharge debited to the payer by T-Mobile Austria represented the true cost borne by T-Mobile Austria by reason of the payer's decision to settle his bill by credit transfer. As the French Government observes, the cost to a payee receiving funds as the result of a domestic or European credit transfer is generally very small or non-existent. Unless the order is incomplete, the payee's account is credited by computer, without the active intervention of the payment service provider.

80. On the other hand, in its written observations T-Mobile Austria claimed that the processing of payments made by means of a transfer order form gave rise to considerable costs, with no further explanation. Nor was any explanation forthcoming in response to the French Government's arguments, for T-Mobile Austria did not attend the hearing.

81. It is, therefore, quite possible that the EUR 3 charged by T-Mobile Austria on every credit transfer order was not for the purpose of passing on to customers its own costs, but in order to deter them from settling their bills by credit transfer because, unlike a direct debit, the transfer procedure does not permit the payee to initiate the payment transaction. That practice would be contrary to Article 52(3), which authorises payees to charge for the actual costs which they have incurred or to offer reductions in order to encourage payers to use payment instruments which are more efficient from the payee's viewpoint. Consequently the Austrian legislature's decision to ban surcharges would be fully in keeping with the Union legislature's objective of preventing 'abusive' pricing, as stated in recital 42 to the Directive.

82. As regards the encouragement of competition mentioned in Article 52(3) of the Directive, the public interest in price transparency, which is defended by a provision such as Paragraph 27(6) ZaDiG,²² should be taken into account. As the Austrian Government points out, the general ban on surcharges prevents an undertaking, where a given payment instrument is used, from charging a final price which is higher than that indicated in its letter or communication, which the customer compares with other price offers.

83. It is also necessary to take into account the characteristics of the sector at issue in the main proceedings. There is strong competition precisely among mobile phone operators as between subscription rates, charges per minute or fixed rates. As the Austrian Government observes, consumers compare call rates, not the charges for the use of payment instruments, when buying a particular subscription.

84. Regarding the promotion of efficient payment instruments, also mentioned in Article 52(3) of the Directive, T-Mobile Austria rightly stresses the need to take account of the interests of payees as well as of payers. Although the two groups often have conflicting interests, there is nothing in the Directive that requires the interests of one of them to be preferred to those of the other.

85. However, it must not be forgotten that Article 52(3) of the Directive and Paragraph 27(6) ZaDiG permit T-Mobile Austria to offer reductions to customers to encourage them to use payment instruments which, from its point of view, are more efficient.

86. Having said that, although T-Mobile Austria considers the direct debit the most efficient payment instrument, some payers may still prefer the credit transfer for reasons connected with the type of their bank account or their wish to check the bill before paying it.

22 — Explanatory memorandum, p. 34.

87. As the Verein für Konsumenteninformation points out, some consumers have bank accounts that do not permit direct debits or only for very small amounts (as in the case of students or recipients of the ‘old-age minimum’, etc.). If, in their case, the balance on the account is not sufficient to cover the direct debit, the bank will debit the payer, not the payee, with the cost of rejection, which entails no additional cost for the payee. From the viewpoint of those consumers therefore, the credit transfer is the most efficient payment instrument because it enables them to choose a payment date when there is a balance on their account sufficient to make payment within the period specified by the payee. Furthermore, a credit transfer, unlike a direct debit, enables the consumer to check the bill before payment. In other words, the efficiency of the payment instrument must be assessed not only in relation to the payee.

88. In addition, in laying down the rules and practices necessary for exercising the freedom to choose an occupation which respects competition and the efficiency of payments, and respects consumers, a provision such as Paragraph 27(6) ZaDiG must not, as T-Mobile Austria claims, breach its fundamental rights, in particular, its right to property and its freedom to choose an occupation, as laid down by Articles 15 and 17 of the Charter of Fundamental Rights of the European Union.

89. T-Mobile Austria’s argument concerning Article 19 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council²³ must also be dismissed. According to that article, Member States are to ‘prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of [a given payment instrument]’. That obligation on the part of the Member States in no way affects their power to prohibit surcharges generally.

90. In the light of the foregoing, the reply to be given to the third question should, in my opinion, be that Article 52(3) of Directive must be interpreted as not precluding the application of national provisions such as Article 27(6) ZaDiG that prohibit a payee from levying charges in general and from levying different charges for different payment instruments in particular.

91. That conclusion would be not be different if the Court were to find, in reply to the second question, that credit transfers effected by telebanking or on a paper medium, and also signed transfer order forms, did not constitute payment instruments.

92. In that case, as the Verein für Konsumenteninformation and the German Government observe, it would still be open to the Member States to ban surcharges when a transfer is used to make payments as, according to Article 86 of the Directive, Article 52(3) is not a harmonised provision. Such a decision would then fall within the competence of the Member States as the Directive would not be applicable.

D – Limitation of the effects of the judgment in time

93. Should the Court find that a credit transfer must be considered a payment instrument within the meaning of the Directive and that Article 52(3) does not preclude a general ban on surcharging as in the case of Paragraph 27(6) ZaDiG, T-Mobile Austria seeks a temporal limitation of the effects of the judgment.

94. According to T-Mobile Austria, that eventuality would have serious financial consequences for undertakings in the telecommunications sector not only in Austria, but also in all the Member States that permit surcharging and for undertakings in other sectors of the economy that impose surcharges in those Member States.

²³ — OJ 2011 L 304, p. 64.

95. In that connection, regard must be had to the settled case-law to the effect that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the delivery of the judgment ruling on the request for interpretation, provided that in other respects the conditions under which an action relating to the application of that rule may be brought before the courts having jurisdiction are satisfied.²⁴

96. It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely: that those concerned should have acted in good faith and that there should be a risk of serious difficulties.²⁵

97. As the Court pointed out in *Santander Asset Management SGIIC and Others*, ‘the Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of European Union provisions, to which the conduct of other Member States or the Commission may even have contributed’.²⁶

98. In the present case, as the Court found in *Santander Asset Management SGIIC and Others*, T-Mobile Austria has ‘failed to put forward any data ... which would have enabled the Court to consider whether [it] actually risks incurring serious economic repercussions’.²⁷ Indeed, whereas in its written observations it merely mentioned, without more, ‘serious financial consequences’, it did not attend the hearing where it could have clarified that point and did not quantify the charges for which it had unlawfully billed its customers.

99. Furthermore, there was no ‘objective, significant uncertainty regarding the implications of European Union provisions, to which the conduct of other Member States or the Commission may even have contributed’ because, as the Impact Assessment showed, 14 Member States prohibited surcharging generally,²⁸ the Commission never reacted against such legislation and one Government of the Member States which permit surcharging, namely the German Government, intervened to submit that a general ban on surcharging, as laid down in Paragraph 27(6) ZaDiG, was compatible with Article 52(3) of the Directive.

100. Accordingly, there is no need to fix any limit in time to the effects of the present judgment.

24 — Case C-347/00 *Barreira Pérez* [2002] ECR I-8191, paragraph 44; Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraph 41, and Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraph 34).

25 — Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 51; Case C-2/09 *Kalinchev* [2010] ECR I-4939, paragraph 50, and Joined Cases C-338/11 to C-347/11 *Santander Asset Management SGIIC and Others* [2012] ECR, paragraph 59.

26 — *Santander Asset Management SGIIC and Others*, paragraph 60. See also Case C-423/04 *Richards* [2006] ECR I-3585, paragraph 42, and *Kalinchev*, paragraph 51.

27 — *Santander Asset Management SGIIC and Others*, paragraph 62.

28 — See footnote 11 above.

VI – Conclusion

101. I therefore propose that the Court should give the following replies to the questions referred by the Oberster Gerichtshof:

- (1) Article 52(3) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC applies to the contractual relationship between a mobile phone operator, as the payee, and its customer (consumer), as the payer.
- (2) A credit transfer initiated either by a transfer order form bearing the payer's handwritten signature or by telebanking must be considered a payment instrument within the meaning of Articles 4.23 and 52(3) of Directive 2007/64.
- (3) Article 52(3) of Directive 2007/64 must be interpreted as not precluding the application of national provisions such as Paragraph 27(6) ZaDiG (Payment Services Law) which prohibit a payee from levying charges in general and from levying different charges for different payment instruments in particular.