

## “Beyond Mobistar” – Assessment of the Deterrent Effect of Direct Charges to Telephone Subscribers under Article 30(2) of the Universal Service Directive

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*Case C-99/09 Polska Telefonia Cyfrowa sp. Z o.o v. Prezes Urzędu Komunikacji Elektronicznej*<sup>1</sup>

*Article 30(2) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive [USD])*<sup>2</sup> is to be interpreted as obliging the national regulatory authority to take account of the costs incurred by mobile telephone network operators in implementing the number portability service when it assesses whether the direct charge to subscribers for the use of that service is a disincentive. However, it retains the power to fix the maximum amount of that charge levied by operators at a level below the costs incurred by them, when a charge calculated only on the basis of those costs is liable to dissuade users from making use of the portability facility (official headnote).

### I. Facts

Before the introduction of a common regulatory framework for electronic communications in 2002, mobile phone users had no right to retain the same number when changing the operator. Number portability guarantees constant accessibility and may therefore be a crucial criterion for sticking with a certain provider. The absence of any possibility to keep the number (which was partly due to technical reasons) was regarded as a real barrier to competition, which should be encountered effectively by the common legal framework.<sup>3</sup> Against this background, the original version of Article 30 Universal Services Directive (USD) contained rules on the modalities of mobile number portability for the first time. While

Article 30 paragraph 1 USD contains a claim for all subscribers to publicly available telephone services to retain their number independently of the undertaking providing the service, paragraph 2 refers to the costs arising out of the transfer of the number to the new operator, which is generally transferred to the subscribers. The national regulatory authorities (NRAs) have to ensure that pricing for interconnection related to the provision of number portability is cost-oriented and that direct charges, if any, do not act as a disincentive for the use of these facilities. However, Article 30 paragraph 3 USD prohibits the NRA from distorting competition by imposing specific or common retail tariffs.

The interpretation of Article 30 paragraph 2 USD had already been subjected to another preliminary ruling four years ago in the Mobistar case which dealt with the costs of number portability. Costs occur due to different reasons: platforms between the operators must be compatible, the subscriber's number must be transferred from one operator to another and technical operations must be carried out to allow the routing of telephone calls to the ported number.<sup>4</sup> The European Court of Justice (ECJ) noted that Article 30 paragraph 2 USD covers not only the additional traffic costs related to number portability,

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1 Judgment of 1 July 2010.

2 OJ 2002 L 108/51, last amended by Directive 2009/136/EC, OJ 2009 L 337/11.

3 See recital 40 in the preamble to the USD.

4 *Ibid.*, para. 24.

but also some non-recurrent additional set-up costs imposed by mobile telephone operators for number porting.<sup>5</sup> While on the one hand traffic costs are usually meant to be partially reimbursed by the operator of the network from which the call is made and which charges the end-user for the call,<sup>6</sup> set-up costs on the other hand are regularly imposed on the recipient operator.<sup>7</sup> These set-up costs represent a large fraction of the costs which may be passed on, directly or indirectly, to any subscriber who wishes to make use of the portability facility for his mobile number.<sup>8</sup> If such costs were not covered, donor operators might fix them at excessive levels thus making the portability facility de-facto illusory.<sup>9</sup> Furthermore, the ECJ declared that Article 30 paragraph 2 USD confers a certain discretion to the NRAs for assessing the situation and defining the method which appears to them to be the most suitable to make portability fully effective. To ensure that pricing related to the provision of number portability is cost-based, the NRAs are allowed to define maximum prices in advance based on an abstract model of the costs in such a way that consumers are not dissuaded from making use of the facility of portability.<sup>10</sup>

In the *Polska Telefonii Cyfrowa* case the ECJ henceforth had to deal with the deterrent effect of direct charges to subscribers.

The relevant (but now amended) Polish law implemented Article 30 (2) USD in such a manner that a donor operator could charge the subscriber a one-off fee set out in its list of tariffs, the amount of which should not act as a disincentive to subscribers to exercise this right. Furthermore, anyone who violated the right of subscribers to port an assigned number in that way was to be liable to a fine. In 2006, the President of the national regulatory authority (Urzędu Komunikacji Elektronicznej – UKE) imposed a fine of about €25,000 on Polska Telefonii Cyfrowa (PTC), Poland's largest mobile phone company. In his opinion the one-off fee valued at that time at about €30 was likely to cause this deterrent effect to subscribers and therefore the company would have failed to fulfill its obligations to facilitate the exercise of porting rights. The President of the UKE based this view on the result of a consumer survey, which had shown a significantly lower willingness to pay for a provider change. PTC filed an action against the fine. The basic issue was whether the NRAs are obliged to consider the costs incurred by the operators in implementing number portability when they assess whether or not the direct charge, which may be lev-

ied on the subscriber acts as a disincentive. After the fine was maintained in the first and annulled in the second level of jurisdiction, the President of the UKE lodged an appeal 'in cassation' before the Polish Supreme Court (Sąd Najwyższy), which decided to delay the proceedings and to refer this question to the European Court of Justice (ECJ).

## II. Judgment

The ECJ (Fourth Chamber) ruled, following the opinion of Advocate General Bot, that the costs for interconnection incurred by an operator and the amount of the direct charge to the subscriber are connected in principle.<sup>11</sup> Therefore, the NRAs had the task, using an objective and reliable method, of determining both the costs incurred by operators in providing the number portability service and the level of the direct charge beyond which subscribers are likely not to use that service.<sup>12</sup> Following that examination, if the need arose, the NRAs would have to oppose the application of a direct charge which, although in the line with those costs, would be a disincentive to the consumer, and could fix the maximum amount of that charge at a level below the costs incurred by them.<sup>13</sup>

## III. Comment

First of all, in order to understand the issue, it is essential to note that Article 30 (2) USD distinguishes the limitation of two charges in different relations; this was not readily identifiable in the original version of the USD: the first is the tariff between the operators and/or service providers and the second is a direct charge, possibly to be paid by the subscriber who is willing to change provider. In pricing for

<sup>5</sup> *Ibid.*, para. 30.

<sup>6</sup> See *ibid.*, para. 16.

<sup>7</sup> See Opinion of Advocate General Bot of 15 April 2010 in Case C-99/09, *Polska Telefonii Cyfrowa sp. Z o.o v. Prezes Urz du Komunikacji Elektronicznej*, para. 35.

<sup>8</sup> Case C-438/04, *Mobistar*, para. 28.

<sup>9</sup> *Ibid.*, para. 29.

<sup>10</sup> *Ibid.*, para. 37.

<sup>11</sup> Para. 22.

<sup>12</sup> Paras. 24–25.

<sup>13</sup> Paras. 26–27.

interconnection related to the provision of number portability – this is the first type of tariff – the donor operator is required to comply with the principle of cost-orientation. But only the second type of tariff must not act as a disincentive for the use of the facility of porting numbers. The Mobistar judgment already occasionally confused these requirements by suggesting the deterrent effect as a criterion of the first type of tariff.<sup>14</sup> Probably there should merely be a statement to the effect that extensive pricing between the companies is likely to have negative effects on customers indirectly through passing on these costs to the new subscribers.<sup>15</sup> However, both the Advocate General<sup>16</sup> and the Court<sup>17</sup> still cite this passage to explain the relationship between the tariffs. The distinction of tariffs in Article 30 (2) USD permits two conclusions in contrast to this: On one hand the deterrent effect is only a decisive criterion in assessing the amount of the second type of charge, and on the other hand cost-orientation cannot be the (only) decisive criterion for this.

In any case, the fact that NRAs are obliged to take account of the costs whenever they assess whether the direct charge acts a disincentive deserves closer attention, and is in line with a functional interpretation of Article 30 (2) USD.

The provision that providers generally are allowed to pass on direct charges does not serve the purpose of making profits but is an alternative to passing on the costs indirectly. Based on the normal case required in the opinion of Advocate General Bot, that the donor operator usually invoices the recipient operator for the (set-up) costs incurred in dealing with a request to port numbers<sup>18</sup> and that usually only

the recipient operator has the possibility to demand direct charges<sup>19</sup>, the direct charge itself seems to be a protection of the other subscribers of the recipient operator; otherwise these tariffs could be respectively justified, above all because these costs do not occur for subscribers without number porting. In this normal case the connection between the tariffs identified by the Court becomes most apparent. The first charge protects recipient competitors from being driven out of the market; the second charge enables them to recover all or parts of the first charge.<sup>20</sup> In principle subscribers are already protected by the fact that pricing is cost-oriented. Moreover, in this scenario there is only a small risk of deterrent charges, seeing that they alone could cause difficulties for the recipient operator to acquire new customers. (Only) in this normal case one might mention the underlying idea of Article 12 (5) of the former Interconnection Directive 97/33/EC<sup>21</sup>, whereupon the NRAs are required to ensure that pricing for interconnection related to the provision of [... number portability] is reasonable, *in order* to ensure that charges to consumers are reasonable.<sup>22</sup>

That direct charges are on the other hand also *objective* reasonable and do not discourage subscribers from changing operator, the NRAs also have to ensure, if the donor operator is already claiming the direct charge,<sup>23</sup> that a dual transmission of the costs over the recipient operator is avoided. Even for this scenario the legal assessment of Article 30 (2) USD can be understood as meaning that the donor operator will be able to recoup his costs and a cost-oriented charge indicates that this is acceptable. If the NRAs observe that number portability is not fully effective, regardless of cost-based pricing, only then may they act within their discretion to ensure this – probably by fixing a corresponding maximum price to customers.

Against this backdrop it is obvious that the deterrent effect needs to be determined in an objective, not subjective, way. Moreover, it is not even necessary to deduce this result from general pricing principles, as the ECJ did.<sup>24</sup> The aim of the provision is to avoid customers desisting from changing operator in the light of the heavy costs. The direct charge has to be a crucial factor for this proportionality. Also representative surveys on willingness to pay reveal the real decision-making behaviour only within narrow limits. Criteria as this one are relativized or possibly counterbalanced by the lucrative attractiveness of alternative offers.

14 See Case C-438/04, *Mobistar*, para. 37.

15 See Bot in Case C-99/09, *Polska Telefonia Cyfrowa*, para. 36.

16 *Ibid.*, para. 59.

17 Para. 21.

18 Bot in Case C-99/09, *Polska Telefonia Cyfrowa*, para. 35.

19 *Ibid.*, para. 37.

20 See Case C-438/04, *Mobistar*, para. 28; Bot in Case C-99/09, *Polska Telefonia Cyfrowa*, paras. 37, 59.

21 OJ 1997 L 199/32.

22 But also see Bot in Case C-99/09, *Polska Telefonia Cyfrowa*, para. 59, who leads back the mentioned paragraph from the *Mobistar* judgment to this.

23 See *ibid.*, para. 38.

24 Para. 24 insofar refers to Bot in Case C-99/09, *Polska Telefonia Cyfrowa*, paras. 52, 53, 55.

As a result of the ECJ judgment the Sąd Najwyższy has meanwhile rejected the appeal in cassation sharing the view of the appellate court. In addition to this, it took up another issue that Advocate General Bot had raised earlier. Bot expressed considerable doubt whether the unpredictability along with a subjective method could come into question as a constituent element of a sanction clause. The Polish Supreme Court has now emphasized strongly that it is up to the NRAs and not to the companies to assess whether a charge has a deterrent effect (that can be sanctioned). If one does not infer this from Article 30 (2) USD, which is addressed to the NRAs and not to the operators, the imposition of the obligation to assess the deterrent effect without any other criteria itself is in violation of the principle of clarity (*nulla poena sine lege certa*).

Beside the version in dispute, Advocate General Bot has also criticised the current version of the Pol-

ish Telecommunications Act.<sup>25</sup> According to that (like in many other countries of the European Union) operators are now obliged to offer number portability to subscribers free of charge. Article 30 (2) USD would not permit such an obligation, leaving open whether operators would be free to absorb charges under this provision or if a national legislation with this content would undercut the discretion of the NRAs in an illegal manner. Anyway Bot's proposal that a prohibition under European law would be best for making portability fully effective is to be endorsed. This would inevitably have a harmonizing effect on the rules of compensation between operators. As competition intensifies, the fact that costs passed on indirectly may not adversely affect telephone tariffs is illustrated by the willingness of recipient operators to absorb these costs in practice.

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25 Bot in Case C-99/09, *Polska Telefonia Cyfrowa*, paras. 5, 72.