JUDGMENT OF THE COURT (Fourth Chamber)

1 July 2010 *

In Case C-99/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Sąd Najwyższy (Poland), made by decision of 19 December 2008, received at the Court on 11 March 2009, in the proceedings

Polska Telefonia Cyfrowa sp. z o.o.

v

Prezes Urzędu Komunikacji Elektronicznej,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, C. Toader, K. Schiemann, P. Kūris (Rapporteur) and L. Bay Larsen, Judges,

* Language of the case: Polish

Advocate General: Y. Bot,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 25 March 2010,

after considering the observations submitted on behalf of:

— Polska Telefonia Cyfrowa sp. z o.o., by S. Dudzik and M. Korcz, radcy prawni,

— Prezes Urzędu Komunikacji Elektronicznej, by M. Kołtoński and M. Chmielewska, radcy prawni,

— the Polish Government, initially by M. Dowgielewicz and subsequently by K. Zawisza and S. Sala, acting as Agents,

— the Slovak Government, by B. Ricziová, acting as Agent,

— the European Commission, by K. Mojzesowicz and C. Vrignon, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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) (OJ 2002 L 108, p. 51).

2 The reference was made in the course of proceedings between Polska Telefonia Cyfrowa sp. z o.o. ('PTC') and Prezes Urzędu Komunikacji Elektronicznej (the President of the Office for Electronic Communications; 'the President of the UKE') concerning the decision of 1 August 2006 by which the President of the UKE imposed a fine of PLN 100 000 (approximately EUR 24 350) on PTC.

Legal context

European Union legislation

3 Recitals 40 and 41 in the preamble to the Universal Service Directive state the following:

'(40) Number portability is a key facilitator of consumer choice and effective competition in a competitive telecommunications environment such that end-users who so request should be able to retain their number(s) on the public telephone network independently of the organisation providing service. The provision of this facility between connections to the public telephone network at fixed and non-fixed locations is not covered by this Directive. However, Member States may apply provisions for porting numbers between networks providing services at a fixed location and mobile networks.

(41) The impact of number portability is considerably strengthened when there is transparent tariff information, both for end-users who port their numbers and also for end-users who call those who have ported their numbers. National regulatory authorities ["NRAs"] should, where feasible, facilitate appropriate tariff transparency as part of the implementation of number portability.'

4 Article 30 of the Universal Service Directive provides:

'1. Member States shall ensure that all subscribers of publicly available telephone services, including mobile services, who so request can retain their number(s) independently of the undertaking providing the service:

(a) in the case of geographic numbers, at a specific location; and

(b) in the case of non-geographic numbers, at any location.

This paragraph does not apply to the porting of numbers between networks providing services at a fixed location and mobile networks.

2. [NRAs] shall ensure that pricing for interconnection related to the provision of number portability is cost oriented and that direct charges to subscribers, if any, do not act as a disincentive for the use of these facilities.

3. [NRAs] shall not impose retail tariffs for the porting of numbers in a manner that would distort competition, such as by setting specific or common retail tariffs.'

National legislation

5 Article 41 of the Law on Telecommunications (ustawa-Prawo telekomunikacyjne) of 16 July 2004 (Dz. U. No 171, heading 1800), in the version applicable to the main proceedings ('the Law on Telecommunications'), is worded as follows:

'1. Fees for mutual use of interconnected networks which relate to the porting of numbers between the networks shall take account of the costs incurred.

2. Fees for mutual use of interconnected networks and for telecommunications access which relate to the choice of service provider shall take account of the costs incurred.'

6 Article 71 of the Law on Telecommunications states:

'1. A subscriber who is party to an agreement with a service provider providing a connection to the public telephone network of an operator may demand, upon a change of operator, that the assigned number be ported to an existing network of another operator in the area of: (1) a numbering area – in the case of geographic numbers; (2) the entire country – in the case of non-geographic numbers.

2. Paragraph 1 shall not apply to the porting of numbers between fixed and mobile public telephone networks.

3. Where the assigned number is ported upon a change of operator, the previous service provider may charge the subscriber a one-off fee set out in its list of tariffs, the amount of which shall not act as a disincentive to exercise of this right by subscribers.'

7 Article 74 of the Law on Telecommunications is worded as follows:

'1. A service provider providing a connection to a public telephone network and an operator to whose network a subscriber, party to an agreement with the service provider providing the connection to the public telephone network, has been connected shall be required to give the subscriber the possibility to exercise his subscriber rights referred to in Articles 69 to 72, by creating appropriate technical conditions or concluding an agreement referred to in Article 31 or Article 128, and, where such possibilities exist, to ensure the implementation thereof.

…

3. The President of the UKE may impose a penalty referred to in Article 209(1)(15) to (17) on a provider and on an operator referred to in paragraph 1, if they:

(1) do not provide the possibilities referred to in paragraph 1 to exercise subscriber rights;

(2) do not implement subscribers' rights where possibilities to do so exist;

(3) implement subscribers' rights in a manner which is inconsistent with the provisions of this Law or the regulation referred to in Article 73.'

8 Article 209(1)(16) of that Law states:

'Any person who prevents subscribers from exercising their rights to port an assigned number … shall be liable to a fine.'

The main proceedings and the question referred for preliminary ruling

9 The order for reference states that the President of the UKE imposed a fine of PLN 100 000 (approximately EUR 24 350) on PTC on the ground that the one-off fee of PLN 122 (approximately EUR 29.70) which PTC charged in the event that the operator was changed, during the period from 28 March to 31 May 2006, constituted an infringement of Article 71(3) of the Law on Telecommunications since such an amount dissuaded PTC's subscribers from making use of their right to port a number.

10 PTC appealed against the decision of the President of the UKE to the Sąd Okręgowy w Warszawie (Regional Court, Warsaw). By judgment of 6 March 2007, the court dismissed that appeal.

11 PTC brought an appeal against that judgment before the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) which, by its judgment of 5 February 2008, annulled the contested decision, holding that the amount of the one-off fee relating to porting a number could not be calculated without taking account of the costs incurred by

the operator in providing that facility. The President of the UKE brought an appeal against that judgment.

12 In that context, the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 30(2) of the [Universal Service Directive] to be interpreted as meaning that the competent [NRA], when ensuring that direct charges to subscribers do not act as a disincentive for the use of the facility of porting numbers, has an obligation to take account of the costs incurred by mobile telephone network operators in providing that facility?'

Consideration of the question referred

13 By its question, the national court asks whether Article 30(2) of the Universal Service Directive is to be interpreted as obliging the NRA 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.

14 The order for reference makes it clear that the dispute in the main proceedings results from PTC's assertions that Article 30(2) of the Universal Service Directive obliges the NRA to take account of the costs incurred by operators in providing the number portability service when it carries out that assessment.

15 Firstly, it must be stated that the concept of number portability covers the facility available to a telephone subscriber to retain the same number when changing operator (Case C-438/04 *Mobistar* [2006] ECR I-6675, paragraph 23).

16 The implementation of that facility requires the platforms between operators to be compatible, the subscriber's number to be ported from one operator to another and technical operations to allow the forwarding of telephone calls to the ported number (see *Mobistar*, paragraph 24).

17 In accordance with recital 40 in the preamble to the Universal Service Directive, number portability is intended to remove the obstacles to consumers' freedom of choice, particularly between mobile telephone operators, and thus to ensure development of effective competition on the telephone services market (see *Mobistar*, paragraph 25).

18 With a view to achieving those aims, the European Union legislature provided, in Article 30(2) of the Universal Service Directive, that the NRAs are to ensure that pricing for interconnection related to the provision of number portability is cost oriented and that direct charges to subscribers, if any, do not act as a disincentive for the use of these facilities (see *Mobistar*, paragraph 26).

19 In addition, it should be noted that Article 30(2) of the Universal Service Directive requires the NRAs to ensure that the operators set the prices on the basis of their costs and that the prices do not dissuade subscribers (see *Mobistar*, paragraph 33).

20 Once it is established that prices are fixed on the basis of costs, that provision confers a certain discretion on the NRAs to assess the situation and define the method which appears to them to be the most suitable to make portability fully effective, in a manner which ensures that subscribers are not dissuaded from making use of that facility (see *Mobistar*, paragraph 34).

21 In that regard, it follows from the Court's case-law that Article 30(2) of the Universal Service Directive does not preclude the NRAs from fixing in advance and on the basis of an abstract model of the costs maximum prices which may be charged by the donor operator to the recipient operator as set-up costs, provided that the prices are fixed on the basis of the costs in such a way that subscribers are not dissuaded from making use of the facility of portability (see, to that effect, *Mobistar*, paragraph 37).

22 It follows from the foregoing that the costs for interconnection incurred by an operator and the amount of the direct charge to the subscriber are in principle connected. That connection makes it possible to reach a compromise between the interests of subscribers and those of the operators.

23 It is to be noted that, in accordance with recital 41 in the preamble to the Universal Service Directive, the NRA should facilitate appropriate tariff transparency as part of the implementation of number portability.

24 It should also be pointed out, as the Advocate General has noted in points 52, 53 and 55 of his Opinion, that the method chosen by the NRA to assess whether the direct charge has a dissuasive effect must be consistent with the principles governing the pricing for interconnection and serve to ensure the objectivity, full effectiveness and transparency of that pricing.

25 It is therefore clear from the scheme of the Universal Service Directive that the NRA has 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 liable not to use that service.

26 Following that examination, the NRA must oppose, if necessary, the application of a direct charge which, although in line with those costs, would, in light of all the information at the disposal of the NRA, be a disincentive to the consumer.

27 Consequently, in that event, the NRA may be led to take the view that the amount of the direct charge which may be claimed from the subscriber must be less than that which would arise from a determination made on the basis solely of the costs, evaluated in accordance with an objective and reliable method, which the operators have to incur to ensure number portability.

28 Having regard to all of the foregoing, the answer to the question referred is that Article 30(2) of the Universal Service Directive is to be interpreted as obliging the NRA 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.

Costs

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

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) 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.

[Signatures]