OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 23 March 2006 [1]

I — Introduction

1. At a time when in the public debate the European Union is associated, almost to the point of caricature, with a detached political process that is remote from citizens and has little relevance for the individual, attention should also be drawn to the many tangible advantages and improvements that the European Union integration project has brought for the individual citizens of the Union.

2. A good example of one such 'success story' is undoubtedly the Community's policy in the telecommunications sector, where the progressive liberalisation and harmonisation of national telecommunications markets and rules since the 1980s has generally resulted in more competition and, for consumers, appreciably lower prices and telephone tariffs, a wider range of products and a better service.

3. In the present case the Cour d'appel (Court of Appeal), Brussels (Ninth Chamber) (Belgium) has referred to the Court of Justice questions on the interpretation 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) [2] and Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive). [3]

4. These questions arise in connection with 'number portability', the facility for users — in this case mobile telephone users — to retain their existing number when they change network operators and to take it to their new network. Particularly in a market, like the mobile telephony market, that is practically saturated (at least in some Member States), portability is of crucial importance with a view to efficient competition

1 — Original language: German.

2 — OJ 2002 L 108, p. 51.

3 — OJ 2002 L 108, p. 33.

because it increases users' willingness to change operators and because, conversely, the lack of a number portability facility or the costs of porting may deter users from choosing a new supplier.

5. The questions referred for a preliminary ruling are asked in proceedings before the Cour d'appel, Brussels, in which the Belgian mobile telephone operator Mobistar brought an appeal against a decision by a national regulatory authority within the meaning of the Framework Directive, namely the decision of the Council of the Institut belge des services postaux et des télécommunications (Belgian Institute for Postal Services and Telecommunications; 'the IBPT') of 16 September 2003 on the set-up costs per ported mobile number for the period from 1 October 2002 to 1 October 2005 ('the contested decision').

6. The referring court is essentially seeking to ascertain, first of all, whether a Member State or specifically a national regulatory authority is permitted to apply ex ante regulation of the set-up costs for the provision of portability in such a way that a maximum price is fixed in respect of mobile operators for the per-line or per-number set-up costs for the provision of number portability on the basis of 'the theoretical costs of an efficient mobile operator'. Secondly, the questions relate to a procedural aspect, namely the extent to which Community law imposes conditions with regard to the information — in particular confidential information — which the national court must be able to have at its disposal in order to consider the substance of the appeal against the contested decision.

II — Legal framework

A — *Community law*

1. Former legal framework

7. As regards the former legal framework in the present case, mention should be made of Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP),[4] as amended by Directive 98/61/EC[5] ('Directive 97/33'), which was repealed by the Framework Directive with effect from 25 July 2003.

4 — OJ 1997 L 199, p. 32.

5 — Directive of the European Parliament and of the Council of 24 September 1998 amending Directive 97/33/EC with regard to operator number portability and carrier preselection (OJ 1998 L 268, p. 37).

8. Under Article 1 of Directive 97/33, the directive establishes a regulatory framework for securing in the European Community the interconnection of telecommunications networks and in particular the interoperability of services, and for ensuring provision of universal service in an environment of open and competitive markets.

9. Under Article 2 of the directive, 'interconnection' means 'the physical and logical linking of telecommunications networks used by the same or a different organisation in order to allow the users of one organisation to communicate with users of the same or another organisation, or to access services provided by another organisation'.

10. Article 7 of Directive 97/33 lays down principles for interconnection charges and cost accounting systems. In addition, Annex IV to the directive provides a 'list of examples of elements for interconnection charges'. That annex includes the following:

'Interconnection charges may include a fair share, according to the principle of proportionality, of joint and common costs and the costs incurred in providing equal access, and number portability, and the costs of ensuring essential requirements (maintenance of the network integrity; network security in cases of emergency; interoperability of services; and protection of data).'

11. Article 12(5) of Directive 97/33 provides:

'National regulatory authorities shall encourage the earliest possible introduction of operator number portability whereby subscribers who so request can retain their number(s) on the fixed public telephone network and the integrated services digital network (ISDN) independent of the organisation providing service, in the case of geographic numbers at a specific location and in the case of other than geographic numbers at any location, and shall ensure that this facility is available by 1 January 2000 at the latest or, in those countries which have been granted an additional transition period, as soon as possible after, but no later than two years after any later date agreed for full liberalisation of voice telephony services.

In order to ensure that charges to consumers are reasonable, national regulatory authorities shall ensure that pricing for interconnection related to the provision of this facility is reasonable.'

2. New legal framework for communications

12. On 7 March 2002 the European Parliament and the Council of the European Union adopted the new common legal framework for all transmission networks and services in the form of four directives, the Framework Directive, the Universal Service Directive, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) [6] and Directive 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive). [7]

(a) The Universal Service Directive

13. Under Article 1 of the Universal Service Directive, the directive concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the Community of good-quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market.

14. Article 30 of the directive provides, with regard to number portability:

'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. National regulatory authorities shall ensure that pricing for interconnection

6 — OJ 2002 L 108, p. 7.
7 — OJ 2002 L 108, p. 21.

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. National regulatory authorities 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.'

(b) The Framework Directive

15. Article 4 of the Framework Directive provides with regard to the right of appeal against decisions of the national regulatory authority:

'1. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.

2. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty.'

B — *National law*

16. The specific rules governing mobile number portability in Belgium are laid down in the Royal Decree of 23 September 2002 on number portability for end-users of publicly available mobile telecommunications services ('the Royal Decree').

17. The Royal Decree includes rules on the way in which costs incurred by operators in connection with mobile number portability are to be borne and draws a distinction between four types of costs: costs generated by the setting-up of portability, per-line or

per-number set-up costs ('set-up costs'), costs connected with the central reference databank, and traffic costs connected with number portability ('traffic costs').

18. Set-up costs are defined in Article 18 of the Royal Decree as follows:

'... the non-recurrent additional cost generated as a consequence of the porting of one or more mobile numbers, in addition to the costs connected with the porting of one or more mobile numbers without number portability, to another mobile operator or service provider or in order to terminate the provision of service.'

19. Under Article 19 of the Royal Decree 'the per-line or per-number set-up costs ... shall be fixed by the Institute on the basis of the theoretical costs of an efficient mobile operator. The amounts fixed by the Institute to cover the per-line or per-number set-up costs ... shall be cost oriented'.

20. According to the order for reference, the set-up costs refer only to the costs incurred by the mobile operator from which a mobile number is ported ('the donor operator'). The donor operator may charge the mobile operator to which the mobile number is ported ('the recipient operator') for the set-up costs on the basis of the tariff set by the IBPT. The amount fixed by the IBPT to cover costs is a maximum amount and mobile operators are permitted to negotiate a lower amount with one another. However, a donor operator may in principle demand the amount fixed by the IBPT even where its actual set-up costs are lower.

21. Under Article 11 of the Royal Decree, the donor operator may not demand any payment from an end-user who has his number ported; on the other hand, the recipient operator is entitled to demand a payment of no more than EUR 15 from the end-user for the porting of the number.

22. Lastly, under Article 18 of the Royal Decree, traffic costs are 'the additional costs generated on the network by calls to ported numbers as compared with calls to non-ported numbers'. The donor operator is to be reimbursed these traffic costs on a pro rata basis by the operator of the network from which the call is generated and which charges the end-user for the call.

III — Facts, main proceedings and questions referred for a preliminary ruling

23. The undertakings Belgacom Mobile, Mobistar and Base offer mobile telecommunications services in Belgium. Belgacom Mobile, a subsidiary of Belgacom, operates a mobile telephony network under the name Proximus. It has been active in the mobile telephony market since 1994 and has enjoyed a statutory monopoly in that market for approximately two years. It is not disputed that its market share is over 50% (59% in terms of revenue) and over 70% in the mobile telecommunications segment aimed at business customers.

24. Mobistar has been active in the market in question since August 1996 and is the second largest mobile operator.

25. Base entered the market only in 1998 and estimates its market share at around 14%, representing 1 105 000 end-users.

26. By its contested decision of 13 September 2003 pursuant to Article 19 of the Royal Decree, the IBPT fixed the amounts to cover the set-up costs per successfully ported mobile number for the period from 1 October 2002 to 1 October 2005, on the basis of the concept of the 'theoretical costs of an efficient mobile operator' contained in the Royal Decree and following consultations with the Belgian mobile operators Base, Mobistar und Belgacom, at EUR 3.86 for a simple installation and EUR 23.41 for a complex installation.

27. Mobistar lodged an appeal with the referring court against the contested decision of the IBPT, in which the IBPT, Belgacom and Base are parties and in which Mobistar claims that the set-up costs are set excessively high in the contested decision and do not correspond to the theoretical costs of an efficient mobile operator within the meaning of Article 19 of the Royal Decree. Base essentially shares the position taken by Mobistar, but objects above all to the calculation method in itself, whereby the set-up costs are fixed on the basis of the theoretical costs of an efficient mobile operator. In its view, the set-up costs should be fixed on the basis of the actual costs incurred by each mobile operator. The Royal Decree is therefore also unlawful because it infringes Article 30(2) of the Universal Service Directive.

28. Belgacom, on the other hand, considers the amount fixed for covering the set-up costs to be too low and has also applied for the annulment of the contested decision. However, like the IBPT, Belgacom takes the view that Article 30(2) of the Universal Service Directive does not concern set-up costs, but only the traffic costs connected with number portability, and is not applicable to the set-up costs.

29. The referring court concludes, prima facie, that the contested decision has no legal basis. It assumes that it is not to be inferred from the new legal framework for telecommunications that the Member States are authorised to restrict the freedom of negotiation of all operators by imposing an obligation of cost orientation of prices or by adopting measures whereby a common price is set for a service supplied by one operator to another. It considers that Base is correct in claiming that Article 30(2) of the Universal Service Directive does not apply exclusively to tariffs for the termination of calls but to all costs generated by number portability. In the view of the referring court, however, it is not apparent from that provision that the Community legislature intended that national authorities should be assigned the task of fixing the set-up costs ex ante, in lieu of the operators, by means of a general and abstract measure. The Royal Decree therefore infringes the Universal Service Directive irrespective of the calculation method.

30. In the event that the legal bases of the contested decision do not infringe Community law, the referring court would have to consider inter alia whether the IBPT committed errors of assessment in fixing the maximum amounts or in developing the model of the costs. The referring court points out, however, that it does not have at its disposal all the information provided by the operators to the IBPT and that the IBPT contends that it is bound by its duty of confidentiality in this respect.

31. Against this background, by a judgment of 14 October 2004, received at the Registry of the Court of Justice on 19 October 2004, in the proceedings pending before it, the Cour d'appel, Brussels, made reference to the Court of Justice of the European Communities for a preliminary ruling on the following questions:

'With regard to the number portability facility provided for in Article 30 of Directive 2002/22/EC (Universal Service Directive):

(1) Does Article 30(2) of the Universal Service Directive, which provides that national regulatory authorities are to ensure that pricing for interconnection related to the provision of number portability is cost oriented, refer only to costs related to traffic to the ported number, or does it also refer to tariffs of costs incurred by operators in executing requests for number porting?

(2) If Article 30(2) of the directive refers only to interconnection costs related to traffic to the ported number, must it be interpreted:

(a) as leaving operators free to negotiate the commercial conditions for

the facility and as prohibiting Member States from imposing ex ante commercial conditions on undertakings obliged to provide the number portability facility in respect of the services provided in relation to the execution of a request for porting?

(b) as not prohibiting Member States from imposing ex ante commercial conditions in respect of that facility on operators which have been designated as having significant market power in a particular market?

(c) a national measure which empowers the national regulatory authority to fix ex ante for all operators and for a given period the maximum amount of the charges which the donor operator may claim from the recipient operator?

(d) a national measure which grants to the donor operator the right to apply the tariff set by the national regulatory authority, relieving that operator of the obligation to prove that the tariff which it applies is oriented to its own costs?

(3) If Article 30(2) of the directive must be interpreted as imposing on all operators the obligation of cost orientation in respect of the costs of number porting, must it be interpreted as precluding:

(a) a national regulatory measure imposing a specific method of calculating the costs in question?

(b) a national measure which fixes ex ante the allocation of the costs between the operators?

With regard to the right of appeal provided for by Article 4 of [the Framework Directive]:

Must Article 4(1) of the Framework Directive be interpreted as meaning that the authority designated to hear and determine appeals must be able to have at its disposal all the information necessary for the merits of the case to be duly taken into account, including the confidential information on the basis of which the national regulatory authority adopted the decision which is the subject-matter of the appeal?'

IV — Answers to the questions referred for a preliminary ruling

committed errors of assessment in the contested decision in developing a theoretical model of the costs and in calculating the amounts.

A — *The interpretation of Article 30 of the Universal Service Directive (first, second and third questions)*

34. The first question essentially seeks to ascertain whether Article 30(2) of the Universal Service Directive also refers to the set-up costs for the provision of portability or refers only to traffic costs.

1. Subject-matter of the questions and main submissions of the parties

35. The second question is asked in the event that the first question is to be answered in the negative and essentially seeks to ascertain whether Article 30(2) of the Universal Service Directive nevertheless precludes ex ante rules governing the set-up costs for the provision of portability or in any case permits such rules in respect of operators having significant market power.

32. First of all, it is necessary to examine in greater detail the subject-matter of the present case in so far as, by its first three questions, which themselves consist of several subquestions, the referring court requests from the Court of Justice an interpretation of Article 30 of the Universal Service Directive.

36. The third question is evidently asked in the event that the first question is to be answered in the affirmative and Article 30(2) of the Universal Service Directive refers to the set-up costs of all operators. In the different subquestions, the referring court addresses the different characteristics of the contested decision, its legal basis and the method adopted therein and thereby seeks clarification as to whether those characteristics and that method are compatible with Article 30(2) of the Universal Service Directive.

33. As is clear from the order for reference, these three questions relate to the validity of the legal basis of the contested decision, and directly to the Royal Decree, whilst the referring court asks the fourth question in case the legal basis of the contested decision is to be regarded as valid in the light of the answer given by the Court and it must therefore be examined whether the IBPT

37. With the first three questions, which will be examined together hereinafter, the referring court would therefore essentially like to establish whether Article 30 of the Universal Service Directive precludes national rules (hereinafter also 'the contested rules') which provide for the (maximum) level of the amounts to cover the set-up costs related to portability to be fixed ex ante for each mobile operator on the basis of a theoretical model of an efficient operator on the market in question. [8]

38. In the present case, Mobistar, Belgacom Mobile, Base, the IBPT, the Commission and the Governments of the United Kingdom, Lithuania, Italy and Cyprus have submitted observations on this question, the broad lines of which may be summarised as follows.

39. Mobistar takes the view that Article 30(2) of the Universal Service Directive refers only to traffic costs, and not to the set-up costs for the provision of portability. However, viewed as a whole, Article 30 of the Universal Service Directive does not preclude national rules like the contested rules.

40. Belgacom essentially shares this view and refers inter alia to the fact that the Universal Service Directive does not seek full harmonisation of the rules relating to portability and merely contains minimum requirements for the Member States in this regard.

41. The IBPT, the Commission and the Lithuanian and Cypriot Governments take the view that Article 30(2) refers only to traffic costs, in each case on the basis of the argument that the execution of requests for number porting, and therefore the set-up costs, would not come under the concept of 'interconnection'. Except for the Cypriot Government, these parties — with different emphases — therefore all agree that a Member State is permitted to adopt rules on portability like the contested rules. The Cypriot Government, on the other hand, concludes with reference to Article 10(1) of the Framework Directive that Article 30(2) of the Universal Service Directive prohibits the Member States from imposing ex ante commercial conditions on operators in respect of the portability facility. There is merely a power to adopt a posteriori measures in this regard.

42. In contrast, Base, the Italian Government and the United Kingdom Government argue that Article 30(2) of the Universal Service Directive refers to both traffic costs and set-up costs for the provision of portability. In the view of both the abovementioned governments, Article 30(2) permits

8 — In this connection, the referring court takes the view that Article 30(2) of the Universal Service Directive is applicable to the set-up costs and that, irrespective of the underlying method of assessment, the Royal Decree infringes that provision in that it entrusts the national authorities with the task of fixing the set-up costs in general and ex ante. However, it considers that the Royal Decree also infringes the Universal Service Directive in so far as it prescribes a certain method for calculation of the costs for the national regulatory authority. The referring court therefore takes the view that the contested decision has no legal basis.

Member States to adopt ex ante rules like the contested rules for all operators. Base claims, however, that under Article 30(2) of the Universal Service Directive the set-up costs should be fixed on the basis of the actual costs incurred by each donor operator and not on the basis of a theoretical model of an efficient operator on the market in question.

2. Assessment

43. It should be noted by way of introduction that, with the first three questions referred for a preliminary ruling, the Court is being asked — in the context of proceedings concerning the lawfulness of a decision of the national regulatory authority — to assess whether Article 30(2) of the Universal Service Directive prevents a Member State from providing for the national regulatory authority, on the basis of an abstract model of the costs, to fix a maximum amount, ex ante and in respect of all operators, which a donor operator may demand from a recipient operator to cover per-line or per-number set-up costs for the provision of number portability.

44. Like most of the parties, I will essentially undertake this assessment in two steps. As a first step, it must be examined whether the set-up costs are covered by the pricing which the national regulatory authorities must ensure is cost oriented under Article 30(2) of the Universal Service Directive. Secondly, it must be considered whether the national regulatory authorities are permitted to do this by fixing ex ante maximum prices in respect of all operators on the basis of an abstract model of the costs.

45. It should be stated first of all that the Universal Service Directive does not give a more precise definition of what is meant by 'pricing for interconnection related to the provision of number portability' within the meaning of Article 30(2).

46. Several parties have argued that that provision refers only to the traffic costs related to the ported number, above all on the ground that setting up number portability, which consists in an administrative process and an information technology process — unlike telephone traffic to the ported number — does not entail or require any interconnection along the lines of 'the physical and logical linking of telecommunications networks' within the meaning of Directive 97/33 and the Access Directive.

47. Aside from the fact that the term 'interconnection', as it is defined in Article 2(b) of the Access Directive or in Article 2(1)(a) of Directive 97/33, does not necessarily have to have the same meaning as in

those directives, I do not consider this narrow interpretation, which relates to the term 'interconnection' and the technical characteristics of the porting, to be convincing.

48. It may be true, as Belgacom has argued for example, that porting a number is technically possible in principle even without 'physical and logical linking' between the networks of the donor operator and the recipient operator, whilst telephone traffic to the ported number would in any case require such linking. However, this distinction appears to be rather artificial and must be qualified in so far as portability ultimately makes sense only in a telecommunications environment where the different networks between which numbers may be ported are interconnected, with the result that communication is possible across network boundaries. In addition, the setting-up of porting, that is to say the administrative processing and the technical setting-up of porting by the donor operator, is a precondition for any connection being created to the ported number in the recipient operator's network. In my view, there is nothing in this respect to suggest that, like telephone traffic or the routeing of calls in the recipient operator's network to the ported number, the setting-up of porting should not be covered by the concept of 'interconnection related to the provision of number portability'.

49. However, an objection was also raised against such an interpretation on the ground that Annex IV to Directive 97/33 provides that interconnection charges may also include a fair share of costs incurred in providing number portability. This shows that the provision of portability does not constitute an interconnection service, otherwise such a separate mention would have been unnecessary.

50. In my view, this mention of the costs incurred in providing number portability in Annex IV to Directive 97/33 actually reinforces the general connection between the provision of porting and interconnection since it gives the costs incurred in providing number portability as an example on the list of 'elements for interconnection charges'. Furthermore, under Section 1(a) of Annex VII to that directive, requirements for number portability are among the areas in the 'framework for negotiation of interconnection agreements' for which the national regulatory authority may set ex ante conditions.

51. However, above all an interpretation of Article 30(2) of the Universal Service Directive in its context and in the light of its aim and purpose indicates that set-up costs are covered by that provision as well as traffic costs.

52. One of the aims of the Community regulatory framework for telecommunications, which includes the Universal Service Directive, is to ensure effective competition in this sector. [9] In recital 40 in the preamble to the Universal Service Directive, number portability is described specifically as 'a key facilitator of consumer choice and effective competition in a competitive telecommunications environment'.

53. As has already been touched on in this passage, number portability is strictly speaking important in two respects, which are two sides of the same coin. It is important, first of all, with regard to effective competition between mobile operators which promote portability in so far as it makes it easier for users to change between operators — because there is no longer the disadvantage of changing number — and thereby eliminates an obstacle for operators in the competition for mobile users. Secondly, it is important with regard to the interest of the consumers themselves in having as much freedom as possible to change between different operators whilst retaining their existing number and thus in greater freedom of choice. This latter, more 'consumer-oriented' aspect is emphasised in the Universal Service Directive, where rules governing number portability are laid down in Chapter IV entitled 'End-user interests and rights'.

9 — See, inter alia, Article 8 of the Framework Directive.

54. Excessive set-up costs for the provision of portability are obviously a burden for operators, which want to attract new customers, and can therefore make it more difficult for a new operator to enter the market. In so far as the recipient operator passes on the set-up costs to the end-user — which it must do, if not directly then at least indirectly through its general tariff structure — such portability costs may deter consumers from using the number portability facility and changing to the new network.

55. Consequently, the number portability facility cannot 'neutralise' the 'telephone number factor' as a criterion in choosing a supplier in favour of appropriate competitive criteria such as quality and price; instead, on account of the costs of number portability, the telephone number continues to be an obstacle to the willingness of mobile customers to change networks and to effective competition between mobile operators. Moreover, it is also clear from the second half of Article 30(2) of the Universal Service Directive relating to any indirect charges that the Universal Service Directive seeks to prevent consumers from being deterred from using the number portability facility.

56. It should also be borne in mind in this connection that operators already established on the market and operators with significant market power — often those undertakings that had exclusive rights prior

to liberalisation — which already have a large customer base are more interested in holding on to their end-users and are not as reliant as an up-and-coming competitor on customers changing networks. These established operators — which, already having more end-users, are more likely to be donor operators — therefore have a natural interest in the set-up costs being fixed as high as possible. By charging excessive set-up costs, donor operators can deter their customers from changing networks and even obtain some compensation for the loss of customers where they do change networks.

57. In the light of these considerations, an interpretation according to which the set-up costs were not covered by the principle of cost orientation laid down in Article 30(2) of the Universal Service Directive would be contrary to the aim and purpose of the Universal Service Directive and would restrict considerably its practical effectiveness in guaranteeing portability.

58. It would not be comprehensible either, as most of the parties have argued, why the traffic costs and not the set-up costs should be covered by Article 30(2) of the Universal Service Directive, especially since the set-up costs have to be borne directly (in Belgium, the recipient operator may demand up to EUR 15 from the end-user for number porting) or at least indirectly by the end-user who uses the portability facility. In contrast, the traffic costs are charged by the donor operator to the operator from whose network the call to the ported number is generated, ultimately the caller.

59. Whilst the traffic costs are costs which do not have to be borne by the end-user who uses the portability facility, the set-up costs are costs which are passed on directly or indirectly to the consumer by the recipient operator.

60. However, realistically, in my opinion, the costs which have to be borne by consumers themselves carry more weight in the decision about changing operators than any additional costs for their callers.

61. From this perspective, the set-up costs actually play an even greater role than traffic costs with respect to the consumer's option of using the number portability service or in acting as a 'disincentive'. This is particularly the case with a 'direct routeing' system, as in Belgium, where calls from Belgian networks are connected directly to the ported number with the result that, as can be seen from the papers before the Court, any traffic costs are

incurred only in the case of calls to the ported number which are generated from abroad.

62. From this point of view too, it appears only logical that the obligation imposed on the national regulatory authority under Article 30(2) to ensure that pricing related to the provision of number portability is cost oriented refers not only to traffic costs, but also to set-up costs.

63. Consequently, as the next step, it must be considered whether the national regulatory authorities are permitted to ensure that the set-up costs are cost oriented by fixing ex ante maximum prices in respect of all operators on the basis of an abstract model of the costs. According to the order for reference and the submissions of the parties, there are essentially two aspects at issue. The first aspect is the scope *ratione personae* of the principle of cost orientation with respect to portability under Article 30(2) of the Universal Service Directive and the question whether the Member States are prohibited from giving the national regulatory authorities the right to impose ex ante conditions or obligations on all operators with regard to the costs related to portability or, for example, only in respect of operators with significant market power. The second aspect is the conformity with Community law of the actual method of regulation, namely fixing a maximum price on the basis of a theoretical model of an efficient operator on the market in question.

64. As is clear from my arguments above, in the Universal Service Directive number portability is presented as a right for the consumer or the end-user which, as is expressly stated in recital 40 in the preamble to the directive, that person must be able to exercise independently of the undertaking providing the service, that is to say independently of the donor or recipient operator in question. Accordingly, in its three paragraphs Article 30 does not make any distinction between undertakings with or without significant market power.

65. In the light of these considerations, it must be stated that the obligation of cost orientation applies generally to 'pricing for interconnection related to the provision of number portability', and in the present case to set-up costs, irrespective of whether that pricing is demanded by operators with or without market power.

66. It must not be forgotten, however, that the referring court has asked the question regarding the regulatory power of the national regulatory authorities against the background of a situation where in the new legal framework for telecommunications — as in the old legal framework — the freedom enjoyed by undertakings to negotiate among

themselves the conditions in respect of telecommunications services on a commercial basis takes precedence over regulation and imposition of ex ante obligations by the national regulatory authorities, and their power to impose specific ex ante obligations on undertakings with significant market power is limited. [10] Among other things, under recital 14 in the preamble to the Access Directive, which concerns the obligations to be imposed on undertakings with significant market power, which were laid down in Directive 97/33, 'this range of possible obligations should be maintained but, in addition, they should be established as a set of maximum obligations that can be applied to undertakings, in order to avoid over-regulation'.

67. However, as has rightly been argued by, among others, the Commission, Mobistar, Base, Belgacom and the IBPT in this connection, number portability, as it is laid down in Article 30 of the Universal Service Directive, is expressly not among the areas under Article 8(3) of the Access Directive in which the national regulatory authorities would be prevented from imposing the ex ante obligations referred to in Articles 9 to 13 of the Access Directive on operators other than those which are to be classified as operators having significant market power.

10 — See recital 13 in the preamble to the Access Directive and recital 27 in the preamble to the Framework Directive.

68. In my opinion, this reinforces the view that a national regulatory authority is permitted, in respect of portability as it is governed in the Universal Service Directive, and specifically in respect of the cost orientation of pricing related to portability, to impose ex ante obligations also on operators without significant market power. With regard to the over-regulation of the telecommunications sector, which the new legal framework, which includes the Universal Service Directive, seeks to avoid, I think it is important that the contested rules do not provide for a fixed price for the set-up costs, but merely for a maximum amount to be fixed by the national regulatory authority for the set-up costs, with the result that the possibility for operators freely to negotiate the level of the set-up costs with one another is not completely restricted, but an (upper) limit is merely set for the freedom of negotiation in this regard.

69. Furthermore, it should be stated that the obligations imposed on the Member States in respect of number portability are defined very broadly in Article 30 of the Universal Service Directive.

70. Under Article 30(1) of that directive, the Member States must ensure number portability in general for all subscribers of publicly available telephone services, including mobile services, independently of the undertaking providing the service. Article 30(2) clarifies that obligation to the effect that national regulatory authorities must ensure that pricing for number portability

— including the set-up costs — is cost oriented and that direct charges to subscribers, if any, do not act as a disincentive. Lastly, Article 30(3) contains a 'negative' stipulation in respect of the national regulatory authorities in so far as they may 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.

71. The Universal Service Directive therefore allows the Member States considerable scope in implementing their obligations in connection with guaranteeing number portability.

72. With particular regard to the regulation of set-up costs, Article 30(2) of the Universal Service Directive does not contain anything to suggest that the ex ante fixing of a maximum price on the basis of a theoretical model of an efficient operator on the market in question would be inconsistent with that provision or would not constitute an adequate means of ensuring that the set-up costs which a donor operator may demand from a recipient operator are cost oriented.

73. Lastly, the interpretation according to which, under the Universal Service Directive, pricing for interconnection related to the provision of number portability does not have to be regulated on the basis of the actual individual costs of the operator in question, but may be regulated ex ante on the basis of an abstract model of the costs, is also supported by recital 42, according to which in performing their tasks under Article 30(2) the national regulatory authorities may also take account of prices available in comparable markets.

74. In the light of the foregoing, I suggest that the Court answers the first three questions referred for a preliminary ruling to the effect that Article 30(2) of the Universal Service Directive does not prevent a Member State from providing for the national regulatory authority, on the basis of a theoretical model of an efficient operator, to fix a maximum amount, ex ante and in respect of all operators, which a donor operator may demand from a recipient operator to cover per-line or per-number set-up costs for the provision of number portability.

B — *The interpretation of Article 4 of the Framework Directive (fourth question)*

1. Subject-matter of the question and main submissions of the parties

75. As is clear from the order for reference, the referring court does not have at its

disposal all the information (statistical data) provided by the operators to the IBPT, on which the IBPT based its assessment of the theoretical costs of an efficient mobile operator. In the main proceedings, the IBPT contends that it is bound by a duty of confidentiality under the Law of 17 January 2003 on its statute.

76. Against this background, the referring court is seeking to ascertain whether under Article 4 of the Framework Directive it must be able to have at its disposal all the information necessary to examine the substance of an appeal within the meaning of that provision, including information which is confidential under national and Community legislation on business confidentiality.

77. The parties [11] agree that under Article 4 of the Framework Directive the appeal body responsible for hearing the appeal against a decision of the national regulatory authority must be able to have at its disposal all the information necessary in order to decide on the substance of the appeal, including information that is subject to confidentiality. However, the protection of confidential data and business confidentiality must be guaranteed and must be reconciled by the court hearing the appeal, within the framework of national procedural law, with the requirements of effective legal protection and the rights of the defence. The parties refer inter alia to the possibility of restricting the parties' access to information which is to be treated as confidential.

78. The IBPT also states that in view of its confidentiality obligations it had been cautious about passing on the information in question to the court, but that it would not oppose a request or an order from the court to that effect.

2. Assessment

79. Under Article 4 of the Framework Directive, as is clear from recital 12 in the preamble to the directive, any party who is the subject of a decision by a national regulatory authority must have the right to an effective appeal against that decision to an independent body.

80. Article 5 the Framework Directive contains rules on the provision of information to national regulatory authorities and the Commission, but does not make any express provision with regard to the appeal bodies which — like the referring court in the present case — have the power under national law to review the decisions of national regulatory authorities. As the parties have rightly stated in this regard, however,

11 — The Lithuanian Government did not submit any observations on this question.

the guarantee of this right to effective legal protection against decisions of national regulatory authorities requires the appeal body — like the national regulatory authorities under Article 5(1) and the Commission under Article 5(2) of the directive — to be able to have at its disposal all the information that it requires in order to give a due decision on the substance of the appeal.

81. As regards the provision of information which is to be considered confidential in accordance with Community and national rules on business confidentiality, Article 5(3) of the Framework Directive provides that the Commission and the national regulatory authorities concerned must ensure such confidentiality. In addition, under Article 5(4) of the Framework Directive regarding the publication of information, the Member States must inter alia comply with Community and national rules on business confidentiality.

82. In accordance with those provisions, the confidentiality of information does not therefore mean that the information could not be provided to the national regulatory authorities or the Commission. Rather, they must 'ensure such confidentiality'.

83. In my view, these rules can also be applied to proceedings before national appeal bodies. Those bodies must therefore have at their disposal the information that they require in order to fulfil their task of ensuring effective legal protection against decisions of national regulatory authorities even where the information is to be considered confidential in accordance with Community and national rules. However, they must ensure confidentiality.

84. National rules which prevent a national appeal body from obtaining from a national regulatory body confidential information which is necessary for the decision on an appeal would not therefore be compatible with the right to effective legal protection laid down in Article 4 of the Framework Directive.

85. Furthermore, in my view, national rules having such content which lay down the detailed rules governing the procedure under Article 4 of the Framework Directive before a national appeal body would also breach the principle of effectiveness in so far as they would render actual effective legal protection against decisions of the national regulatory authority virtually impossible or excessively difficult, even where it is in principle for the

national law of the individual Member States to lay down those detailed procedural rules. [12]

86. The national appeal body — in the present case the referring court — should therefore have disapplied national rules on confidentiality or national procedural rules in so far as they preclude the provision of confidential information which it requires in order to give a due decision on the substance of an appeal. [13]

87. However, such a conflict appears not to arise in the main proceedings to this extent anyway since — as is clear from the papers before the Court — Article 23 of the Law of 17 January 2003 on the statute of the IBPT, on which the IBPT initially relied before the referring court, requires the IBPT or its Council members in rather general terms to safeguard business confidentiality vis-à-vis third parties and the confidentiality of the information passed on by undertakings, without, for example, addressing separately the question of the provision of the information concerned to the appeal body. The IBPT has also already expressed its willingness to comply with an order from the referring court to submit the confidential information in question.

88. Furthermore, as most of the parties have argued, it is for the appeal body — in the present case, the referring court — to take appropriate steps in the proceedings before it in order to strike a balance between the requirements of effective legal protection or the interest of a due examination of the substance of an appeal and the safeguarding of business confidentiality. [14]

89. In a case like the one at issue, the referring court may, for example, order the submission of all information which it requires for a due decision on the substance of the appeal before it against the decision of the national regulatory authority and — in so far as is essential for the protection of the confidential information and having due regard to the rights of the defence — if necessary treat the information in question confidentially, even vis-à-vis the parties to the proceedings.

12 — See, inter alia, Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 60; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29; and Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 33.

13 — See, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraphs 13 and 21.

14 — See, with regard to the protection of confidential information, inter alia, Case 110/84 *Hillegom* [1985] ECR 3947, paragraph 33, and Joined Cases 209/78 to 215/78 and 218/78 *Heintz van Landewyk and Others* v *Commission* [1980] ECR 3125, paragraph 46, and Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921, paragraph 69.

90. In the light of the foregoing, I suggest that the Court answers the fourth question referred for a preliminary ruling to the effect that Article 4 of the Framework Directive must be interpreted as meaning that the authority designated to hear and determine appeals must be able to have at its disposal all the information necessary for the merits of the case to be duly taken into account, including the confidential information on the basis of which the national regulatory authority adopted the decision which is the subject-matter of the appeal. It is for the appeal body to ensure, by taking appropriate steps in the proceedings before it, that the information in question is treated confidentially.

V — Conclusion

91. In the light of the foregoing, I propose that the Court answers the questions referred for a preliminary ruling as follows:

'(1) Article 30(2) of the 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) does not prevent a Member State from providing for the national regulatory authority, on the basis of a theoretical model of an efficient operator, to fix a maximum amount, ex ante and in respect of all operators, which a donor operator may demand from a recipient operator to cover per-line or per-number set-up costs for the provision of number portability.

(2) Article 4 of the Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).must be interpreted as meaning that the authority designated to hear and determine appeals must be able to have at its disposal all the information necessary for the merits of the case to be duly taken into account, including the confidential information on the basis of which the national regulatory authority adopted the decision which is the subject-matter of the appeal. It is for the appeal body to ensure, by taking appropriate steps in the proceedings before it, that the information in question is treated confidentially.'