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The regulation of number porting services in the EU : Are the principles set out by the ECJ in the recent PTC decision reconcilable with the practical consequences of the earlier Mobistar judgment? Case comment to the...

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**The regulation of number porting services in the EU:
Are the principles set out by the ECJ in the recent *PTC*
decision reconcilable with the practical consequences
of the earlier *Mobistar* judgment?**

**Case comment to the preliminary ruling of the Court of Justice
of 1 July 2010**

***Polska Telefonia Cyfrowa v President of Office of Electronic
Communications*
(Case C-99/09)**

Introduction

Number portability is the name given to the facility that allows the subscribers of Publicly Available Telephone Services (PATS) to change their service provider while retaining their original number. By enabling subscribers to switch between telecoms network/service providers with little inconvenience, the number porting service therefore constitutes a key facilitator of consumer choice and effective competition on the electronic communications market. The importance of number portability in this respect is easily demonstrated if it is considered that, in 2010 alone, 930,000 Polish fixed line subscribers availed of this facility, along with a further 866,000 mobile network subscribers¹.

The obligation for operators to provide number porting services in the European Union (EU) is included in Article 30 of the Universal Service Directive (the Directive), and constitutes a valuable regulatory tool under both EU and national law². Prior to its amendment in 2009, the latter provision regulated the pricing of number portability

¹ *Raport o stanie rynku telekomunikacyjnego w Polsce w 2010 r.* [Report on telecommunications market in Poland in 2010], p. 45, 67 (available at: http://www.uke.gov.pl/uke/index.jsp?place=Lead01&news_cat_id=188&news_id=6928&layout=3&page=text).

² Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and user's rights relating to electronic communications networks and services (Universal Service Directive) (as amended by the Citizens' Rights Directive), OJ [2002] L 108/51. The implementation of number portability at MS level is carefully enforced by the European Commission, which has taken infringement proceedings against Austria, Bulgaria, Czech Republic, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia for their failure to adequately implement the requirements.

in the EU by subjecting any charges levied at wholesale level for the provision of this facility to the principle of cost orientation. It also sought to ensure that customers could not be dissuaded from availing of this service by prohibiting the setting of disproportionate retail prices³.

In response to a request submitted by the Polish Supreme Court, the European Court of Justice (ECJ) delivered a preliminary ruling in C-99/09 *PTC* on 1 July 2010 regarding the application of Article 30(2) of the Directive in Poland. In this judgment, the Court clarified that National Regulatory Authorities (NRAs) are required to consider the costs incurred by mobile operators when providing number porting services in order to determine the appropriateness of the direct subscriber charge under Article 30(2). Such retail charges must, however, be set at a level below the costs actually incurred if they are likely to constitute a ‘disincentive’ to subscribers in accordance with that provision⁴.

This paper analyses the ECJ’s judgment in the *PTC* case in the light of its earlier preliminary ruling in C-438/04 *Mobistar*, which also concerned the costing of number porting services under Article 30(2) of the Directive⁵. The reasoning adopted by the Court in both judgments is appraised separately, while the difficulty in reconciling the practical consequences of the *PTC* ruling with the principles as established in the earlier *Mobistar* decision is also explained. In particular, it is argued that, while the ECJ genuinely sought to accord a literal interpretation to the provisions of Article 30(2) in both decisions, the principles enunciated in the *PTC* ruling, coupled with the application of diverse practices at national level regarding the recovery of number porting costs, raises the undesirable possibility that operators in different Member State (hereafter, MS) may be subject to discordant regulatory principles with respect to the costing of the number porting service.

It is argued that such a scenario risks placing certain telecoms operators at an economic disadvantage *vis-à-vis* those that may, depending on the national regulatory framework in place, be subject to the application of more favourable price control principles when recovering their costs. The importance of ensuring the application of a consistent approach with respect to cost recovery at national level is accentuated by the rate of increase in the uptake of the number porting service on a year to year basis in the EU. In Poland alone, mobile number porting transactions increased by 110%

³ The original wording of Article 30(2) has been slightly changed following the amendment of the 2002 EU Regulatory Framework for Electronic Communications in 2009. The former reference to ‘pricing for interconnection’ has now been replaced by reference to ‘pricing between operators and/or service providers related to the provision of number portability’. This amendment brings greater clarity to the text of Article 30(2) in the light of the ECJ’s decision in *Mobistar*, and ensures that the regulatory principle of cost orientation applies to all charges associated with the provision of number porting facility that are levied at wholesale level, and not only those concerning strict traffic related costs.

⁴ C-99/09 *Polska Telefonia Cyfrowa sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej (PTC)*.

⁵ C-438/04 *Mobistar SA v Institut belge des services postaux et de télécommunications (IBPT) (Mobistar)*, ECR [2006] I-6675.

from 2009 to 2010, while the percentage increase in fixed number porting transactions during the same period stood at 62.5%⁶. As the provision of number portability may, in practice, account for a growing part of the expenses incurred by a telecoms operator on a national market, it is therefore important that the costing of this service is subject to the application of congruent regulatory principles in the EU⁷.

The ECJ's decision in PTC

In 2007, the Polish telecoms regulator, the President of the Office for Electronic Communication (in Polish: *Urząd Komunikacji Elektronicznej*; hereafter, UKE), imposed a fine of PLN 100,000 (approx. EUR 25,000) on the Polish mobile operator Polska Telefonia Cyfrowa (PTC). This fine was imposed on the grounds that the one-off fee of PLN 122 (approx. EUR 30) that PTC had been charging subscribers for the provision of the number porting service during the period from 28 March until 31 May 2006 dissuaded them from availing of this facility, and thus constituted an infringement of Article 71(3) of the Polish Telecommunications Law (the latter provision partially transposes the requirements of Article 30(2) of the Directive into national law)⁸. PTC appealed this decision, arguing that Article 30(2) obliges NRAs to take account of the costs incurred by an operator at wholesale level during the porting process when assessing whether or not its retail charge discourages subscribers from availing of this service.

This dispute was eventually litigated before the Polish Supreme Court which⁹, in December 2009, referred the following question to the ECJ for a preliminary

⁶ Raport..., p. 44, 67.

⁷ Wholesale prices for the provision of number porting services across the EU vary to a great extent: from zero charge for porting fixed numbers in Estonia, Germany and Lithuania to EUR 33.9 in the Czech Republic and up to EUR 50 in Slovakia; and from zero charge for mobile porting in seven MS to EUR 20.6 in the Czech Republic and EUR 33.2 in Slovakia. Source: Commission Staff Working Document accompanying the 15th Implementation Report (March 2010), p. 63 (available at: http://ec.europa.eu/information_society/policy/ecom/doc/implementation_enforcement/annualreports/15threport/15report_part2.pdf).

⁸ In this respect, the Polish telecoms regulator (UKE) commissioned the undertaking of a consumer survey in 2006 in order to determine how much fixed and mobile customers were prepared to pay for the number porting service. Its results led UKE to the conclusion that the imposition of a one-off retail charge of more than PLN 50 risked dissuading customers from porting their numbers, and thus constituted a breach Article 71(3) of the Polish Telecommunications Law (the latter provision partially transposes the requirements of Article 30(2) into national law). The adequacy of this approach, whereby retail prices are set by the NRA on the basis of a consumer survey, is questionable. For a more insightful discussion on this issue, see: M. Wach, 'Should a fee for mobile phone number portability be determined solely by subscriber preferences? Comments to the judgments of the Court of Competition and Consumers Protection of 8 January 2007 (Ref. No. XVII AmT 29/06) and 6 March 2007 (Ref. No. XVII AmT 33/06) – Portability fee' (2008) 1(1) *YARS* 266–270.

⁹ Prior to its hearing in the Polish Supreme Court, this case was firstly litigated before the District Court in Warsaw, the decision of which was appealed to the Court of Appeals of Warsaw.

ruling under Article 234 of the EU Treaty [currently Article 267 of the Treaty on the Functioning of the European Union (TFEU)]:

‘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?’¹⁰.

In essence, the ECJ understood the above question as a request for guidance from the Polish Supreme Court concerning the degree to which an NRA is required to consider the actual costs incurred by an operator when seeking to ensure that retail charges do not act as a ‘disincentive’ to subscribers contrary to Article 30(2) of the Directive¹¹.

As noted earlier, Article 30(2) allows for the possibility to regulate the provision of the number porting service at both wholesale and retail levels. While this provision requires that any charges levied at wholesale level are subject to the cost orientation requirement, it does not, however, subject customer number porting charges to a specific price control regime. It is submitted that Article 30(2) therefore facilitates the application of two different, and, in practice, potentially discordant, cost control methodologies. While all charges imposed at wholesale level are subject to the regulatory principle of cost orientation under Article 30(2), the latter provision does not stipulate what price control regime should apply to retail number porting charges. On the contrary, Article 30(2) only sets a relatively subjective benchmark when determining the appropriateness of retail number porting fees; i.e. the notion of a retail charge that acts as a ‘disincentive’ to consumers, or that dissuades them from availing of the number porting service. This framework thus grants NRAs a measure of discretion when regulating the prices paid by subscribers for number porting services, presumably in the light of the diverse economic, social and cultural circumstances that characterise each national telecoms market.

When seeking to address the question submitted by the Polish Supreme Court, the ECJ, in a judgment of only twenty nine paragraphs, acknowledged that the practical implementation of the number portability facility requires the same three elements as identified by the same Court in its earlier *Mobistar* ruling (discussed below), namely: ‘(...) 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’¹².

The Court also expressly recognised that an NRA has the task of determining both the costs incurred by the operators when providing number portability, as well as ensuring that the level of the direct charge does not deter subscribers from using

¹⁰ *PTC*, para. 12.

¹¹ *Ibid*, para. 13.

¹² *Ibid*, para. 16. In fact, the ECJ in *PTC* quoted verbatim the text of its earlier decision in *Mobistar* in this regard, citing para. 24 of the latter judgment.

this service¹³. The ECJ went on to state that an NRA must oppose the application of a direct charge which, although in line with these costs, would be likely to constitute a ‘disincentive’ contrary to Article 30(2) of the Directive¹⁴. In light of this requirement, the ECJ concluded in *PTC* that an NRA therefore retains the power to fix the maximum amount of any such charge at a level below the costs actually incurred when providing this facility if it considers that a higher charge is likely to dissuade subscribers from availing of the number porting service¹⁵.

The ECJ’s decision in *Mobistar*

While also a preliminary reference ruling, the earlier *Mobistar* case differed from *PTC* in that it concerned the setting of number porting charges at wholesale level, while the *Mobistar* decision concerned the setting of consumer charges at retail level. The issue of retail pricing was therefore only indirectly addressed by the ECJ in *Mobistar*, which affirmed that prices should be fixed in such a manner that subscribers are not dissuaded from making use of the number porting facility¹⁶.

In *Mobistar*, the claimant operator had taken an action at national level alleging that the Belgian NRA (*Institut belge des services postaux et des télécommunications*; hereafter, IBPT, had fixed the so-called ‘set-up costs’ that the donor operator (the number is ported from its network) could recover from the recipient operator (the number is ported onto its network) during the number porting process at an excessively high level¹⁷. Importantly, these ‘set-up costs’ were defined under Belgian national law as ‘(...) the non-recurrent additional cost[s] generated as a consequence of the porting of one or more mobile numbers, in addition to the costs connected with the transfer of clients without number portability to another mobile operator or service provider or in order to terminate the provision of the service’¹⁸.

¹³ *Ibid*, para. 25.

¹⁴ *Ibid*, para. 26.

¹⁵ *Ibid*, para. 28.

¹⁶ *Mobistar*, para. 26.

¹⁷ At the time that the request for a preliminary ruling in the *Mobistar* case was submitted to the ECJ, Belgian law stated that the donor operator was entitled to recover certain “set-up” costs associated with the number porting process from the recipient operator at wholesale level through the imposition of an inter-operator fee. While the donor operator was prohibited from levying a retail customer for the provision of the number porting service, the recipient operator was entitled to demand the payment of a regulated retail charge (of no more than EUR 15). This legal framework facilitated the recovery of the donor operator’s costs at wholesale level, while the recipient operator could seek to recover some (or all) of its costs through the imposition of a regulated customer fee at retail level. See: Decision taken by IBPT according to the Law of 17 January 2003 on the statute of the regulator of the Belgian postal and telecommunications sectors (*Moniteur belge*, 24 January 2003) and of the Royal Decree of 23 September 2002 on portability for end-users of publicly available mobile telecommunications services (*Moniteur belge*, 01 October 2002).

¹⁸ Article 18 of the Royal Decree of 23 September 2002.

According to the IBPT decision that fixed the ‘set-up costs’ per mobile number successfully ported (the contested IBPT decision), the notion of ‘set-up costs’ under Belgian law referred only to costs that are incurred by the donor operator¹⁹.

This dispute was litigated before the Belgian Court of Appeals, which sent the case as a preliminary reference to the ECJ, asking, among other questions, whether: ‘(...) Art. 30 (2) of the [Directive] [...] refer[s] only to those costs related to traffic to the ported number [i.e. strictly interconnect related costs], or does it also refer to tariffs of costs incurred by operators in executing requests for number porting²⁰. When seeking to address this question, the ECJ expressly recognised that the actual implementation of the number porting facility by telecoms operators includes the following three elements: 1) the synchronising of platforms between the donor and recipient operators; 2) the actual porting of the subscriber’s number from the donor to the recipient network, and; 3) the technical operations necessary to allow the routing of traffic to the ported number²¹. Importantly, the exact same elements were later identified by the ECJ in its *PTC* judgment.

The ECJ also acknowledged in *Mobistar* that the contested ‘set-up costs’ did not fall within the scope of the checks as expressly set out in Article 30(2)²². It simultaneously concluded, however, that any interpretation of this measure according to which these ‘set-up costs’ would not be subject to the requirements set out in Article 30(2) would be contrary to the aim and purpose of the Directive, and would thus risk limiting its effectiveness²³.

Following from this, the Court recognised in *Mobistar* that the fixing of ‘set-up costs’ at excessive levels by donor operators, and particularly those already established on the market benefiting from a large client base, may dissuade subscribers from making use of the number porting facility²⁴. The ECJ concluded, therefore, that wholesale interconnection services related to the provision of number portability as referred to under Article 30(2) included both the traffic costs of numbers ported (strictly interconnect related costs) as well as the so-called ‘set-up costs’ incurred by an operator when implementing the porting service²⁵.

Notwithstanding the fact that the Court repeatedly stressed the importance of subjecting ‘set-up costs’ to specific price regulation in the *Mobistar* decision, it chose not to define the scope of such costs. In this respect, it only acknowledged in broad terms that such ‘set-up costs’: ‘[...] represent a large part of the costs that may be passed on directly or indirectly by the recipient operator to the subscriber who wishes to make use of the portability facility for his/her mobile number²⁶.

¹⁹ *Mobistar*, para. 14.

²⁰ *Mobistar*, para. 19.

²¹ *Mobistar*, para. 24.

²² *Mobistar*, para. 29.

²³ *Mobistar*, para. 27.

²⁴ *Mobistar*, para. 29.

²⁵ *Mobistar*, para. 30.

²⁶ *Mobistar*, para. 28.

Are the principles set out in *PTC* reconcilable with the practical consequences of the earlier *Mobistar* ruling?

(i) *The operator costs taken into consideration by the ECJ in PTC and Mobistar:*

The ECJ clearly accords a maximalist interpretation in its *Mobistar* ruling to the requirements of Article 30(2) in order to ensure that all costs levied at wholesale level for the provision of the number porting service are subject to the regulatory principle of cost orientation²⁷. It would appear that, by adopting such an approach, the Court is attempting to appropriately address the risk that the setting of excessive wholesale charges could be passed on to subscribers, thus prohibiting or dissuading them from using this important facility. This point is demonstrated by the fact that the ECJ expressly acknowledges in *Mobistar* that the exclusion of the so-called 'set-up costs', as referred to in the judgment, from the scope of Article 30(2), would be: '(...) contrary to the aim and purpose of the Universal Service Directive and might limit its effectiveness from the point of view of the provision of [number] portability'²⁸.

While the ECJ chose not to define the exact scope of such 'set-up costs' in the *Mobistar* judgment, it is nonetheless clear that the Court also sought to attach an expansive interpretation to this notion. This point is illustrated if we consider the wide interpretation accorded by the ECJ to the preliminary reference question submitted by the Belgian Court of Appeal. While the latter Court specifically asked whether or not Article 30(2) refers only to costs related to traffic to the ported number, or whether it also refers to the '(...) tariffs of costs incurred by operators in executing requests for number porting (...)'²⁹; the ECJ chose to interpret this question as asking simply if: '(...) pricing for interconnection related to the provision of number portability, as referred to in Article 30(2) of the Universal Service Directive, concerns the set-up costs in addition to the traffic costs'³⁰.

It is therefore submitted that, owing to the manner in which it chose to interpret the Belgian Court's reference question in *Mobistar*, the ECJ seems to have understood the notion of 'set-up costs' to be synonymous with the tariffs of all costs incurred by operators at wholesale level when executing a number porting request, other than the traffic costs of numbers ported (or strictly interconnection related traffic costs). It thus becomes clear that the costs associated with two of the three elements identified in *Mobistar* as prerequisite to the practical implementation of the number porting facility therefore automatically fall within the scope of the definition of 'set-up costs' as also identified in that ruling. In accordance with the Court's rationale in this respect, the costs associated with: 1) the synchronisation of the platforms between the donor and

²⁷ The *maximalist* approach adopted in *Mobistar* is inadvertently acknowledged by the ECJ when it expressly recognises that 'set-up costs' do not fall within the scope of the checks laid down in Article 30(2). See para. 29 of the judgment.

²⁸ *Mobistar*, para. 27.

²⁹ *Mobistar*, para. 19.

³⁰ *Mobistar*, para. 20.

recipient operators, and 2) the actual porting of the subscriber's number from the donor to the recipient network clearly constitute all of the costs that are borne by an operator at wholesale level when executing a number porting request, in addition to the traffic related or *per se* interconnection costs³¹.

Notwithstanding the above, it is also submitted that the costs associated with the aforementioned two elements may actually qualify as 'set-up costs' under the loose definition attributed by the Court in *Mobistar* to this notion. The costs associated with; 1) the synchronisation of the donor and recipient operators' platforms, and 2) the actual porting of the subscriber number from one network to another, constitute a large part of the expenses that will either be incurred by, or passed on to, the recipient operator, and that will, either directly or indirectly, be passed on by the latter operator to the subscriber at retail level³².

In this regard, the recipient operator will be required to incur certain technical costs when synchronising its platform with that of the donor operator in order to facilitate the number porting process (No. 1) above) and, depending on the practice in place in a particular MS, may also be required to cover the costs incurred by the donor operator under (No. 2) above through the payment of an inter-operator fee at wholesale level (as appears to have been the case under Belgian law prior to the *Mobistar* dispute). In either case, and depending on the legal framework in place at national level, the recipient operator may be able to recover both sets of costs (the costs borne directly by this operator as well as the costs billed by the donor operator at wholesale level) through the imposition of a subscriber fee for the number porting service (direct recovery). Alternatively, the recipient operator may chose to recover these costs by, for example, implementing a slight but proportionate increase to the prices charged to subscribers for the provision of other electronic communications services (indirect recovery)³³.

Likewise, and in accordance with the explanation of 'set-up costs' found in the contested IBPT decision, the costs incurred with respect to both of these activities may also be incurred, in part or in whole, by the donor operator as a result of the porting of a subscriber number. In particular, the donor operator will incur the same network synchronisation costs as the recipient operator under No. 1) above. Moreover, it will also incur costs associated with the actual porting of the number from its network to

³¹ It is possible that the ECJ intended that the costs incurred when providing the third prerequisite element in the number porting process (3) the technical operations necessary to allow the routing of traffic to the ported number latter costs) be understood as synonymous to such traffic related or *per se* interconnection costs.

³² The Court underlines at par. 28 of *Mobistar* that such 'set-up costs' refer exclusively to: '(...) a large part of the costs that may be passed on directly or indirectly by the recipient operator to the subscriber who wishes to make use of the portability facility for his/her mobile number'.

³³ The indirect recovery of costs in this manner is, however, difficult to implement on a competitive market, and undertakings may risk losing market share by unilaterally raising prices for other services in order to recover costs borne in the number porting process.

the network of the recipient operator such as, for instance, technical costs, consumer service costs etc. (No. 2) above).

It is also possible that the third practical element identified by the ECJ in *Mobistar* regarding the implementation of the number porting process (No. 3) above; the technical operations necessary to allow the routing of traffic to the ported number) may fall within either the scope of the definition of the ‘set-up costs’ as established by the Court in that judgment, or within the definition as established by the Belgian NRA in the contested *IBPT* decision. This issue will ultimately depend on the technical solution adopted at national level to facilitate the routing of calls to a ported number.

In the case that the atypical ‘onward routing’ solution is applied in this respect, the donor operator may incur extra traffic related costs as a result of the porting of a subscriber number which it will charge to the recipient operator in the form of a so-called ‘donor conveyance charge’³⁴. Such a ‘donor conveyance charge’ constitutes a typical and recurrent traffic or *per se* interconnection cost that is paid by the recipient operator each time a call is terminated at a ported number. It therefore differs from the Court’s definition of a ‘set-up cost’ in *Mobistar* by virtue of the fact that it will not usually be passed on by the latter operator to the subscriber that has ported his/her number³⁵. Notwithstanding this, the ‘donor conveyance charge’ constitutes a cost that is incurred, in whole, by the donor operator as a result of the porting of a subscriber number. For this reason, it may actually qualify as a ‘set-up cost’ under the ambiguous definition of this notion referred to in the contested *IBPT* decision.

However, in the case that the more common ‘direct routing’ solution is applied to facilitate the number porting process, both the donor and recipient operators will be required to incur certain costs associated with the establishment and maintenance of a central database containing data on the network to which the number has been ported. As in the case of elements No. 1) and 2) above, and in conformity with the

³⁴ A call may be directed to a number ported onto a recipient operator’s network by either of the following two means: (1.) direct routing (which may be realised by means of an ‘all-call query’ or ‘query on release’ system) and, (2.) onward routing. In the former case, the network operator originating the call first queries the location of the number called with the donor operator, or in a central database, before routing the call directly to the network to which the number has been ported. Under the direct routing system, the operator originating a call pays the recipient operator for terminating this call in accordance with the binding termination rates as set out under a standard interconnect agreement. In the case of onward routing, however, the call is automatically directed to the network of the donor operator, from where it is then forwarded to the recipient operator’s network. While the recipient operator receives the termination charge for terminating the call, it is nonetheless required to reimburse the donor operator for the cost of routing the call to the ported number. This fee, known as the ‘donor conveyance charge’, covers the switching, engineering and transmission costs incurred by the donor operator in conveying the call to the recipient operator’s network.

³⁵ The ‘donor conveyance charge’, as a typical interconnection related cost, may only be passed on directly by the recipient operator to its subscriber under the ‘bill and keep’ pricing system. Under the more usual ‘calling party pays’ arrangement, such a charge would be included in the termination rate set for the termination of an off-net call, and would, therefore, ultimately be borne by the subscriber of the network operator originating such a call.

definition of ‘set-up costs’ established by the ECJ in its *Mobistar* decision, the costs borne by the recipient operator in this respect may ultimately be passed on, either by direct or indirect means, to the subscriber that has ported his/her number. It is therefore apparent that the recipient operator’s costs associated with the implementation and functioning of the ‘direct routing’ system may thus also fall within the scope of the ‘set-up costs’ as defined in *Mobistar*.

It is important to recall that the ECJ expressly acknowledges in its *PTC* ruling that the practical implementation of the number porting process by telecoms operators includes the precise three elements identified in the earlier *Mobistar* ruling³⁶. Owing to the fact that the costs associated with the provision of at least two of these three elements (and possibly all three elements) may ultimately fall within the scope of the ‘set-up costs’, the costs referred to by the Court in *PTC* are thus, by implication, largely (or absolutely) synonymous to the ‘set-up costs’ as considered in *Mobistar*. This supposition is supported by the fact that the ECJ expressly acknowledges in *Mobistar* that the ‘set-up costs’ referred to in that judgment represent a large part of the costs that may ultimately be passed on to the subscriber by the recipient operator. It is important to remember in this regard that, while the ECJ decision in *Mobistar* relates exclusively to the recovery of the ‘set-up costs’ at wholesale level, that Court’s ruling in *PTC* concerns the setting of customer number porting charges at retail level.

(ii) Reconciling the practical consequences of PTC with the principles as enunciated in Mobistar:

The reference by the ECJ to the same set of costs in *PTC* as in *Mobistar* may seem an innocuous consequence of the fact that similar issues are essentially under consideration in both judgments. It must, nevertheless, be remembered that, owing to the expansive interpretation accorded by the Court in *Mobistar* to both the requirements of Article 30(2) and to the notion of “*set-up costs*”, this ruling unequivocally requires that NRAs subject all tariffs for the costs recovered at wholesale level in the number porting process to a strict cost orientation obligation. At the same time, the Court’s decision in *PTC* obliges NRAs to take the same costs into consideration when assessing the appropriateness of subscriber tariffs (thus implicitly acknowledging that such costs may equally be recovered at retail as well as wholesale level)³⁷, while simultaneously requiring that the subscriber fee for number porting services be set at a level which

³⁶ See: *Mobistar*, para. 24, and *PTC*, para. 16. The wording used in both paragraphs is exactly the same.

³⁷ The fact that the costs incurred at wholesale level may potentially constitute an important element of the subscriber charge imposed at retail level is even acknowledged by the ECJ in both rulings. The Court in *PTC* recognises that the ‘costs for interconnection’ as referred to under Article 30(2) and the amount of the direct charge levied on the subscriber are, in principle, connected. It is expressly accepted in *Mobistar* that these wholesale costs must be fixed in such a way that subscribers are not dissuaded from number porting as required under Article 30(2). See: *PTC*, para. 22, and *Mobistar*, para. 37.

may be below the actual costs incurred, if a higher fee is likely to dissuade users from availing of this facility³⁸.

It is acknowledged that the ECJ clearly seeks to accord a literal interpretation to Article 30(2) in both judgments by setting out a harmonised regulatory approach to be adopted by NRAs with respect to the costing of number porting services. Nonetheless, it is argued that the practical consequences of the *PTC* ruling may be difficult to reconcile with the principles as enunciated in *Mobistar*. A clear regulatory anomaly arises if it is considered that, depending on whether or not the operator costs incurred in the number porting process are recovered at wholesale or retail level, the tariffs levied for these costs may or may not be subject to the principle of cost orientation. This issue becomes a direct problem considering that, in practice, no uniform model exists in the EU regarding the levying of tariffs for the porting of subscriber numbers. In certain MS (including Poland)³⁹, national law precludes the setting of a direct retail tariff for the provision of number porting services, and costs are therefore only recovered at wholesale level by means of an inter-operator tariff. This is not the case in other MS, however, where the imposition of retail charges is still provided for under national regulation, and where operators may recover the costs borne in the number porting process at both wholesale and retail levels.

It is therefore submitted that the ECJ's judgment in *PTC* inadvertently risks placing operators who are required to recover some, or all, of their 'set-up costs' at retail level at a disadvantage *vis-à-vis* their competitors who are guaranteed a full return on these costs at wholesale level under the principles as enunciated in *Mobistar*. This issue becomes particularly problematic where, for example, a donor operator would levy a fee on a recipient operator at wholesale level for the 'set-up costs' incurred, which the latter would then seek to recover at retail level by setting a direct subscriber charge (as was the case under Belgian law prior to the *Mobistar* dispute). Following from the Court's reasoning in *PTC*, an NRA may, in such a scenario, require that the subscriber fee be set below the level of the costs actually incurred, if a higher charge would be likely to dissuade customers from using the number porting service. Importantly, and in accordance with the ECJ's rationale in this judgment, such a requirement would apply notwithstanding the fact that the recipient operator would, in accordance with the principles set out in the *Mobistar* judgment, be required to pay for these services 'in full' at wholesale level under the cost orientation principle. The same logic may also apply in the case where a donor operator recovers the 'set-up costs' incurred in the number porting process directly at retail level, rather than at wholesale level through the imposition of an inter-operator charge on the recipient operator. In the light of the *PTC* decision, such an operator would be at a disadvantage *vis-à-vis* a donor operator established in another MS if the latter can recover such costs at wholesale level from the recipient operator.

³⁸ *PTC*, pars. 26–27.

³⁹ Article 71(3) of the Telecommunications Law has been amended to provide that number porting services be provided to subscribers free of charge.

The discordant application of the cost orientation principle therefore risks placing operators at a competitive disadvantage, not only *vis-à-vis* other undertakings established in the same MS (e.g. recipient versus donor operator), but also with regard to those established in other MS (e.g. under a particular regulatory framework, a donor operator from MS ‘A’ may be required to recover some, or all, of the costs incurred in implementing the number porting facility at retail level, while a donor operator in MS ‘B’ may be able to recover the same costs at wholesale level subject to the application of the cost orientation requirement).

Conclusion

Rather than mandating the implementation of one universal cost methodology that would apply to the setting of number porting charges at both wholesale and retail levels, Article 30(2) (prior to its amendment in 2009) only required that the wholesale interconnection costs that are incurred during the number porting process are subject to the principle of cost orientation. No provision is made for the application of a definite cost control methodology at retail level, and NRAs were (and still are) therefore guaranteed a certain measure of discretion when ensuring that retail charges do not constitute a ‘disincentive’ to subscribers to use a number porting service.

In *Mobistar*, the ECJ accorded an expansive interpretation to the notion of the ‘set-up costs’ incurred by an operator during the number porting process, while simultaneously confirming that such costs fall within the cost-orientation requirement of Article 30(2) of the Directive. The Court also identified three practical elements that make up the number porting process, each of which, it is argued, may actually constitute a so-called ‘set-up cost’ under the ECJ’s loose understanding of this notion. Likewise, the Court in *PTC* acknowledged that the actual implementation of the number porting facility consists of the same three practical elements as identified in the earlier *Mobistar* decision, while simultaneously confirming that retail number porting charges must be set below the level of the costs actually incurred in providing this service in the case that the setting of a higher customer fee would risk dissuading end-users from availing of the number porting facility. It would therefore seem that, notwithstanding that each decision mandates the use of a different (and ultimately conflicting) standard for the recovery of costs at varying levels of the supply chain (i.e. wholesale/retail), the ECJ is inadvertently referring to the recovery of the same set of costs in both judgments.

In the light of the above, it is thus apparent that the Court’s reasoning in both judgments may inexorably give rise to the implementation of discordant and irreconcilable regulatory practices at national level concerning the costing of number porting services. Considering the lack of a uniform practice at MS level regarding the levying of number porting charges, the implementation of divergent cost control methodologies in this manner is potentially dangerous, and may ultimately lead to the situation whereby potential competitors are subjected to inconsistent regulatory requirements. This risk is accentuated by the fact that the number of subscribers using the number porting facility is increasing significantly on a year to year basis, and the

provision of this service thus accounts for a growing part of the costs incurred by a telecoms operator on a national market⁴⁰.

It is, however, acknowledged that the above-described conundrum is not the result of an error of interpretation on the part of the ECJ, but is rather the result of a genuine attempt on the part of that Court to accord a literal interpretation to the requirements of Article 30(2) itself. In seeking to grant the NRAs maximum discretion when regulating retail charges (presumably in consideration of the diverse circumstances that characterise national markets), the EU legislator thus chose not to provide for the application of a uniform price control principle (in this case cost orientation) at retail as well as wholesale levels. It is submitted that, in so doing, it inadvertently facilitated the application of potentially conflicting regulatory requirements by both courts and NRAs towards the costing of number porting services in the EU⁴¹.

It is argued that the obligation to provide number porting services free of charge to subscribers does offer a potential solution. Importantly, as noted by Advocate General Bot in his opinion to the *PTC* case⁴², the universal availability of free number porting services would give customers the opportunity to reap the greatest benefit from the advantages presented by this facility⁴³. As also noted by the Advocate General, such a solution would create a harmonised and uniform system across all MS for the

⁴⁰ Moreover, and notwithstanding that this discussion goes beyond the scope of analysis of this paper, the choice by the ECJ in *PTC* to facilitate the decoupling of a number porting subscriber fee from the costs actually incurred when providing this service is also questionable. While constituting a departure from the regulatory principle of cost-orientation that is normally applied with respect to *ex-ante* price regulation on the EU electronic communications market (the Bottom-up Long Run Incremental Cost (BU-LRIC) model is clearly favoured by the Commission as the cost-orientated pricing methodology that should be applied on electronic communications markets in the EU), the requirement that NRAs, in certain circumstances, set retail subscriber fees below the level of the costs actually incurred in the number porting process may also be difficult to reconcile with the perceived right of a profit orientated economic undertaking operating in a market economy to (at least) recover the costs incurred when providing a particular product/service.

⁴¹ It is interesting to note that the EU legislator chose to regulate the provision of the number porting facility under Chapter IV of the Directive (End-User Interest and Rights), rather than including it as a separate market susceptible to *ex-ante* regulation under the Commission Recommendation on Relevant Markets. Importantly, the range of complementary *ex-ante* regulatory tools available to an NRA under the market definition and analysis procedure, which may be applied in conjunction with the application of a price control remedy (transparency, cost accounting and price control obligations), is very wide. It is submitted that the definition of the number porting facility as a separate service market could therefore have facilitated the establishment of a more effective legal framework for the regulation of this service at national level than that provided for under Article 30(2).

⁴² See par. 72 of the Advocate General's Opinion.

⁴³ Interestingly, Bühler, Dewenter and Haucap argue that an inefficient over-use of number porting services will occur if subscribers are not required to pay for this facility (this problem is generally known as the 'tragedy of the commons'). See: S. Bühler, R. Dewenter, J. Haucap, *Mobile Number Portability in Europe*, University of the Federal Armed Forces Hamburg (Dept. of economics), Discussion Paper No. 41, August 2005, pp. 7–8.

levying of tariffs for number porting services. It is only regrettable, therefore, that, notwithstanding the important amendments made with regard to the porting process in the 2009 review of the Universal Services Directive (such as the new requirement that number porting process must take a maximum of one working day), the above issue was not adequately addressed in this context⁴⁴. Until the time that the practice of setting retail charges for number portability is either abolished or withdrawn⁴⁵, NRAs and national courts alike should exercise caution when considering the pricing methodologies and regulatory arrangements in place at national level regarding the provision of this service.

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⁴⁴ A possible way to remedy this problem would be for the Commission to issue a Recommendation, under Article 19 of the Framework Directive (as amended), recommending that the imposition of retail fees for number porting services be abolished. The likelihood of this happening is, however, doubtful, as the issuing of such an act may be difficult to reconcile with the principle of minimum harmonisation. See: 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, OJ [2002] L 108/33, Article 19 (as amended).

⁴⁵ It is argued that the introduction of free of charge number porting services in the EU would not lead to significant regulatory/practical problems, considering that the retail cost for this facility is already set at either zero, or at a symbolic level, in at least twenty one of the twenty eight MS. See: Commission Staff Working Document accompanying the 15th Implementation Report (March 2010), p. 63. http://ec.europa.eu/information_society/policy/ecomms/doc/implementation_enforcement/annualreports/15threport/15report_part2.pdf.