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COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES  
COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES  
CÚIRT BHREITHIÚNAIS NA gCÓMHPHOBAL EORPACH  
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TRIBUNAL DE JUSTIÇA DAS COMUNIDADES EUROPELAS  
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EUROPEISKA GEMENSKAPERNAS DOMSTOL

Press and Information

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Judgment of the Court of Justice in Case C-438/04

*Mobistar SA v. Institut belge des services postaux et des télécommunications (IBPT)*

**NATIONAL REGULATORY AUTHORITIES MAY FIX EX ANTE MAXIMUM PRICES FOR THE TRANSFER OF A MOBILE TELEPHONE NUMBER FROM ONE MOBILE TELEPHONE OPERATOR TO ANOTHER**

*Prices must be fixed on the basis of costs in such a way that consumers are not dissuaded from making use of the portability facility*

The Universal Service Directive<sup>1</sup> provides that all subscribers of mobile services who so request must be able to retain their number(s) when changing operator. The national regulatory authorities are to ensure that pricing for interconnection related to the provision of number portability is cost-oriented and that direct charges to subscribers do not act as a disincentive for the use of these facilities.

The Institut belge des services postaux et des telecommunications (IBPT), the national regulatory authority for these sectors in Belgium, fixed the set-up cost<sup>2</sup> per mobile number successfully transferred from one operator to another on the basis of ‘the theoretical costs of an efficient mobile operator’. The donor operator<sup>3</sup> may charge the recipient operator set-up costs in the amount set by the IBPT.

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<sup>1</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51).

<sup>2</sup> Set-up costs are defined in the relevant Belgian provisions as ‘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 transfer of clients without number portability to another mobile operator or service provider or in order to terminate the provision of the service’.

<sup>3</sup> The donor operator is the mobile telephone operator from which a mobile number is transferred, whilst the recipient operator is the mobile operator to which the mobile number is transferred.

Claiming that the costs fixed by the IBPT are too high, Mobistar, a mobile telephone operator active in Belgium, brought an action before the Cour d'appel de Bruxelles (Court of Appeal, Brussels), which referred a number of questions to the Court of Justice of the European Communities for a preliminary ruling.

The Court holds, firstly, that **pricing for interconnection related to the provision of number portability, as referred to in the Directive, concerns the traffic costs<sup>4</sup> of transferred numbers and the set-up costs incurred by mobile telephone operators to implement requests for number transferral.**

The set-up costs represent a large part of the costs which 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 mobile number. Although such costs do not fall within the scope of the checks to be made by the national regulatory authorities, their fixing at excessive levels by donor operators, in particular those already established on the market which have a large client base, might dissuade consumers from making use of that facility, or even make it in fact largely illusory.

Once it is established that prices are fixed on the basis of costs, **the Directive confers a certain discretion on the national authorities** to assess the situation and define the method which appears to them to be the most suitable to make portability fully effective, in a manner which ensures that consumers are not dissuaded from making use of that facility. **The limits of that discretion have not been exceeded in the present case by the national regulatory authorities.**

Secondly, the Court rules that **the Directive does not preclude the fixing of maximum prices for all mobile telephone operators by the national regulatory authorities in advance on the basis of an abstract model of the costs.**

Finally, the Court states that the body responsible for hearing an 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 in full knowledge of the facts on the merits of the appeal, **including confidential information.** However, the protection of such information and business confidentiality must be guaranteed and must be adjusted to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute.

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<sup>4</sup> According to the Belgian legislation on the subject, traffic costs are 'the additional costs generated on the network by calls to ported numbers as compared with calls to non-ported numbers'.

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*Languages available: FR, CS, DE, EL, EN, ES, HU, IT, NL, PL, SK, SL*

*The full text of the judgment may be found on the Court's internet site  
<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-438/04>  
It can usually be consulted after midday (CET) on the day judgment is delivered.*

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