



**According to Advocate General Melchior Wathelet, Member States may prohibit generally a payee from levying handling charges, without a distinction being drawn between different payment instruments**

*That prohibition may also be applied to mobile phone companies*

According to the directive on payment services<sup>1</sup>, Member States may prohibit or limit the practice of surcharging, by which payee undertakings impose charges on their customers for the use of a given payment instrument. That practice seeks to ensure that customers bear the cost of using, in particular, credit or debit cards.

In Austria, payees are prohibited generally from levying handling charges, without a distinction being drawn between different payment instruments.

However, T-Mobile Austria, a provider of mobile telephone services in Austria, provides in its general conditions for the imposition of a service charge in cases where customers pay their bills by means of a cash payment form or by telebanking. Consequently, customers who apply for and use the 'Call Europe' tariff must pay a surcharge of €3 if they opt for 'payment other than by direct debit or credit card', which includes payment by means of a cash payment form or via online banking ('Telebanking').

The Verein für Konsumenteninformation, an Austrian consumer association, considers that practice to be contrary to the general prohibition of surcharging in Austria. The association therefore brought an action before the Austrian courts with a view to restraining T-Mobile Austria from, first, including the contested clause in the contracts into which it enters with its customers and, secondly, making use of that clause in relation to existing contracts. Since the first-instance court and the appeal court upheld that application, T-Mobile Austria appealed to the Oberster Gerichtshof (Supreme Court, Austria).

The Oberster Gerichtshof seeks to determine, first, whether the directive, and more specifically the power that it gives to Member States to prohibit surcharging, applies only to payment service providers, as T-Mobile Austria claims, or also to mobile phone companies. Next, the Oberster Gerichtshof asks whether a credit transfer constitutes a payment instrument within the meaning of the directive, with the result that such a transfer is covered by that power. Finally, that court seeks to establish whether the general prohibition of surcharging in Austria is in compliance with the directive.

In today's Opinion, Advocate General Melchior Wathelet considers, first, that **the power to prohibit surcharging given to Member States by the directive applies to the contractual relationship between a mobile phone operator, as the payee, and its customer (the consumer), as the payer.**

<sup>1</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1).

Secondly, he finds that **a credit transfer initiated either by a payment form bearing the payer's handwritten signature or by telebanking must be considered a 'payment instrument' within the meaning of the directive.**

**Finally, the Advocate General takes the view that** the directive does not preclude the application of national provisions, such as the Austrian provision at issue, which prohibit generally a payee from levying handling charges, without a distinction being drawn between different payment instruments.

The directive confers upon the Member States a **broad discretion** as to whether and how they wish to exercise the power to prohibit or limit surcharging in order to encourage competition, promote the use of efficient payment instruments or prevent unfair pricing.

Although it is for the Oberster Gerichtshof to determine whether the general prohibition of surcharging applicable in Austria 'took sufficient account' of those considerations of general interest, **it appears that the Austrian legislature respected the limits to that discretion.**

In that regard, the Advocate General notes, inter alia, that<sup>2</sup> the practice of surcharging has often led to **abusive pricing** by certain traders, namely where surcharges are disproportionately high in comparison with the cost incurred by the trader for the transaction, particularly where consumers could not avoid those surcharges by choosing another payment instrument. In addition, it appears<sup>3</sup> that surcharging was also used to generate higher income rather than to recover from the payer the actual cost that the payment service provider charged the payee when a payment instrument was used.

**The power simply to prohibit surcharging was given to Member States by the directive in order to prevent abuses of that kind and to overcome the enormous difficulty of establishing a true balance between the actual costs and the costs claimed<sup>4</sup>.**

As regards the encouragement of competition, Advocate General Wathelet notes that the general prohibition of surcharging increases **price transparency**, by preventing an undertaking, in the case where a given payment instrument is used, from charging a final price which is higher than that indicated in its letter or communication, which the customer compares with other price offers.

According to the Advocate General, the fact must not be overlooked that both the directive and Austrian law permit T-Mobile Austria to offer reductions to customers to encourage them to use payment instruments which, from its point of view, are more efficient.

In addition, the Advocate General takes the view that **it is not appropriate to accede to T-Mobile Austria's request for temporal limits to be imposed on the effects of the judgment to be delivered by the Court in this case**, should the Court find that a credit transfer must be considered a payment instrument within the meaning of the directive and that the directive does not preclude a general prohibition of surcharging. The conditions for such a limitation to be applied are not satisfied. In particular, T-Mobile Austria failed to put forward any data which would have enabled the Court to consider whether it actually risks incurring serious economic repercussions should the Court come to such a conclusion.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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<sup>2</sup> According to the recent so-called Impact Assessment of 24 July 2013 accompanying the Commission's proposal to adopt a new directive on payment services in the internal market, by which Directive 2007/64 would be repealed. According to the Impact Assessment, 14 Member States have banned surcharging generally, 12 permit it and one – Denmark – prohibits it only in connection with the use of debit cards.

<sup>3</sup> According to the same Impact Assessment.

<sup>4</sup> The Advocate General notes, however, that the proposal for a directive cited in footnote 2 above provides for, inter alia, the removal of that power.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.*

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