



Payees may be generally prohibited from levying charges on the payer whatever the payment instrument selected

Such a prohibition may also apply to a mobile telephone operator

T-Mobile Austria, a provider of mobile telephone services in Austria, provided, in its general terms and conditions¹, for the imposition of a service charge on its customers where payment was made through online banking or by means of a paper transfer order. An additional monthly fee of €3 was thus charged to consumers who subscribed to the 'Call Europe' tariff who had opted to use those payment methods². The Verein für Konsumenteninformation, an Austrian consumer association, considers that that practice is contrary to the Austrian Payment Services Law. That law prohibits payees from levying charges whatever the payment instrument selected. T-Mobile Austria, by contrast, is of the opinion that neither that Austrian law nor the EU directive which it transposes (the directive on payment services)³ is applicable to it, since it is not a payment service provider but a mobile telephone operator. In addition, T-Mobile Austria claims that the legislature, in breach of the directive, failed to give reasons for the prohibition at issue and that a transfer order form is not a payment instrument within the meaning of the directive.

On application by the consumer association, T-Mobile was prohibited, by the Austrian first and second-instance courts, from including the clause at issue in new contracts and from making use of it in relation to existing contracts. The Oberster Gerichtshof (Supreme Court, Austria), as court of last resort, asks the Court of Justice to interpret the directive in that context.

In its judgment delivered today, the Court has noted that the directive expressly gives Member States the power to forbid or limit the right of the payee to request a charge from the payer for the use of a given payment instrument, taking into account the need to encourage competition and promote the use of efficient payment instruments. That power is applicable to the use of a payment instrument in the course of the contractual relationship between a mobile phone operator (payee) and that operator's customer (payer). The Court finds that that power of Member States concerns the relationship between a 'payee' and 'payer' and that a mobile telephone operator and that operator's customer may, when they receive or make a payment, be considered to be 'payee' and 'payer'.

In addition, the Court finds that the power of Member States is not limited to prohibiting the levying of charges for the use of a given payment instrument. On the contrary, it **also permits Member States to prohibit generally payees from levying charges on the payer whatever the payment instrument selected, if the national legislation, as a whole, takes into account the need to encourage competition and the use of efficient payment instruments. Although exercise of that power requires the national legislation, as a whole, to take into account that need, Member States nevertheless have broad discretion in its application. It is for the Oberster Gerichtshof to ascertain whether the Austrian legislation is consistent with that condition.**

¹ In the version in force in November 2009.

² By contrast, that was not the case for subscribers who had opted for payment by direct debit or by credit card.

³ 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).

In addition, the Court states that both transfer orders by means of a paper order form and transfers ordered through online banking constitute payment instruments within the meaning of the directive. As regards the interpretation of the concept of payment instruments, it notes the divergence between the different language versions of that directive. Given the existence of such non-personalised payment instruments, the Court finds that the concept of payment instrument within the meaning of that directive is capable of covering a non-personalised set of procedures, agreed between the user and the payment service provider, and used by the user in order to initiate a payment order.

T-Mobile Austria requested that the temporal effects of the judgment be limited⁴. It is only in exceptional cases that the Court may impose such a limitation. To do so, it is necessary that individuals and national authorities have been led to adopt practices which do not comply with EU law by reason of objective, significant uncertainty regarding the implications of EU provisions. The Court finds that that condition has not been fulfilled in this case, in so far as the Austrian legislation on payment services had correctly transposed the relevant provisions of the directive. In addition, it finds that T-Mobile had not established, before it, the existence of a risk of serious economic consequences. Therefore, the Court refuses to limit the temporal effects of the judgment.

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 judgment is published on the CURIA website on the day of delivery.

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⁴ According to settled case-law, the interpretation which the Court, in preliminary ruling proceedings, gives to a rule of European Union law clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may and must be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied.