

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

Facts

Comments concerning the Court of the Competition and Consumer Protection (hereafter, SOKiK) case files no. XVII AmT 33/06¹ and XVII AmT 29/06² referring to the fees imposed on subscribers for transferring mobile phone numbers from one mobile phone service provider to another.

The concept of “number portability” refers to a specific telecoms service allowing subscribers to retain a mobile number when switching telecoms operators. According to Article 71(3) of the Polish Telecommunication law (hereafter, PT), a subscriber may be charged a specified one-off fee for retaining a particular mobile number. However, the actual amount of the fee should not discourage subscribers from exercising their right to port numbers. Mobile number portability was designed to increase competition and to help customers switch operators. According to Article 30 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 (hereafter, the Directive), the cost of switching operators that must be born by subscribers should be kept to a minimum.

In 2006, the President of the Polish Office of Electronic Communications (hereafter, UKE) conducted a consumer survey concerning the acceptable level of portability fees. The results of the survey indicated that most Polish individual consumers were inclined to pay not more than PLN 50 for retaining their assigned numbers. On this basis, the President of UKE made a statement saying that one-off porting fees should not exceed the gross amount of PLN 50. This statement was published on 28 March 2006 on the official website of UKE.

The President of UKE later determined that from 1 June 2006 one of the Polish mobile phone service providers – Polska Telefonia Komórkowa Centertel sp. z o.o.

¹ Available at: http://www.uke.gov.pl/uke/index.jsp?place=Lead01&news_cat_id=285&news_id=2100&layout=3&page=text

² Available at: http://www.uke.gov.pl/_gAllery/56/20/5620/wyrok_SOKiK_8.01.2007.pdf

(hereafter, PTK) – has charged its consumers a number porting fee equal to the gross amount of PLN 61 (it used to charged a fee that was equal to PLN 122). The President of UKE decided that this amount discouraged the subscribers of PTK from exercising their right to port numbers, which constituted an infringement of Article 71(3) of the PT. As a result, a fine was imposed on PTK amounting to PLN 200,000. A similar fine of PLN 100,000 was imposed on another Polish mobile phone service provider – Polska Telefonía Cyfrowa sp. z o.o. (hereafter, PTC). In the opinion of the President of UKE, PTC charged, from 28 March 2006 (the publication date of the statement concerning the acceptable level of porting fees) until 31 May 2006, a porting fee set at a level that effectively discouraged its subscribers from transferring their assigned numbers, preventing them from exercising their legal right to port numbers. In this case, the porting fee was initially equal to the gross amount of PLN 120 but decreased to PLN 50 from 1 June 2006 as result of the tariff statement of the President of UKE.

Both PTK and PTC filed separate appeals against the two decisions of the President of UKE. They requested the dismissal of the decisions and the reimbursement of the costs incurred by the firms. PTK and PTC (jointly referred to as the “Operators”) claimed that the President of UKE wrongly interpreted Article 71(3) of the PT by stating that it bans operators from establishing a porting fee on a level that is higher than that expected by consumers, irrespective of the costs actually incurred by the operators. According to PTK, the fee that it charged from 1 June 2006 did not discourage its subscribers from exercising their right to port numbers. PTK claimed that, according to the results of a survey conducted among its customers, its subscribers accept a porting fee equal to the gross amount of PLN 75. Furthermore, PTK argued that mobile phone service providers offer a refund of the porting fees to new subscribers who wish to retain their numbers when switching operators.

The Operators’ interpretation of Article 30(2) of the Directive, and of Article 71(3) of the Polish PT that implements that provision, indicates that a portability fee should take into account and, at least partly reflect, the actual costs of the service incurred by the operators. The fact should be determined therefore, whether PTK or PTC raised their fees beyond their costs, which would discourage their subscribers from number porting. Pursuant to the Directive, national regulatory authorities shall ensure that pricing for interconnection 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.

Furthermore, PTC and PTK claimed that an individual decision of the President of UKE in this matter cannot be based on the subjective beliefs of subscribers arbitrarily determined by the authority on the grounds of a consumer survey. According to PTC, the President of UKE is not allowed to impose a fine without conducting formal proceedings.

Key legal problems of the cases

The main question that arises in this context is whether the amount of the portability fee should reflect the costs of providing the service by the operators? Of fundamental importance is also the related question of whether the President of UKE can arbitrarily establish the level of the fee simply by publishing a statement to that effect on the website of UKE considering, in particular, that it is unclear what the legal nature of such statement might be?

SOKiK ruled that the survey conducted by the President of UKE was correct and showed what consumers expect to pay for number porting. In the opinion of SOKiK, the Operators infringed Article 71(3) of the PT by setting their porting fees on a level that would discourage their subscribers from exercising their right. SOKiK stated that according to Article 30(2) of the Directive, reflected by Article 71(3) of the PT, a one-off fee for number porting should be based on the subjective opinions of subscribers, while the costs incurred by operators shall be omitted. On this basis, SOKiK dismissed the appeals.

Key findings of SOKiK

Considering the facts of the two cases, the determination of the level of the acceptable portability fee was based on a consumer survey carried out in 2006. According to its results, individual clients were willing to pay approximately PLN 46 for number porting while business subscribers accepted a fee of about PLN 60. According to the President of UKE, the only issue that needs to be taken into account when establishing the fee, is the amount that is acceptable to individual clients. On the basis of the survey, and taking into consideration the characteristics of European telecoms markets in 2006, the President of UKE decided that in Poland the porting fee should not exceed PLN 50. Higher fees were regarded as a deterrent for consumers to port their numbers. It is worth noting that the President of UKE set the porting fee without determining how to adjust it to reflect future developments of the telecoms sector or evolving consumer needs and expectations.

However, a decision of the President of UKE should not be based solely on the subjective beliefs of subscribers determined arbitrarily by the President on the grounds of a consumer survey. The question asked in the survey was: what level of porting fees do consumers expect? While it is certainly very helpful to be aware of the wishes of consumers, they should not constitute the only ground for establishing the permissible amount of the fee. Rather than stressing what consumers want or accept to pay, Article 71(3) of the PT expressly states that the decisive factor in this respect is that the fee should not discourage them from porting their number. Thus, in order to use the survey as the basis of a regulatory decision, it should have posed a question reflecting the language of the law far more closely than it actually did.

It is also surprising that the President of UKE seemed to expect immediate implementation of the tariff statement. It follows from the PTC decision, that the President of UKE considered a period of two months for adjusting the level of the

porting fee to be a penalty-inducing infringement of the law. However, the time given to firms to adjust to new legal rules should be reasonable and adequate to the business environment to which it applies.

There are no grounds for imposing a fine on PTK and PTC on the basis of the relevant provisions of the PT. According to its Article 209(1(16)), an operator that prevents its subscribers from exercising their rights to port numbers is subject to penalty. Considering the justification given by the President of UKE in these two cases, it appears that the authority equates the term “to prevent from exercising their rights” with the term “to discourage from using the rights”. This assumption leads the President of UKE to conclude that applying a higher porting fee than the amount determined in the tariff statement is synonymous with preventing subscribers from exercising their rights. However, “discouraging” differs substantially from “preventing”. Collecting a charge for number portability that is in excess of the fee determined by the President of UKE does not necessarily prevent subscribers from exercising their rights. In order for the President of UKE to impose a fine, it needs to be proven that such prevention occurred. No legal grounds can be found therefore for imposing a fine on operators for discouraging, rather than preventing, consumers from porting their numbers. If there is indeed a need to penalise operators for discouraging consumers, the wording of the relevant legislation should be changed and adjusted appropriately.

Moreover, the provisions of the Polish PT do not actually authorise the President of UKE to determine the level of the fee for number portability but only, to monitor its amount. It may be justified for the President of UKE to indicate the formulae for calculating the fee or to stress to operators the fact that its amount should not discourage subscribers from number porting. Even if the optimum amount of the fee were found through a properly conducted consumer survey, the amount proposed by consumers should not serve as the sole basis for determining the permitted level of the fee by the President of UKE, while the lack of the operators’ acceptance of the set amount, should not be the sole ground for imposing a fine. To impose a fine, it would be necessary to justify that the fee charged prevents subscribers from porting their numbers, a fact that has not been proven by the President of UKE or by SOKiK in these two cases.

Moreover, the amount of the fee may not be determined in total isolation from the costs that operators bear with respect to number porting. The Directive stipulates that the costs of number portability may be borne by the operator taking over the number as well as by the subscriber, keeping in mind that the latter should not be burdened to an extent that would discourage him/her from number porting. With respect to the costs, it seems advisable to refer to the jurisprudence of the European Court of Justice (hereafter, ECJ) regarding Article 30(2) of the Directive. ECJ stated in its judgment of 13 July 2006, (C-438/04, *Mobistar*) that number portability is intended to remove the obstacles to consumer freedom of choice, particularly in terms of switching mobile phone operators, and thus to ensure the development of effective competition on the mobile phone services market. To achieve these aims under Article 30(2) of the Directive, national regulators are obliged to ensure that pricing for interconnection related to the provision of number portability is cost-oriented and that direct consumer

fees do not act as a disincentive for the use of these facilities. ECJ indicated that the set-up costs may be passed on directly or indirectly to those subscribers who wish to make use of these facilities. This opinion of the ECJ applies to the two Polish cases that are considered here since Article 71(3) of the Polish PT implements Article 30(2) of the Directive.

Final remarks

In the two commented judgments, SOKiK ruled that under Article 71(3) of the Polish PT, the fee for number portability should be determined solely by consumer preferences. However, this approach is difficult to accept – the portability fee should be determined on the basis of the actual costs of number porting. Therefore, fact that the President of UKE set the fee solely on the basis of a survey conducted among mobile phone subscribers (a survey which presented only their preferences without any consideration for the costs of the service) calls the fee determination process into serious question.

It is worth noting that porting fees that are not related to actual costs will lead to a situation where telecoms operators will consider them to be a penalty rather than a service consideration. In a market economy, the provision of services by a profit-oriented company may not occur at any cost; therefore, obligatory free-of-charge services constitute a punishment to those companies.

It has to be said with reference to the survey, that the President of UKE was obliged to assess whether the questionnaire has been properly conducted both as regards the selection of the respondents and the research method applied (for instance, phone-survey are considered to be less reliable). The choice of the representative group is particularly problematic here because the results of the survey did not state whether the respondents were actually subscribers, how they were selected or why only the opinions of those aged 15 and over were considered to be decisive.

It seems that in the context of the cases under consideration, the President of UKE did not prove that the amount of the portability fee charged by the appellants did not comply with the requirements set out in Article 71(3) of the Polish PT. By virtue of this legal provision, which implements into the Polish legal system the rules contained in Article 30(2) of the Directive, portability fees should not discourage subscribers from porting their numbers, they can, however, still reflect the costs of providing the service incurred by the telecoms operators.

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