

# The ECJ's first, 'bullish' foray into payments regulation

In its recent decision in *T-Mobile Austria GmbH v. Verein für Konsumenteninformation* (Case C-616/11) the ECJ wholeheartedly supported an Austrian consumer group's contention that T-Mobile Austria was in breach of the Austrian Payment Services Law when it sought to charge an additional fee to customers paying their bills via online banking or a paper transfer order. In this article, Paul Graham and Clare Burman of Field Fisher Waterhouse LLP consider the case and whether any ripples from the decision are likely to be felt on UK shores.

## Facts of the case and the ECJ's decision

T-Mobile Austria's general terms and conditions included a clause that imposed a €3 service charge on customers who chose not to use a credit or debit card when paying their bill (for example, they chose to use online banking services or a paper transfer order instead). An Austrian consumers' association successfully argued in the first two tiers of the Austrian courts that this clause breached the Austrian Payment Services Law, which provides that, 'The payment service provider shall not prevent the payee from offering the payer a reduction for the use of a given payment instrument. The payee is not permitted to charge for the use of a given payment instrument.' This represented the transposition into Austrian law of Article 52(3) of the Payment Services Directive 2007 (the 'PSD').

## Arguments raised by T-Mobile and the reference to the ECJ

T-Mobile Austria argued that:

- the prohibition in the Austrian Payment Services Law did not apply to it as it is not a payment services provider;
- a transfer order form (whether completed on paper or online) was not a 'payment instrument' as it had no personalised security features; and
- the prohibition was not consistent with the PSD as the Austrian legislature had failed to give reasons for prohibiting the levying of charges for the use of given payment instruments (as indicated in Recital 42 of PSD).

Austria's Supreme Court, the Oberster Gerichtshof, referred the case to the ECJ for interpretation of three questions relating to the PSD:

1. Could Article 52(3) of the PSD be interpreted to apply to the contractual relationship between a

mobile network operator (as payee) and a consumer (as payer)?

2. Would (a) a paper transfer order form signed by the consumer and/or the procedure for ordering transfers based on such a form and (b) the procedure for ordering online banking transfers, be 'payment instruments' within Articles 4.23 and 52(3) of the PSD?

3. Does Article 52(3) of the PSD prevent national laws from prohibiting payees from levying charges in general and from levying different charges for different payment instruments in particular?

In a relatively short judgment, the ECJ held that:

1. Article 52(3) of the PSD must be interpreted as being applicable to the use of a payment instrument in the course of a contractual relationship between a mobile network operator, as payee, and a customer, as payer;

2. Article 4.23 of the PSD must be interpreted as meaning that both the procedure for ordering transfers by means of a transfer order form signed by the payer in person and the procedure for ordering transfers through online banking constitute payment instruments within the meaning of that provision; and

3. Article 52(3) of PSD must be interpreted as giving Member States the power to prohibit generally payees from levying charges on the payer for the use of any payment instrument, if the national legislation, taken as a whole, takes into account the need to encourage competition and the use of efficient payment instruments, which it is for the referring court to ascertain.

## Why does this matter?

It is worth noting that, not only was the ECJ's decision emphatic, but T-Mobile Austria had already lost the argument twice before the

Austrian Courts and the governments of Austria, Germany, France, Italy and Portugal and the European Commission all disagreed with T-Mobile Austria's position. This begs the question: why did T-Mobile choose to fight such an apparently hopeless case? We suspect that this may be because it could see the substantial commercial consequences that would result if (as eventually happened) the Court ruled against it.

Important regulatory precedent

This case is the first time that the PSD has been considered in the ECJ, so we finally have an insight into the ECJ's approach to payments regulation - and it appears that the ECJ is willing to take a bullish line.

It is also important to the future of payments regulation: the definition of 'payment instrument' is almost unchanged in the text of PSD2 as adopted by the European Parliament in April 2014.

Check your terms and conditions

The commercial impact of the ECJ's ruling could be significant: effectively, any payee (regardless of whether it is a payment service provider or not) should be reviewing its terms and conditions to see if it makes any distinction in the price which consumers pay when using different payment methods.

As UK consumers, we have become used to seeing discounts offered to us by utility providers, mobile phone operators, the travel industry, online and physical retailers where we pay by direct debit, or to paying an additional fee if we pay by credit card. The ECJ's ruling affirms that national governments can, in certain circumstances, prohibit payees from levying charges for the use of a particular payment instrument,

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and Regulation 54(3) of the UK's Payment Services Regulations 2009 (SI 2009/209) (the 'PS Regulations') contains a very similar prohibition to that in Austria.

Note though the distinction between surcharging (which can, and will, be more closely controlled - particularly once the impending EU regulation governing interchange fees in card-based payment transactions is introduced) and offering a reduction to encourage the use of a payment instrument (which is not prohibited).

Mission creep? Extension of PSD into paper instruments

From the outset, there has been a general understanding that paper transactions are entirely outside the scope of the PSD as the issuance of various paper-based payment instruments is expressly excluded from the definition of a 'payment service' in the PSD<sup>1</sup>. Even the Financial Conduct Authority ('FCA') has expressed the view that: 'Nor if the payment transaction is initiated by paper, would that document be considered to be a payment instrument' (at Q20 PERG 15 of the UK's Perimeter Guidance Manual). In the T-Mobile Austria case, the ECJ has chipped away at that tenet by focussing on the procedure for ordering a payment.

Article 4.23 of the PSD defines a payment instrument as, 'any personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used by the payment service user in order to initiate a payment service' (although the ECJ noted a disparity between different language versions of that definition, with some - including the German language version - limiting the adjective 'personalised'

to apply to devices only). Note that no distinction is drawn in Article 4.23 between paper and other instructions to initiate the payment service.

In its deliberations on the scope of the definition, rather than looking first at whether a payment service was initiated, the ECJ instead focussed on whether the procedures for ordering payment were 'personalised' - namely that they allowed a payment service provider to verify that the payment order was initiated by a user authorised to do so (as opposed to a 'non-personalised' set of procedures that would allow a payment order to be made anonymously). On that basis, paper instructions (and not merely online instructions) by which a payment order can be initiated could amount to payment instructions, and so be subject to PSD, depending on the service being provided<sup>2</sup>.

The payments industry, including the FCA, will need to consider the consequences of such a change - and in the FCA's case, update PERG to reflect this interpretation.

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1. See Article 3(g), PSD.  
2. N.B. issuing paper cheques, bankers' drafts, paper-based vouchers and paper postal orders is still expressly excluded from the definition of 'Payment Services' - see Article 3(g) PSD and also paragraph (g), Part 2 of Schedule 1 in the PS Regulations.