

## JUDGMENT OF THE COURT (Fifth Chamber)

6 October 2015 (\*)

(Reference for a preliminary ruling — Directive 2002/22/EC (Universal Service Directive) — Costing of universal service obligations — Taking account of the rate of return on equity capital — Direct effect — Scope *ratione temporis*)

In Case C-508/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Czech Republic), made by decision of 23 October 2014, received at the Court on 13 November 2014, in the proceedings

**Český telekomunikační úřad**

v

**T-Mobile Czech Republic a.s.,**

**Vodafone Czech Republic a.s.,**

intervening parties:

**O2 Czech Republic a.s.,** formerly Telefónica Czech Republic a.s.,

**UPC Česká republika s.r.o.,**

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas (Rapporteur), E. Juhász and D. Šváby, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

- Český telekomunikační úřad, by J. Novák, advokát,
- T-Mobile Czech Republic a.s., by P. Hromek and D. Schmied, advokáti,
- O2 Czech Republic a.s., formerly Telefónica Czech Republic a.s., by M. Krejčík,
- the Czech Government, by M. Smolek, J. Vláčil and T. Müller, acting as Agents,
- the Lithuanian Government, by D. Kriaučiūnas and R. Dzikovič, acting as Agents,
- the European Commission, by P. Němečková and L. Nicolae, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Articles 12 and 13 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 ('Universal Service Directive') (OJ 2002 L 108, p. 51).

2 The request has been made in proceedings between, on the one hand, the Český telekomunikační úřad (the Czech telecommunications regulatory authority) and, on the other, T-Mobile Czech Republic a.s. ('T-Mobile Czech Republic') and Vodafone Czech Republic a.s. concerning the decision of the Czech telecommunications regulatory authority of 23 February 2011 by which that authority set the amount of the loss connected with the provision of the universal service for 2004 incurred by Telefónica Czech Republic a.s. ('Telefónica Czech Republic'), now O2 Czech Republic a.s. ('O2 Czech Republic').

## Legal context

### *EU law*

3 Article 2 of the Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33, 'the Act of Accession') provides that, as from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession are binding on the new Member States and apply in those States under the conditions laid down in those Treaties and in that act.

4 Recital 4 in the preamble to Directive 2002/22 states that '[e]nsuring universal service (that is to say, the provision of a defined minimum set of services to all end-users at an affordable price) may involve the provision of some services to some end-users at prices that depart from those resulting from normal market conditions. However, compensating undertakings designated to provide such services in such circumstances need not result in any distortion of competition, provided that designated undertakings are compensated for the specific net cost involved and provided that the net cost burden is recovered in a competitively neutral way'.

5 Recital 18 of that directive states:

'Member States should, where necessary, establish mechanisms for financing the net cost of universal service obligations in cases where it is demonstrated that the obligations can only be provided at a loss or at a net cost which falls outside normal commercial standards. It is important to ensure that the net cost of universal service obligations is properly calculated and that any financing is undertaken with minimum distortion to the market and to undertakings, and is compatible with the provisions of Articles 87 and 88 of the Treaty.'

6 Article 3(2) of Directive 2002/22 provides:

'Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality. They shall seek to minimise market distortions, in particular the provision of services at prices or subject to other terms and conditions which depart from normal commercial conditions, whilst safeguarding the public interest.'

7 Article 12 of that directive, entitled 'Costing of universal service obligations', states in paragraph 1:

'Where national regulatory authorities consider that the provision of universal service as set out in Articles 3 to 10 may represent an unfair burden on undertakings designated to provide universal service, they shall calculate the net costs of its provision.

For that purpose, national regulatory authorities shall:

- (a) calculate the net cost of the universal service obligation, taking into account any market benefit which accrues to an undertaking designated to provide universal service, in accordance with Annex IV, Part A; or
- (b) make use of the net costs of providing universal service identified by a designation mechanism in accordance with Article 8(2).'

8 Article 13 of Directive 2002/22, entitled 'Financing of universal service obligations', provides in paragraph 1:

'Where, on the basis of the net cost calculation referred to in Article 12, national regulatory authorities find that an undertaking is subject to an unfair burden, Member States shall, upon request from a designated undertaking, decide:

- (a) to introduce a mechanism to compensate that undertaking for the determined net costs under transparent conditions from public funds; and/or
- (b) to share the net cost of universal service obligations between providers of electronic communications networks and services.'

9 The second paragraph of Part A of Annex IV to Directive 2002/22 provides the following description of how the net cost of universal service obligations is to be calculated:

'National regulatory authorities are to consider all means to ensure appropriate incentives for undertakings (designated or not) to provide universal service obligations cost efficiently. In undertaking a calculation exercise, the net cost of universal service obligations is to be calculated as the difference between the net cost for a designated undertaking of operating with the universal service obligations and operating without the universal service obligations. This applies whether the network in a particular Member State is fully developed or is still undergoing development and expansion. Due attention is to be given to correctly assessing the costs that any designated undertaking would have chosen to avoid had there been no universal service obligation. The net cost calculation should assess the benefits, including intangible benefits, to the universal service operator.'

10 Article 5(5) of Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2012 L 7, p. 3) provides:

'For the purposes of this Decision, "reasonable profit" means the rate of return on capital that would be required by a typical undertaking considering whether or not to provide the service of general economic interest for the whole period of entrustment, taking into account the level of risk. The "rate of return on capital" means the internal rate of return that the undertaking makes on its invested capital over the duration of the period of entrustment. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism.'

11 Paragraph 61 of the Commission Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ 2012 C 8, p. 4) states, inter alia:

'Reasonable profit should be taken to mean the rate of return on capital ... that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism. The rate should be determined where possible by reference to the rate of return on capital that is achieved on similar types of public service contracts under competitive conditions (for example, contracts awarded under a tender). In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, reference can be made to comparable undertakings situated in other Member States, or if necessary, in other sectors, provided that the particular characteristics of each sector

are taken into account.’

- 12 The footnote relating to paragraph 61 states that ‘[t]he rate of return on capital means the Internal Rate of Return (IRR) that the undertaking makes on its invested capital over the lifetime of the project, that is to say the IRR over the cash flows of the contract’.

*Czech law*

- 13 For 2004, the provision and coverage of the universal service were governed by Law No 151/2000 Sb. on telecommunications and amending other laws, in the version in force in 2004 (‘the Telecommunications Law’). Article 31 of that law, entitled ‘Justifiable loss’, is worded as follows:

‘(1) The universal service provider is entitled to reimbursement of justifiable loss.

(2) “Justifiable loss” means the difference between the economically justified costs, including a reasonable profit, incurred by a telecommunications licence holder in fulfilling the universal service obligation, and which would not have been accrued but for that obligation, and the income and revenue obtained by the telecommunications licence holder from fulfilling the universal service obligation.

(3) If the telecommunications licence holder also provides other telecommunications services or pursues other activities in addition to the universal service, it is required to maintain separate accounts of the costs and revenue connected with the services provided as part of the universal service.

(4) The method of calculating the justifiable loss, the documents required to substantiate the justifiable loss and the determination of a reasonable profit shall be laid down in an implementing provision.’

- 14 The Telecommunications Law was followed by Decree No 235/2001 Sb. of the Ministry of Transport and Communications laying down detailed measures for the calculation and reimbursement of the justifiable loss connected with the provision of universal service by a telecommunications licence holder. Article 2 of that decree, entitled ‘Method of calculating the justifiable loss’ provides:

‘(1) The universal service provider shall calculate the justifiable loss by deducting from the sum of the income and revenue derived from the provision of the loss-making services, the sum of the economically justified costs of providing those services and a reasonable profit. The universal service provider shall submit the calculation of the justifiable loss on the form issued by the Czech telecommunications regulatory authority.

(2) For the purposes of assessing whether the costs are economically justified, the universal service provider is required to submit to the Czech telecommunications regulatory authority a separate set of accounts of the costs and revenue connected with the services provided as part of the universal service in accordance with Article 34(2)(a) of the [Telecommunications] Law before 31 May of each calendar year.’

- 15 Article 3 of that decree, entitled ‘Documents required to substantiate the calculations of the justifiable loss’, provides:

‘(1) The universal service provider shall submit to the Czech telecommunications regulatory authority, along with the calculation of the justifiable loss for the corresponding year, the following:

(a) the balance sheet drawn up in accordance with the applicable rules;

(b) the analytical accounts of the costs and revenue;

(c) the results of the separate accounts of the costs and revenue, drawn up in accordance with Article 34(2)(a) of the [Telecommunications] Law and with the methods for determining the amount of the economically justified costs; data concerning the loss-making services shall be

broken down according to the different costs and revenue items in accordance with the structure set out in Annex No 1;

- (d) an overview of the distribution of tangible and intangible capital assets in the depreciation profiles, using a coefficient for accelerated depreciation and indicating the methods for classifying equity capital allocated to the purchase of those assets;
- (e) an overview of the discounts given, according to type.

(2) The universal service provider shall allow the Czech telecommunications regulatory authority, on request, to verify the data relating to the calculation of the justifiable loss, including the calculation of reasonable profit, on the basis, inter alia, of the technical documentation, statistics and original accounting documents.

(3) The recording of the justifiable loss, the documents sent by the universal service provider and the documents used to verify the calculation of the justifiable loss shall be retained by the Czech telecommunications regulatory authority for a period of five years from the end of the relevant year.'

16 Article 4 of that decree, entitled 'Determination of a reasonable profit', states:

'For the purposes of recording the justifiable loss, reasonable profit shall be determined having regard to the book value of the equity capital which the universal service provider allocated for the procurement of tangible and intangible capital assets which must be used to provide loss-making services. The universal service provider shall calculate the reasonable profit using the method set out in Annex No 3.'

17 Annex No 3 to Decree No 235/2001 Sb. of the Ministry of Transport and Communications, entitled 'Calculation of reasonable profit', states:

'1. The universal service provider shall calculate reasonable profit using the formula:

$$RP = 0.145 \times BVEC$$

where:

RP = Reasonable profit

BVEC = The book value of the equity capital allocated for the procurement of tangible and intangible capital assets which must be used to provide loss-making services.

2. The book value of the equity capital shall be determined in accordance with the accounting rules.'

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

18 On 27 September 2010, the Czech telecommunications regulatory authority adopted a decision confirming the amount of the loss declared by Telefónica Czech Republic as a consequence of providing the universal service for 2004. For the calculation of that loss, the provider's reasonable profit was included in the amount of the net cost of providing the universal service, in accordance with the national law in force until 30 April 2005. In an administrative complaint procedure, the Czech telecommunications regulatory authority confirmed that decision by decision of 23 February 2011.

19 T-Mobile Czech Republic and Vodafone Czech Republic a.s. brought administrative appeals against that decision before the Městský soud v Praze (Prague Municipal Court), which annulled the decision, holding it to be unlawful for infringement of Directive 2002/22.

- 20 According to the *Městský soud v Praze*, Article 31 of the Telecommunications Law infringed Articles 12 and 13 of that directive, because Czech law made provision for determining the amount of the loss and for a method of calculating and determining the justifiable loss which are different from those provided for under that directive. Thus, in applying national law, the Czech telecommunications regulatory authority was wrong to take into account every loss, of any kind, where, under Directive 2002/22, only a loss representing an ‘unfair burden’ should have been taken into account, as was stipulated by the Court in the judgment in *Commission v Belgium* (C-222/08, EU:C:2010:583, paragraphs 35, 37, 42 and 43). Furthermore, national law did not allow the intangible benefits of providing the universal service to be taken into account when determining the amount of the loss.
- 21 The *Městský soud v Praze* found that the requirements for the direct applicability of Directive 2002/22 were met, because the rule laid down by that directive is clear and unconditional, even though the meaning of the vague legal term ‘unfair burden’ must be defined by the administrative authorities or the courts. It is not possible to interpret Czech law as complying with Directive 2002/22 since, under Czech law, the Czech telecommunications regulatory authority is not permitted to decline to take into account in its decision the inclusion of a reasonable profit in the amount of the net cost of the universal service.
- 22 The *Městský soud v Praze* acknowledged that the direct effect of that directive could not be detrimental to an individual, but it classified Telefónica Czech Republic, in which the Czech State had a 51.1% shareholding, as a ‘State entity’ under State control and therefore subject to the direct effect of that directive, holding that Directive 2002/22 was applicable *ratione temporis* to the universal service provided for the whole of 2004, and therefore also for the period prior to the Czech Republic’s accession to the European Union on 1 May 2004.
- 23 The Czech telecommunications regulatory authority brought an appeal on a point of law before the Nejvyšší správní soud (Supreme Administrative Court) against the decision of the *Městský soud v Praze*.
- 24 With regard to the issue whether it is possible, for the purposes of Directive 2002/22, also to include in the net cost of the universal service obligation the reasonable profit provided for by national law, the Nejvyšší správní soud, relying on a literal interpretation, considers that profit, whether reasonable or not, cannot be considered to be a cost item covered by the notion of the ‘net cost’ of the universal service obligation, as stated and provided for in that directive. However, according to the referring court, it is important not to overlook the possibility that net cost within the meaning of that directive also takes into account the component costs of ‘equity capital’ incurred by the provider in the provision of the universal service, costs which were, not altogether appropriately, classified by national law as ‘reasonable profit’. The Nejvyšší správní soud therefore considers it necessary to ask the Court whether Articles 12 and 13 of Directive 2002/22 must be interpreted to the effect that the mechanism based on the ‘net cost’ of providing universal service precludes the amount of the determined net cost from also including the ‘reasonable profit’ of the provider of that service, even if it is expressed in the form of capital investments costs at 14.5% of the book value of the equity capital.
- 25 In those circumstances, the Nejvyšší správní soud decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:
- ‘(1) Must Articles 12 and 13 of Directive 2002/22 be interpreted to the effect that the mechanism, defined in those articles, based on the ‘net cost’ of providing universal service, precludes the ‘reasonable profit’ of the provider from being included in the amount of the net cost, as determined, of that service?
- (2) If the answer to Question 1 is in the affirmative, do those provisions of Directive 2002/22 (Articles 12 and 13) have direct effect?
- (3) If Articles 12 and 13 of Directive 2002/22 have direct effect, can that effect be relied on against a commercial company in which a Member State holds (controls) 51% of the shares, in the present case, O2 Czech Republic a.s. (is it a ‘State entity’)?

- (4) If the answers to Questions 1 to 3 are in the affirmative, can Directive 2002/22 also be applied to relations which came into being in the period before the accession of the Czech Republic to the European Union (from 1 January to 30 April 2004)?'

### **Consideration of the questions referred**

#### *The first question*

- 26 By its first question, the referring court asks, in essence, whether Articles 12 and 13 of Directive 2002/22 must be interpreted as precluding the net cost of the universal service obligation from including the 'reasonable profit' of the provider of that service.
- 27 T-Mobile Czech Republic and O2 Czech Republic maintain that the questions put by the referring court do not concern the key issue in the dispute in the main proceedings and propose to the Court a number of new questions concerning, in particular, the determination of items which may be included in the net cost of the universal service obligation and the determination of the 'unfair burden' borne by an undertaking designated to provide universal service.
- 28 Under Article 267 TFEU, it is for the national court, not the parties to the main proceedings, to bring a matter before the Court of Justice. The right to determine the questions to be put to the Court thus devolves on the national court alone and the parties may not change their tenor (see, inter alia, judgment in *Singer*, 44/65, EU:C:1965:122, p. 965, and, to that effect, judgment in *Santesteban Goicoechea*, C-296/08 PPU, EU:C:2008:457, paragraph 46).
- 29 Moreover, to answer requests to amend the questions formulated by the parties in the main proceedings would be incompatible with the function given to the Court by Article 267 TFEU and with its duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union, bearing in mind that, under that provision, only the order of the referring court is notified to the interested parties (see, inter alia, judgment in *Phytheron International*, C-352/95, EU:C:1997:170, paragraph 14, and, to that effect, judgment in *Santesteban Goicoechea*, C-296/08 PPU, EU:C:2008:457, paragraph 47).
- 30 In the present case, it is apparent from the actual text of the order of the referring court, notified to all the interested parties referred to in Article 23 of the Statute of the Court of Justice, that the Nejvyšší správní soud is asking the Court about the principle of taking into account the return on equity capital employed by the undertaking designated to provide universal service in order to determine the amount of the net cost of the universal service obligation, because it would like to have guidance in deciding whether that return on equity capital may be taken into account where it is fixed at 14.5% of the book value of the equity capital employed by that undertaking.
- 31 On the other hand, the referring court has not stated that there is a need to reply to other questions relating to the determination of items which may be included in the net cost of the universal service obligation or to the 'unfair burden' borne by the undertaking designated to provide universal service.
- 32 Therefore, it is appropriate to respond to the first question submitted by the referring court without there being any need to reply also to the new questions proposed by T-Mobile Czech Republic and O2 Czech Republic.
- 33 According to Articles 12 and 13 of Directive 2002/22, in order to determine the amount of compensation that may be due to an undertaking designated to provide universal service, it is necessary, as a first step, to calculate the net cost of the universal service obligation for the undertaking designated as provider and, next, where the national regulatory authorities find that an undertaking is subject to an unfair burden, those authorities must decide to introduce a mechanism to compensate that undertaking for the determined net costs, and/or to share the net cost of universal service obligations between providers of electronic communications networks and services.

- 34 According to the second paragraph of Part A of Annex IV to Directive 2002/22, the net cost is to be calculated as the difference between the net cost to a designated undertaking of operating with the universal service obligations and operating without the universal service obligations. For the purposes of that calculation, as has been accepted by all the interested parties which have submitted observations to the Court, the cost of loans or of equity capital must be taken into account where the designated undertaking has had to rely on capital in order to make the investments needed to provide universal service.
- 35 In that respect, it is immaterial that the net cost item is called 'reasonable profit' under the national legislation at issue, since it, in fact, represents a cost borne by the universal service provider.
- 36 Although Directive 2002/22 does not contain any express reference to the possibility of including the cost of equity capital or 'reasonable profit' in the calculation of the net cost borne by the undertaking providing universal service, a teleological interpretation of that directive nevertheless permits the conclusion to be drawn that such items may be included.
- 37 Article 3(2) of Directive 2002/22 stresses the need to ensure the implementation of universal service using the most efficient approach and minimising market distortions. As recital 4 in the preamble to that directive states, ensuring universal service may involve the provision of some services to some end-users at prices that depart from those resulting from normal market conditions. The EU legislature therefore provided — as is clear from recital 18 in the preamble to the directive — that Member States should, where necessary, establish mechanisms for financing the net cost of universal service obligations in cases where it is demonstrated that the obligations can be fulfilled only at a loss or at a net cost which falls outside normal commercial standards (see judgment in *Base and Others*, C-389/08, EU:C:2010:584, paragraph 34).
- 38 The cost of the capital employed is part of the overall costs incurred by an undertaking operating under normal commercial conditions. It therefore must also be included in the calculation of the net cost of universal service obligations so as to enable the undertaking designated to provide universal service to recover the specific net cost involved without it deviating from normal commercial standards or suffering a loss.
- 39 Furthermore, as is clear from recital 18 of Directive 2002/22, any financing granted with a view to providing compensation for the net cost of universal service obligations must be compatible with the provisions of Articles 107 TFEU and 108 TFEU. As the European Commission submits, the interpretation of the term 'net cost' within the meaning of that directive must therefore take account of the rules relating to the assessment of aid granted for the provision of services of general economic interest on the basis of Article 107 TFEU.
- 40 In that respect, the Court has previously held that compensation representing consideration for the services provided by the recipient undertakings in order to discharge public service obligations cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of those obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (see, by analogy, judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 92).
- 41 As regards the method for evaluating the return on equity capital to be taken into account, it is clear from recital 18 of Directive 2002/22 that the net cost of universal service obligations must be properly calculated and that any financing must be undertaken with minimum distortion to the market and to undertakings. Accordingly, capital remuneration should be necessary and reasonable and directly attributable to the investment made in providing universal service, and should not lead to the provider concerned being overcompensated.
- 42 As the Czech telecommunications regulatory authority and the Commission stated, paragraph 61 of the Commission Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest and Article 5(5) of Decision 2012/21 give guidance on how to evaluate the 'reasonable profit', which is defined as the rate of return on capital. Although that communication is not a binding rule of law, it may, none the less, serve as a guide for interpreting the notion of 'net cost', for the purposes of Directive 2002/22.

43 Paragraph 61 of that communication and Article 5(5) of Decision 2012/21 state that reasonable profit should be taken to mean the rate of return on capital that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism. The rate is defined as the internal rate of return which the undertaking obtains on the capital invested during the period of entrustment. That rate may be determined by taking comparable undertakings as a point of reference.

44 It is in the light of those various factors that the national court is to ascertain whether the annual rate of return adopted by national legislation is in line with the guidance set out in paragraphs 40 to 43 above, when the return is determined on a flat-rate basis at 14.5% of the book value of the equity capital invested by the undertaking designated to provide universal service.

45 The answer to the first question is therefore that Articles 12 and 13 of Directive 2002/22 must be interpreted as not precluding the net cost of the universal service obligation including the 'reasonable profit' of the provider of that service, fixed at the rate of return on equity capital that would be required by an undertaking comparable to the universal service provider considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk.

*The second and third questions*

46 In so far as the referring court, following the examination which it is to carry out in accordance with paragraph 44 above, may find that the national legislation at issue is not in line with the guidance given in the reply to the first question, it is necessary to reply to the second and third questions, by which the referring court asks, in essence, whether Articles 12 and 13 of Directive 2002/22 must be interpreted as having direct effect, and if so, whether they can be relied on against a commercial company in which a Member State has a 51% shareholding.

47 According to settled case-law, a directive cannot of itself impose obligations on individuals, but can only confer rights. Consequently, an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party (see judgments in *Wells*, C-201/02, EU:C:2004:12, paragraph 56 and the case-law cited, and *Arcor and Others*, C-152/07 to C-154/07, EU:C:2008:426, paragraph 35).

48 On the other hand, mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from relying on the provisions of a directive against the Member State concerned (see judgments in *Wells*, C-201/02, EU:C:2004:12, paragraph 57 and the case-law cited, and *Arcor and Others*, C-152/07 to C-154/07, EU:C:2008:426, paragraph 36).

49 In the main proceedings, the dispute before the referring court is between private entities and the Member State concerned, acting through the national regulatory authority which made the decision at issue.

50 It is clear that O2 Czech Republic is a third party in relation to the dispute before the referring court and is likely to suffer only adverse repercussions which could not be regarded as obligations imposed under the directives relied on before the referring court. It follows that the issue whether that undertaking is a State entity is immaterial.

51 On that basis, it is necessary to examine whether Articles 12 and 13 of Directive 2002/22 meet the requirements for having direct effect.

52 It is clear from settled case-law that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the Member State where it has failed to implement the directive correctly (see judgments in *Pfeiffer and Others*, C-397/01 to C-403/01,

EU:C:2004:584, paragraph 103 and the case-law cited, and *Arcor and Others*, C-152/07 to C-154/07, EU:C:2008:426, paragraph 40).

53 Articles 12 and 13 of Directive 2002/22 satisfy those criteria, given that they clearly state that any financing of the universal service obligations must be made on the basis of the calculation of the net cost, which must be interpreted as also including ‘reasonable profit’, equivalent to the rate of return on capital, and that that obligation is not qualified by any condition. Even though Directive 2002/22 allows the national regulatory authorities a certain degree of discretion when implementing those provisions, that does not alter the precise and unconditional nature of the obligation arising out of those provisions (see, by analogy, judgment in *GMAC UK*, C-589/12, EU:C:2014:2131, paragraphs 29, 30 and 32).

54 It follows from the foregoing that the answer to the second and third questions referred is that Articles 12 and 13 of Directive 2002/22 must be interpreted as having direct effect and they may be relied on directly before a national court by individuals to challenge a decision of a national regulatory authority.

#### *The fourth question*

55 By its fourth question, the referring court asks, in essence, whether Directive 2002/22 must be interpreted to the effect that it is applicable for the purpose of determining the amount of the net cost of the obligations relating to the universal service provided by the designated undertaking during the period prior to the Czech Republic’s accession to the European Union, that is to say, for the year 2004, between 1 January and 30 April 2004.

56 Article 2 of the Act of Accession provides that, as from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession are binding on the new Member States and apply in those States under the conditions laid down in those Treaties and in that act.

57 As the Commission submitted, that act does not contain special provisions concerning the application of the articles of Directive 2002/22 before the accession of the Member States concerned.

58 In the absence of such provisions, Directive 2002/22 became applicable to the Czech Republic from the date of its accession to the European Union, pursuant to Articles 2, 53 and 54 of the Act of Accession (see, to that effect, judgment in *Saldanha and MTS*, C-122/96, EU:C:1997:458, paragraph 14; order in *Pannon*, C-143/09, EU:C:2009:564, paragraph 17; judgment in *Elektrownia Pątnów II*, C-441/08, EU:C:2009:698, paragraph 32; and order in *RANI Slovakia*, C-298/09, EU:C:2010:343, paragraph 38).

59 It follows that Directive 2002/22 must be interpreted to the effect that it is not applicable for the purpose of determining the amount of the net cost of the obligations relating to the universal service provided by the designated undertaking during the period prior to the Czech Republic’s accession to the European Union, that is to say, for the year 2004, between 1 January and 30 April 2004.

#### **Costs**

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

**(1) Articles 12 and 13 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 (Universal Service Directive) must be interpreted as not precluding the net cost of the universal service obligation including the 'reasonable profit' of the provider of that service, fixed at the rate of return on equity capital that would be required by an undertaking comparable to the universal service provider considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk.**

- (2) Articles 12 and 13 of Directive 2002/22 must be interpreted as having direct effect and they may be relied on directly before a national court by individuals to challenge a decision of a national regulatory authority.**
- (3) Directive 2002/22 must be interpreted to the effect that it is not applicable for the purpose of determining the amount of the net cost of the obligations relating to the universal service provided by the designated undertaking during the period prior to the Czech Republic's accession to the European Union, that is to say, for the year 2004, between 1 January and 30 April 2004.**

[Signatures]

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\* Language of the case: Czech.