JUDGMENT OF THE COURT (Fourth Chamber)

6 October 2010 *

In Case C-222/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 22 May 2008,

European Commission, represented by H. van Vliet and A. Nijenhuis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by T. Materne and M. Jacobs, acting as Agents, assisted by S. Depré, avocat,

defendant,

* Language of the case: Dutch.

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of Chamber, C. Toader, K. Schiemann, P. Kūris and L. Bay Larsen, Judges,

Advocate General: P. Cruz Villalón,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 March 2010,

after hearing the Opinion of the Advocate General at the sitting on 22 June 2010

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by failing fully to transpose Articles 12(1) and 13(1) and Annex IV, Part A, 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), the Kingdom of Belgium has failed to fulfil its obligations under that directive and Article 249 EC.

Legal context

Community legislation

Directive 2002/22

2 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'.

3 Recital 18 in the preamble to Directive 2002/22 reads as follows:

'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. …'

4 Recital 21 in the preamble to Directive 2002/22 is worded as follows:

'When a universal service obligation represents an unfair burden on an undertaking, it is appropriate to allow Member States to establish mechanisms for efficiently recovering net costs. …'

5 Under Article 3 of Directive 2002/22, entitled 'Availability of universal service':

'1. Member States shall ensure that the services set out in this Chapter are made available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an affordable price.

2. 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.'

6 Article 8 of Directive 2002/22, entitled 'Designation of undertakings' provides that:

'1. Member States may designate one or more undertakings to guarantee the provision of universal service …

2. When Member States designate undertakings in part or all of the national territory as having universal service obligations, they shall do so using an efficient, objective, transparent and non-discriminatory designation mechanism, whereby no undertaking is a priori excluded from being designated. Such designation methods shall ensure that universal service is provided in a cost-effective manner and may be used as a means of determining the net cost of the universal service obligation in accordance with Article 12.'

7 Article 9 of Directive 2002/22, entitled 'Affordability of tariffs', provides that:

'1. National regulatory authorities shall monitor the evolution and level of retail tariffs of the services identified in Articles 4, 5, 6 and 7 as falling under the universal service obligations and provided by designated undertakings, in particular in relation to national consumer prices and income.

2. Member States may, in the light of national conditions, require that designated undertakings provide tariff options or packages to consumers which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing or using the publicly available telephone service.

…'

8 Article 12 of Directive 2002/22, entitled 'Costing of universal service obligations', states at 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).'

9 Under Article 13 of Directive 2002/22, entitled 'Financing of universal service obligations':

'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.

…'

10 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:

'Universal service obligations refer to those obligations placed upon an undertaking by a Member State which concern the provision of a network and service throughout a specified geographical area, including, where required, averaged prices in that geographical area for the provision of that service or provision of specific tariff options for consumers with low incomes or with special social needs.

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.

…'

11 In accordance with Article 38 of Directive 2002/22, Member States were to adopt the laws, regulations and administrative provisions necessary to comply with the directive by 24 July 2003 at the latest, were to inform the Commission immediately thereof and were to apply those measures from 25 July 2003.

National legislation

12 On 13 June 2005, the Kingdom of Belgium adopted the Law on electronic communications (*Moniteur belge* of 20 June 2005, p. 28070, 'the Law of 13 June 2005'), which was subsequently amended by the Law of 25 April 2007 laying down miscellaneous provisions (IV) (*Moniteur belge* of 8 May 2007, p. 25103, 'the Law of 25 April 2007').

13 Article 74 of the Law of 13 June 2005, as amended by the Law of 25 April 2007, is worded as follows:

'The social component of universal service shall consist in the provision, by all operators offering consumers a publicly accessible telephone service, of special tariff conditions for certain categories of beneficiary.

The categories of beneficiary and the tariff conditions referred to in the first paragraph and the procedure for obtaining such tariff conditions are set out in the Annex.

The [Belgian Postal Services and Telecommunications] Institute [("the Institute")] shall provide the Minister [responsible in the matter of electronic communications] with an annual report of the relative share of operators in the total number of "social subscribers" in relation to those operators' market share, determined on the basis of turnover in the public telephony services market.

A fund shall be established for the universal service in relation to social tariffs, from which social tariff providers that have submitted an application to the Institute to that effect shall be compensated. The fund shall have legal personality and shall be administered by the Institute.

The King shall, by a decree debated in the Council of Ministers, the opinion of the Institute having been given, determine the rules for the operation of the system of compensation.

In the event that the number of tariff reductions granted by an operator falls below the number of tariff reductions which correspond to its share of the total turnover of the market in public telephony services, the operator shall make good that difference.

In the event that the number of tariff reductions granted by an operator exceeds the number of tariff reductions which correspond to its share of the total turnover of the market in public telephony services, the operator shall receive compensation to make good that difference.

The compensation referred to in the preceding paragraphs shall be payable immediately. Actual settlement through the fund shall take place as soon as the fund becomes operational or, at the latest, within the year following entry into force of this Article.

The Institute shall calculate, in accordance with the method set out in the Annex, the net cost of social tariffs for all operators which have submitted an application for compensation to the Institute.

The Institute may lay down detailed rules for the calculation of the costs and compensation within the parameters set by this Law and the Annex thereto.'

14 Article 45a of the Annex to the Law of 13 June 2005, inserted by Article 200 of the Law of 25 April 2007, sets out the method to be used in calculating the net costs of social tariffs. Article 45a provides as follows:

'The net cost of the social tariffs for universal service shall correspond to the difference between the revenue which social tariff providers would earn under normal commercial conditions and the revenue which they receive as a result of the reductions for social tariff beneficiaries provided for in the present Law.

Within the first five years following the entry into force of the Law, compensation payments which the incumbent social tariff provider may receive shall be reduced by a percentage determined by the Institute.

The percentage referred to in the preceding paragraph shall be determined on the basis of indirect gains. The Institute shall take account in this regard of the calculations which it has already made in determining the net cost of the incumbent social tariff provider.'

15 Article 202 of the Law of 25 April 2007 provides as follows:

'In the [eighth] paragraph of Article 74 of the Law of 13 June 2005 … the phrase "[t]he compensation referred to in the preceding paragraphs shall be payable immediately" is to be interpreted as follows:

In preparing the Law of 13 June 2005 … in the light of the requirements laid down in Directive [2002/22], the legislature, acting in its capacity as national regulatory authority, examined the unfair nature of the burden following a request to that effect from the historic universal service operator and after the Institute had determined the net cost of universal service provision. In that context, the legislature came to the view, confirmed moreover by the Raad van State [(Council of State)], that, in so far as account is taken of any indirect benefit, including any intangible benefits, which may accrue from the provision of universal service, any loss-making situation revealed by the calculation does in fact constitute an unfair burden.'

The pre-litigation procedure and proceedings before the Court

16 The Commission, after receiving, on 24 June 2005, the text of the Law of 13 June 2005, by which the Kingdom of Belgium adopted measures transposing Directive 2002/22, questioned, by a letter of formal notice of 15 November 2006, whether certain aspects of that law complied with Articles 12(1) and 13(1) of the directive.

17 In its response dated 16 February 2007, the Kingdom of Belgium stated that amendments were to be made to the Law of 13 June 2005: the Law of 25 April 2007 subsequently enacted those amendments.

18 The Commission then withdrew a number of its complaints. It continued, however, to pursue two complaints, namely those relating, first, to the absence, in the Belgian legislation, of any provision requiring the national regulatory authority to examine whether the obligation to offer social tariffs represents an unfair burden and, second, to the method used by that authority to calculate the net costs associated with the provision of social tariffs.

19 On 29 June 2007, the Commission issued a reasoned opinion inviting the Kingdom of Belgium to take the necessary measures to comply with Directive 2002/22 within two months of receipt of the opinion.

20 By letter of 1 August 2007, the Kingdom of Belgium requested an extension of that period, which the Commission refused on the ground that the conditions laid down in that regard were not met.

21 Since the Commission considered the information provided by the Kingdom of Belgium to be unsatisfactory, it decided to bring the present action.

The action

First complaint, concerning the rules for determining whether the obligation to apply social tariffs represents an unfair burden

Arguments of the parties

22 In the Commission's submission, Articles 12(1) and 13(1) of Directive 2002/22 require the national regulatory authority to consider the nature of the burden which the provision of universal service entails for operators designated to provide that service.

23 By enacting the amendments made by the Law of 25 April 2007 to Article 74 of the Law of 13 June 2005, the Belgian legislature regarded any net costs resulting from the obligation to apply social tariffs as representing, for the undertakings concerned, an unfair burden which must necessarily give rise to compensation. A fund for universal service in relation to social tariffs was subsequently established, financed by contributions from operators and intended to be used for compensating those undertakings.

24 The Commission, as well as entertaining doubts as to whether the legislature itself can be a national regulatory authority, also maintains that Directive 2002/22 imposes an obligation to carry out a case-by-case examination, when calculations are made regarding the net costs and financing of universal service obligations, in order to determine whether the burden is unfair. Consequently, in the Commission's submission, the fact that the assessment in that regard was carried out at the same time as adoption of the law intended to introduce rules relating to universal service is incompatible with Directive 2002/22, since that amounts to determining without prior analysis that the burden is unfair and to doing so generally and in the abstract.

25 The Commission further submits that the method adopted does not reflect the rules laid down by Directive 2002/22, since neither the Belgian legislature nor the Institute has ever properly considered whether the provision of universal service represents an unfair burden for the operators concerned.

26 As regards the Institute's calculation on 26 November 2002 of the net costs of universal service obligations, the Commission maintains that, since the Law of 13 June 2005 was not adopted until two and a half years after the Institute issued its opinion, the calculation was out of date and did not reflect the actual situation. Although the Law of 13 June 2005 imposed the universal service obligation on all operators, the Institute's opinion concerning the costs borne by the company Belgacom ('Belgacom') related only to estimates for the year 2003 when Belgacom was the only company subject to the requirement to apply social tariffs. Accordingly, the opinion in question was not founded on a proper calculation of net costs on the basis of which the Kingdom of Belgium could conclude that the adoption of the Law of 13 June 2005 would result in an unfair burden for all operators.

27 The Commission concludes that the Belgian system is not conducive to observance of the principles of cost effectiveness, efficiency, objectivity, non-discrimination and minimum disruption of competition, as established by the case-law of the Court, referring in that regard to Case C-220/07 *Commission* v *France* [2008] ECR I-95, paragraph 31.

28 The Commission further submits that the powers of the Institute, as a result of the way they are regulated by Belgian law, are too narrow, inasmuch as there is no provision for the Institute to find that the provision of universal service does not involve an unfair burden.

29 Finally, the Commission is surprised that the Belgian legislature has acted as national regulatory authority in relation to just one aspect of the telecommunications directives, namely the assessment of whether the provision of universal service results in an unfair burden, when the Law of 13 June 2005 did not provide for it to perform that task, there having in any event been no publication to that effect, contrary to the requirements laid down by Article 3(4) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), and when arguments based on Belgian constitutional law cannot effectively be raised.

30 Relying on the principle of institutional autonomy, Article 249 EC, recital 11 in the preamble to Directive 2002/21 and Articles 2 and 3 thereof, the Kingdom of Belgium maintains that, under its constitutional arrangements, there is nothing to prevent the Belgian Parliament from acting as national regulatory authority for the purpose of making a finding that an unfair burden exists as a result of the provision of universal service.

31 The fact that legislation establishes what is to be understood by 'unfair burden' avoids any unequal treatment as between the various operators, which are now all required to apply social tariffs and thus sustain losses in that respect, since those tariffs are lower than normal prices. All the net costs which an undertaking responsible for universal service must bear as a provider of that service must thus be regarded as unfair costs and therefore be made good.

32 The Kingdom of Belgium explains that the tasks assigned to the national regulatory authority regarding the organisation of the social aspect of universal service have been divided between, on the one hand, the legislature and, on the other, the Institute which, as the body responsible for implementation, determines, in accordance with conditions laid down by law, the right of each operator to compensation.

33 The Kingdom of Belgium points out that a liberalised system of universal service with a specific social component, such as that at issue, in which all the operators are designated as providers of that service, is conducive to continuing competition between the operators and entails significant advantages for consumers.

34 If such a system is to operate properly, however, operators must have guarantees as to the possibility of obtaining compensation. To that end, the compensation provided for covers the statutory reductions which they have had to grant in order to meet the needs of social subscribers so far as that amount exceeds, as a proportion, their respective market shares. The net cost determined in that way corresponds to what the third paragraph of Part A of Annex IV to Directive 2002/22 defines as 'costs attributable to … specific end-users or groups of end-users who … can only be served … under cost conditions falling outside normal commercial standards'.

35 As regards the Commission's argument that the Belgian legislation fails to provide for any examination as to whether the burden resulting from the universal service obligations is unfair, the Kingdom of Belgium submits that the legislature considered the burden to be unfair where a net cost has to be borne and an application for financing is made. Any other assessment of the unfair nature of the burden would result, in the context of the Belgian system, in a distortion of competition between the undertakings concerned, since, whilst they are all subject to the same obligations, only some of them would be entitled to apply for compensation.

36 Moreover, before the decision was taken as to the unfair nature of the burden, the Institute calculated the net cost entailed by the provision of a universal social service in accordance with Part A of Annex IV to Directive 2002/22. That calculation was made for the first time in 2002 and was then updated in 2005, with account being taken, in particular, of the possible market benefits which Belgacom might enjoy because of the monopoly it held at the time.

37 As regards the requirement for transparency in Article 12(2) of Directive 2002/22, the Kingdom of Belgium draws attention to the fact that the final decision concerning the calculation of the net cost was published on 18 May 2005 on the Institute's web-site.

38 Furthermore, action on the part of the legislature was necessary because of constitutional requirements, since the system of compensation set up for the benefit of operators has to be classified as a tax scheme.

39 Directive 2002/22 requires there to be a single assessment of whether the burden is unfair, which leads, as a consequence, to the introduction of a general financing mechanism, as referred to in Article 13(2) of the directive. The Commission, incorrectly, failed to take account of the fundamental difference between, on the one hand, the calculation of the net cost in relation to the decision as to the potentially unfair nature of the burden and the decision providing for a mechanism for compensation – which was a single operation that took place when the Law of 13 June 2005 was adopted – and, on the other hand, the calculation of the net cost under Article 45a of the Annex to that law, which is an annual exercise carried out with a view to compensation being paid to all the operators concerned.

Findings of the Court

40 As a preliminary point, it should be recalled that Directive 2002/22 is intended to create a harmonised regulatory framework which secures, in the electronic communications sector, the delivery of universal service, that is to say, of a defined minimum set of services to all end-users at an affordable price. According to Article 1(1) of Directive 2002/22, one of the objectives of the directive is to ensure the availability, throughout the European Community, of good quality, publicly available services through effective competition and choice (*Commission* v *France*, paragraph 28).

41 Under Article 3(2) of Directive 2002/22, Member States are to 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 and they are to seek to minimise market distortions, whilst safeguarding the public interest (*Commission* v *France*, paragraph 29).

42 As recital 4 to Directive 2002/22 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 Community legislature therefore provided – as is clear from recital 18 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 provided only at a loss or at a net cost which falls outside normal commercial standards.

43 Accordingly, under the first subparagraph of Article 12(1) of Directive 2002/22, where national regulatory authorities consider that the provision of universal service, as set out in Articles 3 to 10 of the directive, may represent an unfair burden

on undertakings designated to provide universal service, they must calculate the net costs of its provision.

44 It must be stated that, although the second subparagraph of Article 12(1) and Annex IV of Directive 2002/22 lay down the rules for calculating the net costs of the provision of universal service where the national regulatory authorities have considered that such provision may represent an unfair burden, it is not apparent either from Article 12(1) or from any other provision of the directive that the Community legislature itself intended to prescribe the conditions in which those authorities are to consider, as a preliminary matter, that the provision of universal service may represent an unfair burden.

45 In those circumstances, the Kingdom of Belgium has not failed to fulfil its obligations under Article 12 of Directive 2002/22 by laying down the conditions by reference to which it must be determined whether or not that burden is unfair.

46 Conversely, it is apparent from Article 13 of Directive 2002/22 that it is only on the basis of the calculation of the net costs of the provision of universal service, as referred to in Article 12, that national regulatory authorities may find that an undertaking designated to provide universal service is in fact subject to an unfair burden and that Member States must then decide, upon request from a designated undertaking, to introduce a compensation mechanism in respect of that cost.

47 In accordance with Article 12(1)(a) and Annex IV of Directive 2002/22, that calculation must be made for each of the undertakings designated to provide universal service.

48 Since the finding that the provision of universal service represents an unfair burden for one or more of those undertakings is a pre-requisite to the establishment by Member States of compensation mechanisms in respect of the costs borne by the undertaking[s], it is necessary to determine what is to be understood by 'unfair burden', as the term is not defined by Directive 2002/22.

49 In that regard, it is apparent from recital 21 to Directive 2002/22 that the Community legislature intended to link the mechanisms for the recovery of net costs which an undertaking may incur as a result of the provision of universal service to the existence of an unfair burden on that undertaking. In that context, in concluding that the net cost of universal service does not necessarily represent an unfair burden for all the undertakings concerned, it intended to exclude the possibility that any net costs of universal service provision automatically give rise to a right to compensation. In those circumstances, the unfair burden which must be found to exist by the national regulatory authority before any compensation is paid is a burden which, for each undertaking concerned, is excessive in view of the undertaking's ability to bear it, account being taken of all the undertaking's own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share.

50 In the absence of any specific provision in this regard in Directive 2002/22, it falls to the national regulatory authority to lay down general and objective criteria which make it possible to determine the thresholds beyond which – taking account of the characteristics mentioned in the preceding paragraph – a burden may be regarded as unfair. However, the fact remains that the authority cannot find that the burden of providing universal service is unfair, for the purpose of Article 13 of the directive, unless it carries out an individual assessment of the situation of each undertaking concerned in the light of those criteria.

51 If the national regulatory authority finds that one or more undertakings designated as providers of universal service are subject to an unfair burden or if one or more of them requests compensation, it then falls to the Member State to establish the

necessary mechanisms to that end, in accordance with Article 13(1)(a) of Directive 2002/22, from which it is also clear that that compensation must coincide with the net costs, as calculated under Article 12 of the directive.

52 It follows from all the foregoing that Member States cannot, without infringing their obligations under Directive 2002/22, make a finding that the provision of universal service in fact constitutes an unfair burden in respect of which compensation is payable unless they have calculated the net cost which such provision represents for each undertaking responsible for it and have assessed whether that cost constitutes an excessive burden for the undertaking concerned. Nor can they adopt a compensation scheme in which the compensation is unrelated to the net cost.

53 It is appropriate to consider the merits of the first complaint in the light of those considerations.

54 It is apparent from Article 74 of the Law of 13 June 2005, as interpreted by the Law of 25 April 2007, that, in concluding that the provision of the social component of universal service represents an unfair burden, the Belgian legislature considered that, in so far as account was taken, in the calculation of the net cost of that service, of all the indirect benefits, including intangible benefits, which may be generated by the provision of that service, 'any loss-making situation revealed by the calculation … constitute[s] an unfair burden'. It is also clear from Article 74 that the legislature decided that, in the event of the number of tariff reductions granted by an operator being higher than the number of tariff reductions which correspond to its share of overall turnover in the market for public telephony services, that operator will receive compensation, the amount of which will be calculated by reference to that difference.

55 In reaching that decision, in 2005, on the unfair nature of the burden represented by the provision of social tariffs in respect of the universal service, the Belgian legislature relied on an opinion produced by the Institute in 2002 concerning the costs borne by the historic operator – Belgacom – and relating to estimates for the year 2003.

56 As is clear from the finding at paragraph 44 of this judgment, there was nothing to prevent the national regulatory authority, when the Law of 13 June 2005 required all telecommunications operators henceforth to offer social tariffs, concluding, on the basis of the abovementioned infomation, that the cost of providing universal service 'may' represent an unfair burden for the purposes of Article 12 of Directive 2002/22.

57 However, the methods for determining the unfair burden giving rise to a right to compensation, as provided for by that law, do not appear to comply with the requirements set out in Article 13 of Directive 2002/22.

58 First, in considering any loss-making situation revealed by the calculation of the net cost to be an 'unfair burden', the Belgian legislature granted an automatic right to compensation to operators whose net costs incurred on account of their universal service obligations none the less do not represent an excessive burden, whilst it is apparent from what has been said at paragraph 49 of this judgment that, although a loss-making situation is a burden, it is not necessarily an unfair burden for every operator.

59 Second, the assessment of the unfair nature of the burden associated with the provision of universal service requires a specific examination both of the net cost which provision of that service represents for each operator concerned and of all the characteristics particular to each operator, such as the quality of its equipment, its economic

and financial situation and its market share, as is evident from paragraphs 47 and 49 of this judgment. However, the Kingdom of Belgium has not established, and nor does it appear from any of the documents before the Court, that the Belgian legislature took all those characteristics into account when it concluded that the provision of universal service represented an unfair burden.

60 Third, by providing that there is to be automatic compensation for any cost borne because the number of tariff reductions granted by an operator exceeds, as a proportion, its market share, the Law of 13 June 2005 establishes a mechanism which results in compensation that is unrelated to the net cost of universal service provision as it has been calculated under Article 12 of Directive 2002/22.

61 It follows from the foregoing that the Court must accept the Commission's first complaint, in so far as it is based on a failure to fulfil the obligations laid down in Article 13 of Directive 2002/22.

Second complaint, concerning the calculation of the net cost of the provision of universal service

Arguments of the parties

62 In the framework of its second complaint, the Commission argues, first, that inasmuch as, under the Belgian legislation, the calculation of the net cost of universal service provision is based on a notional loss equal to the amount corresponding to the number of tariff reductions granted which exceeds, as a proportion, the market share

of the operator concerned, the real costs which the undertaking would have in fact avoided in the absence of a universal service obligation are not taken into account. Such an approach is contrary both to Article 12 of Directive 2002/22 and to the obligation deriving from Part A of Annex IV thereto.

63 Second, the method of calculation provided for by the Belgian legislation does not take into account the market benefits that a designated undertaking enjoys, whilst Directive 2002/22 requires that the calculation of net cost take account of the benefits which may derive from the provision of universal service, including intangible benefits.

64 The Commission further submits that the Kingdom of Belgium incorrectly regards the terms 'revenue' and 'costs' as synonymous. The fact that a supplier obtains lower revenue because it has to offer a social tariff is, however, quite separate from the question as to what additional net costs it incurs as a result of the universal service obligation.

65 In fact, the additional real costs borne by the provider, that is to say, costs which it would avoid if it were not obliged to offer a social tariff, do not necessarily correspond to the amount of the reductions which it has to grant. Those costs depend, first, on the cost structure of the operator concerned, which, in turn, depends on the type of services which it has provided and, second, on the situation of that operator with regard to its customers. Thus, there may be a significant difference between (i) the additional costs borne by the historic operator because it continues to provide certain social customers with a landline which has been connected for many years and (ii) the additional costs borne by a new operator which connects new social customers to its network.

66 Finally, with regard to the calculation of market benefits, the Commission submits that the assertion that, as a rule, no indirect market benefits accrue to operators is not founded on any specific evidence. Since the Institute has never calculated the net costs – the calculation regarding Belgacom in 2002 must be regarded as out of date and inappropriate – there are no grounds for concluding that the obligation to offer social tariffs fails to generate any market benefits for any operator.

67 After asserting that the method of calculation is perfectly in keeping with the requirements of Directive 2002/22, the Kingdom of Belgium explains that the net cost of universal service obligations corresponds, in the Belgian system, to the difference between (i) the revenue which the universal service provider would earn in normal commercial conditions and (ii) the revenue which it earns as a result of the reductions provided for by law in respect of beneficiaries of the social tariff.

68 The only financial losses which an operator could have avoided in the absence of a universal service obligation are the mandatory tariff reductions. In fact, leaving aside the type of tariff applied, operators offer the same service to every existing subscriber.

69 Since each public telephony operator is required to provide universal service to consumers, it is not possible to identify an indirect market benefit in relation to a given operator. In any event, any benefits are liable to be the same for all operators.

70 Moreover, according to the Kingdom of Belgium, although the finding that the historic operator enjoyed a significant commercial advantage over other operators justified adopting Article 45a of the Annex to the Law of 13 June 2005, which set up a mechanism whereby the compensation received by the historic operator is progressively

reduced, that mechanism does not involve recognition that such an advantage could also exist for other operators.

71 The Kingdom of Belgium argues that, in the light of the wording of Annex IV to Directive 2002/22, two types of costs may be taken into account in the calculation of the net cost, namely (i) losses attributable to the fact the cost of universal service is not covered by revenue and (ii) costs arising from departures from normal commercial conditions.

72 Accordingly, the approach adopted by the Belgian legislature – consisting in adopting as the net costs the reductions in comparison with normal commercial conditions which providers of the social component of universal service must provide to social subscribers – is consistent with the wording of Part A of Annex IV to Directive 2002/22. In the Kingdom of Belgium's submission, the opposite approach would result, in the liberalised Belgian system, in a distortion of competition between telecommunications undertakings, since the latter would all be required to grant social reductions but would receive different compensation.

73 With regard to the examination of market benefits, the Kingdom of Belgium submits, first, that a net cost calculation was made in respect of Belgacom in which account was taken of the commercial benefits which Belgacom might gain from universal service provision on account of the monopoly which it held at the time in that sector and, second, that, since the universal service was opened up, the annual calculation of the net costs has been made at the time when the amount of compensation due to each operator is determined following an application for compensation. The analysis of the liberalised Belgian system shows that the indirect market benefits which may accrue to operators as a result of granting social reductions are liable to be the same for all operators.

Findings of the Court

74 As a preliminary point, it should be observed, first, that under Part A of Annex IV to Directive 2002/22, the net cost of universal service provision 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 them. To that end, according to Part A of Annex IV, the costs that any designated undertaking would have chosen to avoid had there been no universal service obligation must be correctly assessed and the benefits, including intangible benefits, to the universal service operator must be assessed.

75 Second, Article 45a of the Law of 13 June 2005 provides that the net cost of the social component of universal service is to be equal to the difference between the revenue which an operator would receive under normal commercial conditions and the revenue which it receives as a result of the reductions for social tariff beneficiaries provided for in that law.

76 The Commission, in the first part of this complaint, submits that the calculation prescribed by the national legislation at issue fails to take account of the real costs which the designated undertaking would in fact have avoided had it not been subject to universal service obligations.

77 It should be noted that this part of the complaint concerns the rules laid down by Directive 2002/22 for calculating the net cost of the universal service obligation, which entail taking into account additional costs which the designated operator has had to bear on account precisely of the obligations connected with universal service. Accordingly, this part of the complaint would be founded only if the calculation method at issue were bound to prevent those additional costs being taken into account.

78 In that regard, although it is not in dispute that the method established by the Law of 13 June 2005 for calculating the net cost of the provision of services at social tariffs is different from the method used for other components of universal service, such as the 'fixed geographical component', the provision of public telephones or the directory enquiry service, in respect of which there is specific provision for 'costs avoided' to be taken into account, the conclusion cannot be drawn, on the basis of that circumstance alone, that the calculation of the net cost of providing services at social tariffs fails to comply with the requirements of Directive 2002/22.

79 Moreover, the material in the documents before the Court gives no grounds for finding to be incorrect the Kingdom of Belgium's assertion that the only financial losses which an operator could avoid if it were not obliged to provide services at social tariffs are the mandatory tariff reductions, since, leaving aside the type of tariff applied, the service offered by operators to an existing subscriber is the same. It therefore follows that, regardless of the situation of each of those operators, the content of the various services which they each provide to their subscribers and, consequently, the cost structure pertaining to that content as such do not appear to be modified merely because some of the subscribers may be entitled to social tariffs.

80 The Commission, therefore, has not established that the national legislation at issue, in providing that the net cost of the social component of universal service corresponds to the difference between the revenue which the supplier who provides services at social tariffs would receive in normal commercial conditions and the revenue which it actually receives owing to the tariff reductions which the legislation concerned provides for in respect of beneficiaries of social tariffs, fails to take account of the costs which undertakings designated to provide universal service would have chosen to avoid had there been no universal service obligation.

81 The first part of the second complaint must therefore be rejected.

82 The second part of the complaint alleges that the calculation prescribed by the national legislation at issue fails to take into account the market benefits, including intangible benefits, which the undertakings concerned derive from providing services at social tariffs.

83 The Kingdom of Belgium argues that, since the obligation to provide services at social tariffs falls on all operators that are active in Belgium, market benefits are as a rule liable to be the same for all those operators. In making that argument, it does not dispute that the national legislation at issue fails to take into account the possible market benefits deriving from the provision of services at social tariffs.

84 It follows, however, from Article 12(1)(a) in conjunction with Annex IV of Directive 2002/22 that the calculation of the net cost of universal service provision must include the assessment of the benefits, including intangible benefits, which the operator concerned derives from such provision. Since Article 12(1)(a) and Annex IV are part of the harmonised regulatory framework which Directive 2002/22 is intended to create, the onus is on Member States to take those benefits into account when they lay down the rules for calculating the net cost of universal service provision.

85 In those circumstances, the second part of the second complaint must be held to be well founded.

86 Having regard to all the foregoing considerations, it must be declared that,

— first, by failing to take into consideration, in the calculation of the net cost of provision of the social component of universal service, the market benefits, including intangible benefits, accruing to the undertakings responsible, and

— second, by making a general finding on the basis of the calculation of the net costs of the erstwhile sole provider of universal service that all undertakings now responsible for the provision of universal service are in fact subject to an unfair burden on account of that provision and by having done so without carrying out a specific assessment both of the net cost which the provision of universal service represents for each operator concerned and of all the characteristics particular to each operator, including the quality of its equipment or its economic and financial situation,

the Kingdom of Belgium has failed to fulfil its obligations under Articles 12(1) and 13(1) of Directive 2002/22.

Costs

87 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of those rules, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs.

88 In the present case, since the Commission has succeeded on some and failed on other heads of its application, the Kingdom of Belgium must be ordered to pay two thirds of the costs and the Commission must be order to pay one third of the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. Declares that,

— **first, by failing to take into consideration, in the calculation of the net cost of provision of the social component of universal service, the market benefits, including intangible benefits, accruing to the undertakings responsible, and**

— **second, by making a general finding on the basis of the calculation of the net costs of the erstwhile sole provider of universal service that all undertakings now responsible for the provision of universal service are in fact subject to an unfair burden on account of that provision and by having done so without carrying out a specific assessment both of the net cost which the provision of universal service represents for each operator concerned and of all the characteristics particular to each operator, including the quality of its equipment or its economic and financial situation,**

the Kingdom of Belgium has failed to fulfil its obligations under Articles 12(1) and 13(1) 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);

2. Dismisses the action as to the remainder;

3. Orders the Kingdom of Belgium to pay two thirds of the costs and orders the European Commission to pay one third of the costs.

[Signatures]